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Paul M. Secunda

Marquette University Law School, paul.secunda@marquette.edu

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"THE LONGEST JOURNEY, WITH A FIRST STEP": BRINGING COHERENCE TO SOVEREIGNTY AND JURISDICITONAL ISSUES IN GLOBAL EMPLOYEE BENEFITS LAW

PAUL M. SECUNDA*

INTRODUCTION

Global employee benefits law is an emerging field of study that requires coherence at the threshold level of coverage. The statutory maze of sovereignty and jurisdictional issues involved with U.S. employee benefit laws, for instance, make it difficult to determine when American employee benefit laws apply to U.S. citizens abroad or to foreign citizens in the United States. This raises significant problems in particular given the growing tendency of the U.S. Congress to export U.S. labor and employment standards to other parts of the world through legislative amendment.¹ Additionally, this state of affairs is made even worse by the fact that no formal international legal machinery exists to deal with these issues, leaving corporations alone to navigate U.S. and foreign employee benefits law.² Although a single global employee benefits law regime is not

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1. See *infra* note 42 and accompanying text.

2. Jennifer L. Hagerman, *Navigating the Waters of International Employment Law: Dispute Avoidance Tactics for United States-Based Multinational Corporations*, 41 VAL. U. L. REV. 859, 860-61 (2006) ("There is currently no formal international legal system in place. Many complexities and risks arise when United States-based corporations operate abroad, as Multinational Corporations ('MNCs') must contend with United States employment laws, foreign employment laws, and the operation of these laws in the international context. For the most part, United States law cannot be applied to operations in other countries due to sovereignty issues and jurisdictional obstacles. Similar obstacles arise when foreign countries attempt to apply their laws to American companies.").

presently realistic,³ it is possible to start piecing together this regime by determining when and where U.S. employee benefits law applies, beginning with a consideration of the scope of the chief employee benefits law in the United States, the Employee Retirement Income Security Act of 1974 (ERISA).⁴

While the expansion of U.S. labor standards beyond U.S. borders is not without controversy, few would question the authority of Congress to extend these protections overseas if it intended to do so.⁵ There is reason to suspect that Congress did intend to extend ERISA coverage beyond U.S. borders; although ERISA has no explicit provision extending coverage overseas, it does have broad jurisdictional language. ERISA § 4(a),⁶ states in pertinent part: “[T]his title shall apply to any employee benefit plan if it is established or maintained—(1) by any employer engaged in commerce or in any industry or activity affecting commerce.”⁷ In most cases, this language has been interpreted to find that ERISA does not apply to employee benefits matters that arise outside of the United States.⁸ But that is not the end of the story. Many questions about coverage still exist given the vagueness of ERISA’s provisions when it comes to matters of extraterritorial application, whether related to the application of ERISA to foreign employees in the United States or the application of ERISA to foreign companies operating to some degree in the United States.

Thus, three additional dimensions of ERISA coverage involving the global context must be explored relating to: (1) issues of legal foreign employees in the United States; (2) issues of foreign government employer immunity under the Foreign Sovereign

3. *Id.* at 861.

4. 29 U.S.C. §§ 1001-1461 (2000). ERISA covers private-sector, employer-provided pension and welfare benefit employee benefit plans. *Id.* at § 1003(a).

5. *See* E.E.O.C. v. Arabian Am. Oil Co. (ARAMCO), 499 U.S. 244, 248 (1991) (“Congress has the authority to enforce its laws beyond the territorial boundaries of the United States. Whether Congress has in fact exercised that authority in these cases is a matter of statutory construction.”).

6. 29 U.S.C. § 1003(a).

7. Following the practice of other ERISA books and scholars, this article refers to the original section numbers as enacted by ERISA in the “ERISA §” format, rather than to the United States Code section numbers.

8. *See, e.g.,* Maurais v. Snyder, No. C.A. 00-2133, 2000 WL 1368024, at *3 (E.D. Pa. Sept. 14, 2000).

Immunities Act (FSIA);⁹ and (3) issues surrounding foreign undocumented workers.

This article proceeds in two parts. First, it explores the extraterritorial application of ERISA to domestic and foreign workers abroad, highlighting the confusing nature of the current legal framework.¹⁰ Part I concludes with a proposal for an extraterritorial application model similar to the one used by Title VII of the Civil Rights Act of 1964¹¹ and other U.S. employment discrimination statutes, which would simplify greatly this area of the law. Part II then considers the plight of foreign employees in the United States, including issues surrounding the “foreign plan” exception under ERISA § 4(b)(4), the application of FSIA to foreign sovereign companies’ American operations, and the status of undocumented workers in the United States under ERISA. This second part concludes that courts should abandon the *Hoffman Plastics v. NLRB*¹² holding in the ERISA context for undocumented workers and that future immigration reform should ensure that documented workers employed by U.S. companies receive the same employee benefit rights under ERISA as their American counterparts. Taken together, these two sections offer proposals with one goal in mind: beginning the work toward making a globally-integrated U.S. employee benefit scheme a reality in our lifetimes.

I. UNITED STATES CITIZENS WORKING ABROAD

A. Application of ERISA to Events Outside the United States

1. *Maurais v. Snyder*

When discussing the extraterritorial reach of ERISA, a good place to start is *Maurais v. Snyder*,¹³ one of the few cases that has addressed the topic. In *Maurais*, Dr. Maurais, a citizen of Canada, filed a lawsuit for \$75,750.00 for unpaid surgical and other medical services that he provided to Corey Snyder, a U.S. citizen, in Canada.¹⁴

9. 28 U.S.C. § 1604 (2000).

10. *See infra* Part I.

11. 42 U.S.C. §§ 2000e-2000e-17 (2000).

12. 535 U.S. 137 (2002).

13. No. C.A. 00-2133, 2000 WL 1368024 (E.D. Pa. Sept. 14, 2000).

14. *Id.* at *1. “On July 5, 1998, Snyder was involved in a high speed boat racing accident in Canada. Snyder was rushed to a hospital in Montreal where he came under the care of Dr.

“At the time the services were rendered, Snyder was a participant in a group health insurance plan issued to his employer, Highway Marines Service, by Guardian Life Insurance Company.”¹⁵ When Dr. Maurais failed to receive compensation from Snyder or the Plan for the surgical procedures performed,¹⁶ he brought claims against Snyder in federal court for implied contract, quantum meruit, unjust enrichment, conversion and punitive damages; similarly, he brought state law claims against Guardian based on theories of implied contact and negligent misrepresentation.¹⁷

In response, Guardian sought to dismiss the claims against it on the grounds that ERISA preempted the two state law claims brought against it.¹⁸ Before ruling on the ERISA preemption defense, the court determined that it had to consider the threshold issue of whether ERISA applied at all to activities that occurred in Canada: “Since the surgery was performed on an American citizen in Canada by a Canadian doctor, we must consider whether ERISA has extraterritorial application.”¹⁹ Because no court had ruled on that issue, the court found a Supreme Court decision on a related topic instructive.²⁰ The decision that the *Marais* court looked to was *E.E.O.C. v. Arabian American Oil Company (ARAMCO)*,²¹ in which the Supreme Court considered whether Congress intended the extraterritorial application of Title VII of the Civil Rights Act of 1964,²² a statute prohibiting various forms of employment

Maurais. Dr. Maurais contacted Guardian and received authorization from Guardian to perform certain surgical procedures on Snyder.” *Id.* Dr. Maurais subsequently performed numerous surgical procedures on Snyder and Snyder remained under Dr. Maurais care until he was transferred to a hospital in Philadelphia. *Id.*

15. *Id.* There is no dispute that the Guardian Plan is an “employee welfare benefit” governed by ERISA. *Id.*

16. As it turns out, “On March 15, 1999, Guardian sent Snyder a check in the amount of \$38,002.00 along with an Explanation of Benefits statement which identified Dr. Maurais as the medical care provider, and set forth the services rendered by Dr. Maurais, the dates of service, and the approved allowance for each service.” *Id.* Snyder spent the money on himself. *Id.*

17. *Id.* at *2.

18. *Id.* ERISA § 514 is a broadly-worded preemption provision that permits ERISA to supersede most state laws which “relate[] to” employee benefit plans. ERISA § 514(a). State laws are defined expansively to include “all laws, decisions, rules, regulations or other State action having the effect of law, of any State.” *Id.* § 514(c)(1).

19. *Maurais*, 2000 WL 1368024, at *2.

20. *Id.*

21. 499 U.S. 244 (1991).

22. 42 U.S.C. §§ 2000e-200e-17 (2000).

discrimination against protected groups.²³ In that case, the Court ultimately concluded that Congress did not intend for Title VII to apply overseas.²⁴ As the Court held:

It is a longstanding principle of American law “that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” This “canon of construction . . . is a valid approach whereby unexpressed congressional intent may be ascertained.” It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.

In applying this rule of construction, we look to see whether “language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control.” We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is “the affirmative intention of the Congress clearly expressed,” we must presume it “is primarily concerned with domestic conditions.”²⁵

Thus, *ARAMCO* stands for the proposition that unless Congress “clearly expressed” an “affirmative intention,” courts should presume that a statute is primarily concerned with domestic matters.²⁶ Because there was no language in ERISA that could establish a clearly expressed intent on behalf of Congress to legislate extraterritorially, the *Maurais* court found that ERISA did not apply to Dr. Maurais’ medical services claims in Canada.²⁷

The *Maurais* court came to this conclusion even though ERISA contains a very broad jurisdictional statement.²⁸ Relying on this provision, Guardian maintained that the claim was within the

23. *ARAMCO*, 499 U.S. at 246.

24. *Id.* at 259.

25. *ARAMCO*, 499 U.S. at 248 (citations omitted).

26. *See Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957).

27. *Maurais v. Snyder*, No. C.A. 00-2133, 2000 WL 1368024, at *3 (E.D. Pa. Sept. 14, 2000).

28. *See* 29 U.S.C. § 1003(a)(1) (2000) (ERISA applies “to any employee benefit plan if it is established or maintained - (1) by any employer engaged in commerce or in any industry or activity affecting commerce”).

jurisdiction of ERISA because, technically speaking, it met all the elements of ERISA § 4(a)(1): (1) it was an employee benefit plan; (2) it was established and maintained in the United States by Snyder's employer; (3) his employer engaged in commerce; and (4) the plan was not otherwise exempted from coverage by ERISA.²⁹

The court rejected this textualist argument, holding instead that the “broad jurisdictional language” of ERISA § 4(a)(1) does not operate to extend statutory protections for employee benefits granted by a United States employer to events arising anywhere in the world.³⁰ Noting that a similar argument made under the equally broad jurisdictional language of Title VII was also rejected by the *ARAMCO* Court,³¹ the court in *Maurais* observed that *ARAMCO* stands for a “presumption against extraterritorial application and in the absence of particular language in a statute that overcomes that presumption, the statute should not be applied in an extraterritorial manner.”³² In support of this reading, one of the cases cited by the *ARAMCO* Court was specifically telling: *New York Central Railroad Company v. Chishlom*.³³ In that case, the Supreme Court found that where a U.S. citizen employed on a U.S. railroad suffered fatal injuries thirty miles north of the Canadian border, the National Labor Relations Act (NLRA)³⁴ did not apply.³⁵ Similarly, the court found that ERISA did not apply in *Maurais*.

29. The exemption for foreign plans under ERISA § 4(b)(4) is discussed in more detail below. One could conceivably argue, employing a reverse inference, that Congress intended extraterritorial application of ERISA in situations like *Maurais* based on the fact that it did not specifically exempt from ERISA these circumstances when it clearly could have done so in the same manner as ERISA § 4(b)(4). Nevertheless, this alternative view of ERISA's application outside the United States does not appear to meet the “clearly evinced intention of Congress to the contrary” standard of *ARAMCO* and, thus, the *Maurais* Court did not adopt it, see *Maurais*, 2000 WL 1368024, at *3.

30. *Maurais*, 2000 WL 1368024, at *3.

31. *Id.*

32. *Id.* (citing *N. Y. Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 31 (1925) (establishing that the Federal Employees Liability Act, 45 U.S.C. § 51 does not have extraterritorial application because the Act “contains no words which definitely disclose an intention to give it extraterritorial effect”); *McCullough v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) (refusing to find a congressional intent to apply the National Labor Relations Act abroad because there was no specific language in the Act reflecting Congressional intent to do so).

33. 268 U.S. 29 (1925).

34. 29 U.S.C. §§ 151-169 (2000).

35. *Chisholm*, 268 U.S. at 30. *Maurais* does not represent the first time a court has utilized case law from the NLRA context before to determine the scope of ERISA. See *Metropolitan*

Beyond the language of the jurisdictional provision, Guardian also sought to rely on precedent holding that ERISA applied to benefits claims arising out of plans established on Indian Tribe reservations. Specifically, Guardian pointed to *Smart v. State Farm Insurance Co.*,³⁶ which held ERISA applicable to Indian Tribe employers and Native American employees.³⁷ The *Maurais* Court distinguished *Smart*, however, by noting that Indian Tribes, unlike nations, do not have absolute immunity from Congressional power.³⁸ Instead, Congress has plenary power to limit, modify, or even eliminate the powers of Indian Tribe self-governance because the tribes' limited sovereignty is subject to complete defeasance by Congress.³⁹ Also, while Indian reservations are located within the United States, Canada is a separate sovereign nation. Consequently, the consensus view is that ERISA applies to Indian reservations within the United States, even though tribes retain a substantial degree of sovereignty.⁴⁰

Accordingly, *Maurais* held that, because a presumption exists against extraterritorial application absent clear Congressional intent, and ERISA does not contain a clear expression of that intent, ERISA does not apply extraterritorially.⁴¹ But one has to wonder, given the

Life Ins. Co. v. Taylor, 481 U.S. 58, 65 (1987) (finding ERISA § 502(a)(1)(B)'s complete preemption of breach of contract claims in benefit denial cases similar to the complete preemption of contract claims by § 301 of the Taft-Hartley Amendments in collective bargaining agreement breach cases).

36. 868 F.2d 929 (7th Cir. 1989).

37. *Id.* at 938 ("ERISA, a statute of general application without an expressed congressional intent with respect to coverage of Indian Tribe employers, does not affect a Tribe's ability to govern itself in intramural matters, nor does it affect a specific right secured to the Lake Superior Chippewa Tribe by treaty or other statute. Consequently, ERISA applies to the Chippewa Health Center employee benefits plan.").

38. Although Indian Tribes are "distinct, independent political communities, retaining their original natural rights' in matters of local self-government," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (citing *Worcester v. Georgia*, 6 Pet. 515, 559 (1832)), they are no longer possessed of the "full attributes of sovereignty." *United States v. Kagama*, 118 U.S. 375 (1886).

39. *Smart*, 868 F.2d at 932 (citing *Rice v. Rehner*, 463 U.S. 713 (1983)).

40. *Id.* at 932 ("Congress intended ERISA to include an employment benefit plan which is established and maintained by an Indian Tribe employer for the benefit of Indian employees working at an establishment located entirely on an Indian reservation."). There is an argument that the court's decision in *Smart* is suspect because, pre-*ARAMCO*, it is doing exactly what the *Maurais* court said it should not do: inferring Congress's intent as to ERISA's applicability to Indian Tribe employers when there is arguably no clear intent evidenced.

41. *See Maurais v. Snyder*, No. C.A. 00-2133, 2000 WL 1368024, at *3 (E.D. Pa. Sept. 14, 2000).

increasing importance of global trade and the internationalization of the economy in the United States, whether there will be pressure to export the labor and employment standards of the United States, including ERISA standards, to other countries?⁴² As the next section explains, similar pressures seem to have led to new extraterritorial provisions in U.S. employment discrimination laws.

2. The Proposal: ERISA § 4(b)(6)

Although the scope of ERISA's extraterritorial application could theoretically be expanded by a court applying a different interpretation of ERISA's jurisdiction from that of *Maurais*,⁴³ it would be far better for Congress to expand the scope of ERISA coverage explicitly through amendments to ERISA like those employed for other U.S. employment discrimination statutes. Indeed, Title VII of the Civil Rights Act of 1964,⁴⁴ the Age Discrimination in Employment Act of 1967 (ADEA),⁴⁵ and the Americans with Disabilities Act of 1990 (ADA)⁴⁶ all have been amended and now contain provisions that permit extraterritorial application in specified circumstances.⁴⁷ Title VII's provision is representative:

(b) Compliance with statute as violative of foreign law

It shall not be unlawful . . . for an employer (or a corporation controlled by an employer) . . . to take any

42. See generally Phillis R. Morgan & R. Bradley Mokros, *International Employment*, INTERNATIONAL LEGAL DEVELOPMENTS IN REVIEW: 2000 BUSINESS REGULATION, 35 INT'L LAW. 351 (2001).

43. For instance, a court could disagree with *Maurais*'s reliance on *ARAMCO* and read the ERISA foreign plan exemption, § 4(b)(4), to imply that employee benefit plans maintained by employers which are *not* primarily for the benefit of foreigners outside of the United States, but for U.S. citizens, would apparently, by reverse inference, be covered. Under this reading, an employee benefit plan maintained for a United States employer's Toronto employees, most of whom are United States citizens, would be subject to ERISA requirements for employer-provided benefit plans. For a fuller discussion of this alternative, see generally *infra* Part II.A.

44. 42 U.S.C. § 2000e-1(b), (c) (2000).

45. 29 U.S.C. § 623(f)(1), (h) (2000).

46. 42 U.S.C. § 12112(c) (2000).

47. Congress amended these laws in response to what it saw as an incorrect interpretation of employment discrimination law's application to U.S. citizens working abroad. See Michelle Shender, *Claims By Non-Citizens Under The Americans With Disabilities Act: Proper Extraterritorial Application In Torrico V. International Business Machines?*, 17 PACE INT'L L. REV. 131, 137 (2005) ("In response to the decision in *Aramco*, Congress added section 109 to the Civil Rights Act in 1991, and thereby amended both Title VII and the ADA to apply extraterritorially to U.S. citizens abroad. The EEOC, in its Enforcement Guidance, explained that the purpose behind section 109 of the 1991 Civil Rights Act was to respond to the *Aramco* decision.").

action otherwise prohibited . . . , with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), . . . to violate the law of the foreign country in which such workplace is located.

(c) Control of corporation incorporated in foreign country

(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 2000e-2 or 2000e-3 of this title engaged in by such corporation shall be presumed to be engaged in by such employer.

(2) Sections 2000e-2 and 2000e-3 of this title shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on—

- (A) the interrelation of operations;
- (B) the common management;
- (C) the centralized control of labor relations;
- and
- (D) the common ownership or financial control, of the employer and the corporation.⁴⁸

This language has been interpreted by various courts to mean that statutory coverage extends to Americans employed abroad by American companies or their subsidiaries.⁴⁹ The reasoning behind these laws appears to be based on an interest in eliminating employment discrimination against U.S. citizens wherever it may occur.⁵⁰

On the other hand, these statutory schemes do not extend “to foreign nationals working abroad for American companies or their subsidiaries.”⁵¹ *Hu v. Skadden, Arps, Slate, Meagher & Flom LLP*,⁵² for instance, provides an application of this principle under the

48. 42 U.S.C. § 2000e-1(b), (c) (2000).

49. *See, e.g.,* Helm v. S. Af. Airways, No. 84-5404, 1987 WL 13195, at *7 (S.D.N.Y. 1987) (ADEA context).

50. *See* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85, 87-88 (1998).

51. *Iskandar v. Am. Univ. of Beirut*, No. 98-6616, 1999 WL 595651, at *2 (S.D.N.Y. 1999) (ADEA context).

52. 76 F. Supp. 2d 476 (S.D.N.Y. 1999).

ADEA. In *Hu*, a Chinese citizen living in United States claimed that a law firm engaged in age discrimination in not hiring him for an overseas position.⁵³ Relying on extraterritorial provisions of the ADEA,⁵⁴ the court concluded that the plaintiff could not claim the statute's protection because, as a foreign citizen, the protection of ADEA did not extend to him.⁵⁵ Thus, while having broader application than ERISA, these statutory schemes still are not applied evenly to all workers regardless of citizenship or location. Where the statutes do not apply, however, there are good reasons for not further extending U.S. law including: "international law limitations on extraterritoriality, which Congress should be assumed to have observed . . . [and] the need 'to protect against unintended clashes between our laws and those of other nations which could result in international discord.'"⁵⁶

At the end of the day, it is unclear whether ERISA will be amended to allow for extraterritorial application in some instances. Until that happens, there will likely be more decisions like *Maurais* finding a presumption against the extraterritorial application of ERISA given the established case law upon which *Maurais* rests. This state of affairs makes little sense when similar employment statutes like Title VII, the ADEA, and ADA have been amended to provide for extraterritorial application in the case of American employees who are working abroad for American companies or their subsidiaries. These situations lack the potential sovereignty and jurisdictional obstacles that courts worry about in these circumstances.⁵⁷ Additionally, like its consistency with the extraterritorial extension of employment discrimination statutes, this proposed extension of ERISA to American citizens working abroad

53. *Id.* at 476-77.

54. 29 U.S.C. § 623(f)(1), (h) (2000).

55. *Hu*, 76 F. Supp. 2d at 478; *see also* *Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600 (N.D. Tex. 1999) (holding that a former, non-U.S. employee, who had lived and carried out his duties in Japan, while employed with Japanese subsidiary of American corporation, was not protected by Title VII or ADEA).

56. Dodge, *supra* note 50, at 90 (quoting *E.E.O.C. v. Arabian Am. Oil Co. (ARAMCO)*, 499 U.S. 244, 248 (1991)).

57. *See* *Helm v. S. Af. Airways*, No. 84-5404, 1987 WL 13195, at *7 (S.D.N.Y. June 25, 1987) ("Congress was careful not 'to impose its labor standards on another country.' Accordingly, Congress did not extend ADEA's protections to foreign nationals working abroad for American companies or their subsidiaries." (quoting P.L. 98-459, 1984 U.S. Code Cong. & Adm. News, p. 3000)).

would be consistent with providing pension and welfare benefit protection to American citizens wherever they may reside.

This article therefore proposes that § 4(b)(6) be added to the ERISA jurisdictional provisions to read:

(b) The provision of this title shall not apply to any employee benefit plan if –

(6) such plan is maintained by an employer (or a corporation controlled by an employer) with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation) to violate the law of the foreign country in which such workplace is located.

This provision would be interpreted to mean that ERISA statutory coverage has been extended to Americans employed abroad by American companies or their subsidiaries (as long as there is not conflicting foreign law), but not to foreign nationals working abroad for American companies or their subsidiaries. Such an amendment would have the additional benefit of being able to depend on existing case law under other statutory regimes with similar provisions for further interpretation.

This proposed amendment also would bring clarity to situations where U.S. employees are temporarily working outside of the United States. There does not appear to be a case directly on point involving ERISA. However, in the traditional labor law context, which ERISA law often tracks,⁵⁸ the Third Circuit Court of Appeals has held that the NLRA⁵⁹ does not apply to employees of a U.S. company while they are performing temporary work outside the United States.⁶⁰ The court came to this decision based on the presumption against extraterritoriality in *ARAMCO* and *McCullough*.⁶¹ Like the NLRA, ERISA “include[s] no mechanism for extraterritorial enforcement, and [there is] not . . . a method for resolving any conflicts with labor laws of other nations,”⁶² as there is under Title VII and other anti-discrimination statutes.⁶³ This suggests that ERISA does not apply to

58. *See supra* note 32.

59. 29 U.S.C. § 152(3) (2006).

60. *See Asplundh Tree Expert Co. v. NLRB*, 365 F.3d 168 (3d Cir. 2004).

61. *Id.* at 173-78.

62. *Id.* at 175; *see also* *Cleary v. U.S. Lines, Inc.*, 555 F. Supp. 1251, 1259 (D.N.J. 1983) (confirming that “a United States citizen working abroad cannot enforce the provisions of the [Fair Labor Standards Act]”).

63. *See supra* notes 22-26.

U.S. employees temporarily assigned overseas. Policymakers may with this interpretation, but, if policymakers wanted coverage to extend in these circumstances, an amendment to ERISA providing for extraterritorial application would easily resolve these cases.

II. FOREIGN EMPLOYEES WORKING IN THE UNITED STATES

To be completely accurate, the issue of foreign employees in the United States does not even raise issues of extraterritoriality because an extraterritorial application of a statute involves the regulation of conduct beyond the borders of the United States. Consequently, it could be argued that the presumption against extraterritoriality does not apply in this context.⁶⁴ However, the presence of these foreign employees in the United States raises three additional issues that deserve attention for those interested in a more global approach to employee benefits law: (1) the application of ERISA to foreigner employees and companies legally located in the United States; (2) the application of the Foreign Surveillance Immunity Act (FSIA), 28 U.S.C. § 1604, to foreign sovereign employers; and (3) the application of ERISA to undocumented workers in the United States.

A. Foreign Employees and Employers Permissibly in the United States

When a foreign corporation employs a foreign citizen in the United States and guarantees that employee certain benefits, it is unclear whether those benefits are covered by ERISA. Although Title VII, the ADEA, and the ADA, have all been interpreted to apply to foreign employers doing business in the United States regardless of the citizenship of the plaintiff,⁶⁵ the foreign plan exception under ERISA § 4(b)(4), the only specific provision in

64. For instance, some of these cases do not even discuss *ARAMCO*'s presumption against extraterritoriality. See *infra* notes 67-69 and accompanying text.

65. See, e.g., *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11th Cir. 2000) (applying Title III of the ADA's public accommodation provisions to a foreign-flag cruise ship in United States waters); *Morelli v. Cedel*, 141 F.3d 39 (2d Cir. 1998) (agreeing with the EEOC, and finding that, "ADEA generally protects the employees of a branch of a foreign employer located in the United States"); *Ward v. W & H Voortman, Ltd.*, 685 F. Supp. 231 (M.D. Ala. 1988) (holding "that any company, foreign or domestic, that elects to do business in this country falls within Title VII's reach and should, and must, do business here according to its rules prohibiting discrimination").

ERISA that deals with employee benefit plans maintained outside the United States, is less clear. ERISA § 4(b)(4) states that “[t]he provisions of this title shall not apply to any employee benefit plan if . . . (4) such plan is maintained outside the United States primarily for the benefit of individuals substantially all of whom are nonresident aliens.”⁶⁶

Under the foreign plan exception, two elements must be met for the plan to be exempt from ERISA: (1) the employee benefit plan must be primarily for the benefit of persons substantially all of whom are nonresident aliens; and (2) the plan must be maintained outside of the United States. When adjudicating related claims under this exception, most litigation has focused on whether the plan in question is maintained inside or outside of the United States. Consider how the court analyzed the foreign plan exception in *Molyneux v. Arthur Guinness & Sons, P.L.C.*:

There is no dispute that AGS is based in Britain, not in the United States. Although it is not disputed that Molyneux resides in New York, it appears that he is a British subject. Nowhere in the complaint or in the lengthy affidavits before the court is there any suggestion that the severance pay “plan,” should it exist, covers even one U.S. citizen employed in the United States, or that a severance payment has ever been made by AGS to any alien in the United States. ERISA explicitly excludes from its coverage any employee benefit plan if “such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are non-resident aliens.” [ERISA § 4(b)(4)]. Thus, on the facts alleged, ERISA is irrelevant.⁶⁷

In a footnote, however, the *Molyneux* Court went further and observed:

Even if it were possible to construe the clear language of [ERISA §4(b)(4)] to permit suits such as this one, there is little to suggest that the purposes of ERISA extend to disputes between British subjects and British employers. Repeated references are made in the legislative history to American working men and women and to aspects of the Social Security system. . . . It is also noted that ERISA was

66. 29 U.S.C. § 1003(b)(4) (2006).

67. 616 F. Supp. 240, 244 (S.D.N.Y. 1985).

not intended to cover “plans established or maintained outside of the United States for the benefit of non-United States citizens. . . .”⁶⁸

The corollary to exempting benefit plans maintained outside of the United States for foreign citizens working in the United States would appear to be the rule that foreign employees working in the United States for a foreign employer or American employer generally come under ERISA if the plan is maintained inside the United States. A court recently adopted this corollary in *Lasheen v. Loomis Co.*⁶⁹

In *Lasheen*, Mohammed Lasheen’s estate sued Loomis, a U.S.-based benefits service company, for breach of fiduciary duty and breach of contract under ERISA for healthcare benefits owed under a medical benefits plan established by the Egyptian Embassy in the United States.⁷⁰ Loomis was hired by the Embassy of Egypt to manage its benefit plan for students and teachers who were temporarily in the United States.⁷¹ Importantly, the plan provided that to be eligible as a participant, the employee could have “neither received nor applied for naturalization or permanent residency status in the United States, Puerto Rico, or Canada, or for any other change [in immigration] status in the United States as an ‘F’ or ‘J’ visa holder.”⁷² The issue before the Court was whether this was a foreign plan exempted from ERISA.⁷³ Because the plan prohibited participants from making a change in their immigration status, the court easily concluded that the plan exclusively provided benefits for non-resident aliens.⁷⁴ Thus, the plan satisfied the first element of the § 4(b)(4) exemption: it was “primarily for the benefit of persons substantially all of whom are nonresident aliens.”⁷⁵

68. *Id.* at 244 n.7 (citations omitted); *see also* *Pitstick v. Potash Corp. of Sask. Sales, Ltd.*, 698 F. Supp. 131 (S.D. Ohio 1988) (where a Canadian corporation’s severance plan fell within the exemption of ERISA § 4(b)(4) when only 30 of 1,666 covered employees were United States citizens and plan was established and maintained in Canada even though the principal place of business was in the United States).

69. No. Civ. 01-227, 2006 WL 618289 (E.D. Cal. Mar. 9, 2006).

70. *Id.* at *1. Lasheen’s estate claim for benefits for treatment of liver cancer was either denied or ignored. The estate alleged that the denial of benefits led to his death. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at *3.

74. *Id.*

75. *Id.* Other cases have also concluded that plans can only meet the § 4(b)(4) exemption if they are primarily for the benefit of nonresident aliens. *See, e.g., In re Lefkowitz*, 767 F. Supp. 501, 505 (S.D.N.Y. 1991), *aff’d*, 996 F.2d 600 (2d Cir. 1993) (finding that ERISA § 4(b)(4)

The harder question in *Lasheen* was whether the plan met the second element of the foreign plan exemption of being “maintained outside of the United States.”⁷⁶ As with many areas in the newly-developing field of global employee benefits law, the court and the parties were unable to locate any case on point; therefore, the court treated the issue as a matter of first impression.⁷⁷ As such, it relied in part on a number of opinion letters from the Office of Pension and Welfare Benefit Programs (“OPWBP”) and from the Pension Benefit Guaranty Corporation (“PBGC”).⁷⁸

From these OPWBP and PBGC opinion letters, the court derived six factors to consider in determining whether an employee benefit plan is maintained in the United States:

- (1) All plan records concerning participation accrual, vesting and other matters necessary to determine and pay plan benefits are maintained outside the United States;
- (2) The work locations of the employees are outside of the United States;
- (3) The plan is administered by a company located outside the United States;
- (4) All operations of the companies are located outside of the United States;
- (5) The trust is established outside the United States;
- (6) Assets of the plan are held outside the United States.⁷⁹

The initial part of the court’s analysis employing these factors focused on whether diplomatic property—the Embassy of Egypt—could be considered property outside of the United States.⁸⁰ Although the court concluded that it could be,⁸¹ it also found that this factor and the other factors were not dispositive on the ERISA exemption

exemption did not apply to employee pension plans adopted by foreign corporations where employee was United States citizen).

76. *Lasheen*, 2006 WL 618289 at *4.

77. *Id.* (“Neither the parties nor this court have discovered any cases which interpret what it means to be ‘maintained outside of the United States.’”).

78. *Id.* That being said, the court appears less than enamored by the analysis conducted therein. *Id.* (“Unfortunately, the letter opinions provide little analysis or explanation behind the conclusions they declare.”). In any event, such opinion letters only have weight to the extent that they are persuasive. *Id.* (citing *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)).

79. *Id.*

80. *Id.* at *4-6.

81. *Id.* at *6.

issue.⁸² Instead, the court decided the case based on two new factors: whether the plan said that ERISA applied and where most of the plan's activities were carried out.⁸³

On the first factor, "the plan, in unambiguous language, declares itself an ERISA plan. There is, to say the least, something appealing about taking the plan at its word."⁸⁴ As to the second factor, where most of the activities of the plan were carried out, the court observed that "Loomis was doing most of the administration of the plan," "Loomis represented itself as the administrator of the plan in a letter sent to the plaintiff's attorney dated Nov. 3, 2000," and "the BSMA [Benefit Service Management Agreement] provides that the provisions of the plan shall be enforced under the laws of the Commonwealth of Pennsylvania."⁸⁵ Consequently, the court concluded that most of the activities of the plan took place in the United States.⁸⁶

Thus, the court in *Lasheen* found that, although the Embassy of Egypt plan existed primarily for the benefit of nonresident aliens like Lasheen, the fact that it was maintained inside the United States made the ERISA exception for foreign plans was not applicable, allowing Lasheen's estate to continue with its claims under ERISA.⁸⁷ Thus, *Lasheen* supports an interpretation of ERISA § 4(b)(4) that indicates that ERISA applies when a foreign employee works for a foreign corporation in the United States that maintains an employee benefit plan inside the United States.

B. Foreign Sovereign Immunities Act (FSIA) Issues

An additional difficult question of ERISA coverage for both foreign and domestic employees in the United States arises when the employer is an arm of a foreign government. Under the Foreign

82. *Id.* at *7 ("Attempting to apply the criteria derived from the opinion letters to the evidence adduced does not result in a certain result.").

83. *Id.* at *8.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* Because this was a case of first impression, the district court gave the Loomis Company and the Egyptian government the chance to take an immediate appeal to the appellate court on the issue of ERISA coverage over the Egyptian Embassy Plan. *Id.* Unfortunately, at least from an academic standpoint, Lasheen's Estate and Loomis came to a settlement agreement later, conditioned upon their ability to recover against the Egyptian defendants. *Lasheen v. Loomis Co. (Lasheen II)*, No. CIV. S-01-227, 2008 WL 295079, at *1 (E.D. Cal. Feb. 1, 2008).

Sovereign Immunities Act of 1976 (FSIA),⁸⁸ “foreign states are presumed to be immune from the jurisdiction of United States courts unless one of the Act’s exceptions to immunity applies.”⁸⁹ FSIA was not relevant in the *Lasheen* court’s analysis of the foreign plan exception because the issue there was one of statutory construction, not one of immunity. Foreign immunity did subsequently become an important issue once *Lasheen* and *Loomis* sought to recover the cost of the benefits from the Egyptian government in accordance with their settlement agreement. In *Lasheen v. Loomis Co. (Lasheen II)*,⁹⁰ the court explained the application of the FSIA to the facts of this case this way:

The FSIA bars suit against a foreign sovereign nation subject to certain exceptions. Accordingly, it “provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.” Courts operate under the presumption that the actions of foreign states and their instrumentalities fall within FSIA’s protections unless one of its exceptions applies.

* * *

[T]he Agreement between *Loomis* and the Egyptian defendants contains a provision that constitutes waiver by implication. Specifically, the Agreement states that it “shall be enforced under the laws of the Commonwealth of Pennsylvania.” Under *Joseph*, this language waives any claim to immunity.

* * *

Second, under FSIA’s “commercial activity” exception, foreign states are not entitled to immunity “where [] action is based upon a commercial activity carried on in the United States by the foreign state.”

* * *

The Agreement between *Loomis* and the Egyptian defendants is the type of activity that a private party could also undertake. The Agreement states that *Loomis* would provide “administrative services” regarding the Egyptian

88. 28 U.S.C. § 1604 (2000).

89. *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1459 (9th Cir. 1995).

90. 2008 WL 295079, at *1 (quoting *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428, 443 (1988)).

defendants' Health Care Benefits Plan. Private companies often make similar arrangements; undertaking such conduct does not require the exercise of the power of a sovereign nation. The court therefore finds that the Agreement between Loomis and the Egyptian defendants falls within FSIA's "commercial activity" exception.⁹¹

Based on this opinion, one would assume that Lasheen and Loomis finally would be able to recover from the Egyptian defendants. Whether this decision means that all administration and operation of employee benefit plans going forward will come under the "commercial activity" exception to FSIA is less clear.

Courts have weighed in on both sides of this issue. In *Mukaddam v. Permanent Mission of Saudi Arabia to the United Nations*,⁹² for instance, a Second Circuit district court found that a clerical employee's duties in the office of the Permanent Mission of Saudi Arabia to the United Nations came under the FSIA commercial activity exception.⁹³ In *Gates v. Victor Fine Foods*,⁹⁴ by contrast, the Ninth Circuit Court of Appeals initially held that a Canadian corporation was a foreign sovereign subject immune under FSIA.⁹⁵ This was no small matter in the case, since the Canadian sovereign subject company could not be held liable to its U.S. subsidiary employees for failure to give COBRA continuation of health insurance notices,⁹⁶ nor could it be held liable for interfering with employee benefit rights under ERISA § 510, unless one of the FSIA exceptions applied.⁹⁷ Ultimately, the *Gates* court determined that the activity in question did not come under the FSIA "commercial activity" exception because the Canadian sovereign company was not involved in its American subsidiary's operations, including its

91. *Id.* at *2-4 (citations omitted).

92. 111 F. Supp. 2d 457 (S.D.N.Y. 2000).

93. *Id.* at 466.

94. 54 F.3d 1457.

95. *Id.* at 1462-63 ("[W]e hold that Alberta Pork is an agency or instrumentality under the Act and thus is immune from jurisdiction unless one of the Act exceptions applies."). "[Alberta Pork] is a Canadian entity established pursuant to the Alberta Marketing of Agricultural Products Act, R.S.A. 1980, c. M-5, to provide for the effective marketing and promotion of hogs produced in the Province of Alberta." *Id.* at 1459.

96. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1161-1168 (2000) ("ERISA").

97. *See id.* at § 1140.

decision to terminate its employee benefit plan.⁹⁸ As such, the court did not hold the Canadian sovereign company liable.

The *Gates* holding indicates that the FSIA commercial activity exception turns on the amount of control a foreign parent has over a U.S. subsidiary. Had the Canadian sovereign company exercised more centralized control over the U.S. subsidiary operations, including over the decision whether to terminate the plan, the commercial activity exception may have applied and the plan covered by ERISA. This aspect of FSIA gives foreign government employers an incentive to export management control over its U.S. subsidiary operations to remain immune from American employee benefit law.

C. Undocumented Workers

The growing issue of illegal immigration in the United States and the increasing number of undocumented employees being employed by American companies raise important questions in the employee benefits context. Unlike American labor law, which has a watershed decision addressing the issue of whether undocumented workers are eligible for back pay for violations of the NLRA,⁹⁹ American employee benefits law is silent.¹⁰⁰

For instance, the courts have yet to address whether undocumented workers eligible to receive employee benefits, or ERISA remedies, from ERISA-covered plans operating in the United States. At the same time, the Court's opinion in the NLRA case of *Hoffman Plastics* provides some important clues. The decision in *Hoffman Plastics* was not merely based on the language of the NLRA, but also on federal immigration policy in general, as expressed in the Immigration Reform and Control Act of 1986

98. 54 F.3d at 1465.

99. *Hoffman Plastics Compound, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding that undocumented workers are ineligible for back pay remedy for union-based discrimination under the National Labor Relations Act).

100. This is perhaps unsurprising, as the labor market for undocumented workers is largely illicit, and these workers would seem to care more about a living wage than health insurance, pension plans, or other employee benefits. *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988) ("We doubt . . . that many illegal aliens come to this country to gain the protection of our labor laws. Rather it is the hope of getting a job—at any wage—that prompts most illegal aliens to cross our borders."). Nevertheless, it is exactly these undocumented workers who might have the most glaring need for health insurance for themselves and their families given their circumstances. Furthermore, the short-term, transitional nature of their work puts a premium on having a portable retirement plan.

(IRCA).¹⁰¹ Therefore, the analysis used by the Court in *Hoffman Plastics* provides a model by which the issue of ERISA application can be approached.

The IRCA prohibits the employment of undocumented workers in the United States,¹⁰² and enforces this law through an extensive employment verification system that requires employers to verify the identity and eligibility of all new hires by examining certain documents before they are permitted to start work.¹⁰³ Employers who violate the IRCA are subject to both civil penalties and criminal prosecution.¹⁰⁴ As the *Hoffman Plastics* Court pointed out, “[u]nder the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies.”¹⁰⁵

Under ERISA, however, courts do not have the remedial discretion that the National Labor Relations Board (NLRB) does.¹⁰⁶ Nevertheless, an argument can be made, applying the majority’s reasoning in *Hoffman Plastics*, that awarding employee benefits to undocumented workers would “run[] counter to policies underlying IRCA.”¹⁰⁷ Permitting benefits to those who are here illegally in the United States would, according to the Supreme Court, “encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.”¹⁰⁸ Thus, if *Hoffman Plastics* is deemed to apply to

101. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

102. 8 U.S.C. § 1324a (2000).

103. *See id.* § 1324a(b). This is the familiar I-9 verification of employment form that employers have to fill out for their employees on the commencement of the employee’s employment.

104. *See id.* § 1324a(e)(4)(A); *see also id.* § 1324(f)(1).

105. *Hoffman Plastics Compound, Inc. v. NLRB*, 535 U.S. 137, 148 (2002).

106. *See* National Labor Relations Act of 1935 29 U.S.C. § 160(c) (2000) (“NLRA”). *See also* *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612, n.32 (1969) (noting that the Board “draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts”).

107. *Hoffman Plastics*, 535 U.S. at 149.

108. *Id.* at 151. *See also* *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984) (“[E]mployees must be deemed ‘unavailable’ for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States.”).

the ERISA context, an undocumented worker probably would not be eligible for benefits, or to sue for benefits, under ERISA.¹⁰⁹

At the same time, lower courts and government agencies have found undocumented workers eligible for remedies under other labor statutes after *Hoffman Plastics*. In *Singh v. Jutla & C.D. & R. Oil*,¹¹⁰ for example, the district court in the Northern District of California held that *Hoffman Plastics* did not preclude an undocumented worker's retaliation action under the Fair Labor Standards Act of 1938 (FLSA),¹¹¹ which regulates wages, hours, and child labor in the workplace.¹¹² The *Singh* court distinguished the *Hoffman Plastics* case by establishing that, unlike the employer in *Hoffman Plastics*, the employer in *Singh* knew of the worker's undocumented status and was allegedly withholding from Singh unpaid wages rather than back pay.¹¹³

Similarly, in *Patel v. Quality Inn South*,¹¹⁴ the Eleventh Circuit concluded that undocumented workers are "employees" under Section 3(e) of the FLSA¹¹⁵ for many of the same reasons mentioned in *Singh*.¹¹⁶ Indeed, the court noted that if it were otherwise, employers "might find it economically advantageous to hire and underpay undocumented workers and run the risk of sanctions under the IRCA."¹¹⁷ Harkening back to the language of *Hoffman Plastics* about the federal policy underling IRCA, the court pointed out that giving employers an incentive to hire undocumented workers by denying employees remedies under the FLSA would run contrary to

109. However, *Hoffman Plastics* does not answer the question whether undocumented workers are statutory employees under Section 2(3) of the NLRA. A recent, influential Court of Appeals decision, *Agri Processor Co. v. NLRB*, 514 F.3d 1 (D.C. Cir. 2008), *petition for cert. filed* (June 30, 2008) (No. 08-21), suggests that they are. In a 2-1 decision, the D.C. Circuit reaffirmed that undocumented workers are employees under the NLRA even if not entitled to back pay under *Hoffman Plastics*. *Id.* at 3. *See also* *Sure-Tan*, 467 U.S. 883 (pre-*Hoffman Plastics* and IRCA, finding undocumented workers to be "employees" under NLRA).

110. 214 F.Supp. 2d 1056 (N.D. Cal. 2002).

111. 29 U.S.C. §§ 201-219 (2000).

112. *Singh*, 214 F. Supp. 2d at 1061-62.

113. *Id.* ("*Hoffman* does not establish that an award of unpaid wages to undocumented workers for work actually performed runs counter to IRCA." (citing *Flores v. Albertsons, Inc.*, 2002 WL 1163623 (C.D. Cal. 2002))).

114. 846 F.2d 700 (11th Cir. 1988).

115. § 203(e)(1) (2002).

116. *Patel*, 846 F.2d at 704-05.

117. *Id.* at 704.

the federal policy underlying IRCA.¹¹⁸ Other federal courts examining the impact of *Hoffman Plastics* on the remedies available to undocumented workers under the FLSA have come to similar conclusions.¹¹⁹

In short, the FLSA cases invoking *Hoffman Plastics* suggest another way that courts may choose to address the issue of federal immigration policy preemption in the ERISA context. Following the logic of these cases, a court might conclude that by not following the remedial scheme of ERISA, employers would be given incentive to hire undocumented workers, counter to the federal policy contained in IRCA.¹²⁰

In addition to this case law that casts some uncertainty as to the impact of the *Hoffman Plastics* holding on ERISA, the Wage and Hour Division of the U.S. Department of Labor, responsible for enforcing the FLSA, has supported extending ERISA protections to undocumented workers; as it noted in a Fact Sheet issued after the *Hoffman Plastics* decision: “The Department’s Wage and Hour Division will continue to enforce the FLSA [Fair Labor Standards Act] and MSPA [Migrant and Seasonal Agricultural Worker Protection Act] without regard to whether an employee is documented or undocumented.”¹²¹ Similarly, the Equal Employment Opportunity Commission (EEOC), the primary agency responsible for enforcing Title VII’s prohibitions on employment discrimination based on race or national origin, issued a press release which stated that, “[w]hile *Hoffman* affects the availability of some forms of relief

118. *Id.*

119. *Flores v. Amigon*, 233 F. Supp. 2d 462 (E.D.N.Y. 2002); *Cortez v. Medina’s Landscaping*, 2002 U.S. Dist. LEXIS 18831 (N.D. Ill. Sept. 30, 2002); *Liu v. Donna Karan Int’l, Inc.*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002).

120. Additionally, a trend among state courts involving workers’ compensation statutes may indicate that courts would be unwilling to let employers avoid complying with ERISA with regard to their undocumented workers. Although these decisions concededly involve state law, the reasoning behind these decisions resonates with the FLSA cases discussed above when they conclude that failing to enforce employment laws as regards undocumented workers would also undermine the federal immigration policy under IRCA. *See, e.g.*, *Dowling v. Slotnik*, 712 A.2d 396 (Conn. 1998) (holding that excluding undocumented workers from workers’ compensation statutes would encourage employers to take advantage of the workers and undermine IRCA); *Ruiz v. Belk Masonry Co., Inc.*, 559 S.E.2d 249 (N.C. Ct. App. 2002) (holding that undocumented workers are covered by workers’ compensation provisions).

121. *See WAGE AND HOUR DIV., U.S. DEP’T OF LABOR, FACT SHEET #48: APPLICATION OF U.S. LABOR LAWS TO IMMIGRANT WORKERS: EFFECT OF HOFFMAN PLASTICS DECISION ON LAWS ENFORCED BY THE WAGE AND HOUR DIVISION* (2007), <http://www.dol.gov/esa/whd/regs/compliance/whdfs48.pdf>.

to undocumented workers, make no mistake, it is still illegal for employers to discriminate against undocumented workers.”¹²² Thus, there is a possibility that if the Employee Benefits Security Administration, the government agency in charge of the labor-oriented provisions of ERISA,¹²³ were to follow the approach of the Wage and Hour Division and the EEOC, ERISA would still cover undocumented workers in the United States, even as certain types of relief might be unavailable to them.

Moreover, because *Hoffman Plastics* was a closely-divided 5-4 decision, it is plausible that the Supreme Court could decide to adopt the reasoning of Justice Breyer’s dissent in *Hoffman Plastics* for the ERISA context. A court following this analysis could note that ERISA certainly applies to undocumented workers as employees and then point out that there is nothing in IRCA which says that undocumented workers cannot keep their benefits:

[IRCA’s] language itself does not explicitly state how a violation is to effect the enforcement of other laws, such as the labor laws. What is to happen, for example, when an employer hires, or an alien works, in violation of these provisions? Must the alien forfeit all pay earned? May the employer ignore the labor laws?¹²⁴

Indeed, the lower courts FLSA decisions discussed above adopted this exact approach.

Consider, for instance, *Patel* in this regard: “By reducing the incentive to hire such workers the FLSA’s coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA.”¹²⁵ Perhaps a future court will, along similar lines, find that the IRCA does not require an undocumented worker to forfeit his or her health benefits or retirement monies because such policies would give employers the incentive to hire undocumented workers in violation of IRCA policy. Indeed, a court

122. See Press Release, Equal Opportunity Employment Comm’n, EEOC Reaffirms Commitment to Protecting Undocumented Workers from Discrimination (June 28, 2002), <http://www.eeoc.gov/press/6-28-02.html> (quoting Commissioner Leslie E. Silverman).

123. While the labor provisions are administered by the Employee Benefits Security Administration (EBSA), the tax provisions are administered by the Department of Treasury. See RICHARD A. BALES, JEFFREY M. HIRSCH & PAUL M. SECUNDA, UNDERSTANDING EMPLOYMENT LAW 197 (2007).

124. *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137, 154-55 (2002) (Breyer, J., dissenting).

125. *Patel v. Quality Inn South*, 846 F. 2d, 700, 704-05 (11th Cir. 1988).

might follow the lead of *Patel* and conclude that ERISA “is an area in which decisions under the NLRA are not helpful in interpreting [it],” and that, “[n]othing in [ERISA] suggests that undocumented aliens cannot recover [benefits] under [it].”¹²⁶ Under such an approach, an undocumented worker would be entitled to the full range of available remedies under ERISA without regard to his or her immigration status.

Alternatively, a court considering this issue might, as a matter of first impression, find that remedies under the NLRA and ERISA are different enough that the *Hoffman Plastics* analysis should not apply at all. Under this line of reasoning, a court could find that back pay remedies are not available under ERISA’s civil enforcement scheme.¹²⁷ ERISA places less emphasis on individual victim compensation.¹²⁸ This legal orientation might mean that courts would be more likely to focus on undocumented workers being able to fulfill the ERISA policy of having employees report illegal employer or fiduciary conduct to the appropriate government authorities.¹²⁹

Needless to say, what will happen in this area of ERISA law in the future is uncertain. Regardless of whether undocumented workers are eligible for employee benefits, they will still come to work in the United States¹³⁰ and employers will still hire them.¹³¹ This does not

126. *Id.* at 706 (interpreting the FLSA).

127. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993) (interpreting “appropriate equitable relief” in § 502(a)(3) to mean injunctions, mandamus, or restitution, but not money damages such as compensatory or punitive damages). Additionally, there is now a more significant argument that the Supreme Court’s decision in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), does not permit back pay for wrongful termination as an equitable remedy under ERISA Section 502(a)(3). See, e.g., *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir. 2004) (holding that back pay as equitable relief is not available under § 502(a)(3) for violation of ERISA § 510). But see *Aetna Health Inc. v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) (“As the array of lower court cases and opinions documents, fresh consideration of the availability of consequential damages under § 502(a)(3) is plainly in order.”).

128. For example, the fiduciary breach provision provides relief to the plan as a whole rather than to individual participants or beneficiaries. See ERISA §§ 502(a)(2), 409.

129. See COLLEEN E. MEDILL, *INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE* 62 (2d ed. 2007) (describing the twin policy objectives of ERISA’s reporting and disclosure requirements as “providing sufficient information to participants so that they can ‘self-police’ the administration of their employee benefit plans and deterring fiduciary misconduct”).

130. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 155 (Breyer, J., dissenting) (noting the “attractive force of employment, which like a ‘magnet’ pulls illegal immigrants toward the United States.” (citing H.R. REP. NO. 99-682, pt. 1, at 45 (1986), as reprinted in 1986 U.S.C.C.A.N. 5649)).

mean, however, that these problems are not important enough for undocumented workers and that, accordingly, Congress should give up on passing comprehensive immigration reform to address these questions. Certain members of Congress have already under proposed legislation, including the Secure America and Orderly Immigration Act of 2005, attempted to ensure that¹³²

[a] nonimmigrant alien [temporary or guest worker] . . . shall not be denied any right or remedy under Federal, State, or local labor or employment law that would be applicable to a United States worker employed in a similar position with the employer because of the alien's status as a nonimmigrant worker.¹³³

If such provisions were to become law, at least recognized, foreign temporary or guest workers would be covered by ERISA on the same terms as U.S. citizens, eliminating much of the uncertainty currently surrounding employee benefits law related to such workers. And as long as foreign workers are in the United States in some form of government-sanctioned program, and perhaps even if they are not,¹³⁴ they should be able to enjoy the fruits of their labor, including the ability to maintain health insurance and to save for retirement for themselves and their families. A just global employee benefits system demands no less.

CONCLUSION

One of the most neglected areas of employee benefits law in the United States today is the extraterritorial application of ERISA to U.S. employees in other countries. Additionally, the courts and legislature have not spent the necessary time to discuss ERISA coverage issues for foreign employees in the United States, whether

131. *Id.* (noting that the lack of back pay to prevent to deter labor law violations against undocumented workers “increases the employer’s incentive to find and to hire illegal-alien employees”). M. Patricia Fernandez Kelly explains the attraction of immigrants for employers: “many of them are not citizens. Accordingly, immigrants assess working conditions, wage levels, and quality of life by comparison to their point of origin, not to their point of destination. As a result, immigrants tend to be less demanding and more compliant than native United States citizens.” M. Patricia Fernandez Kelly, *Underclass and Immigrant Women as Economic Actors: Rethinking Citizenship in a Changing Global Economy*, 9 AM. U. J. INT’L L. & POL’Y 151, 153 (1993).

132. S. 1033, 109th Cong. (2005).

133. *Id.* § 304(h)(3); *see also id.* § 304(h)(5) (providing the same “benefits” to nonimmigrant workers as U.S. workers).

134. *See supra* notes 100-104 and accompanying text.

legal or illegal and whether working for foreign government or non-government employers. This is an increasingly crucial area of employee benefits law as the globalization of the world's workplaces continues apace.

After surveying the tangled web of ERISA law in this context, the article proposes two statutory fixes and one new path for courts to take in applying employment benefits law in the immigration milieu. First, Congress should amend ERISA to add ERISA § 4(b)(6) to provide ERISA coverage for American employees working abroad as long as ERISA does not conflict with the laws of a foreign country. Such a law would make clear that ERISA's extraterritorial application is of a limited nature and does not extend to foreign employees working abroad for American companies or their subsidiaries. Second, Congress should pass comprehensive immigration legislation and include within that legislation a provision that would make clear that documented workers maintain the same rights to employee benefits under ERISA as any other U.S. citizen. Third, courts should consider ERISA policies and the dissenting opinion in *Hoffman Plastics* to support a conclusion that undocumented workers should remain eligible for all appropriate relief under ERISA.

These steps may appear fairly modest for one who wishes to see concrete movement toward a more coherent, global employee benefit scheme, but to quote Lao Tzu: "The tallest tree begins as a tiny sprout, the highest monument, as a clod of dirt, the longest journey, with a first step."¹³⁵

135. LAO TZU, TAO TE CHING ¶ 64 (Ned Ludd trans.), <http://www.terebess.hu/english/tao/ludd.html> (last visited September 17, 2008).