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**“The Longest Journey, With A First Step”:  
Bringing Coherence To Sovereignty And  
Jurisdictional Issues In Global Employee Benefits  
Law**

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# **“The Longest Journey, With A First Step”: Bringing Coherence To Sovereignty And Jurisdictional Issues In Global Employee Benefits Law**

By Paul M. Secunda<sup>\*</sup>

## **INTRODUCTION**

Global employee benefits law is an emerging field of study in its infancy that desperately requires coherence at the threshold level of statutory coverage. This threshold level of statutory coverage in the global context consists of a statutory maze of sovereignty and jurisdictional issues that are currently complex and hard to negotiate. Consider one recent description about some of these tricky issues:

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.<sup>1</sup>

This state of affairs means that a single global employee benefits law regime is not presently realistic.<sup>2</sup> Nonetheless, it is possible to start piecing together this regime by asking when and where U.S. employee benefits law applies and by starting with a consideration of the

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<sup>1</sup> 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).

<sup>2</sup> *Id.* at 861.

scope of the chief employee benefits law in the United States, the Employee Retirement Income Security Act of 1974 (ERISA).<sup>3</sup>

As an initial matter, “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.”<sup>4</sup> Although ERISA has no explicit provision extending coverage overseas, it does have broad jurisdictional language under ERISA §4(a),<sup>5</sup> which 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.”<sup>6</sup> 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. But, of course, it is not that easy. Many questions of coverage still exist given the vagueness of ERISA’s provisions when it comes to not only these matters of extraterritorial application, but also application of ERISA to foreign employees in the United States and foreign companies operating to some degree in the United States. Thus, three additional dimensions of ERISA coverage involving the global context must be explored: (1) issues of legal foreign employees located in the United States, (2) issues of foreign government employer immunity under the

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<sup>3</sup> 29 U.S.C. §§ 1001-1461. ERISA covered private-sector, employer-provided pension and welfare benefit employee benefit plans. *Id.* at § 1003(a).

<sup>4</sup> *E.E.O.C. v. Arabian American Oil Co. (ARAMCO)*, 499 U.S. 244, 248 (1991).

<sup>5</sup> 29 U.S.C. § 1003(a).

<sup>6</sup> Following the practice of other ERISA books and scholars, this case book refers to the original section numbers as enacted by ERISA in the “ERISA §” format, rather than to the United State Code section numbers. Additionally, Department of Labor Regulations found in 29 C.F.R. are referred to as “DOL Reg.”

Foreign Service Immunity Act (FSIA),<sup>7</sup> and (3) issues surrounding foreign undocumented workers.

The paper proceeds in two parts. The first part explores the extraterritorial application of ERISA to domestic and foreign workers abroad and establishes the confusing nature of this legal framework currently. Part I concludes by suggesting the addition of ERISA §4(b)(6) which would simplify greatly this area of the law by following an extraterritorial application model used by Title VII of the Civil Rights Act of 1964<sup>8</sup> and other U.S. employment discrimination statutes. Part II then consider 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. The second part concludes by suggesting that future courts should abandon the *Hoffman Plastics* holding in the ERISA context for undocumented workers and that future immigration reform should contain clear provisions providing that documented workers employed by U.S. companies receive the same employee benefit rights under ERISA as their American counterparts. The hope of this article is that these proposals will begin the work making a globally-integrated, U.S. employee benefit scheme a reality in our lifetimes.

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<sup>7</sup> 28 U.S.C. § 1604.

<sup>8</sup> 42 U.S.C. §§ 2000e-2000e-17 (2000).

## I. EMPLOYEES IN THE UNITED STATES WORKING ABROAD

### A. *Application of ERISA to Events Outside the United States*

#### 1. *Maurais v. Snyder*

A good place to start with the topic of the extraterritorial reach of ERISA is with one of the few cases in this area of the law, *Maurais v. Snyder*, from Judge Weiner of the federal district court in Philadelphia.<sup>9</sup> In *Maurais*, Dr. Maurais, a citizen of Canada, filed a lawsuit for \$75,750.00 for unpaid surgical and other medical services rendered that he provided in Canada to Corey Snyder, a U.S. citizen.<sup>10</sup> 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 The Guardian Life Insurance Company.<sup>11</sup> When Dr. Maurais was unable to receive compensation from Snyder or the plan for the surgical procedures performed,<sup>12</sup> he brought claims against Snyder in federal court for implied contract, quantum meruit, unjust enrichment, conversion and

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<sup>9</sup> No. C.A. 00-2133, 2000 WL 1368024 (E.D. Pa. Sept. 14, 2000) (per Weiner, J.).

<sup>10</sup> *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. 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 remained under Dr. Maurais case until he was transferred to a hospital in Philadelphia. *Id.*

<sup>11</sup> *Id.* There is no dispute that the Guardian Plan is an “employee welfare benefit” governed by ERISA.

<sup>12</sup> 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 ended up using the money on himself. *Id.*

punitive damages and against Guardian on theories of implied contact and negligent misrepresentation.<sup>13</sup>

In response, Guardian sought to dismiss for failure to state a claim because of its belief that ERISA preempted the two state law claims brought against it.<sup>14</sup> 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 the 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. Although no court has specifically decided the issue, we do find the decision of the Supreme Court in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991), to be quite instructive.<sup>15</sup>

In *E.E.O.C. v. Arabian American Oil Co. (ARAMCO)*,<sup>16</sup> the Supreme Court considered whether Congress meant Title VII of the Civil Rights Act of 1964,<sup>17</sup> which prohibits various forms of employment discrimination against protected groups, to have extraterritorial

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<sup>13</sup> *Id.*

<sup>14</sup> ERISA §514 is a broadly-worded preemption provision that permits ERISA to supersede most state laws which "relates 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).

<sup>15</sup> *Maurais*, 2000 WL 1368024, at \*2.

<sup>16</sup> 499 U.S. 244 (1991).

<sup>17</sup> 42 U.S.C. §§ 2000e-200e-17 (2000).

application.<sup>18</sup> The Court concluded that Congress did not intend for Title VII to apply overseas.<sup>19</sup> In this regard, the Court wrote:

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.” *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). This “canon of construction ... is a valid approach whereby unexpressed congressional intent may be ascertained.” *Id.* It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord. *See McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963).

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.” *Foley Bros.*, 336 U.S. at 285. 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,” *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957), we must presume it ‘is primarily concerned with domestic conditions.’ *Foley Bros.*, 336 U.S. at 285.<sup>20</sup>

Because there was no language in ERISA that could establish a clearly expressed intent on behalf of Congress to legislate extraterritorially, the Court found that ERISA did not apply to Dr. Maurais’ medical services claims in Canada.<sup>21</sup> Thus, *ARAMCO* stands for the proposition that unless there is “the affirmative intention of the Congress clearly expressed,” courts will presume that a statute is primarily concerned with domestic matters.<sup>22</sup>

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<sup>18</sup> *ARAMCO*, 499 U.S. at 247.

<sup>19</sup> *Id.* at 259.

<sup>20</sup> *ARAMCO*, 499 U.S. at 248.

<sup>21</sup> *Maurais*, 2000 WL 1368024, at \*3.

<sup>22</sup> *See Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957).

The court came to this conclusion even though ERISA contains a very broad jurisdictional statement.<sup>23</sup> Under this provision, Guardian maintained ERISA applied because technically speaking it meets all the elements ERISA §4(a)(1): (1) it is 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) it is not an employee benefit plan otherwise exempted from coverage by ERISA.<sup>24</sup>

But the court rejected this textualist argument. It found that the “broad jurisdictional language” of ERISA §4(a)(1) does not operate to extend statutory protections to employee benefits granted by a United States employer to anywhere in the world.<sup>25</sup> It noted that a similar argument made under the equally broad jurisdictional language of Title VII was also rejected by the *ARAMCO* Court.<sup>26</sup> Significantly, 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

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<sup>23</sup> 29 U.S.C. § 1003(a)(1) (ERISA applies “to any employee benefit plan if it is established or maintained by any employer engaged in commerce or in any industry or activity affecting commerce.”)

<sup>24</sup> 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.

<sup>25</sup> *Maurais*, 2000 WL 1368024, at \*3

<sup>26</sup> *Id.*



manner.<sup>27</sup> In fact, one of the cases cited by the *ARAMCO* Court was specifically telling. The Court in *McCullough v. Sociedad Nacional de Marineros de Honduras*<sup>28</sup> had 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)<sup>29</sup> did not apply.<sup>30</sup> Similarly, ERISA did not apply in *Maurais*.

Beyond this jurisdictional language, Guardian also sought to rely on precedent that ERISA applied to benefits claims arising out Plans established of Indian Tribe reservations. Specifically, Guardian pointed to *Smart v. State Farm Ins. Co.*,<sup>31</sup> which held ERISA applicable to Indian Tribe employers and Indians.<sup>32</sup> The *Maurais* Court distinguished *Smart*, however, by

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<sup>27</sup> *Id.* at \*3 (citing *New York Central R. Co. v. Chisholm*, 268 U.S. 29, 31 (1925) (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) (Court refused to find a congressional intent to apply the National Labor Relations Act abroad because there was not any specific language in the Act reflecting Congressional intent to do so).

<sup>28</sup> 372 U.S. 10 (1963).

<sup>29</sup> 29 U.S.C. §§ 151-169.

<sup>30</sup> *McCullough*, 372 U.S. at 19. *Maurais* does not represent the first time a court has utilized case law from the NLRA context before to determine the scope of ERISA. Especially in the area of ERISA civil enforcement actions, the Court has observed that the complete preemption of ERISA § 502(a)(1)(B) of all denial of benefit claims is similar to claims preempted by § 301 of the Taft-Hartley Amendments to the NLRA for breach of collective bargaining agreements. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

<sup>31</sup> 868 F.2d 929 (7th Cir.1989).

<sup>32</sup> *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.”).

noting that Indian Tribes, unlike nations, do not have absolute immunity from Congressional power.<sup>33</sup> Instead, Congress has plenary power to limit, modify or even eliminate the powers of Tribes' self-governance because Indian tribes possess limited sovereignty, which is subject to complete defeasance by Congress.<sup>34</sup> Also, while Indian reservations are located within the United States, Canada, of course, is not and is a separate sovereign nation. Consequently, the consensus view is that ERISA does apply to Indian reservations within the United States, even though tribes retain a substantial degree of sovereignty.<sup>35</sup>

The upshot of *Maurais* is that because there exists a presumption against extraterritorial application absent clear Congressional intent, and ERISA does not contain that intent, it does not apply extraterritorially. But one has to wonder that given the increasing importance of global trade and the internationalization of the economy in the United States, whether there will likely

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<sup>33</sup> 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).

<sup>34</sup> *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932 (7<sup>th</sup> Cir. 1989) (citing *Rice v. Rehner*, 463 U.S. 713 (1983)).

<sup>35</sup> *Id.* at 936 (“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.

be pressure to export the labor and employment standards of the United States, including ERISA standards, to other countries.<sup>36</sup>

## 2. The Proposal: ERISA §4(b)(6)

Although the scope of ERISA's extraterritorial application could be an issue for courts to address some day through applying a different interpretation to current ERISA coverage,<sup>37</sup> it would be far better for Congress to do so explicitly by amending ERISA as it has done with other U.S. employment discrimination statutes. For instance, Title VII of the Civil Rights Act of 1964,<sup>38</sup> the Age Discrimination in Employment Act of 1967 (ADEA),<sup>39</sup> and the Americans with Disabilities Act of 1990 (ADA),<sup>40</sup> all have been amended and now contain provisions which permit their application extraterritorially in specified circumstances. 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 action otherwise prohibited . . ., with respect to an

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<sup>36</sup> See generally Phillis R. Morgan & R. Bradley Mokros, *International Employment* in INTERNATIONAL LEGAL DEVELOPMENTS IN REVIEW: 2000 BUSINESS REGULATION, 35 INT'L LAW. 351 (2001).

<sup>37</sup> 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, for instance, 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.

<sup>38</sup> 42 U.S.C. § 2000e-1(b), (c).

<sup>39</sup> 29 U.S.C. § 623(f)(1), (h).

<sup>40</sup> 42 U.S.C. § 12112(c).

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.<sup>41</sup>

This language has been interpreted by various courts to mean that statutory coverage has been extended to Americans employed abroad by American companies or their subsidiaries.<sup>42</sup> On the other hand, these statutory schemes also limit ERISA and do not extend ERISA “to foreign nationals working abroad for American companies or their subsidiaries.”<sup>43</sup> *Hu v. Skadden, Arps,*

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<sup>41</sup> 42 U.S.C. § 2000e-1(b), (c).

<sup>42</sup> *Helm v. South African Airways*, No. 84-5404, 1987 WL 13195,, at \*7 (S.D.N.Y.1987) (ADEA context).

<sup>43</sup> *Iskandar v. American University of Beirut*, No. 98-6616, 1999 WL 595651, at \*2 (S.D.N.Y.1999) (ADEA context).

*Slate, Meagher & Flom LLP*<sup>44</sup> provides an application of this principle under the 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.<sup>45</sup> Relying on extraterritorial provisions of the ADEA,<sup>46</sup> the court concluded that the plaintiff could not claim the statute's protection.<sup>47</sup>

At the end of the day, whether ERISA will be amended like the employment discrimination statutes to allow for extraterritorial application in some instances is really anyone's guess. Until that happens, it appears likely that there will be more decisions like *Maurais* finding a presumption against the extraterritorial application of ERISA. 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 when American employees 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.<sup>48</sup>

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

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

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<sup>44</sup> 76 F. Supp. 2d 476 (S.D.N.Y. 1999).

<sup>45</sup> *Id.* at 476-77.

<sup>46</sup> 29 U.S.C. § 623(f)(1), (h).

<sup>47</sup> *Hu*, 76 F. Supp. 2d at 478; *see also* *Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600 (N.D. Tex. 1999) (holding that former, non-U.S. employee, who had lived and carried out his duties in Japan, while employed with Japanese subsidiary of American corporation, not protected by Title VII or ADEA).

<sup>48</sup> *See Helm*, 1987 WL 13195, at \*7 (“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.”).

(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 would also 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 has been known to follow,<sup>49</sup> the Third Circuit Court of Appeals has held that the NLRA does not apply to employees of a U.S. company while they were performing temporary work in Canada.<sup>50</sup> The court came to this decision based on the presumption against extraterritoriality in *ARAMCO* and *McCullough*.<sup>51</sup> Similar to 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

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<sup>49</sup> See *supra* note 30.

<sup>50</sup> See *Asplundh Tree Experts Co. v. NLRB*, 356 F.3d 168 (3d Cir. 2004).

<sup>51</sup> *Id.* at 173-74.

nations,”<sup>52</sup> as there is under Title VII and other antidiscrimination statutes.<sup>53</sup> This suggests that ERISA may not apply to U.S. employees temporarily assigned overseas. Again, if policymakers wanted coverage to extend in these circumstances, an amendment to ERISA providing for extraterritorial application could make cases such as this moot.

## **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. This is because an extraterritorial application of a statute involves the regulation of conduct beyond the borders of the United States. Consequently, it could even be argued that the presumption against extraterritoriality does not apply in this context.<sup>54</sup> However, there are three additional areas that deserve attention in this context: (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 to foreign sovereign employers; and (3) the application of ERISA to undocumented workers in the United States.

### **A. *Foreigner Employees and Employers Permissibly in the United States***

What happens when a foreign corporation locates one of its foreign employees in the United States and guarantees certain employee benefits? Although Title VII, the ADEA, and the ADA have all been interpreted to apply to foreign employers doing business in the United States

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<sup>52</sup> *Id.* at 175-76; *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].”).

<sup>53</sup> *See supra* notes 38-41.

<sup>54</sup> For instance, *Lasheen* did not even discuss *ARAMCO*’s presumption against extraterritoriality.

regardless of the citizenship of the plaintiff,<sup>55</sup> the foreign plan exception under ERISA, §4(b)(4), is less clear. ERISA §4(b)(4) states, “The 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.”<sup>56</sup>

This is the only specific provision in ERISA dealing with employee benefit plans maintained outside of the United States and under it, two elements must be met: (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. Most of the litigation, of which again there has been little, has focused on whether the Plan in question is maintained inside or outside of the United States.

For a plan maintained outside of the United States, consider how the court analyzed the foreign plan exception in *Molyneux v. Arthur Guinness and Sons, P.L.C.*:<sup>57</sup>

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.

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<sup>55</sup> See, e.g., *Ward v. W & H Voortman, Ltd.*, 685 F. Supp. 231 (M.D. Ala. 1988) (Title VII); *Morelli v. Cedel*, 141 F.3d 39 (2d Cir. 1998) (ADEA); and *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11<sup>th</sup> Cir. 2000) (Title III of the ADA).

<sup>56</sup> 29 U.S.C. § 1003(b)(4).

<sup>57</sup> 616 F. Supp. 240, 244 (S.D.N.Y. 1985).



But in a footnote, 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. *See* 1974 U.S. Code Cong. & Ad. News 4639 et seq. It is also noted that ERISA was not intended to cover “plans established or maintained outside of the United States for the benefit of non-United States citizens....” H.R. Rep. (Educ. & Labor Comm.) No. 93-533, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4656.<sup>58</sup>

Thus, it is fairly clear that foreign employees working in the United States generally come under ERISA if the Plan is maintained outside of the United States.

On the other hand, consider how the court in *Lasheen v. The Loomis Co.*,<sup>59</sup> struggled with determining the location of where a Plan was maintained. In *Lasheen*, Mohammed Lasheen’s estate sued The Loomis Company, 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.<sup>60</sup> Loomis had been hired by the Embassy of Egypt to manage its benefit plan for students and teachers who were temporarily in the United States.<sup>61</sup> Importantly, the Plan provided that to be eligible as a

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<sup>58</sup> *Id.* at 244 n.7; *see also* *Pitstick v Potash Corp. of Saskatchewan Sales, Ltd.*, 698 F Supp. 131 (S.D. Ohio 1988) (where Canadian corporation with its principal place of business in the United States established a severance pay plan under Canadian law and maintained the plan in Canada primarily for the benefit of Canadian employees but applied it equally to the corporation's United States employees, most of whom were neither citizens nor residents of the United States, court held that the severance plan fell within the exemption of ERISA § 4(b)(4)).

<sup>59</sup> No. Civ. 01-227, 2006 WL 618289 (E.D. Cal. Mar. 9, 2006)

<sup>60</sup> *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.*

<sup>61</sup> *Id.*

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.”<sup>62</sup> The issue before the Court was whether this was a “foreign plan” exempted from ERISA.<sup>63</sup>

Because the Plan contained the language concerning not seeking a change in immigration status to be eligible, the court was easily able to conclude that the Plan exclusively provided benefits for non-resident aliens.<sup>64</sup> Thus, the first element of the §4(b)(4) exemption had been satisfied: the Plan was “primarily for the benefit of persons substantially all of whom are nonresident aliens.”<sup>65</sup>

The harder question was whether the Plan met the second element of the foreign plan exception of having to be “maintained outside of the United States.” As with many areas in the newly-developing field of global employee benefits law, the court and the parties were not able to locate any case on point and therefore, the court treated it the issue as a matter of first impression.<sup>66</sup> The court relied in part on a number of opinion letters from the Office of Pension

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at \*3.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* Other cases have also concluded that plans 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) exemption did not apply to employee pension plans adopted by foreign corporations where employee was United States citizen).

<sup>66</sup> *Lasheen*, 2006 WL 618289, at \*4 (“Neither the parties nor this court have discovered any cases which interpret what it means to be ‘maintained outside of the United States.’”).

and Welfare Benefit Programs (“OPWBP”) and from the Pension Benefit Guaranty Corporation (“PBGC”).<sup>67</sup>

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.” Opinion No. 83-27A; PBGC Opinion 80-19; see also Opinion 82-38A (“centralized information and records concerning the fund” were stored outside the country); PBGC Opinion 80-19.

(2) The work locations of the employees was [sic] outside of the United States....” Opinion No. 83-27A; PBGC Opinion 80-19 (“one of the factors to which the PBGC will attach particular weight is the work location of the employees covered by the plan”); Opinion No. 80-61 A (“all participants are currently employed outside of the United States”); PBGC Opinion 78-14.

(3) The Plan is administered by a company located outside the United States. Opinion No. 80-61 A.

(4) All operations of the companies are located outside of the United States. Opinion No. 81-58A.

(5) The trust is established outside the United States. PBGC Opinion 78-14.

(6) Assets of the Plan are held outside the United States. Opinion No. 80-61A.<sup>68</sup>

The initial part of the court’s analysis employing these factors focused on where diplomatic property in the form of the Embassy of Egypt could be considered property outside of

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<sup>67</sup> *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, 120 S. Ct. 1655, 146 L.Ed.2d 621 (2000)).

<sup>68</sup> *Id.*

the United States.<sup>69</sup> Although the court, after some analysis, concluded that it could be,<sup>70</sup> it also found that this factor and the other factors were not dispositive on the ERISA exemption issue.<sup>71</sup> Instead, the court decided the case based on two new factors: what the Plan itself said about whether ERISA provided coverage and where most of the Plan's activities were carried out.<sup>72</sup>

On the first issue, “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.”<sup>73</sup> As to the second issue, 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.”<sup>74</sup> Consequently, the court concluded that most of the activities of the Plan did take place in the United States.

Thus, the court in *Lasheen* found that the Embassy of Egypt Plan was primarily for the benefit of nonresident aliens like Lasheen, but was maintained in the United States. As a result, the ERISA exception for foreign plans was found not to be applicable and Lasheen's estate was

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<sup>69</sup> *Id.* at \*4-\*6.

<sup>70</sup> *Id.* at \*6.

<sup>71</sup> *Id.* at \*7 (“Attempting to apply the criteria derived from the opinion letters to the evidence adduced does not result in a certain result.”).

<sup>72</sup> *Id.* at \*8.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

permitted to continue with its claim under ERISA.<sup>75</sup> Thus, *Lasheen* supports an interpretation of ERISA §4(b)(4) that when a foreign employee works for a U.S. subsidiary of a foreign corporation that maintains an employee benefit plan inside the United States, ERISA applies.

***B. Foreign Service Immunity 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 Service Immunity Act (FSIA),<sup>76</sup> “foreign states are presumed to be immune from the jurisdiction of United States courts unless one of the Act's exceptions to immunity applies.”<sup>77</sup> “Foreign sovereign immunity is premised on comity and respect for the equality and independence of sovereigns.”<sup>78</sup> FSIA was not relevant in the initial decision in *Lasheen v. Loomis Co.* because the issue there was one of statutory construction, not one of immunity. The foreign immunity issue did subsequently become important 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)*,<sup>79</sup> the court explained the application of the FSIA to the facts of this case this way:

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<sup>75</sup> *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.*, No. CIV. S-01-227, 2008 WL 295079, at \*1 (E.D. Cal. Feb. 1, 2008).

<sup>76</sup> 28 U.S.C. § 1604.

<sup>77</sup> *Gates v. Victor Fine Foods*, 54 F. 3d 1457, 1459 (9<sup>th</sup> Cir. 1995).

<sup>78</sup> *Id.* at 1466.

<sup>79</sup> No. CIV. S-01-227, 2008 WL 295079, at \*1 (E.D. Cal. Feb. 1, 2008).

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.” *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428, 443, 109 S.Ct. 683, 102 L.Ed.2d 818 (1988). 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. *Joseph v. Office of the Consulate Gen. of Nig.*, 830 F.2d 1018, 1021 (9th Cir.1987) (citing *Meadows v. Dominican Republic*, 817 F.2d 517, 522 (9th Cir.1987)).

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[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.” Decl. of John Pierce (“Pierce Decl.”), Ex. D at 5. Under Joseph, this language waives any claim to immunity.

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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.” 28 U.S.C. § 1605(a)(2)

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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 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.<sup>80</sup>

Based on this opinion, one would assume that Lasheen and Loomis were able to finally recover from the Egyptian defendants. But does this decision mean going forward that all administration and operation of employee benefit plans will come under the “commercial activity” exception to FSIA? For instance, in *Murkaddam v. Permanent Mission of Saudi Arabia to the United*

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<sup>80</sup> *Id.* at \*2-\*4.

*Nations*,<sup>81</sup> the court found that a clerical employee's duties in the United Nations for Saudi Arabia came under the FSIA commercial activity exception.<sup>82</sup>

On the other hand, in *Gates v. Victor Fine Foods*,<sup>83</sup> the Ninth Circuit Court of Appeal initially held that a Canadian corporation was a foreign sovereign subject immune under FSIA.<sup>84</sup> Consequently, unless one of the FSIA exceptions applied, 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<sup>85</sup> and for interfering with employee benefit rights under ERISA §510.<sup>86</sup> On the question of an applicable exception to FSIA, 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's subsidiary's operations, including its decision to terminate its employee benefit plan.<sup>87</sup>

The *Gates* holding seems to indicate that these commercial activity FSIA cases turn 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

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<sup>81</sup> 111 F. Supp. 2d 457 (S.D.N.Y. 2000).

<sup>82</sup> *Id.* at 458.

<sup>83</sup> 54 F. 3d 1457 (9<sup>th</sup> Cir. 1995).

<sup>84</sup> *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.").

<sup>85</sup> 29 U.S.C. §§ 1161-1168.

<sup>86</sup> *Id.* at § 1140.

<sup>87</sup> *Gates*, 54 F.3d at 1465.

and the Plan covered by ERISA. Thus, this aspect of FSIA gives foreign government employers 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 employers raises important questions in the employee benefits context. And yet, unlike American labor law which has a watershed decision on the issue of whether undocumented workers are eligible for back pay for violations of the NLRA,<sup>88</sup> American employee benefits law is silent.

Yet the issue remains: are undocumented workers eligible to receive employee benefits, or ERISA remedies, from ERISA-covered plans operating in the United States? Although there does not appear to be a specific answer to this question, the Court's opinion in the NLRA case of *Hoffman Plastics* might provide some important clues. This is because that decision 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 (IRCA).<sup>89</sup>

IRCA prohibits the employment of undocumented workers in the United States,<sup>90</sup> and enforces this law through an extensive employment verification system which requires

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<sup>88</sup> *Hoffman Plastics Compound v. NLRB*, 535 U.S. 137 (2002) (holding that undocumented workers are ineligible for a back pay remedy for union-based discrimination under the National Labor Relations Act).

<sup>89</sup> Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

<sup>90</sup> 8 U.S.C. §1324a.



employers to verify the identity and eligibility of all new hires by examined certain documents before they are permitted to start work.<sup>91</sup> Employers who violate IRCA may be subject to both civil penalties and criminal prosecution.<sup>92</sup> 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.”<sup>93</sup>

Under ERISA, decisionmakers do not have the remedial discretion that the National Labor Relations Board (NLRB) does,<sup>94</sup> but it would appear, applying the majority’s reasoning in *Hoffman Plastics*, that awarding benefits to undocumented workers does “run[] counter to policies underlying IRCA.”<sup>95</sup> Permitting 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.”<sup>96</sup> Thus, if *Hoffman Plastics* is deemed to apply to the ERISA context, it is likely that an undocumented worker would not be eligible for benefits, or to sue for benefits, under ERISA.

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<sup>91</sup> *Id.* at §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.

<sup>92</sup> *Id.* at §§ 1324a(e)(4)(A), (f)(1).

<sup>93</sup> *Hoffman Plastics*, 535 U.S. at 148.

<sup>94</sup> See 29 U.S.C. § 160(c). See also *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612, n. 32 (1969) (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”).

<sup>95</sup> *Hoffman Plastics*, 535 U.S. at 149.

<sup>96</sup> *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.”).

Nonetheless, other labor and employment laws have been found to apply to undocumented workers, even after *Hoffman Plastics*. In the aftermath of *Hoffman Plastics*, the Wage and Hour Division of the U.S. Department of Labor issued a Fact Sheet stating: “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.”<sup>97</sup> Similarly, the Equal Employment Opportunity Commission (EEOC) issued a press release which stated that, “[w]hile *Hoffman* affects the availability of some forms of relief to undocumented workers, make no mistake, it is still illegal for employers to discriminate against undocumented workers.”<sup>98</sup> Thus, there is a possibility that if the Employee Benefits Security Administration (EBSA), the government agency in charge of the labor-oriented provisions of ERISA,<sup>99</sup> were to follow the approach of the Wage and Hour Division and the EEOC, ERISA would still cover undocumented workers in the United States, but certain types of relief might be found to be out of bounds to them.

However, because *Hoffman Plastics* was a closely-divided 5-4 decision, there is a still chance that future courts could decide to adopt the reasoning of Justice Breyer’s dissent in the

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<sup>97</sup> 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*, <http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm>.

<sup>98</sup> See PRESS RELEASE, EQUAL OPPORTUNITY EMPLOYMENT COMM’N, *EEOC Reaffirms Commitment To Protecting Undocumented Workers From Discrimination* (June 28, 2002), available at <http://www.eeoc.gov/press/6-28-02.html> (quoting Commissioner Leslie E. Silverman).

<sup>99</sup> While the labor provisions are administered by the 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).

ERISA context and find that similar relief under ERISA for undocumented workers does not “run[] counter to,’ or ‘trench[] upon,’ national immigration policy . . . [because affording back pay to undocumented workers] reasonably helps to deter unlawful activity that *both* labor laws *and* immigration laws seek to prevent.”<sup>100</sup> Moreover, 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?<sup>101</sup>

Staying with this line of thoughts, perhaps a future court will find that IRCA does not require an undocumented worker to forfeit his or her health benefits or retirement funds.

Alternatively, another argument might go that damage remedies are not even currently available under ERISA’s civil enforcement scheme,<sup>102</sup> and a back pay remedy may not qualify as “appropriate equitable relief” under ERISA §502(a)(3).<sup>103</sup> As such, there is less emphasis in

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<sup>100</sup> *Hoffman Plastics*, 535 U.S. at 153 (Breyer, J., dissenting) (emphasis in the original). Indeed, the labor law policy of providing back pay to undocumented workers who are discriminated against because of their union affiliation may be consistent with immigration policy. *See* H.R. Rep. No. 99-682, at 58, U.S. Code Cong. & Admin. News 1986, pp. 5649, 5662 (IRCA does not “undermine or diminish in any way labor protections in existing law, or ... limit the powers of federal or state labor relations boards ... to remedy unfair practices committed against undocumented employees.”).

<sup>101</sup> *Hoffman Plastics*, 535 U.S. at 154-55 (Breyer, J., dissenting)

<sup>102</sup> *See* *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993) (interpreting “appropriate equitable relief” in Section 502(a)(3) to mean injunctions, mandamus, or restitution, but not money damages such as compensatory or punitive damages).

<sup>103</sup> *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 Section 502(a)(3) for violation of Section 510).

ERISA on individual victim compensation and more focus on undocumented workers being able to fulfill the ERISA policy of reporting illegal employer or fiduciary conduct to the appropriate government authorities.<sup>104</sup>

What will happen in this area in the future is uncertain, but what can be said with almost absolute certainty is that regardless of whether or not undocumented workers are eligible for employee benefits, they will still come to work in the United States<sup>105</sup> and employers will still hire them.<sup>106</sup> Why? M. Patricia Fernandez Kelly explains that, “[the] reason why immigrants are so attractive to 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.”<sup>107</sup> This does not mean, however, that Congress should give up on passing some kind of comprehensive immigration reform.

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<sup>104</sup> 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.”).

<sup>105</sup> *Hoffman Plastics*, 535 U.S. at 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, p. 45 (1986), U.S. Code Cong. & Admin. News 1986, p. 5649).

<sup>106</sup> *Id.* (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.”).

<sup>107</sup> 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).

For instance, under certain proposed legislation, including the Secure America and Orderly Immigration Act of 2005,<sup>108</sup> “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.”<sup>109</sup> If such provisions were to become law, it appears that at least recognized, foreign temporary or guest workers would be covered by ERISA on the same terms as U.S. citizens. And as long as foreign workers are in the United States are in some form of government-sanctioned program, and perhaps even if they are not,<sup>110</sup> they should be able 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 demand 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, both legal and illegal and both working for foreign government and non-government employers, in the United States. These are increasingly crucial areas of employee benefits law as the globalization of the world’s workplaces continues apace.

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<sup>108</sup> S.1033, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2005).

<sup>109</sup> *Id.* at § 304(h)(3); *see also id.* at § 304(h)(5) (providing the same “benefits” to nonimmigrant workers as U.S. workers).

<sup>110</sup> *See supra* notes 100-104 and accompanying text.

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 also 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 which would make clear that undocumented workers maintain the same rights to employee benefits under ERISA as any other U.S. citizen. Third, courts in the future should consider ERISA policies and the dissenting opinion in *Hoffman Plastics* to support a conclusion that undocumented workers should remain eligible for appropriate relief under ERISA.

These steps may appear fairly modest for one who wishes to see concrete movement toward a 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."<sup>111</sup>

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<sup>111</sup> LAO TZU, TAO TE CHING ¶ 64 (translated by Ned Ludd), <http://www.terebess.hu/english/tao/ludd.html>.