DOL Weighs in on Retirement Plan Forfeitures Litigation

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In our December 2024 article for the Benefits Report (https://www.truckerhuss.com/newsletter/benefits-report-december-2024-2/), we discussed the emergence of a wave of fiduciary breach class action litigation against retirement plan fiduciaries alleging misuse of plan forfeitures. These lawsuits (of which there are now over fifty pending nationwide) generally allege that retirement plan fiduciaries breach their fiduciary duties, violate ERISA's anti-inurement rule, or engage in prohibited transactions when they use plan forfeitures to offset employer matching contribution obligations instead of paying plan administrative costs otherwise payable by plan participants.

To recap the basics, forfeitures occur when an employee leaves his or her company before the employer's matching contribution fully vests. The non-vested balance of the matching contributions in the participant's account is forfeited and held in a separate plan forfeiture account. As has long been approved by the IRS, forfeitures may (at least as a tax qualification matter) be allocated to one of three uses: (1) offsetting matching contributions; (2) defraying plan expenses; or (3) providing additional benefits to participants. Notwithstanding the longstanding and widespread nature of this practice, plaintiffs contend that by failing to use forfeitures to pay plan expenses, fiduciaries cause administrative costs to increase–and ultimately to be charged to participant accounts–thereby harming participants.

The initial wave of decisions in these cases has been mixed, although the weight of authority remains in defendants' favor. For example, courts ruling in defendants' favor, such as those in the *Thermo Fisher*, *Clorox*, *BAE Systems*, *Booz Allen*, and *HP* cases, generally agree that plaintiffs' claims are implausible because they purport to create a new benefit in the form of payment of plan administrative expenses, which is not required under ERISA. By contrast, in the *Qualcomm*, *Intuit*, and *Salesforce* cases, courts found that the plaintiffs plausibly alleged that plan fiduciaries harmed participants by letting the administrative expense charge fall on participants rather than the employer, and allowed the cases to move forward.

The DOL's Amicus Brief in HP: Constrained Fiduciary Discretion

On July 9, 2025, the Department of Labor (DOL) filed an amicus ("friend of the court") brief (https://www.truckerhuss.com/wp-content/uploads/2025/08/FS_Hutchins-Amicus-Brief_7.9.2025-1.pdf) in the *Hutchins v. HP* (https://www.truckerhuss.com/wp-content/uploads/2025/08/Dkt-71-Hutchins-v.-HP-02-05-2025.pdf) lawsuit, which is currently on appeal before the Ninth Circuit Court of Appeals. This is a significant development because it marks the first time the DOL has taken a position with respect to these lawsuits.

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In *HP*, which was an early case filed in the Northern District of California, the plaintiff alleged that, from 2019 until 2023, the HP plan committee violated ERISA by deciding to use forfeited funds to pay HP's "outstanding and unpaid matching contributions" for the prior year, rather than reducing participants' administrative expenses. Defendants moved to dismiss all claims and the district court granted the motion, with leave to amend. The court reasoned that although the HP plan committee was exercising a fiduciary function in making the decision to allocate forfeitures to offset employer matching contributions, plaintiffs' allegations were nevertheless implausible, as they would almost always require a fiduciary under similar circumstances to choose to reduce participant expenses rather than offset matching contributions, thereby creating a *de facto* duty to maximize plan benefits, which courts have repeatedly held is not required under ERISA. Plaintiff filed an amended complaint, which emphasized HP's alleged conflict of interest in administering the plan's forfeiture provision. The district court again granted HP's motion to dismiss, without leave to amend. Plaintiff subsequently appealed to the Ninth Circuit.

Although its amicus brief is limited to the facts of the *HP* case, the DOL makes several arguments that could be applied to these cases more broadly. Specifically, the DOL acknowledges that the decision of how to allocate plan forfeitures is a fiduciary (rather than a settlor) function, given the discretionary language of the HP plan document at issue. (By contrast, some cases, such as *BAE Systems*, involve *mandatory* plan language that removes this discretion and makes forfeiture allocation a settlor (plan design) function.) Nevertheless, the DOL argued that this decision for *HP* "was tightly constrained by settlor decisions regarding (1) plan funding and design, and (2) the risks of a dispute with the plan sponsor, both of which weigh in favor of allocating forfeitures to fund matching contributions." The DOL went on to note that the lawsuit does not allege that participants and beneficiaries received less than the matching contribution they were guaranteed under the plan, or that the plan administrative fees were excessive. The DOL noted further that determinations regarding the amounts to be contributed to a plan, as well as the level of benefits to be provided, are settlor determinations and, therefore, "cannot be dictated by a fiduciary's decision."

The DOL also argued that if the HP plan committee did as plaintiff suggests–use forfeitures to reduce plan expenses rather than offset contributions–the plan sponsor would in turn need to contribute more funds to the plan to cover the matching contributions. This would place the plan administrator in the position of seeking to compel the plan sponsor to contribute additional funds to the plan (funds that would have previously been paid from the plan's forfeitures account). This could, according to the DOL, lead to "a potentially protracted legal dispute, using Plan Assets," that would deplete funds otherwise available to participants. Moreover, the DOL argued that the plan sponsor could very well determine to reduce its matching contributions prospectively (a settlor decision permissible under ERISA) and use the funds it would have otherwise used as matching contributions to offset losses from a forfeitures dispute. This risk, the DOL argued, is properly factored into a fiduciary's assessment of the best course of action in evaluating its fiduciary duties. The DOL also noted that the plan sponsor might amend the plan to reduce matching contributions, thereby harming participants.

Whether the DOL's hypothetical scenario would actually come to fruition–employers still need to attract and retain talent, and matching contributions are a key tool toward that effort–the import of the DOL's amicus brief is significant. While couched in case-specific facts, the agency's reasoning aligns with arguments advanced by plan sponsors and fiduciaries, and reinforces longstanding administrative practices, including decades of plan administration custom and IRS guidance. Time will tell whether courts view these cases similarly, but for the time being, momentum does appear to be on defendants' side.

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