



Litigation Trends: Responding to the Uptick in Claims Challenging the Use of Retirement Plan Forfeitures

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Since late 2023, there has been a surge in litigation challenging the use of forfeitures in retirement plans. These cases argue that the use of forfeitures to reduce employer contributions, instead of reducing participant's expenses, violates ERISA's fiduciary duties—even if allowed in the plan document.

While the litigation challenges long-standing IRS rules, the court outcomes have been mixed. In initial cases, several district courts declined to dismiss claims, resulting in closer scrutiny of the employer's decisions. However, in recent cases such as *Hutchins v. HP Inc.*, plan sponsors have successfully defeated similar claims, with the *Hutchins* court noting that these claims ignore "decades of settled law," the plaintiff's interpretation "is implausible in light of the long history of using forfeitures to reduce employer contributions," and that these claims stretched "the fiduciary duties of loyalty and prudence beyond the law and [] create benefits beyond what was promised in the Plan itself."

WHAT SHOULD EMPLOYERS DO?

Despite positive results in recent cases, due to the increased frequency of this litigation, we encourage employers operating retirement plans containing discretionary language to take action to limit exposure of their plan fiduciaries.

The first step to mitigating risk is understanding whether the plan documents contain discretionary language permitting the use of forfeitures for plan expenses or future employer contributions. If so, consider:

1. Narrowing the acceptable uses of the plan's forfeiture account to one category of expenses (g., employer contributions only or plan expenses paid by the employer only), or
2. Identifying one category of expenses to always be paid first.

If the employer determines that it is comfortable losing flexibility in utilizing funds as they see fit, non-discretionary language can be added through a plan amendment, so that there would no longer be a choice for the fiduciary to make, which decreases liability.

Pre-approved plans may pose challenges for employers looking to address this litigation. If a pre-approved plan includes non-tailorable discretionary language, the employer may be stuck or risk loss of protection of the pre-

approved plan design. An alternative solution could be adopting a separate policy selecting non-discretionary uses of forfeitures that fit within the existing pre-approved plan terms.

For assistance with proactively protecting your retirement plan fiduciaries, please contact Optimatum Solutions or a member of the Winston & Strawn Employee Benefits and Executive Compensation Practice.

[David Neikrug](#) and [Sarah Shtutin](#), Optimatum Solutions, co-authored this blog. Kristine Lofquist, paralegal, also co-authored this blog.

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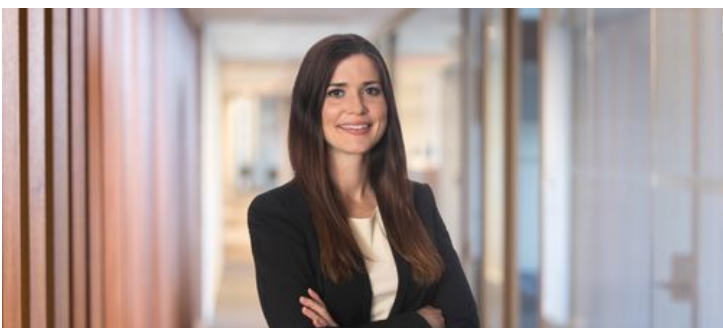
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