COMPLIANCE | October 9, 2023

Complaints Allege Improper Use of 401(k) Plan Forfeitures

Plan fiduciaries were accused of fiduciary breaches for using plan forfeitures to offset future employer contributions, but ERISA experts would be surprised if this longstanding and widespread practice was found to be a violation.

Reported by REMY SAMUELS

In two recent lawsuits, plan fiduciaries have been accused of violating ERISA by using plan forfeitures to offset future employer contributions, as well as to pay administrative expenses.

The use of forfeitures, or the non-vested portion of a former employee's account balance in a retirement plan, to offset employer contributions is a longstanding practice explicitly permitted under Treasury regulations and consistent with guidance from the Department of Labor, according to Groom Law Group.

Representatives from the law firm, which is not involved with either case, stated that the claims are surprising, given that this use of forfeitures is well established and widespread.

Separate Complaints Filed by Same Law Firm

In *Dimou v. Thermo Fisher Scientific Inc.*—filed on September 19 in U.S. District Court for the Southern District of California—Konstantina Dimou, a participant in Thermo Fisher's 401(k) plan and represented by law firm Hayes Pawlenko LLP, alleges that the employer breached its fiduciary duties under the Employee Retirement Income Security Act and "consistently chose to utilize the forfeited funds in the plan exclusively for the company's own benefit, to the detriment of plan and its participants, by using these plan assets solely to reduce future company contributions to the plan."

The biotechnology company, which has more than $6 billion in plan assets, maintains offices in South San Francisco and Carlsbad, California, among other national and international locations, and employs more than 300,000 people.

According to the complaint, the governing plan documents state that the company will allocate and use all or a portion of a participant's benefit forfeited under the plan to either pay for "reasonable expenses of the plan" or reduce its discretionary contributions, special contributions, matching contributions and other contributions payable under the plan.

The complaint alleges that Thermo Fisher consistently declined to use any of these plan assets to cover plan expenses over at least the past six years. Further, the lawsuit states that all participant accounts have been charged with administrative expenses, on at least a quarterly basis, over that period.

"The deduction of administrative expenses from participant accounts reduces the funds available to participants for distributing and/or investing," the complaint states.

Thermo Fisher did not immediately respond to a request for comment.

In another complaint, *Rodriguez v. Intuit Inc.*, filed on October 2 in the U.S. District Court for the Northern District of California, plan participant Deborah Rodriguez, also represented by Hayes Pawlenko LLP, similarly alleges that Intuit Inc. reallocated forfeited funds for its own benefit, to the detriment of the plan and its participants.

The financial software company is accused of reallocating nearly all forfeited plan assets to reduce future company matching contributions to the plan, according to the complaint. As of 2021, the plan had more than $2 billion in assets, according to Form 5500 filings.

The complaint states that in 2021, company matching contributions to the plan were reduced by $2.273 million as a result of Intuit's reallocation of forfeited nonvested funds for "the company's own benefit." Only $74,000 of nonvested funds were used to pay plan expenses totaling $975,040, leaving a balance of approximately $140,000 in the forfeiture account, according to the complaint.

"Intuit has received notice of this complaint and is reviewing the matter," a spokesperson wrote in an email. "We are proud to offer our employees best-in-class benefits designed to support health and financial well-being for themselves and their families. This includes helping them build long-term financial security through our 401(k) retirement plan, where we match $1.25 for every $1 contributed by regular full-time employees in the United States, up to 6% of the employee's eligible pay."

Allegations Considered 'Implausible' by Legal Experts

In both cases, the plaintiffs seek the "restoration" to the plan of amounts used to offset employer contributions, disgorgement of the assets and profits made by the plan sponsors' use of the money that would have been contributed, attorneys' fees and other equitable relief.

Marcia Wagner, founder and managing partner of the Wagner Law Group, which is not involved in either case, said almost all defined contribution plans permit forfeitures to be used to reduce future employer contributions or to pay reasonable expenses, and some plans also permit, as a third alternative, allocating forfeitures among plan participants. She added that she would be surprised if these lawsuits are successful.

"For there to be a prohibited transaction under ERISA, the relevant plan fiduciary must know or should have known that the transaction was prohibited, and in view of this long-standing practice been approved by the IRS for inclusion in tax qualified plans, such an allegation would be implausible," Wagner wrote in an emailed response. "From an ERISA fiduciary perspective, the language of a plan document must be followed unless it is improper, is inconsistent with the terms of the plan or violates ERISA."

Wagner said the only basis for a challenge would be if the use of the forfeitures to reduce employer contributions is inconsistent with ERISA's exclusive benefit requirement. However, she said that statutory language does not prohibit an employer from receiving some benefit from a transaction.

If the complaints are successful, Wagner said "potential implications would be great," because of how widespread and longstanding the existing practices for the application of forfeitures are.

Tags 401(k) litigation, ERISA, ERISA lawsuit, retirement plan forfeitures

Reported by Remy Samuels