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# New Wave of 401(k) Forfeiture Lawsuits May Hinge on Plan Terms

By Jacklyn Wille

Deep Dive

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- New legal theory raised in ERISA suits over 401(k) forfeitures
- Cases could turn on terms of plan documents, lawyers say

Qualcomm Inc., Intuit Inc., and Clorox Co. are facing new lawsuits asking whether a common way of handling forfeited 401(k) money could violate federal law, a legal theory that could turn on the language used by a given plan.

The lawsuits, which also target Thermo Fisher Scientific Inc., center on the portion of an employee's 401(k) account that comes from contributions made by their employer. Unlike contributions from the employee's salary, which are immediately fully vested, employer contributions can remain unvested for a period of time and can be forfeited in whole or in part when a worker leaves the company after a few months or years.

The lawsuits say that an employer runs afoul of the Employee Retirement Income Security Act when it exercises discretion over these forfeitures to benefit itself over workers. According to the lawsuits, the companies used forfeitures to reduce the money they'd otherwise have to contribute to their plans, instead of using it to reduce the administrative expenses borne by workers.

Using 401(k) forfeitures to reduce employer contributions is a common practice that's been approved by regulators when done the right way, according to attorneys interviewed by Bloomberg Law. Four cases casting doubt on the practice have been filed since September by Hayes Pawlenko LLP, a small employment law firm in California that didn't respond to inquiries about the litigation.

## Plan Terms Key

Like many ERISA disputes, this legal theory could turn on the language of a given plan document.

It's common for 401(k) plans to say that forfeited money can or should be used to pay for administrative expenses or put toward employer contributions, Brock J. Specht, a partner with Nichols Kaster PLLP in Minneapolis, said. Some documents specify how forfeitures must be used and in what order, while others are more vague and allow for discretion, he said.

The complaints against Qualcomm, Intuit, Clorox, and Thermo Fisher each say that the relevant plan document gives the employer discretion over whether to put forfeitures toward expenses or contributions. Several attorneys interviewed by Bloomberg Law flagged this as an important point.

The fact that the companies' use of forfeitures appears to be authorized by the plans could be a "big obstacle" for the plaintiffs to overcome, Alex C. Lakatos, a partner in Mayer Brown LLP's Washington office, said.

Alex Smith, of counsel with Holland & Hart LLP in Denver, said he was surprised to see these cases and skeptical that they would be successful. A lawsuit against an employer that put forfeitures toward contributions could potentially be viable, he said, but likely only if the plan document required that this money go toward expenses instead.

A case in which forfeitures were being used in a manner not contemplated by the plan document could be more challenging for an employer to defend, said Andrew L. Oringer, a partner with Wagner Law Group in New York. Employers should confirm that whatever they're doing with forfeitures is authorized by the plan document and, at a minimum, not prohibited, he said.

### **Fiduciary Obligations**

ERISA requires that plan fiduciaries act in the best interests of their participants. These cases posit that a fiduciary who has discretion to use money to lower participants' expenses will breach its duties if it instead uses that money to lower its own expenses.

This line of reasoning overlooks the fact that employers aren't required to offer retirement plans or provide specific levels of compensation within proper legal parameters, Oringer said. Decisions about benefit levels are questions of plan design, rather than fiduciary actions, he said.

"If the level of benefits is itself a fiduciary question, then every plan has to provide the maximum benefit permitted by law, all the way up to the highest limitation," Oringer said. "That obviously is not the way the rules work."

The fact that an employer can choose how to use plan forfeitures doesn't mean that it's acting in a fiduciary capacity under ERISA when it makes that choice, René E. Thorne, a principal with Jackson Lewis PC in New Orleans, said. Guidance from the Internal Revenue Service reflects that employers have a choice with respect to these forfeitures, she said.

Specht said the legal theory advanced by the cases could be viable if the right facts are present.

"If there's a fiduciary obligation imposed, it's an obligation to use the money in the interest of the participants, and not for the interests of the employer," Specht said. "That's the fundamental duty of loyalty, and to the extent they're not doing that, it's a serious problem."

### **Next Big Thing?**

Class litigation under ERISA often goes in waves. Recent series of cases have targeted retirement plans sponsored by large universities, plans that offer specific suites of target date funds, and pension plans that calculate benefits using decades-old life expectancy data.

As more and more cases get filed under a particular statute, it makes sense that we'd see smaller firms file smaller cases, Lakatos said. And that can lead to new legal theories as more "non-ERISA plaintiffs' firms begin to mine ERISA for new causes of action," Thorne said.




Plaintiffs' firms have an incentive to find common practices that may not be done "quite right" and could potentially fuel a new wave of litigation, Oringer said.

If they find a rampant practice and can convince a court that it's improper, they've got the "next era" of litigation, he said.

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