

Capital One Faces Latest 401(k) Forfeiture Lawsuit

The banking company has been accused of using forfeited funds for its own benefit by funding future employer contributions.

Reported by [REMY SAMUELS](#)

Capital One Financial Corp. and its board of directors are facing a lawsuit brought by former employees over the usage of 401(k) plan forfeitures, joining more than 20 other companies that have been sued over forfeitures this year.

In *Singh et al. v. Capital One Financial Corp. et al.*, filed last week in U.S. District Court for the Southern District of New York, the banking company was accused of breaching its duties under the Employee Retirement Income Security Act by using participant-forfeited funds to reduce company contributions to the plan instead of using the funds to reduce or eliminate the amounts charged to participants for plan administrative costs.

[Get more! Sign up for PLANSPONSOR newsletters. →](#)

According to the lawsuit, which cites the plan's Form 5500 filings, more than \$42 million was "improperly steered" from paying administrative costs and instead used to "benefit the company."

The Capital One Financial Corp. Associate Savings Plan contained more than \$10 billion in assets and had 68,271 participants, according to its most recent Form 5500.

The plaintiffs also allege that Capital One did not obey the language related to managing plan forfeitures from its own plan documents. According to the lawsuit, the plan document stated that all amounts forfeited under the plan must be first used to pay plan administration costs and next to reduce and be considered part of employer matching contributions for the plan year in which the forfeiture occurs.

"As a direct and proximate result of the breaches of fiduciary duties alleged herein, the plan and its participants suffered millions of dollars of losses due to the failure to utilize forfeited accounts to pay plan expenses," the complaint alleges. "Had defendants complied with their fiduciary obligations, the plan would not have suffered these losses, and the plan's participants would have had more money available to them for their retirement."

In addition, Capital One and its board were accused of failing to monitor and evaluate the performance of the plan committee, as well as failing to remove committee members whose performance was "inadequate" by "continuing to engage in conduct that benefited the company."

Forfeiture Litigation Trend

A recent law alert from the Wagner Law Group, written by Michael Schloss, stated that to date there have been 25 forfeiture lawsuits filed in a variety of jurisdictions—11 in federal courts in California.

Six decisions on motions to dismiss have been issued so far. Two motions were denied outright and one motion was granted without leave to refile. The three remaining motions were granted, including a recent one against [Clorox](#), but with leave for all plaintiffs to amend their complaints.

Schloss pointed out that many of these cases assume that forfeiture accounts hold only nonvested employer contributions, but the plaintiffs argue that this is likely an incorrect assumption. Form 5500 information demonstrates that many forfeiture accounts also contain other vested and distributed amounts, such as vested plan assets

transferred conditionally from the accounts of missing or nonresponsive participants and uncashed checks.

“Because none of the recent forfeiture complaints or court decisions to date has focused on the use of forfeiture amounts arising from sources other than nonvested employer contributions, there is as of yet no allegation or court decision considering how these additional facts may impact the legal analysis of their use to fund employer contributions,” Schloss wrote.

As forfeiture cases continue to unfold, the law firm advised plan sponsors to review the forfeiture provisions of their own defined contribution plans to determine what, if any, actions might reduce the risk of litigation.

ERISA attorneys, when commenting on other cases, have also recommended that plan sponsors ensure they are abiding by the language in their plan documents when it comes to forfeitures.

The plaintiffs in the Capital One case are represented by law firm Capozzi Adler, and representation for Capital One has not yet been named in the legal filing.

Capital One did not immediately respond to a request for comment.

Tags

[ERISA lawsuit](#), [forfeited funds](#)

Reported by

[Remy Samuels](#)