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401(k)s and the Courts in 2025

Plan forfeiture court decisions, Loper Bright's use and potential DOL guidance shifts are all on the table, according to ERISA experts.

Reported by ALEX ORTOLANI

2025 may be an active year for both attorneys and plan fiduciaries working with employer-sponsored retirement plans.

First, there are 401(k)-related cases already in motion that may start to be clarified by court decisions, including the raft of plan forfeiture and pension risk transfer lawsuits that hit this year. Then there is the likely use and effects of the *Loper Bright* decision, which overturned decades of judicial deference to federal agencies. And that's all before potential moves by the new administration and Congress regarding the Department of Labor's Retirement Security Rule; environment, social and governance investing guidance; and the use of cryptocurrency in defined contribution plans.

Plan Forfeiture Cases

In the 12 months through October, there were more than 20 cases filed in various federal district courts against plan sponsors alleging the misuse of retirement plan forfeiture assets, according to Daniel Aronowitz, president of Encore Fiduciary, which offers fiduciary liability insurance to plan administrators.

"Plaintiff law firms have figured out that the easiest way around the pleading standard [or rules that govern how parties present their claims] that we've been fighting about for years is to just use the magic words: plan forfeitures," Aronowitz told an audience at PLANADVISER 360 in Scottsdale, Arizona, on November 12.

Aronowitz said that before these cases, fiduciaries had been assuming that plan forfeitures were a settlor, not fiduciary function—meaning their setup was not held to a fiduciary standard. The recent complaints are challenging that by questioning the use of forfeitures, even in some instances where their use was clearly laid out in the plan setup.

Drew Oringer, a partner in and general counsel at Wagner Law Group, says the plaintiffs' bar is attacking plan forfeitures to see if courts will engage on the question of whether there is a fiduciary claim to how a forfeiture was set up by a firm, even if the plan documentation was clear.

"There are a lot of plans in the market that have the kind of provisions that are potentially open to question under the law," Oringer says. "The question is going to be: Which courts look at this and say, 'There is no fiduciary claim at all,' 'There is a fiduciary claim, but we don't see it as a viable one,' or, 'There's a fiduciary claim, and we see it as a viable one'? … What the plaintiffs' lawyers want here is to see a significant number of courts putting it into that last bucket."

If district, and then circuit, courts were to find viable fiduciary claims, then plan fiduciaries will likely start to settle the cases, rather than go through costly legal battles, Oringer says. In turn, the market might then start to adjust, with plan fiduciaries being "less discretionary" in how the plan is teed up to use plan forfeitures.

If, on the other hand, the cases are dismissed at the circuit level, then plan sponsors will likely "leave their plans as they have been for decades," he says.

Aronowitz expressed the view that, if it was less costly for plan sponsors to go to trial in such cases, he believes they would be more likely to fight the charges, win and tamp down further suits from the plaintiffs' bar.

Pension Risk Transfer Litigation

Athene Holding Ltd. has not been named as a defendant in those cases, and the Apollo-backed firm, the largest seller of retail annuities in the U.S., has vehemently denied the claims.

"I don't think there is standing in those cases," Aronowitz said. "But it's a potentially new issue [for plan sponsors] as to whether you can only go to the safest annuities on the market or what those even are … it remains unclear at the moment."

The DOL, for its part, reviewed the rules around pension risk transfers, known as IB 95-1, in 2024. While it decided not to offer any amendments or additional guidance, it did not rule out doing so in the future.

Loper Bright

A widely covered U.S. Supreme Court decision made earlier this year is also likely to play a role in ERISA-related cases in 2025. On June 28, the Supreme Court issued a decision in *Loper Bright Enterprises v. Raimondo* that overturned the precedent set by the 1984 ruling in Chevron v. Natural Resources Defense Council Inc. That so-called Chevron doctrine had called on courts to defer to federal agencies' interpretations of federal law when deciding cases, including those involving the DOL and the IRS.

Due to Loper Bright, the courts no longer need to defer, and they can rule on the merits of the case as they see them. Experts say that may embolden plaintiffs' attorneys to bring complaints against plan fiduciaries. But it may also be used by defendants to plead their case directly to the court, as opposed to assuming deference to regulations, notes Stephanie Gutwein, a partner in Faegre Drinker Biddle & Reath LLP.

"You are definitely going to start seeing *Loper Bright* be used," Gutwein says. "We have clients where it's on the table, and we're discussing it in many client counseling situations."

As district courts rule on cases, it may make plan administration more difficult for large, multi-state employers who will need to negotiate disparate rulings, Gutwein notes.

Gutwein and colleague Joelle Groshek, an associate at Faegre Drinker, recently wrote about a case that showed potential hurdles to using *Loper Bright* to overturn past cases. In *Cogdell v. Reliance Standard Life Insurance Co.*, a district court applied Loper Bright and another Supreme Court ruling, *Corner Post Inc., v. Board of Governors of the Federal Reserve System*, to reject a defendant's attempt to argue that a regulation was invalid.

The result of that case is pending circuit review. But Groshek says it shows a potentially high bar in using *Loper Bright* for benefit disputes that are not, on their face, going after the regulations themselves. These types of everyday benefits cases differ, she notes, from when complaints are being filed directly against federal regulations—such as the DOL's fiduciary rule that has been stayed by two Texas courts.

"Unless a regulation gets taken out altogether, you are likely going to see some inconsistent decisions," Groshek says.

Trump Administration

Finally, ERISA experts believe there may be relevant changes as early as next year resulting from the 2024 election results. Lawyers from Lathrop GPM point to three regulatory areas to watch.

First, they are expecting that "changes to the definition of fiduciary investment advice are likely to be shelved by the new administration, as the defense of rules issued in 2024 is unlikely to continue," according to a write-up led by Allie Itami, a partner in Lathrop GPM's business transactions group.

The second area is related to ESG-related investment rules for retirement plans. The firm expects guidance to switch back to the prior Trump administration's "pecuniary factors" that must be prioritized over any other considerations.

Third, employee stock ownership plans may not see long-anticipated regulation regarding "adequate consideration"—the pricing of the shares in ESOP plans—which can be difficult to gauge due to the small market for such shares.

"Although a proposal was sent to [the Office of Management and Budget], finalizing a regulation may not be high priority for a de-regulatory administration,"

"It's hard to say what the next big thing will be, because it's a question of what the plaintiffs' lawyers come up with," Oringer says. "They've shown themselves to be very creative in the past in coming up with areas they believe may lead to settlements."

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