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Labor Department's support for HP could turn tide in wave of 401(k) forfeiture lawsuits, experts say

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By: **Robert Steyer**
July 15, 2025 08:00 AM

Retirement industry members welcomed the Labor Department's support for HP Inc. in that company's defense of its 401(k) forfeiture practices, saying the DOL's views could provide legal ammunition for a pro-sponsor court ruling.

"I suspect the court will respect the Labor Department's analysis," attorney Nevin Adams wrote in an email response to questions. Adams is the former chief content officer for the American Retirement Association who still writes legal commentary for the organization.

"I never thought there was a basis for these forfeiture lawsuits," Carol I. Buckmann, founding partner of Cohen & Buckmann, wrote in a response to questions. "I think this amicus brief will have weight."

The DOL filed an amicus brief July 9 in the 9th U.S. Circuit Court of Appeals, San Francisco, saying HP acted properly in addressing employer-match funds forfeited by plan participants who left the company before being fully vested.

A 401(k) plan participant, having lost twice at the district court level, filed the appeal in Hutchins vs. HP Inc.

"The Secretary has not previously spoken directly to the issue," said the amicus brief filed by several members of the DOL's office of the solicitor. "The Secretary respectfully requests that this court hold that plaintiff failed to adequately plead a breach of the fiduciary duties of loyalty and prudence and uphold the district court's decision dismissing" the challenge to the HP plan.

Dozens of forfeiture suits filed in the last 2 years

The DOL amicus brief was the first formal comment from the department about the dozens of forfeiture lawsuits that have been filed since September 2023 in which sponsors' practices have been challenged as violating ERISA even though the IRS gives plans a choice in dealing with forfeited funds. Employers can use the funds to reduce plan expenses or reduce its contributions to the plan.

Many cases have been dismissed, although a few have been settled and a few have survived a motion to dismiss at the district court level. The HP case is the first to reach the appeals court level.

The HP plaintiff, like those in similar cases, argued that the plans violated ERISA's duty of loyalty by reducing contributions instead of cutting plan expenses. The duty of loyalty provision requires sponsors to place participants' interests ahead of employer interests.

A key reason for its opinion, the DOL wrote, was that the plaintiff "misunderstands the boundary between settlor and fiduciary functions." The former covers setting up and funding an ERISA plan; the latter, among other duties, manages and monitor's the plan's investments.

Setting the amount a sponsor contributes to a plan and its level of benefits are settlor functions "solely within the sponsor's control and cannot be dictated by a fiduciary's decision," the DOL amicus brief said.

"HP did not violate ERISA's duty of loyalty merely because the plan sponsor applied forfeitures to reduce its contributions," Buckmann wrote.

Courts don't have to follow amicus brief filings by the DOL, but the department's comments here not only discuss the specific facts of the case but also provide information on DOL policy.

"I do think there are elements particular to this particular case — the document language — but the broad-based principles I think apply to most of these cases," Adams wrote.

"Significantly, the Labor Department has helpfully outlined a rationale for how it could be a prudent decision to offset employer contributions with forfeitures, regardless of the firm's financial situation," he added. "Considering that several (other district court cases) are already queued up waiting this decision, I suspect the dominoes to fall pretty quickly in that direction."

In the HP case, 401(k) plan participant Paul Hutchins filed a class-action lawsuit in November 2023. The plan has a three-year requirement for full vesting of employer-match contributions. (Individual 401(k) contributions are vested immediately and aren't affected.)

A federal District Court judge in San Jose, Calif., dismissed the complaint in May 2024. Hutchins amended the lawsuit, but the judge dismissed it in February 2025, saying Hutchins could not refile in his court. Hutchins appealed.

Although the facts of the HP lawsuit and other lawsuits vary, they contain common themes that are addressed by the DOL amicus brief, Andrew L. Oringer, general counsel for the Wagner Law Group, wrote in an email response to questions.

"So, this brief and its thinking may wind up having significance beyond this particular case," he wrote.

"The DOL's brief may have a steadying effect, providing the court with a starting framework within which to work," he added. "However, the court would be free to adopt its own approaches and analysis."

Given this pro-sponsor amicus brief, Oringer mused what would have been the response from the Biden administration DOL vs. the Trump administration DOL. "One can reasonably wonder if the DOL of the prior administration would have waded into the dispute, and, if it would have, whether it would have come out on the employer's side," he wrote.

Representatives of employer trade organizations — which filed their own pro-HP amicus brief July 9 — praised the DOL's comments in this case.

"It's very meaningful that the Department chose to side with HP," Andy Banducci, senior vice president, retirement and compensation policy for the ERISA Industry Committee, said in an email. "We hope the 9th Circuit will consider the fact that both the plan sponsor community and DOL agree on this case."

ERIC was joined by the American Benefits Council and the U.S. Chamber of Commerce in filing an amicus brief.

"Plaintiffs had tried to argue that even though IRS/Treasury had spoken on the issue, (and) because DOL had not ... this was an open issue for the courts," Chantel Sheaks, vice president of retirement policy for the U.S. Chamber of Commerce, wrote in an email. "The brief now shows the courts where DOL is on this issue."

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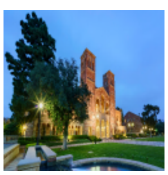

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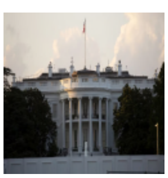

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