

DOL's Plan Forfeiture Amicus Brief 'Significant,' Legal Experts Say

The filing was a win for plan sponsors, though it is not expected to end the recent flurry of litigation alone.

Reported by [JAMES VAN BRAMER](#)

Legal experts have embraced the Department of Labor's support for HP Inc. in its defense of a 401(k)-forfeiture complaint, saying the amicus brief issued last week would boost the odds of court rulings in plan sponsors' favor.

The DOL's amicus brief stated that "a fiduciary's use of forfeited employer contributions in the manner alleged in this case, without more, would not violate ERISA."

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Legal experts say the department's decision to weigh in will influence future court decisions.

"The amicus brief is significant in that it's a shift from the way that the department has historically approached amicus briefing and a shift [to] the more employer-friendly position, at least in this case, of the department," says Katie Kohn, a Thompson Hine partner who represents employers. "It's also an indication that the department may be willing to go outside of the traditional regulatory and sub-regulatory guidance area to use other tools available to it to help support the employee benefit system."

Still, Kohn says the DOL's amicus filing alone will not slow down litigation, but will likely influence more district courts to rule in favor of plan sponsors.

Since September 2023, a date many legal experts consider the start of the flurry of plan forfeiture litigation, there have been nearly 60 lawsuits filed seeking class action status and challenging plan sponsors' using plan forfeitures to offset their employer contributions to 401(k) plans, according to Mayer Brown law firm.

Prior to the DOL weighing in, plan sponsors were already winning a majority of plan forfeiture cases, but plaintiffs continue to bring litigation. According to Mayer Brown, defendants won more than 70% of initial motion to dismiss rulings in plan forfeiture cases, but plaintiffs have still filed more than 24 new cases so far this year.

In one of the most recent cases, WakeMed Health and Hospitals faces an ERISA complaint for allegedly misusing plan forfeiture funds in its 403(b) plan.

According to Kohn, however, the department's decision to distinguish between settlor functions and fiduciary functions will significantly boost plan sponsors' defenses in forfeiture cases.

Andrew Oringer, a partner in and general counsel at Wagner Law Group, also says the DOL's distinction was significant, though he notes that following the 2024 U.S. Supreme Court's decision overturning the longstanding *Chevron* standard of deference to federal agencies, the DOL's brief holds less influence than it had before.

"The amicus brief pushes toward trying to help the courts understand that these might not be fiduciary issues," Oringer says.

Tags

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