

LEGAL UPDATE

Department of Labor Supports Employers in Forfeiture Allocation Litigation

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In a surprising development in the series of forfeiture allocation cases filed under ERISA alleging breaches of fiduciary duty and prohibited transactions by plan fiduciaries, the Department of Labor (DOL) has filed an amicus (friend of the court) brief, in an action to which it is not a party, in support of the employer. The case is *Hutchins v. Hewlett Packard*, a Ninth Circuit case and the first of such forfeiture cases to reach an Appellate Court.

The DOL acknowledged in its brief that it had not previously addressed the issue, and setting forth an agency's legal position for the first time in an amicus brief is

generally disfavored by courts, who believe that law should be established by regulation, rather than by litigation. The optimal means of providing guidance is by way of notice and comment under the Administrative Procedure Act. However, proceeding in such a manner is a time-consuming process, and the DOL may well have been concerned about the ever-increasing number of cases being filed on this subject, without a clear consensus on the correct outcome.

So far, decided cases at the District Court level have favored employers, but clearly not sufficiently to dissuade future

litigants. Moreover, the position the DOL would take on this issue was not a foregone conclusion, because the DOL generally supports plan participants in ERISA litigation. Since the DOL rarely files amicus briefs at the District Court level, the Ninth Circuit appeal was its first opportunity to set forth its views on the forfeiture allocation issue.

As is frequently the case in these forfeiture suits, a starting point is the specific language of the plan document, which the DOL regarded as tightly constraining the actions the fiduciary could take. Second, as in any litigation, the way plaintiffs plead their case affects the response. The plaintiffs' complaint, even after amendment, was still conclusory on several points. Third, on any appellate brief, the DOL focuses on case law within that Circuit; therefore in any event, a Ninth Circuit decision in favor of the employer defendants would only be binding in the Ninth Circuit. At a minimum, however, the brief makes clear that the positions of the IRS and DOL are consistent on this issue, which had been one of the concerns in this area. Further, the DOL's contention that the use of plan

forfeitures to pay plan administrative expenses rather than reduce employer matching contributions has the potential to cause conflict between a plan sponsor and plan administrator is persuasive, because plan fiduciaries do not have any control over the funding of a plan, which is a settlor function.

Celebration by plan sponsors would be premature at this point. The Ninth Circuit could reject the position taken by the DOL in its entirety. However, a position expressed by the DOL to an Appellate Court may at a minimum, have a chilling effect on future forfeiture allocation litigation challenges. The DOL has at a minimum, provided some hope to those fiduciaries involved in the fifty or so other similar cases that are currently active.

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