



# Benefits Management in a Changing Regulatory Environment

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# Growing Trends in ERISA Litigation

## Investing in Private Equity

- Anderson v. Intel (9th Cir.)
  - Intel 401(k) plan included investment options which were pooled investment vehicles which invested in stocks, bonds, hedge funds and private equity funds
  - The Plaintiffs stated that the pooled vehicles underperformed equity indices which they argued were comparative funds

# Growing Trends in ERISA Litigation

## Investing in Private Equity

- Anderson v. Intel (9th Cir.)
  - The Plaintiffs also claimed that the pools were imprudent because of the higher fees and added risk over alternative funds
  - Anderson alleged the allocation to hedge funds and private equity funds “drastically departed from prevailing standards of professional asset managers.”

# Growing Trends in ERISA Litigation

## Investing in Private Equity

- Anderson v. Intel (9th Cir.)
  - The panel affirmed dismissal of the suit
  - Prudence is evaluated prospectively, based on the methods the fiduciaries employed, rather than retrospectively, based on the results they achieved
  - Anderson did not make allegations regarding the methods of investment selection and his comparators were insufficient

# Growing Trends in ERISA Litigation

## Investing in Private Equity

- Anderson v. Intel (9th Cir.)
  - The aims of the pooled vehicles were made clear to participants. The disclosure relating to the pools stated the pool would be invested to “provide greater downside protection in faltering markets, with the tradeoff being slight underperformance in rallying ones, as has been the case in the current bull market”
  - There was also a loyalty claim dismissed because the Plaintiff only stated the potential for a conflict

# Growing Trends in ERISA Litigation

## Investing in Private Equity

- Supreme Court accepted cert. on January 16, 2026
  - Split in the circuits on need for a “meaningful benchmark” with Johnson v. Parker-Hannifin Corp (6<sup>th</sup> Cir)
  - “Fiduciary Duties in Selecting Designated Investment Alternatives” DOL regulation sent to OMB on January 13, 2026

# Growing Trends in ERISA Litigation

To Forfeit or not Forfeit that is the Question!

- Forfeiture? What is that?
- The Question—How can a plan lawfully use unallocated forfeitures?
- Plaintiffs allege Defendants improperly use plan forfeitures (which are plan assets) to offset employer matching contributions rather than defray plan administrative expenses, and that this decision is a fiduciary breach.
- Settled law for more than 50 years
- Longstanding practice and IRS Guidance supports the use of forfeitures to offset matching contributions.

# Growing Trends in ERISA Litigation

To Forfeit or not Forfeit that is the Question!

- Historically permissible uses of forfeitures
  - Pay plan administrative expenses
  - Offset the cost of providing benefits to other participants
  - Provide additional benefits to other participants
  - Restore unvested accounts of rehired participants
  - Correct administrative errors

# Growing Trends in ERISA Litigation

To Forfeit or not Forfeit that is the Question!

- Motions to dismiss granted in 16 cases and denied in 6 cases across 13 states
- 70+ cases (and growing) have been filed since 2023; 35 new cases in 2025 alone
- Appeals pending in the 3rd, 8th and 9th Circuits

# Growing Trends in ERISA Litigation

## Forfeitures – Claims

- Litigation claims
  - Breach of fiduciary duties of prudence and loyalty
  - Violation of the plan document
  - Anti-inurement/exclusive benefit violation
  - Prohibited transaction

# Growing Trends in ERISA Litigation

## Forfeitures – Background

- Defendants include the plan sponsors and plan committees.
- Forfeiture claims are now routinely added to 401(k) fee complaints.

# Growing Trends in ERISA Litigation

## Forfeitures – Defenses

- Defendants were performing settlor functions and not as fiduciaries under ERISA in designing the plan terms and deciding on plan contributions
- ERISA's anti-inurement rule does not apply to reallocation of funds within the plan.
- Forfeiture funds are not plan assets because participants have no interest in them.
- Alleged “forfeiture funds” are reallocations of plan assets and are still being used to pay for participant benefits

# Growing Trends in ERISA Litigation

## Forfeitures – Defenses

- Plaintiffs lack constitutional standing to sue as they have received all of the benefits they were entitled to under the plan.
- Long standing IRS, DOL and Congressional guidance and regulations permit using forfeitures to reduce employer contributions.
- Defendants acted in accordance with plan terms.

# Growing Trends in ERISA Litigation

## Forfeitures – Example

- Barragan v. Honeywell International Inc., D. N.J., August 18, 2025
- Case began in early 2024 in California where the court eventually dismissed the plaintiffs' claims but allowed the plaintiffs to amend and refile their lawsuit
- Plan document provides that administrative expenses of the plan are charged to participant accounts
- Plan document gives Honeywell discretion to decide how forfeitures are to be used
- Conflict of interest
  - Participants want forfeitures to be used to pay administrative expenses to reduce the amount that they have to pay
  - Company wants forfeitures to reduce its out-of-pocket cost of matching contributions

# Growing Trends in ERISA Litigation

## Forfeitures – Example

- Plaintiffs urged the court to make a new rule that when a fiduciary has the discretion to allocate forfeitures, ERISA requires it to choose the “best” option for plan participants
- The court ruled that ERISA does not create an exclusive duty to maximize pecuniary benefits
- The court rejected the argument that Honeywell breached a fiduciary duty by not conducting an investigation about how to use forfeitures
- Finally, the court held that Honeywell’s use of forfeitures did not result in a prohibited transaction because the use of forfeitures is not a transaction
- Dismissed with prejudice

# Growing Trends in ERISA Litigation

## Forfeitures – DOL Weighs In

- On July 9, 2025, the new version of the DOL filed an amicus brief in *Hutchins v. HP*, in support of HP.
- Although the DOL has generally remained silent in the onslaught of forfeiture cases, its amicus brief emphasized the Secretary's interest in clarifying that using forfeited employer contributions as alleged in *Hutchins* does not violate ERISA.
- The DOL clarified the distinction between settlor and fiduciary decisions, stating that plan funding and design decisions are settlor functions and that the decision to use forfeited funds is not a breach of fiduciary duties under ERISA.

# Growing Trends in ERISA Litigation

## Forfeiture Exposure Analysis

- Review plan and SPD
- Review Form 5500s – complaints pulled language from Form 5500
- Review service provider agreements re forfeiture provisions
- Ask whether plan complies with existing forfeiture procedures
- Review vesting and forfeiture processes

# Growing Trends in ERISA Litigation

## Forfeiture Fixes

- Where plan provides discretion, document process for decision-making
- Amend plan to remove discretion; use a “waterfall” provision

# Thank you

Any Questions?