

TYPES NOT MAPPED YET October 07, 2024 | TTR not mapped yet | Michael T. Graham

New ERISA Decision in 401(k) Forfeiture Suit Furthers Court Split

In the past year, there have been several lawsuits that have challenged an employer's use of forfeited funds from employee 401(k) accounts to satisfy the employer's plan contributions under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Unlike plan contributions that come from an employee's paycheck, which immediately vest when made, employer contributions can be forfeited when a worker leaves the company after a short period and before vesting those employer contributions.

These lawsuits allege that an employer violates ERISA's fiduciary obligations when it exercises discretion over the forfeitures to the benefit the employer over its employees. The plaintiffs in these cases contend that the employers used the forfeitures to reduce the monies that they would otherwise have contributed to the plans, instead using the funds to reduce administrative expenses. Employers like HP Inc. and BAE Systems Inc. have successfully moved to defeat such claims, while other courts have denied motions to dismiss and allowed claims against Qualcomm Inc. and Intuit Inc. to proceed to discovery.

On September 19, 2024, Judge Todd Robinson of the U.S. District Court for the Southern District of California furthered the court split on the forfeiture issue in *Dimou v. Thermo Fisher Scientific and Management Pension Committee of the Thermo Fisher Scientific Inc. 401(k) Retirement Plan*, Case No. 3:23-cv-1732 (S.D. Cal. Sept. 19, 2024). In *Dimou*, the plaintiff is a participant in the Thermo Fisher's 401(k) plan (the "Plan"). Like the cases above, the plaintiff was immediately vested in his own contributions and becomes vested in the employer's plan contributions after two years of benefit service. The Plan participants' wage withholdings and employer contributions become Plan assets when they are deposited in the Plan's trust. Additionally, the Plan's administrative expenses are shared equally by Plan participants and charged to their Plan accounts. When an employee has a break in benefit service before the employer contributions fully vest, the employee forfeits the balance of any unvested employer contributions in their accounts, and the employer can exercise discretionary authority over how those forfeitures are allocated. The Plan's governing document permitted the defendants to allocate or use all or part of the forfeitures to pay reasonable Plan expenses or to reduce its employer contributions required under the Plan.

The plaintiff alleged that from 2017 to 2022, the Plan defendants used Plan forfeitures exclusively to offset the company's contributions. In September 2023, the plaintiff filed a class action complaint under ERISA, alleging six separate claims for fiduciary breaches and prohibited transactions. The Plan defendants moved to dismiss the complaint in its entirety. Citing heavily from a June 2024 ruling in HP's favor - *Hutchins v. HP Inc.*, Case No. 23-cv-5875, 2024 WL 3049456 (N.D. Cal. Jun. 17, 2024), the Court granted the Plan defendants' motion to dismiss, finding that the plaintiff's fiduciary breach claims rested on a legal theory that is too broad to be plausible. The Court also found that ERISA does not create an unqualified duty for employers to maximize participants' financial benefits or pay their administrative expenses. In addition to dismissing the fiduciary breach claims against the Plan defendants, the Court also held that the Company did not violate ERISA's prohibited transaction rules by using the forfeitures to benefit the Plan sponsor and not the Plan participants.

The Court is permitting the plaintiff to amend the Complaint, so there most likely will be another episode to this case. Also, it will be interesting to see if more plaintiffs file similar lawsuits before a U.S. Court of Appeals addresses the District Court conflict on this issue.

We will continue to monitor the *Dimou* case, as well as the other similar cases that remain pending. In the meantime, please contact anyone in our [Labor & Employment Practice Group](#) or our [Employee Benefits Practice Group](#) if you have any questions.



authorsTest

michael

Michael T. Graham