Employers Continue to Be Sued for Using Plan Forfeitures to Offset Future Employer Contributions

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As we previously explained here, the IRS expressly permits employers to apply a participant forfeiture to offset future employer contributions. However, some plaintiffs' lawyers are not convinced. They claim this use of forfeitures results in a prohibited transaction and breach of fiduciary obligations—even when expressly permitted in the plan document. This summer we addressed these claims as being the hot new trend in ERISA class-action lawsuits. Unfortunately, for employers, those claims have only been getting hotter.

The newest round of lawsuits not only doubles down on the theme that using forfeitures to offset future employer contributions is prohibited, but also that it is impermissible to apply participant forfeitures in the year following the year in which the forfeitures occurred—despite explicit written guidance from the IRS to the contrary. With the elimination of the *Chevron Doctrine* earlier this year, it is possible that a sympathetic judge may find these arguments more persuasive and ignore the IRS guidance. In the meantime, an employer may be able to minimize its risk by drafting the plan document to include ordering rules that specify when forfeitures must be applied to offset future employer contributions and promptly applying plan forfeitures as incurred.

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