

Participants May Pursue Claims Against Employer for Disgorgement of Profits

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An employer permitted participants in its 401(k) plan to transfer their account balances into the employer's cash balance plan, where each participant's account balance was based on hypothetical investments chosen by the participant. The employer was not required to and did not invest the trust assets in the investments chosen by the participants. The IRS determined that the transfers violated the anti-cutback provision in Code Section 411(d)(6) because the transfer eliminated participants' actual separate accounts. Participants sued the employer for violating the parallel anti-cutback provision in ERISA Section 204(g)(1) and sought an accounting of the profits that the employer made on the spread between the plan's actual investments and the hypothetical account balance investments. The U.S. Court of Appeals for the Fourth Circuit reversed the district court's dismissal and reinstated the plaintiffs' claims holding that financial injury is not a prerequisite for standing when the remedy being sought is disgorgement of profits. The appellate court also found that the employer had violated ERISA's anti-cutback provision and that disgorgement of profits is an available equitable remedy under ERISA. *Pender v. Bank of America Corp.*, No. 14-1011 (4th Cir. June 8, 2015).