Q1 2026: Lessons from the Litigation Landscape – An "Activist" DOL, a Turnaround in Forfeiture Suit Dismissals, and an EBSA Leadership Split on PRT

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The first quarter of 2026 made one thing clear: the ERISA litigation environment is evolving — not in wholesale reversals of doctrine, but in meaningful shifts in emphasis, posture, and tone. Consider that the Department of Labor (DOL) has "recalibrated" its litigation positions in several high-profile cases. Courts continue to grapple with nearly 100 forfeiture reallocation lawsuits. Underperformance claims are resurfacing. Perhaps most strikingly, current and former leaders of the Employee Benefits Security Administration (EBSA) have now publicly diverged over fiduciary standards in pension risk transfers.

Here's What You Really Need to Know

- The Supreme Court's review of a 401(k) case involving alternative investments and the concept of a "meaningful benchmark" appears delayed until at least 2027, leaving existing pleading standards in place for now. This means that some federal courts will require a "meaningful benchmark" to get past the motion to dismiss stage of the suit — and others won't.
- The DOL has reversed its prior position on burden shifting in ERISA fiduciary breach cases and now supports placing the burden of proving causation squarely on plaintiffs.
- In forfeiture reallocation litigation, the DOL has now filed its fourth amicus brief backing plan fiduciaries. Most of these cases have been dismissed at the motion to dismiss stage, though a small number of courts have begun allowing the case to proceed.
- Underperformance cases targeting specific funds are resurfacing, reminding fiduciaries that process-related claims remain very much alive.

Let's Dive In

The year got off to a quick start with the nation's highest court agreeing to hear arguments in a 401(k) case involving alternative investments and the need for a "meaningful benchmark." The suit, originally filed in 2019, argued that the fiduciaries on the Intel 401(k) Savings Plan breached their fiduciary duties by "investing billions of dollars in retirement savings in unproven and unprecedented investment allocation strategies featuring high-priced, low-performing illiquid and opaque hedge funds."[i] It was a suit that failed to make its case at both the district and appellate courts.

In their petition for consideration of their case by the Supreme Court, the plaintiff basically argued that the application of a "meaningful benchmark" standard baseline for consideration required "that a complaint must identify a 'relevant comparator' fund with 'similar objectives' against which the performance of the challenged fund can be measured" — even though, and as the U.S. Court of Appeals for the 9th Circuit "freely admitted," nothing in ERISA's text explicitly requires such a rule.[ii]

That said, a month later, the Supreme Court agreed to extend briefing due dates in the case, setting an April 13, 2026 due date for the petitioners' brief and a respondents' brief due date of June 22, 2026. But its recent absence on the Court's April calendar indicates a delay in this case till next term.

Burden of Proof Pivot – Paused?

Speaking of pivots, the parties in a separate case under consideration by the nation's highest court — with implications for resolving the burden of proof in ERISA fiduciary breach litigation — filed to dismiss the suit in January. Though this case was dismissed, it presented important issues.

The issue raised by the plaintiffs was that the U.S. Court of Appeals for the 1st, 2nd, 4th, 5th, and 8th Circuits had held that the burden shifts to employers to disprove causation once plaintiffs alleged an injury as a result of a fiduciary breach. However, decisions in the Court of Appeals for the 10th and 11th Circuits held that the burden of proving a link between the alleged injury and actions (or lack thereof) was on the part of the plan fiduciaries.

Interestingly enough, the DOL — in response to a request from the U.S. Supreme Court — just reversed its earlier position on which party bears the burden of proof in cases involving an allegation of a fiduciary breach. In an amicus ("friend of the court") filing in response to the request, the DOL commented that, "Following the change in Administration and this Court's invitation, the government has reviewed its position and concluded that the relevant authorities are better understood as leaving the burden of proving causation on ERISA plaintiffs."[iii]

Burden "Shift"

Speaking of shifts in position, during the quarter, the DOL withdrew its previous support of plaintiffs in a case concerning the burden of proof involving Yale University. As has been the case with most in that genre, it alleged that employees paid excessive recordkeeping fees in addition to the plan selecting and imprudently retaining funds which the plaintiffs claim have historically underperformed for years. Moreover, the complaints challenged the use of multiple recordkeepers, rather than a single recordkeeper — a practice that they claim "…caused plan participants to pay duplicative, excessive, and unreasonable fees for plan recordkeeping services."[iv]

The suit concluded with a rare ERISA jury trial — a jury finding that there was a fiduciary breach but found no monetary injury as a result. That said, in a letter to the Court of

Appeals for the 2nd Circuit, the DOL recently requested its 2023 amicus brief be withdrawn. The DOL "has reconsidered its position on shifting the burden on loss causation for claims alleging a breach of fiduciary duty under [ERISA], as recently articulated in the government's amicus brief filed in *Pizarro v. Home Depot"* — and respectively asked the court "not to rely on the previously filed brief for any purpose."[v]

Different "Strokes"

Just in case there was any doubt that the current DOL views the world differently than previous ones, Phyllis Borzi, who headed the EBSA during the Obama administration, and Ali Khawar, who served as EBSA's acting assistant secretary under former President Biden, in February — "submit this brief to provide the Court with the perspective of former officials charged with ERISA enforcement."[vi] The amicus brief goes on to comment that their perspective "may assist the Court in evaluating arguments advanced in this appeal that diverge from longstanding Department of Labor interpretations and enforcement approaches across multiple administrations."

Those arguments almost certainly include those provided by the current DOL in the case involving pension risk transfers (PRT) at Lockheed Martin Corp. just last month. The case — *Konya v. Lockheed Martin Corp.* — is one of the few in this genre to get past the motion to dismiss stage. In this case, as in most others, the suit challenges the transfer of pension obligations to Athene.

The argument? "Instead of selecting the safest possible annuity to ensure that their employees and retirees would have continued financial security of Lockheed employees and retirees, Lockheed Martin selected Athene, which is substantially riskier than numerous traditional annuity providers," the suit noted.[vii]

Indeed, in its amicus filing with the court, the DOL noted that pension risk transfer (PRT) is a process "expressly permitted by ERISA," that "over the last three decades, no annuity selected in a PRT transaction has defaulted or failed."[viii] It also focused on Interpretive Bulletin 95-1, which outlines six factors to be considered in that process, factors that it says are expected to be weighted and balanced. It further notes that IB 95-1 advises fiduciaries to "take steps calculated to obtain the safest annuity available, unless under the circumstances it would be in the interests of participants and beneficiaries to do otherwise." And that, the brief notes amounts to "little more than restate a fiduciary's general duty of loyalty and process-based duty of prudence; then, it applies those duties to the specific PRT context."

Pivot "Tell"

In contrast, the position of the former EBSA heads argued not only that participants "…suffer a cognizable injury when fiduciaries allegedly expose their earned benefits to materially greater risk through an imprudent or disloyal selection process" but that the suit – perhaps particularly at the pleading stage "… plausibly alleges a concrete and particularized injury: a non-speculative, materially increased risk of nonpayment that is

fairly traceable to the challenged fiduciary decision and redressable through ERISA's remedial provisions, including equitable relief."

Those differing perspectives notwithstanding, to date most of these suits have been dismissed, typically because no injury had (yet) been suffered by the plaintiffs (and thus no standing to bring suit), and also that the decision to transfer the pension obligations to a third party was a settlor, rather than a fiduciary decision.

Time will tell how these perspectives factor into future litigation which — with record volumes of PRT transactions underway — seem unlikely to fade anytime soon.

Forfeiture Forays

We've noted previously the extraordinary number — closing in on one hundred now — of lawsuits challenging the use of plan forfeitures to offset employer contributions, rather than offsetting plan expenses. That decision — widely characterized as a fiduciary one by the courts — has been challenged as not being in the best interests of plan participants, even though the practice has long been sanctioned by Internal Revenue Service (IRS) regulations, and DOL guidance (and in most cases, by language in the plan document).

However, and noting that "the fiduciary-centered issue in this case — one of dozens percolating through the courts — lives in the heartland of those standards in which clarity, uniformity, and consistency must prevail," the DOL has now filed its fourth amicus brief backing plan fiduciaries.[ix] The most recent involves the Honeywell 401(k), and it echoes comments already made in similar lawsuits involving HP, JP Morgan Chase, and Siemens. The basic arguments are that the participants received all the benefits promised by the plan, and — critically for purposes of the cases in which the DOL has weighed in — the forfeiture reallocation decision was specifically supported by the terms of the plan document.

However, in recent weeks, several federal judges have been willing to allow these suits to move beyond the motion to dismiss stage — acknowledging that in so doing they are adopting a "minority" position in these suits. Additionally — and acknowledging the distinction that might be applied at the motion to dismiss stage of the proceedings — in a recent case involving the Fresenius Medical Care North America 401(k) Savings Plan, Judge William G. Young went so far as to comment that "merely following the Plan document, however, does not insulate a fiduciary from ERISA liability, and the Plan Participants, at least at the motion to dismiss stage, have stated a claim for breach of fiduciary duty and loyalty."[x]

That said, and with the majority of cases failing to get past that motion to dismiss stage and on to trial, there is currently little in the way of judicial precedent on which to rely.

Imprudent Underperformance

Suits challenging imprudent investments are hardly novel, but as the first quarter wound to a close, there were a number emerging, targeting specific investment choices. Those suits targeted Bloomberg, Dell, and Stifel, among others. While the suits involved different plans, and different investment options, they shared common allegations that the funds challenged were held in the plan(s) for extended period of times despite poor performance (compared to comparables, and in many cases, the benchmarks named by the plan's investment policy statements), and that they ultimately "breached their fiduciary duties through an imprudent process for investigating, evaluating, and monitoring investments."[xi]

Along those lines, a five-year litigation was settled — on the eve of a rare ERISA jury trial – for $134 million. The suit — with plaintiffs represented by Schlichter Bogard LLC, had targeted the fiduciaries of the $7 billion Liberty Mutual plan for failing to monitor, control, and evaluate the plan's recordkeeping fees, managed account fees, and two specific plan investments.

Healthcare Fiduciary?

As a reminder that healthcare programs carry with them ERISA fiduciary responsibilities, a motion to dismiss a fiduciary breach suit brought by Oregon Potato Co. was rejected. The firm, which provided brokerage and consulting services to the Oregon Potato plan, argued that it wasn't a fiduciary, and pointed to language in its service agreement to that effect.

However, the judge noted that the plaintiffs "sufficiently" alleged that "Defendants have used their status as a service provider and their status as a fiduciary to cause the Plan to enter into the following (i) the payment of excessive fees for services performed, (ii) the transfer of Plan assets for the use or benefit of a party-in-interest, and (iii) the receipt of assets on their own account for a transaction involving the assets of the Plan."[xii] Said another way, it's not what you say you are, it's what you do, or have the power to do that determines fiduciary status.

Also on the healthcare fiduciary front, Wells Fargo was, for the second time, granted its motion to dismiss in a healthcare fiduciary suit, with the judge determining that the plaintiffs lacked standing or personal injury to bring the suit.[xiii] Once again, and while acknowledging that the price comparisons provided were "staggering", the judge drew comparisons between the program and a defined benefit plan, and concluded that the program is positioned as something in which the plan sponsor exercises discretion in the rates set on its own accord, and that the plaintiffs may have paid more for some individual drugs, but less on others.

Class "Acts"

An appellate court has rejected certification of a class seeking to sue plan fiduciaries who held BlackRock LifePath target-date funds. The district court here viewed the suit

as one under ERISA section 502(a)(2), which allows participants to sue on behalf of the plan. This is what we see all the time in these suits. It allows individually harmed plaintiffs to bring suit on behalf of the plan. And viewed that way, the district court certified a mandatory class under Rule 23(b)(1) — which is what we normally see in ERISA class action suits.

However, the U.S. Court of Appeals for the 4th Circuit viewed it differently. Instead of a plan recovery, the judges here saw it as an attempt to recover individual damages — viewing the structure of a defined contribution plan as very different from a defined benefit program — where losses would truly be plan-wide. They note, for example, the possibility that all the losses across the plan's 1,000 individual accounts totaled $100 million — and then comment that the loss, if any, to each account in the plan might "vary significantly depending on factors like how much money a participant had invested in the imprudent fund, how long he had held the investment, and the precise timing of when he had bought and sold."[xiv]

This opinion from the 4th Circuit could matter quite a bit for ERISA litigation strategy because it directly challenges the procedural foundation used in many of the large fiduciary-breach cases over the past 15 to 20 years. It has, for instance, already been cited as precedent in another case in the 4th Circuit.

Former DOL Officials Push Back on Bill to Restrict ERISA Litigation

Though not specifically tied to an individual suit, eight former DOL officials are calling on lawmakers to reject legislation designed to limit the recent tsunami of ERISA litigation. That letter was submitted ahead of the U.S. House Committee on Education and the Workforce mark-up on the ERISA Litigation Reform Act (H.R. 6084), which was introduced last November by Rep. Randy Fine (R-Fla.).[xv]

The bill was described as strengthening the pleading standards for lawsuits brought under the ERISA. More specifically, H.R. 6084 was said to clarify the burden of proof in certain fiduciary-related claims and establish a targeted stay of discovery during the early stages of litigation. However, the former DOL officials say it will "significantly weaken the enforcement framework Congress designed to protect the retirement and health benefits of America's workers, retirees, and their families."[xvi]

The letter argues that the legislation "...replaces the settled expectations of a legal regime based on hundreds of years of trust law and ordinary rules of civil procedure with a new and untested framework that tips the scale in favor of defendants charged with prudently and loyally managing plan assets and will obstruct meritorious claims." They assert that it effectively overrides the Supreme Court's unanimous decision in *Cunningham v. Cornell University*, and express concerns about recent staff attrition and budget constraints at EBSA, noting that "With federal enforcement capacity so severely diminished, preserving the longstanding ability of participants to obtain

redress through private actions is more important than ever."

Action Items for Plan Sponsors

Even if you are the fiduciary of a plan that might not be at substantial risk of a significant class-action lawsuit, these back-to-the-basics best practices apply to plans of all sizes. For plan sponsors, consider the following:

- If forfeitures are used to offset employer contributions, make sure that specific language is in the plan document. Consider changing any language that provides discretion in applying forfeitures to language that directs how forfeitures will be used. Also consider which decisions are fiduciary versus settlor in nature and document accordingly.
- Take steps to ensure that your process for reviewing funds, fees and services is documented (preferably in an investment policy statement), that your committee members are informed on the issues and alternatives, and that your process is deliberative and documented.
- If you have, or are contemplating a PRT, remember that while the decision to do so is a corporate/settlor decision, the process of reviewing and selecting the provider is a fiduciary one.
- Remember that there are healthcare fiduciary duties under ERISA as well, and act accordingly in ensuring that the fees and services rendered are reasonable and in the best interest of participants and beneficiaries.

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[i] *Anderson v. Intel Corporation Investment Policy Committee*, Complaint, No. 5:19-cv-04618 (N.D. Cal. Aug. 9, 2019), ECF No. 1.

[ii] *Anderson v. Intel Corporation Investment Policy Committee*, 137 F.4th 1015 (9th Cir. 2025).

[iii] Brief for the United States as Amicus Curiae, *Pizarro v. The Home Depot, Inc.*, No. 24-620 (U.S. Dec. 9, 2025).

[iv] *Vellali et al. v. Yale University et al.*, Complaint, No. 3:16-cv-01345 (D. Conn. Aug. 9, 2016), ECF No. 1.

[v] Letter from Wayne R. Berry, Associate Solicitor, Office of the Solicitor, Plan Benefits Security Division, U.S. Department of Labor, to Catherine O'Hagan Wolfe, Clerk of Court, U.S. Court of Appeals for the Second Circuit, December 23, 2025, *Vellali et al. v. Yale University et al.*, No. 23-1082 (2d Cir.).

[vi] Brief of Amici Curiae Ali Khawar and Phyllis Borzi in Support of Plaintiffs-Appellees and Affirmance, *Lockheed Martin Corporation v. Konya et al.*, No. 25-2061 (4th Cir. Jan. 30, 2026), Doc. 63-1.

[vii] Complaint, *Konya et al. v. Lockheed Martin Corporation*, No. 8:24-cv-00750 (D. Md. Mar. 13, 2024), ECF No. 1.

[viii] Brief of the U.S. Secretary of Labor as Amicus Curiae in Support of the Appellant and Reversal, *Konya et al. v. Lockheed Martin Corporation*, No. 25-2061 (4th Cir. Jan. 9, 2026), Doc. 55-1.

[ix] Brief of the U.S. Secretary of Labor as Amicus Curiae in Support of Appellee and Affirmance, *Barragan v. Honeywell International Inc.*, No. 25-2609 (3d Cir. Jan. 30, 2026), Doc. 42.

[x] *Heet v. National Medical Care Inc.,* No. 1:25-cv-11644 (D. Mass. 2025).

[xi] *Striplin v. Stifel Financial Corp.*, No. 4:26-cv-00255 (E.D. Mo. 2026).

[xii] *Oregon Potato Company et al v. Strong et al*, No. 4:2025cv05139 (E.D. Wash. 2025).

[xiii] *Navarro et al. v. Wells Fargo & Co. et al.*, No. 0:24-cv-03043 (D. Minn. 2024).

[xiv] *Trauernicht v. Genworth Financial Inc.*, No. 24-1880, slip op. (4th Cir. Mar. 10, 2026).

[xv] ERISA Litigation Reform Act, H.R. 6084, 119th Cong. (2025).

[xvi] Letter from Phyllis C. Borzi, Former Assistant Secretary of Labor for Employee Benefits Security, et al., to Rep. Tim Walberg, Chairman, H. Comm. on Education & the Workforce, & Rep. Robert Scott, Ranking Member, H. Comm. on Education & the Workforce (Mar. 12, 2026).