

Live from Workplace Horizons 2025: What's Hot in ERISA — Forfeiture and Tobacco Surcharge Class Actions

By Stacey C.S. Cerrone

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Meet the Authors



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Details

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Welcome to a special edition of We get work®, recorded live from Workplace Horizons 2025 in New York City, Jackson Lewis' annual Labor and Employment Law Conference. Over 500 representatives from 260 companies gathered together to share valuable insights and best practices on workplace law issues impacting their business today. Here's your personal invitation to get the insights from the conference, delivered directly to you.



Transcript

INTRO

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Alitia Faccone

Senior Director of Business Development

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Stacey, welcome to Live from Workplace Horizons 2025 behind the podcast mic in our studio this afternoon, thank you so much for joining us. Stacey, you are a principal in our New Orleans office of Jackson Lewis. I know what your answer is going to be, but please tell our listeners a little bit about your practice, and really, honestly, in 2025, what are some of the things that you're hearing from clients? What are they concerned about?

Stacey Cerrone

Principal, New Orleans

I practice solely ERISA class action litigation. That is what I do and what I've done for probably the past 20 years. What we're seeing right now is a new wave of litigation. Over the past 10 years, I would say, the litigation has really been focused on fee and investment type litigation where plaintiffs are claiming that fiduciaries of a 401k plan have caused the plan to pay too much in expenses and have imprudent investments. Those cases are still being filed, but they've slowed down some.

There are two new waves of cases. The first set of cases are what we call the forfeiture cases. In those cases, the plaintiffs are challenging how 401k plan fiduciaries use forfeitures in a 401k plan. The other area where we are seeing a huge rise of litigation are called tobacco surcharge cases. Those cases involve health plans and whether those plans can charge employees who use tobacco products a surcharge for smoking.

Facone

It seems like that is what's hot in ERISA litigation right now, which is the title of your presentation. Can you just share a little brief summary of what that presentation was, what you covered, and the issues that the attendees really needed to know about?

Cerrone

Sure, so I covered both. They're very different issues – one involves a 401k plan and one involves the health plans – but I covered both of those sets of litigations because those are where we're seeing all of the claims filed right now. We are seeing them filed fast and furious. We are also seeing the DOL get involved in the tobacco surcharge cases, so we have that aspect of it also.

For the forfeiture cases, what the plaintiffs are claiming is that the forfeitures in the plan – not to get too esoteric, but, forfeitures happen in a plan when an employee leaves and all of their contributions are not vested. The unvested portion of the contributions become forfeitures, and the plan dictates how a fiduciary may use the forfeitures. What we're seeing is that plaintiffs are claiming that the fiduciaries must always use the forfeitures to pay plan administrative expenses instead of using them to pay future employer contributions. That's the basic claim. We have DOL regulations and IRS regulations for the past actually 50 years that allow employers to use forfeitures to pay employer contributions, but plaintiffs are arguing that that's not in the best interest of participants. That's one genre of lawsuits.

The other genre is the really interesting tobacco surcharge litigation. In a nutshell, what those claims involve are the tobacco surcharges that a health plan can charge to their employees who use tobacco products. There are very specific regulations and statutory authority that allow an employer to do that, but they have to meet certain requirements. One of those requirements is that there is a reasonable alternative standard to quitting smoking if an employee cannot quit smoking to avoid the surcharge. In most situations, what that reasonable alternative standard

is, is a tobacco cessation program. Plaintiffs are challenging those tobacco cessation programs and saying the cessation programs are illegal and thus the surcharge for everyone was illegal.

Facone

You work in an incredibly complex area of the law based on what you just said. How do employers know if all of these rules apply to them? If they do, when they're dealing every day with accommodation requests and all the other HR issues that crop up, how do you deal with this complexity? How do you help advise them to work their way through these issues?

Cerrone

The first place that we always tell employers to start, and this is true whether it's the 401k plan or the health plan, is what does the plan say? It's very easy to check your plan and say, on the forfeiture side, let's check my 401k plan and let's see what it says. Then, are my fiduciaries doing what the plan says?

That's true with the surcharge cases too. Look at your health plan. It's very quick to just look and see, do we have a surcharge? Most people don't even know that there is a surcharge. If so, what is our reasonable alternative standard, and does it meet the regulations?

Facone

So, start with the basics. What were some of the key takeaways you shared during your presentation? As we just discussed, this is a lot of information and there's a lot to think about. What could you share not only with our Workplace Horizons audience, but everybody listening to our podcast today?

Cerrone

The first thing, like I said, and that just goes back to what I said before, check your plan. Check your plan, and it's not just the plan because once you check your plan and see, well, it looks like all our ducks are in a row, then you have to check all of your ancillary plan documents.

For the forfeitures, check your SPD, check your 5500s to make sure that the language itself is consistent with what's in the plan, and then make sure that your fiduciaries are actually operating the plan the way the plan says to be operated. That's on the forfeiture side.

The tobacco side is a little more complex because one of the issues that plaintiffs are raising is that the notice of the tobacco cessation program doesn't comply with any of the regulations. In addition to checking your plan on the tobacco surcharge piece, you also have to make sure that you're notifying employees based on what the regulations tell you to do, that employees are receiving the notification, and that you are operating the surcharge in a way that's consistent with the regulations and with the statute.

Facone

Stacey, you and I sit together probably every year and we talk about what's hot in ERISA litigation. What would you say, and maybe it is these cases, but what would you say is the biggest change? Because we've had a lot of change in employment law in the last several months between Workplace Horizons 2024 and 2025.

Cerrone

For the governmental entity that governs these ERISA issues, EBSA, we don't currently have a secretary of EBSA right now. That particular person has not been confirmed yet, and we're not sure when that will happen. We're not really sure if the new administration will make changes that will help inform employers as to how to move forward with respect to these two issues. We do think there probably will be changes once he is confirmed, but again, we're not 100% sure how that will affect everybody. It is definitely something to pay attention to.

Faccone

More to come and probably more for us to talk about at Workplace Horizons 2026. Stacey, thank you so much for joining me this afternoon. Welcome back and enjoy the rest of the conference.

OUTRO

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