

Publications

DOL Moves on Multiple Employer Plans

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On July 29, 2019, the U.S. Department of Labor (“DOL”) released a regulatory package consisting of (1) its final regulation (“Final Regulation”) clarifying the circumstances under which “bona fide” groups or associations of employers and professional employer organizations (“PEOs”) may be permitted to sponsor single defined contribution multiple employer plans (“MEP”) and (2) a request for information (“RFI”) on whether DOL should issue additional regulations to allow unrelated employers to participate in “open” MEPs. The Final Regulation becomes effective on September 30, 2019.

This regulatory package follows DOL’s issuance of Field Assistance Bulletin 2019-01 (“FAB 2019-01”) on July 26, through which DOL provided transition relief to the administrators of multiple employer plans (not only defined contribution “MEPs” but other pension plans and health and welfare plans as well) that may have previously failed to include certain information with those plans’ Forms 5500.

Background

Advocates of MEPs regularly suggest that MEPs hold the potential to increase efficiencies, manage costs more effectively, reduced burdens on employers, and improve retirement outcomes for the American workforce. However, there are barriers under both the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), and the Internal Revenue Code that limit the availability of MEPs to most employers.

Under ERISA, a plan must be established and maintained by an “employer.” ERISA defines “employer” as “any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.” ERISA does not explain what it means to act “directly as an employer” or “indirectly in the interest of an employer, in relation to an employee benefit plan,” nor does it explain what is meant by “group or association of employers.” Therefore, there has been general uncertainty regarding the circumstances under which employers can participate in a

MEP. Previous DOL guidance generally limited MEP participation to employers who share a common nexus unrelated to the provision of employee benefits.

President Trump signed Executive Order 13847 on August 31, 2018. The Executive Order directed DOL to consider issuing regulations or other guidance to make it easier for small and mid-size businesses, including those with non-traditional employment structures, to participate in MEPs. In addition, it directed DOL to consider policies to expand access to retirement plans for part-time workers, sole proprietors, working owners, and other “entrepreneurial workers with non-traditional employer-employee relationships,” including potentially allowing them to participate in MEPs. In response, on October 22, 2018, DOL issued a proposed regulation to supersede its prior guidance and clarify when a group or association, or a PEO, would be acting as an “employer” under ERISA that may sponsor a MEP.

Executive Order 13847 also directed the Treasury Department to issue regulations addressing the consequences to the tax-qualified status of a MEP if a participating employer fails to follow applicable Internal Revenue Code requirements regarding tax qualification (e.g., non-discrimination rules). As described in a recent Groom [Benefits Brief](#), the Treasury Department issued proposed regulations that would address the so-called “One Bad Apple Rule” by clarifying the conditions under which a participating employer’s failure to follow tax qualification requirements would not threaten the qualified status of the MEP as a whole.

Final Regulation

The structure of the Final Regulation is not significantly different from the proposed MEP regulation. Thus, the Final Regulation provides conditions under which a “bona fide” group or association or PEO may act as an “employer,” as defined under ERISA, and sponsor a MEP. DOL states that the Final Regulation supersedes decades of prior sub-regulatory guidance.

As with the proposed regulation, the Final Regulation only applies to defined contribution retirement plans, including 401(k) and 403(b) plans. Additionally, the Final Regulation does not permit open MEPs, in which wholly unrelated employers could participate, and does not permit financial institutions to act as the sponsor of a MEP. However, as described below, the RFI solicits comments on whether open MEPs and MEPs sponsored by financial institutions should be allowed.

A. Bona Fide Groups or Associations of Employers

The Final Regulation provides that a “bona fide” group or association of employers may sponsor a MEP for the employees of the group or association’s employer members, including working owners. To be considered bona fide, the group or association must –

- *Have a formal organizational structure with a governing body and bylaws or other similar indications of formality*
- *Be controlled, in form and substance, by its employer members, who also must control the MEP*