

Open MEP Opportunities

A look at the compliance challenges, as well

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President Donald Trump's executive order signed on August 31, and efforts in Congress such as the Retirement Enhancement and Savings Act of 2018 (RESA) are strong indicators that open multiple employer plans or "open MEPs" will become more attractive in the not too distant future. The president and a number of prominent members of Congress see open MEPs as a way to increase the availability of 401(k) plans to more American workers, particularly those who work for small employers.

The success of these plans will largely depend on the nature of the guidance issued by the Department of Labor (DOL) at the president's direction or that of any legislation enacted by Congress. The 2014 ERISA [Employee Retirement Income Security Act] Advisory Council, of which I was a member, specifically looked at this issue in the context of benefits outsourcing and encouraged the DOL to issue guidance that would promote, rather than discourage, the implementation of open MEPs.

Assuming the DOL or Congress takes appropriate action, advisers may be in a position to offer small businesses an efficient, cost-effective solution to providing retirement benefits to their employees. In turn, advisers will likely be required to assume some liability under the Employee Retirement Income Security Act (ERISA) and act in accordance with its fiduciary and prohibited transaction provisions.

For an open MEP to be most beneficial to employers, it must be treated as a single plan for purposes of ERISA. Such treatment allows most plan functions—both settlor and fiduciary in nature—to be carried out by the lead sponsor, which could be the adviser. In addition, the lead sponsor, or a party or parties designated by the lead sponsor, acts as the named fiduciary or fiduciaries to the plan, accepting responsibility for plan administration, plan investments and selection of service providers.

A single Form 5500 is filed on behalf of the plan, and the plan is subject to a single audit by a certified public accountant (CPA)—i.e., assuming the plan has more than 100 participants. Effectively, the participating employer's role is limited to, first, determining whether to become a participating employer and then to providing data and contributions to the named fiduciary and trustee.

A significant barrier to the adoption of open MEPs has been the DOL's interpretation of the

definition of “employer” in Advisory Opinion 2012-04A. In that opinion, the department takes the position that, to have a single multiple employer plan, there must be an “employment-based common nexus or other genuine organizational relationship” between the lead sponsor and “the employers of employees that benefit from the plan, or among the different groups of employees that participate in the plan.” This common nexus requirement does not need to be fulfilled in an open MEP situation.

Presumably, in order to meet the stated goals of the president’s executive order, the DOL must change its views on the common nexus requirement and allow open MEPs to be formed for the primary purpose of providing retirement savings and benefits.

The lead sponsors of open MEPs should assume they will be fiduciaries in connection with the provision of an open MEP. One of the DOL’s key concerns about the plans is that some lead sponsors of such arrangements may prove to be bad actors. Indeed, the DOL has in the past used the term “promoter” to describe sponsors of open MEPs. The agency will likely want to indicate other fiduciaries to which participants may turn in case a sponsor is a bad actor or is otherwise unable to meet any liabilities it may incur by breaching a fiduciary duty.

The agency may, therefore, require that participating employers act as a fiduciary, in some respect, in regard to joining the MEP. For example, the agency may state that such employers have a fiduciary duty to prudently select a MEP sponsor—e.g., a sponsor that is adequately insured or capitalized and appropriately qualified to run such a plan. In the long run, the attractiveness of open MEPs to small employers may be dependent on how much of the fiduciary liability those that participate may shift to the lead sponsor.

Additionally, open MEPs are more likely to succeed if the participating employers are not held liable for each other’s acts. For example, the failure of one employer to send pretax contributions in a timely way or to send properly determined compensation could have implications under ERISA and the federal tax code plan qualification provisions. All of the participating employers potentially could bear such compliance risks unless the DOL, IRS or Congress addresses this issue.

In summary, advisers likely will have the opportunity to sponsor open MEPs and make them available to their small business clients; they also likely will be subject to ERISA, to at least some extent.

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