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MEPmentum Continues: DOL Issues Guidance on Association Retirement Plans, PEOs, and Turns to 'Open' MEPs

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INTRODUCTION

Many members of the retirement community have long advocated for expanding the availability of multiple employer plans (MEPs) as a way to encourage more small employers to sponsor retirement plans. However, certain requirements under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (Code) limit the availability of MEPs for most employers. MEP initiatives have gained steam in recent months as the two federal agencies most directly responsible for administering ERISA and its related provisions under the Code—the Department of Labor (DOL) and the Internal Revenue Service (IRS)— have issued guidance intended to expand access to MEPs, while even more dramatic changes at the regulatory and legislative level may be forthcoming.

BACKGROUND

ERISA generally requires that a retirement plan be established and maintained by an "employer,"[1] which ERISA defines 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."[2] But ERISA does not specify what it means to act "indirectly in the interest of an employer," nor does it define a "group or association of employers" in this context, creating substantial uncertainty regarding who may sponsor and/or participate in a MEP. Prior DOL guidance has generally required that employers participating in a MEP share an employment-based common nexus or other genuine organizational relationship that is unrelated to the provision of benefits.[3]

In August 2018, the White House issued an Executive Order directing DOL and the Treasury Department to consider proposing guidance that would clarify and expand the ability of small and mid-size employers to participate in MEPs.[4] In response to the Executive Order, DOL released a proposed rule to expand MEP availability in October 2018,[5] and the Treasury Department and the IRS issued a proposed rule to provide relief from the onerous "one bad apple" rule in June 2019.[6] On July 31, 2019, DOL published its final regulation (the "Final Rule")[7] along with a Request for Information soliciting public comments on whether DOL should issue additional regulations to allow unrelated employers to partici-

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[1] ERISA §3(2)(A). A retirement plan may also be established and maintained by an "employee organization," e.g., a labor union.

[2] ERISA §3(5).

[3] *See, e.g.*, DOL Advisory Opinion 2012-04A.

[4] Exec. Order No. 12,857.

[5] 83 Fed. Reg. 53,534 (Oct. 23, 2018).

[6] 84 Fed. Reg. 31,777 (Jul. 3, 2019). *See* David Levine and David Ashner, *IRS Proposed Rule Offers Relief to The Multiple Employer Plan One Bad Apple Rule,* 47 Tax Mgmt. Comp. Plan. J. No. 8 (Aug. 2, 2019).

[7] 84 Fed. Reg. 37,508 (Jul. 31, 2019).

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pate in ''open'' MEPs.[8] We summarize the Final Rule and the Request for Information below.

SUMMARY OF DOL FINAL RULE

Bona Fide Groups or Associations of Employers, and Bona Fide PEOs

DOL's Final Rule, like its October 2018 proposed rule, is intended to clarify the requirements for a group or association of employers, or a professional employer organization (PEO), to act as an ''employer'' within the meaning of ERISA that can sponsor a defined contribution MEP. Under the Final Rule, a group or association of employers, or a PEO, will be considered ''bona fide'' and therefore eligible to act as an employer that can sponsor a MEP, if specified requirements are satisfied.

The Final Rule provides that a group or association of employers is considered bona fide only if the following requirements are met:[9]

- The group or association must have at least one substantial business purpose unrelated to sponsoring a MEP (but sponsoring a MEP may be the primary purpose of the group or association).
- Each employer in the group or association must be acting directly for at least one employee who is covered under the MEP.[10]
- The group or association must have a formal organizational structure with a governing body and by-laws (or similar indications of formality).
- In both form and substance, the group or association must be controlled by its employer members, who must control the MEP.
- The employer members of the group or association must have a ''commonality of interest'' (as described below).
- Participation in the MEP must be limited to employees and former employees of the group or association's employer members and their beneficiaries.
- The group or association cannot be a bank or trust company, insurance issuer, broker-dealer, or similar financial services firm, nor can it be owned by or affiliated with such an entity (but such an entity may be a participating employer in a bona fide group or association).

For purposes of the above requirements, the Final Rule provides that a group or association of employers has a ''commonality of interest'' if the employer members are in the same trade, industry, line of business, or profession. A ''commonality of interest'' may also be found if all employer members are located in the same geographical region that does not exceed the boundaries of a single state, or in the same metropolitan area (even if the metropolitan area spans more than one state).[11]

Similarly, a PEO is considered bona fide under the Final Rule only if the following requirements are met:[12]

- The PEO must perform ''substantial employment functions'' (as described below) on behalf of its client employers that adopt the MEP, and must maintain adequate records relating to those functions.
- The PEO must have substantial control over the MEP's functions and activities, and must act as the plan sponsor, the plan administrator, and a named fiduciary of the MEP.
- Each client employer that adopts the MEP must act directly as the employer of at least one employee who is covered by the MEP.[13]
- Participation in the MEP must be limited to current and former employees of the PEO and its client employers, and their beneficiaries.

Under the Final Rule, the determination of whether a PEO performs ''substantial employment functions'' is generally based on all the facts and circumstances, but a safe harbor is available. Specifically, a PEO will be deemed to perform substantial employment functions within the meaning of the Final Rule if the PEO: (1) assumes responsibility for paying wages to employees of its client employers; (2) assumes responsibility for reporting and withholding of employment taxes for its client employers; (3) plays a role in recruiting, hiring, and firing workers of its client employers; and (4) assumes substantial control over, the functions and ac-

[8] 84 Fed. Reg. 37,545 (Jul. 31, 2019).

[9] 29 C.F.R. §2510.3-55(b)(1).

[10] The Final Rule clarifies that a working owner who meets certain conditions may be treated as both the employer and an employee for purposes of satisfying these requirements. 29 C.F.R. §2510.3-55(d).

[11] 29 C.F.R. §2510.3-55(b)(2).

[12] 29 C.F.R. §2510.3-55(c)(1).

[13] While the Final Rule provides for working owners to be treated as both the employer and the employee for purposes of satisfying the requirements for a bona fide group or association of employers, this treatment does not extend to PEOs. Accordingly, under the Final Rule, only employers that have at least one common law employee may participate in a PEO-sponsored MEP.

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tivities of any employee benefits that the PEO is required to provide under its service contract with its client employers. Further, a PEO cannot satisfy the safe harbor if its responsibilities described above are conditioned on the receipt or adequacy of payment from its client employers.[14]

Fiduciary Governance

In its preamble to the Final Rule, DOL clarified the fiduciary responsibilities of MEP sponsors, as well as employers that participate in a MEP.[15] Under the Final Rule, a bona fide group or association of employers or a bona fide PEO that sponsors a MEP is responsible for ensuring that the operation and administration of the MEP complies with the requirements of Title I of ERISA, including applicable fiduciary requirements and prohibited transaction rules. Accordingly, the MEP sponsor (and not individual participating employers) would generally be designated as the ''plan administrator'' as defined in §3(16) of ERISA, and would therefore be responsible for compliance with fiduciary requirements and reporting and disclosure obligations, such as filing annual reports on Form 5500 and issuing required plan notices to participants.

The MEP sponsor would also have fiduciary responsibility for the selection and monitoring of plan service providers, including monitoring compensation arrangements by reviewing fee disclosures provided in accordance with the rules under §408(b)(2) of ERISA. Of note, DOL stated its view that ERISA's fiduciary duties require the MEP sponsor to act impartially with respect to all participating employers and their employees, taking into account any different interests.[16] As an example, DOL stated that if a MEP sponsor negotiates discounted prices on investments or services based on the MEP's large size, it must allocate the discounts ''in an evenhanded manner'' among participants. Questions remain as to how this ''evenhandedness'' requirement would apply in various contexts.

The preamble to the Final Rule states that individual participating employers in a MEP are generally responsible for prudently selecting and monitoring the MEP sponsor.[17] Participating employers should receive and review periodic reports from the MEP sponsor regarding the fiduciary management and administration of the MEP. However, participating employers generally do not have fiduciary responsibility for any day-to-day administrative duties with respect to the MEP, nor are they responsible for duties assigned to the ''plan administrator'' under Title I of ERISA, because the MEP sponsor would typically (and always in the case of a PEO-sponsored MEP) be designated as the plan administrator.

Termination of MEP Participation

DOL's preamble to the Final Rule also addressed several questions surrounding the situation where a participating employer terminates its relationship with a MEP sponsor.[18] In DOL's view, a MEP will continue to operate as a single plan for purposes of ERISA's fiduciary rules even after a participating employer has terminated its relationship with the MEP sponsor, even though such severance causes the requirements for a bona fide group or association of employers (or a bona fide PEO) to no longer be satisfied, for a reasonable period of time following the termination. However, if the participating employer does not take any action to spin off or transfer its interest in the MEP to a separate plan, and continues to make contributions to the MEP as it had before the termination of its relationship with the MEP sponsor, then after a reasonable period of time, the participating employer will be considered to have established its own separate plan, and the MEP sponsor will be considered a service provider to that separate plan. Importantly, the other participating employers in the MEP (and the MEP itself, apart from assets attributable to the terminating employer's former participation in the MEP) would not be affected.

POTENTIAL FOR BROADER REFORMS: 'OPEN' MEPS

Summary of DOL Request for Information

When DOL issued its proposed rule to expand MEP availability in October 2018, the proposal included a request for comments regarding, among other topics, the circumstances under which ''open'' MEPs, i.e., plans covering employees of multiple unrelated employers, should be permitted, consistent with ERISA's statutory requirement that plans be established by an ''employer.''[19] In response, DOL received a significant number of comments advocating for open MEPs, persuading DOL that further consideration of open MEPs is warranted. DOL therefore published a Request for Information (RFI) at the same time that it issued the Final Rule, to solicit additional public com-

[14] 29 C.F.R. §2510.3-55(c)(2).

[15] 84 Fed. Reg. 37,522 (Jul. 31, 2019).

[16] 84 Fed. Reg. 37,525 (Jul. 31, 2019).

[17] 84 Fed. Reg. 37,522 (Jul. 31, 2019).

[18] 84 Fed. Reg. 37,524-37,525 (Jul. 31, 2019).

[19] 83 Fed. Reg. 53,542 (Oct. 23, 2018).

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ments on a broad range of issues relating to open MEPs.[20]

The RFI sets forth 18 specific topics about which DOL is interested in receiving public comments, though commenters are encouraged to address any other topics relating to open MEPs.[21] For example, DOL asks whether it should permit financial institutions or other persons to sponsor open MEPs, whether a commercial entity sponsoring a MEP would have conflicts of interest with respect to the plan and its participants, and how permitting open MEPs would impact existing MEPs sponsored by groups or associations of employers and PEOs. Other questions in the RFI address so-called ''corporate MEPs,'' i.e., plans covering employees of employers that have some level of common ownership, but that are not within the same controlled group or affiliated service group within the meaning of the Code. The RFI also requests information relating to the expected costs and benefits of permitting open MEPs, including which types of entities are likely to sponsor an open MEP, which types of employers are likely to join an open MEP, and how the fees associated with an open MEP are expected to compare to fees for existing MEPs and individual plans sponsored by small businesses.

Stakeholders who wish to respond to the RFI must submit their comments by October 29, 2019.

[20] 84 Fed. Reg. 37,545 (Jul. 31, 2019).

[21] 84 Fed. Reg. 37,546-37,548 (Jul. 31, 2019).

Legislative Reform

While the Final Rule is helpful in expanding MEP availability to some extent, retirement industry stakeholders are closely following a legislative proposal that would create an even more permissive framework for unrelated employers to participate in open MEPs. The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act)[22] would permit unrelated employers to participate in ''pooled employer plans'' (i.e., open MEPs), which would be treated as a single plan under ERISA. The SECURE Act would also amend the Code to create a path for pooled employer plans to address qualification failures by one participating employer without imperiling the overall plan or other participating employers.

The SECURE Act was approved by the House on May 23, 2019, by a vote of 417-3, but has since hit procedural roadblocks in the Senate. While the legislative package enjoys broad, bipartisan support, it remains to be seen whether, and if so how, the Senate will move on the SECURE Act before the end of the 2019. If Congress is unable to pass the SECURE Act this year, its prospects will likely be less certain next year as Congress turns its attention to the 2020 election.

[22] H.R. 1994, 116th Cong. (1st Sess. 2019).

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