

Court Ruling on Association Health Plans Leaves Future of DOL MEP Rule in Doubt

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On March 28, the District Court for the District of Columbia (“Court”) blocked key provisions of the Department of Labor’s (“DOL”) final rule, “Definition of ‘Employer’ Under Section 3(5) of ERISA – Association Health Plans” (“AHP Final Rule”). *New York v. United States Dep’t of Labor*, No. CV 18-1747, 2019 WL 1410370 (D.D.C. Mar. 28, 2019). The Court’s ruling strikes at the foundations underlying the DOL’s October 22, 2018 proposed rule (the “MEP Proposed Rule”) to facilitate and expand the availability of defined contribution multiple employer plans (“MEPs”), which is similar to the AHP Final Rule in many respects. As a result, the future of the MEP Proposed Rule may now be uncertain.

MEP Proposed Rule

DOL issued the MEP Proposed Rule in response to the President’s Executive Order 12857, which directed DOL to consider ways to expand access to coverage under the retirement system and reduce costs by clarifying the circumstances under which businesses and working owners, among others, could sponsor or adopt MEPs. The MEP Proposed Rule would specify the types of “bona fide” groups or associations of employers and professional employer organizations (“PEOs”) that are permitted to sponsor a MEP. In particular, the MEP Proposed Rule would clarify when such a group or association, or a PEO, would be acting as an “employer,” as defined under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), that may sponsor an ERISA plan.

The MEP Proposed Rule would provide that a group or association of employers may sponsor a MEP if, among other things, it has members with a commonality of interests, meaning the employers must be either (i) in the same trade industry, line of business, or profession or (ii) have a principal place of business within a region that does not exceed the boundaries of the same state or same metropolitan area. The MEP Proposed Rule would also provide that a PEO could sponsor a MEP if it meets certain

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factors and if it performs “substantial employment functions,” based on the relevant facts and circumstances. Finally, the MEP Proposed rule would clarify that working owners (*i.e.*, sole proprietors and other self-employed individuals) may elect to act as employers for purposes of participating in a bona fide employer group or association and may be treated as employees of their businesses for purposes of being able to participate in a MEP. A complete description of the MEP Proposed Rule can be found in a prior Groom [Benefits Brief](#).

Notably, the provisions in the MEP Proposed Rule regarding groups or associations and working owners that qualify as “employers” who may sponsor or participate in MEPs substantially mirror provisions in the AHP Final Rule, which clarifies when groups or associations, and working owners qualify as “employers” who may sponsor or participate in association health plans.

Summary of Court Decision

Attorneys general from 11 states and the District of Columbia filed suit in July 2018 against the AHP Final Rule, contending the new rules undermine the Affordable Care Act. The attorneys general alleged that the AHP Final Rule “increases the risk of fraud and harm to consumers, requires States to redirect significant enforcement resources to curb those risks, and jeopardizes state efforts to protect their residents through stronger regulation.”

The Court agreed with the attorneys general and found that the AHP Final Rule’s provisions regarding groups or associations and working owners are unreasonable interpretations of ERISA. Specifically, the Court held that the AHP Final Rule’s provisions regarding groups or associations impermissibly included arrangements that go beyond an employment relationship, as defined under ERISA. Further, the Court held that a working owner without common employees cannot be considered an employer under ERISA. A more complete description of the Court’s decision can be found in a recent Groom [Benefits Brief](#).

DOL has now released Questions and Answers (“Q&As”) addressing the decision. The Q&As state that DOL “disagrees with the [Court]’s ruling and is considering all available options in consultation with the Department of Justice including the possibility of appealing the District Court’s decision and the possibility of requesting that the District Court stay its decision pending an appeal.” However, the agency notes that, “at this time, [DOL has] not reached a decision on how to proceed.”

Implications for MEPs

The Court’s decision to block key portions of the AHP Final Rule has significant implications for the future of DOL’s MEP Proposed Rule. As noted above, the provisions in the MEP Proposed Rule regarding groups or associations and working owners substantially mirror those of the AHP Final Rule, and the MEP Proposed Rule is subject to the same definition of “employer” that the Court reviewed. As a result, there is a risk that, if the MEP Proposed Rule were to be finalized as proposed, a court might also block the MEP Proposed Rule’s provisions related to groups or associations and

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working owners as unreasonable interpretations of ERISA. However, the Court's decision does not implicate the MEP Proposed Rule's provisions regarding PEOs or suggest, contrary to DOL's position expressed in the MEP Proposed Rule, that a PEO may not act as the sponsor of a single plan MEP.

At the very least, the Court's decision with respect to the AHP Final Rule likely will delay the issuance of any final MEP rule. DOL now has to decide whether to (a) move forward with the MEP Proposed Rule in its current form despite the decision, (b) defer completion of the rule until the AHP Final Rule litigation reaches a conclusion, or (c) rework the MEP Proposed Rule to address the Court's decision. At this point, DOL has not signaled its intentions, and it will likely take time for the agency to chart a path forward.

MEP Legislation

DOL's MEP rulemaking eventually may not be necessary as there are a number of bipartisan legislative proposals to expand MEPs. For example, the House Ways and Means Committee unanimously approved the Setting Every Community up for Retirement Enhancement Act of 2019 (the "SECURE Act," [H.R. 1994](#)) on April 2, and that bill contains a provision that would solve the ERISA and Internal Revenue Code issues that hamper the adoption of "open" MEPs (*i.e.*, MEPs covering multiple unrelated employers). The SECURE Act and other similar legislation would preempt the DOL rulemaking process and moot the Court's opinion (as it relates to MEPs) by amending ERISA to expand the use of open MEPs without many of the conditions in DOL's MEP Proposed Rule.

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