The Investment Lawyer
Covering Legal and Regulatory Issues of Asset Management
VOL. 26, NO. 7 • JULY 2019

REGULATORY MONITOR

ERISA Update

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Multiple Employer Plans

Recently, there has been a great deal of regulatory, judicial, and legislative activity surrounding association multiple employer plans (Association MEPs) and open multiple employer plans (Open MEPs). The Trump Administration, some financial services providers, and others see multiple employer plans (MEPs) as an effective mechanism for efficiently making available employee benefits to employees of small employers. This column provides a summary of recent activity with regard to Association MEPs and Open MEPs with a focus on those MEPs that provide retirement benefits under employee benefit plans covered by the Employee Retirement Income Security Act of 1974, as amended (ERISA).

As discussed below, a recent decision by the US District Court for the District of Columbia (DC Federal District Court or Court) called into question whether persons will sponsor Association MEPs pursuant to the Department of Labor's (DOL or Department) rulemaking efforts to expand the availability of Association MEPs. However, legislation with bi-partisan support working its way through Congress may, if passed, expand the availability of Open MEP-like arrangements that meet certain requirements.

Types of MEPs

Over time, the employee benefits industry generally has divided MEPs into three categories, "Corporate MEPs," "Association MEPs," and "Open MEPs." These terms are not specifically defined in ERISA or the Internal Revenue Code of 1986, as amended (the Code), but have evolved over time as common terms of usage in the benefits industry.

"Corporate MEPs" consist of two or more companies who participate in an employee benefit plan. The companies have some type of ownership or control relationship. However, such relationship is not sufficient to result in the companies' treatment as a single employer for purposes of Section 414(b) or Section 414(c) of the Code. Corporate MEPs typically result from corporate transactions. Corporate MEPs are not the subject of recent regulatory, judicial, and legislative activity and are not addressed in this discussion.

"Association MEPs" consist of two or more companies who do not have a common ownership or control relationship, but have some type of connection other than the provision of employee benefits. Typically, the companies belong to an association that offers a variety of services to its member companies such as professional networking, professional education, and representation before federal, state,

and local governments and their respective agencies. The companies normally pay an annual or other periodic fee to be a member of the association in order to get these services. A benefit of membership also may include access to employee benefit plans made available to association member companies. The association or its affiliate is the sponsor of the plans and provides administrative or other services to the plans. In addition, much of the fiduciary responsibility related to the plan is borne by parties other than the association members.

"Open MEPs" consist of two or more companies who do not have a common ownership or control relationship and who do not have a connection through membership in an association as described above. In effect, the only connection among the participating employers is participation in the plan. Historically, the Department for purposes of ERISA has been unwilling to treat Open MEPs the same as Association MEPs. Association MEPs and Open MEPs have been the subject of recent regulatory, legislative, and judicial activity and are the focus of this discussion.

Department of Labor Guidance

The Department's historical treatment of Association MEPs and Open MEPs is grounded in ERISA's statutory language. Section 3(3) of ERISA defines the term "employee benefit plan" and "plan" to include "…an employee pension benefit plan…" An "employee pension benefit plan," pursuant to Section 3(2)(A) of ERISA is "…any plan, fund, or program…established or maintained by an employer or by an employee organization…" for the purpose of providing retirement benefits to employees or for the deferral of income by employees.

Under Section 3(5) of ERISA, an "employer" is "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." The term "employee," as defined in Section 3(6) of ERISA, means "any individual employed by an employer." An "employee organization" pursuant to Section 3(4) is "…any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan."

In a number of advisory opinions, most recently in DOL Advisory Opinion 2012-04A (May 25, 2012), the Department expressed its view that the participants in a plan must be employees of the "employer" or "employers" who establish or maintain the plan, the employees must "participate in" an "employee organization" that establishes or maintains the plan, or the employees must have a membership or interest in the organization that establishes or maintains the plan by reason of their status as employees. In other words, the Department requires that there be an "employment based common nexus" among the employers and employees "…that is unrelated to the provision of benefits."

Alternatively, the Department is of the view that the participants of the plan must be direct employees of employers that belong to a "bona fide employer association acting in the interest of the direct employers." The Department looks to a "genuine organizational relationship" among the employers "…that is unrelated to the provision of benefits." In its 2012 Advisory Opinion, the Department points to a number of factors that indicate a "bona fide employer association" including, among other things, the purpose of the association, the powers, rights and privileges of the members, and whether the employer members control the association. In summary, it looks for "genuine economic or representational interest unrelated to the provision of benefits…" The DOL also requires that employers who participate in the plan either directly or indirectly exercise control over the plan.

Based on the foregoing, the Department has been unwilling to treat an Open MEP as a single "employee benefit plan" for purposes of ERISA. However, an Association MEP that meets the requirements outlined in the 2012 Advisory Opinion and other DOL guidance may be treated as a single plan for purposes of ERISA. Some providers of employer-based retirement benefits, products, and services believe that there are certain advantages to a MEP if it can be treated as a single plan. For example, the MEP need only file a single Form 5500 and undergo a single audit by an independent certified public accountant. Additionally, a single employer participating in the MEP may be the "plan sponsor" as defined in Section 3(16)(B) of ERISA, the "plan administrator" as defined in Section 3(16)(A) of ERISA, and the named fiduciary of the plan for purposes of Section 402 of ERISA. Thus, the other participating employers may be able to avoid some of the potential liability under ERISA associated with maintaining the employee benefit plan, for example, selection of service providers and investment options.

Trump Administration's Directive to the DOL and Subsequent Regulations

On August 31, 2018, President Trump issued Executive Order 13847, "Strengthening Retirement Security in America" (Executive Order). The Executive Order stated that "[i]t shall be the policy of the Federal Government to expand access to workplace retirement plans for American workers." The Executive Order focused on making available retirement benefits to employees of small employers and to that end directed the Department to "[e]xpand[] access to multiple employer plans (MEPs)…" because an MEP "…is an efficient way to reduce administrative costs of retirement plan establishment and maintenance and would encourage more plan formation and broader availability of workplace retirement plans, especially among small employers."

In response, the Department published on October 23, 2018, a proposed regulation called the *Definition of "Employer" Under Section 3(5) of ERISA-Association Retirement Plans and Other Multiple-Employer Plans* regulation (ARP Regulation) [83 Fed. Reg. 53534 (Oct. 23, 2018)]. For purposes relevant to this column, the ARP Regulation largely mirrored the provisions in the Department's final regulation promulgated on June 21, 2018, called the *Definition of "Employer" Under Section 3(5) of ERISA-Association Health Plans* (AHP Regulation) [83 Red. Reg. 28912 (June 21, 2018)].

In the ARP Regulation, the Department stated that it was limited by the ERISA statute with regard to how broadly it could interpret terms such as "employee benefit plan," employer," and "employee organization." Therefore, the regulation did not address Open MEPs. However, the Department attempted to broaden the availability of Association MEPs by expanding its interpretation of a "bona fide association." The Department included a "commonality of interest" provision, which required that the employers participating in the plan either (1) be "…in the same trade, industry, line of business or profession…" or (2) have "a principal place of business in the same region that does not exceed the boundaries of a single State or a metropolitan area (even if the metropolitan area includes more than one State)." Additionally, a "bona fide association" would exist so long as the plan sponsor engaged in at least one activity other than providing employee benefits even if its primary purpose was to provide benefits. Finally, the Department expanded the definition of "employee" to include sole proprietors so that plans otherwise intended to meet the ARP Regulation could be made available to sole proprietors, which technically are not an "employee" of any entity.

In some regards, the ARP Regulation appeared to broaden the availability of MEPs, particularly Association MEPs. For example, local chambers of commerce who otherwise may have been concerned about creating a MEP for its members, which

generally are small businesses in a geographic or metropolitan area, likely could be confident that it could create an Association MEP under the ARP Regulation. However, the Department specifically stated that a "bona fide association" could not be a financial services company, for example, bank, adviser, or broker-dealer, thus prohibiting such company from being an Association MEP sponsor. The Department requested public comment on the ARP Regulation by December 24, 2018. A number of commenters requested reconsideration of the status of Open MEPs and whether a financial services company could sponsor a MEP. However, we should not expect the Department to take action, particularly in light of the below-discussed decision by the DC Federal District Court.

DC Federal District Court Decision

On March 28, 2019, the DC Federal District Court in *New York v. United States Dep't of Labor*, [No. CV 18-1747, 2019 WL 1410370 (D.D.C. Mar. 28, 2019)] blocked key provisions of the Department's final AHP Regulation, which applied to health benefit MEPs. Many of the headlines about this case focused on language in the opinion that the AHP Regulation in the eyes of the Court was an attempted "end run" around certain requirements of the Affordable Care Act. However, the basis for the decision was the Court's rejection of the DOL's attempt to broaden its interpretation of when plans in which multiple employers participate may be considered a single plan for ERISA purposes. As such, the Court's decision directly struck at those same key provisions in the ARP Regulation.

Among other things, the Court concluded that common geography does not ensure that associations sponsoring a plan share a commonality of interest and, therefore, creates no "meaningful limit" on these associations. The Court pointed out that the DOL did not provide a rationale that would connect geography and common employer interest and failed to explain how geography furthers the ERISA requirement that associations act "in the interest of employers," or why employers with a place of business in a state would share common interests. In the Court's view, geography was not a "logical proxy" for common interest. The Court also rejected the DOL's attempt to expand its own prior guidance on the test for "bona fide association" by allowing a "bona fide association" to exist even if the primary purpose of the association was to provide employee benefits so long as the association had "'at least one substantial business purpose' unrelated to the provision of health care…" Doing so, according to the court, "failed to set meaningful limits on the character and activities of an association."

The Court also rejected the AHP Regulation's attempt to expand Association MEP access to sole proprietors without employees because their inclusion in such plans is "contrary to the text of ERISA." The Court in its decision explained that following the Department's rationale for its change in the definition of "employee" could result in an Association MEP that consisted solely of working owners without common law employees. The Court concluded that a working owner without employees is "beyond ERISA's scope" when a sole proprietor establishes a benefit plan for himself, that is, ERISA contemplates the existence of an employer-employee relationship.

While the Court's decision applied to the AHP Regulation, the decision should be viewed as a significant challenge to the ARP Regulation, at least for the time being. Given that the AHP Regulation and ARP Regulation for the most part mirror each other with regard to the provisions struck down by the Court, it is possible that a similar outcome would occur with regard to the ARP Regulation if finalized.

The Department has appealed the Court's decision and it could prevail. The Department also submitted the ARP Regulation to the Office of Management and Budget, which indicates the issuance of a final ARP Regulation is imminent. However, given the legal uncertainty created by the district court, persons may be reluctant in the near

term to implement a MEP in reliance on the ARP Regulation.

Outlook for MEPs

Despite the legal uncertainty, the Department continues its efforts to expand access to Association MEPs vis-à-vis the ARP Regulation. If the Department is successful in its appeal of the DC Federal Circuit Court's decision, we could see interest in forming MEPs pursuant to the ARP Regulation. However, in the intervening months, there may be reluctance to rely on the regulation. Additionally, there is benefits legislation before Congress including the House's Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), which has bi-partisan support. The House passed the SECURE Act on May 23, 2019. The SECURE Act, which is now being considered by the Senate, includes MEP provisions that will allow for the creation of Open MEP-like arrangements that meet certain conditions. If a bill that includes these provisions is enacted into law, financial services providers and other organizations may have greater flexibility to provide Open MEPs to employers. Of course, predicting the likelihood of Congress enacting legislation, even with bi-partisan support, can be challenging. Notwithstanding, financial services providers should closely follow these developments as they consider MEPs and other alternatives to providing retirement benefit products and services to employers.

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