DOL Moves on Multiple Employer Plans

PUBLISHED: August 12, 2019

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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*

Groom Insight: In the preamble to the Final Regulation, DOL emphasized that whether the control requirement is met is dependent on the facts and circumstances. DOL also clarified that employer members would not be required to exercise day-to-day control over the operations of the group or association. Instead, DOL stated that employer members would be deemed to have sufficient control over the group or association if they (a) regularly nominate and elect members of the group or association's governing body, (b) retain authority to remove elect members of the group or association's governing body, and (c) have the authority to approve or veto decisions regarding the formation, design, amendment, and termination of the MEP.

- *Have at least one substantial business purpose unrelated to offering and providing employee benefits to its employer members, though the primary purpose of the association or group may be to offer and provide MEP coverage*

Groom Insight: As a result, DOL stated that a group or association that exists solely to offer a MEP would not meet this condition. DOL opined that if a group or association had active membership before sponsoring a MEP, the prior active membership would be "compelling evidence" of its collateral substantial business purpose. DOL also clarified that it would not be inconsistent with the substantial business purpose test if a group or association created a wholly-owned subsidiary to sponsor a MEP. Notably, in the Final Regulation, DOL indicated that it puts significant weight on the concept of a "substantial" business purpose and, effectively, this requirement is not an automatic "check the box" item.

- *Limit plan participation to employees and former employees of employer members and their beneficiaries*
- *Have 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 (even if the metropolitan area includes more than one State)*

Groom Insight: DOL stated that it would not challenge "reasonable and good faith" classifications of trade industries, lines of business, or professions that establish the commonality of the group or association's employer members. The Final Regulation also provides that a group or association of employer members is deemed to share commonality

with its employer members, meaning employees of the group or association may participate in the MEP that the group or association sponsors.

- *Ensure that each employer member acts directly as an employer for at least one employee participating in the MEP*

B. Bona Fide PEOs

As with bona fide groups or associations of employers, the Final Regulation provides that bona fide PEOs may act as "employers" under ERISA for purposes of sponsoring a MEP. This is premised upon DOL's position that PEOs can act "indirectly in the interest of an employer" – specifically, their client employers – and therefore meet the ERISA definition of "employer" with regard to the MEPs that they sponsor and administer for the benefit of employees of their client employers.

To be "bona fide" for purposes of the Final Regulation, a PEO must satisfy four requirements –

- *Perform "substantial employment functions" on behalf of client employers*
- *Have substantial control over functions and activities of MEP, as plan sponsor, plan administrator, and a named fiduciary*
- *Ensure that each client employer participating in the MEP has at least one employee who is a participant covered under the MEP*
- *Ensure that participation in the MEP is limited to current and former employees of the PEO and of client employers, as well as their beneficiaries*

For most PEOs, the most challenging consideration will be establishing whether they perform "substantial employer functions" on behalf of the client employers that adopt the MEP. The Final Regulation confirms that whether a PEO performs substantial employment functions on behalf of its client employers is determined on the basis of a "facts and circumstances" test. However, the Final Regulation contains a "safe harbor" whereby a PEO will be considered to perform "substantial employment functions" on behalf of client employers that adopt the MEP if it meets four specific criteria with respect to each client employer that participates in the MEP.

Groom Insight: Significantly, the preamble to the Final Regulation states that "a PEO's status under the final rule does not make the PEO more or less likely to have an employment relationship (whether referred to as joint employment or otherwise) with the client-employer, for purposes of other laws or liabilities." DOL also states in the preamble that a PEO's status as an employer for ERISA purposes (with regard to MEP sponsorship) has no effect on the rights or responsibilities of any party under the Internal Revenue Code or Fair Labor Standards Act, and neither supports nor prohibits a finding of an employment relationship generally. PEOs will welcome DOL's position, since there will be

concern about unintended liability (such as tort liability, or under other federal or state statutes) that could result if a PEO's sponsorship of a MEP could be used to establish that it was acting as an employer in other contexts.

Groom Insight: DOL also explicitly states in the preamble that the Final Regulation does not address when a PEO may be able to act as an employer for establishing or maintaining a single group health plan to cover the employees of the PEO's client employers. This is interesting because logically, the recognition of the PEO as an ERISA "employer" for purposes of sponsoring a MEP should extend to the PEO's ability to sponsor other ERISA plans for the benefit of employees of its client employers. DOL acknowledges that many PEOs currently offer health plans to employees of client employers, but notes that "health plan sponsorship may raise different issues and require different regulatory conditions than retirement plans… [u]ntil the Department takes additional regulatory or other action, a PEO interested in sponsoring a health arrangement for its client employers must look to the terms of the statute."

C. Working Owners

The Final Regulation clarifies that working owners (*i.e.,* sole proprietors and other self-employed individuals who own their business) 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 MEPs sponsored by groups or associations. The working owner must work at least 20 hours per week or 80 hours per month on average or have wages or self-employment income equal to or exceeding the working owner's cost of coverage. That test must be met when the employer joins the MEP and confirmed periodically pursuant to reasonable monitoring procedures (including averaging over 12-month periods). As with the proposed regulation, the clarification for working owners does not extend to MEPs sponsored by "bona fide" PEOs, so employers must have at least one common law employee to participate in a PEO-sponsored MEP.

D. Governance

DOL addressed some basic questions regarding the manner in which it envisioned MEPs to be managed. In this respect, DOL stated that the group or association, or PEO (as the case may be), would act as plan sponsor, a "named fiduciary," as defined under section 402 of ERISA, and "plan administrator" as defined under ERISA section 3(16), and be responsible for the standard reporting, disclosure, and fiduciary obligations that apply to those roles. Moreover, DOL stated that the group or association, or PEO would act as the "responsible plan fiduciary" as defined under DOL's regulation at 29 CFR 2550.408b-2 for purposes of selecting service providers and reviewing their compensation

disclosures. Therefore, individual employers participating in the MEP would not be required to review such compensation disclosures.

Nonetheless, DOL stated that participating employers would retain an obligation for choosing and monitoring the arrangement, monitoring the activities of the group or association, or PEO, and other fiduciaries of the MEP, and forwarding required contributions to the MEP. DOL opined that it expected that participating employers will be furnished with periodic reports on the management and administration of the MEP, including information on fees and expenses paid to the MEP's service providers.

DOL also addressed the ERISA plan status of the MEP, and fiduciary status of the group or association, or PEO, in circumstances where participating employers attempt to terminate their relationship with the MEP. DOL clarified that pending an employer's termination of its relationship, and within a reasonable timeframe following the effective date of the termination, the MEP would continue to constitute a single plan for purposes of ERISA, and the group or association, or PEO, would continue to owe fiduciary obligations to the participants and beneficiaries associated with the terminating employer. However, if the employer fails to take action to implement the termination, such as spinning off or transferring the assets associated with the employer within a reasonable timeframe, the employer will be considered to have created a separate, single plan for purposes of ERISA, and the group, association, or PEO would be considered a service provider to the single plan. DOL stated that the employer's failure to implement a spin-off or transfer would not, however, affect the status of the other participating employers as participating in a unified MEP.

E. MEP Fiduciary's Duty of Impartiality

In the preamble to the Final Regulation, DOL stated its view that, as a result of its fiduciary duties of loyalty and prudence, a group or association, or PEO, acting as the sponsor of a MEP, or other fiduciary of the MEP, would be required to be deal "impartially" with participating employers and their associated MEP participants. DOL opined that when such a MEP fiduciary negotiates pricing of services provided to the MEP and investments made available under the MEP, and secures discounted pricing, the fiduciary should "take care to see that these advantages are allocated among participants in an evenhanded manner" because of the fiduciary's responsibility to act on behalf of all participants, "regardless of the size of their employer." These statements raise questions regarding the allocation of administrative and investment fees and expenses on a differential basis.

F. Interpretive Bulletin 2015-02

In 2015, DOL published Interpretive Bulletin 2015-02 addressing state-sponsored MEPs. The guidance stated, among other things, that state-sponsored may satisfy the commonality requirement under DOL sub-regulatory guidance because of the unique relationship the state has to employers. In response to commenters' questions, DOL clarified that Final Regulation does not affect Interpretive Bulletin 2015-02, so presumably, states can continue to rely on the guidance.

G. Association Health Plan Litigation

On March 28, 2019, the U.S. District Court for the District of Columbia blocked provisions of DOL's Association Health Plan rule that substantially mirror the provisions of the Final Regulation regarding the groups or associations that may sponsor a MEP. *New York v. United States Dep't of Labor*, No. CV 18-1747, 2019 WL 1410370 (D.D.C. Mar. 28, 2019). Specifically, the Court found that DOL's position that employer groups or associations and working employers could be "employers" for purposes of ERISA was an unreasonable interpretation of the statute. Some thought the court decision would delay the issuance of the Final Regulation, or cause DOL to re-work its provisions. However, DOL merely noted in a footnote to the preamble of the Final Regulation that it disagrees with the court's decision and has filed an appeal and added a provision to the Final Regulation stating that if any of the provisions in the Final Regulation are found to be invalid or stayed pending further agency action, the remaining portions would remain operative. As a result, the Final Regulation is potentially subject to challenge on the same grounds as the Association Health Plan rule.

The RFI

The Final Regulation widens the availability of MEPs to a degree. However, many stakeholders believe the Final Regulation's commonality restraints, as well as the limitations on the entities that may sponsor a MEP, are unwarranted. Instead, some believe that wholly unrelated employers should be able to band together and participate in open MEPs, and that any type of entity, including financial institutions, should be permitted to sponsor a MEP. In response to the large number of comments on DOL's proposed MEP regulation advocating for open MEPs, DOL issued the RFI to solicit additional information.

The RFI seeks additional comments on whether DOL should permit open MEPs, the costs and benefits associated with permitting open MEPs, the types of plans that would join open MEPs, and whether MEPs sponsored by groups or associations, or PEOs, would continue to exist or might be overshadowed if open MEPs were to be permitted. DOL also sought comments on the types of entities that should be permitted to sponsor open MEPs and whether conflicts of interest might arise in their maintenance of a MEP. Finally, DOL has previously stated in subregulatory guidance that employers in a controlled group of corporations share sufficient commonality to participate in a MEP. DOL asked for comments on whether it should issue regulations addressing the precise amount of common ownership necessary for employers to share commonality.

Responses to the RFI are due by October 29, 2019.

FAB 2019-01

An amendment to ERISA that went into effect in 2014 requires that the administrator of a multiple employer plan include a list of participating employers on the plan's annual Form 5500, and for some plans, a good faith estimate of each employer's percentage of total contributions made during the year.

DOL learned that a significant number of MEPs had not provided this information on past years' Forms 5500.

FAB 2019-01 provides transition relief for multiple employer plans that did not provide this information in past Form 5500 filings. Under the transition relief, DOL will not reject previous years' Forms 5500, or seek civil penalties, for failure to include participating employer information, so long as the 2018 Form 5500 filings and future filings include such information. In addition, FAB 2019-01 provides a special 2½ month extension, so that multiple employer plan administrators will have additional time to file Form 5500 with participating employer information included without seeking an extension through IRS Form 5558.

MEP Legislation

There is legislation pending in Congress that would expand the availability of MEPs beyond the conditions of the Final Regulation. The Setting Every Community Up for Retirement Enhancement Act of 2019 (the "SECURE Act," H.R. 1994) would permit open MEPs, and would not require that a MEP be sponsored by a group or association or PEO. Although the legislation would not technically supersede the Final Regulation, it is considerably more permissive and may be more attractive to potential MEP sponsors.

On May 23, the House overwhelmingly passed the SECURE ACT by a vote of 417-3. Since then, Senate leadership has been considering whether and how to move the SECURE Act. For example, the SECURE Act may be attached to a larger, must-pass bill, such as a spending bill, later this year.