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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Attention: Definition of Employer—MEPs RIN 1210-AB88.

This letter provides comments of the National Association of Professional Employer Organizations (NAPEO) on the proposed regulations issued by the U.S. Department of Labor, Employee Benefits Security Administration regarding the proposed rule *"Definition of "Employer" under Section 3(5) of ERISA- Association Retirement Plans and Other Multiple-Employer Plans"* (referred to throughout this letter as the "Proposed Rule").

NAPEO is the voice of the professional employer organization (PEO) industry. PEOs provide comprehensive HR solutions such as payroll, employee benefits, human resources, tax administration, and regulatory compliance assistance for small and mid-sized businesses. By performing these substantial employment functions on behalf of their clients, PEOs help businesses improve productivity, increase profitability, and focus on their core mission. Through a PEO, the employees of their small and mid-sized business clients also may gain access to employee benefits such as: 401(k) plans; health, dental, life, and other insurance; dependent care; and other benefits they might not typically receive as employees of a small company.

There are 907 PEOs in the United States providing services to 175,000 small and mid-sized businesses, employing 3.7 million people. The PEO industry's 175,000 clients represent 15 percent of all employers with 10 to 99 employees.¹ The total employment represented by the PEO industry is roughly the same as the combined number of employees for Walmart (United States only), Amazon, IBM, FedEx, Starbucks, AT&T, Wells Fargo, Apple, and Google. Between 2008 and 2017, the number of PEO client worksite employees grew at a compounded annual rate of 8.3 percent, which is 14 times higher than the compounded annual growth rate of employment in the economy overall during the same period.

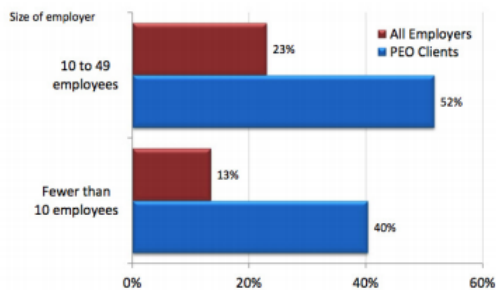
NAPEO strongly supports the Proposed Rule, and commends Secretary Acosta and the leadership of the Department of Labor for issuing this important rulemaking. The issuance of this proposed rule is a positive step in formalizing the legal framework for PEOs to provide retirement benefits for their client's shared employees. This action, along with the passage of the Small Business Efficiency Act contained in the Tax Increase Prevention Act (H.R. 5771, Public Law 113-295) which created the voluntary IRS PEO Certification Program, demonstrates the federal government's recognition of the PEO industry and the important role it plays in supporting our nation's small businesses.

¹ PEO industry data from *"An Economic Analysis: The PEO Industry in 2018;"* Laurie Bassi and Dan McMurrer, September 2018.

PEOs and Access to Retirement Benefits

One of the most important benefits that PEOs offer to their clients is increased access to employer-sponsored retirement plans, such as 401(k) plans. Such plans are far more likely to be available to a company that uses a PEO than a comparable small company that handles all HR functions in-house. A 2013 NAPEO white paper² confirms this fact. It found that nearly all PEOs (98 percent) offer some type of retirement plan to their clients. Based on the most recent data available at that time, provided by the Employee Benefit Research Institute (EBRI), only 16 percent of all employees of the smallest companies (those employing fewer than 10 workers), and 30 percent of those at companies with 10 to 49 employees, work for a company that sponsors some type of retirement plan.

Figure 1. Percentage of workers participating in retirement plan



percent of employees versus 23 percent.

The differences in retirement plan availability are reflected in similarly large variance in employee retirement plan participation between those working for PEO clients and others. Among the smallest businesses (employing fewer than 10 workers), the percentage of employees participating in employer-provided retirement plans is over 3 times greater among employees working at PEO clients than it is among employees of all other similarly-sized businesses (40 percent versus 13 percent; see Figure 1).³ For employees working for somewhat larger businesses (with between 10 and 49 employees), there is also a major difference: 52

In addition to providing this key benefit to businesses in terms of employee attraction and retention, the enhanced access to retirement plans also provides substantial benefits to employees. A large body of research shows that having accessible retirement savings options at work has a significant impact on people's ability to save for their futures. For example, a 2015 survey found employees in companies more likely to offer access to employer-sponsored retirement plans are significantly more confident about being able to retire comfortably and to believe they are building a large enough "nest egg."⁴

NAPEO Comments on the Proposed Rule

While NAPEO and its members support the issuance of the Proposed Rule, we offer comments below intended to expand upon our support for this rule and also to clarify and improve any resulting final rule.

² "Professional Employer Organizations Fuel Small Business Growth;" Laurie Bassi and Dan McMurrer, September 2013.

³ Craig Copeland, "Employment-Based Retirement Plan Participation: Geographic Differences and Trends, 2011," EBRI Issue Brief (November 2012, no. 378), p. 36 (http://www.ebri.org/pdf/briefspdf/EBRI_IB_11-2012_No378_RetParticip.pdf), combined with calculations of data provided by NAPEO from its 2012 *Financial Ratio & Operating Statistics Survey*. The NAPEO results were gathered from PEOs using ranges (e.g., a PEO would report "26 to 50%" of its total worksite employees are covered by a retirement plan). For calculating overall percentages, we used the midpoint of each range.

⁴ Transamerica Center for Retirement Studies, "16th Annual Transamerica Retirement Survey of American Workers: A Compendium of Findings About American Workers" (August 2015), https://www.transamericacenter.org/docs/default-source/resources/center-research/16th-annual/tcrs2015_sr_16th_compendium_of_workers.pdf.

Recognition of PEOs as (3)(5) “Employers” under ERISA

NAPEO appreciates the Department’s acknowledgment that a PEO can be an “employer” as defined in section 3(5) of ERISA for the purposes of sponsoring a MEP covering the employees providing services for client employers. Per the statute, an “employer” is defined not only as a common law employer of an employee, but also “any person acting ... indirectly in the interest of an employer, in relation to an employee benefit plan....”⁵ The entire PEO industry is premised on providing valuable services to client employers. Indeed, when Congress adopted an expansive definition of “employer” in ERISA to encompass “persons acting indirectly in the interest of an employer,” it seems clear that Congress intended to include organizations, such as PEOs, that establish meaningful relationships with other employers by taking on essential employment-related duties.

We are aware there are other entities in the benefit plan marketplace seeking to offer retirement benefits to individuals via the use of a group model (such as associations or so-called “open” MEPs), but PEOs are very different from these entities. In contrast to these entities, most PEOs share a “co-employment” relationship with their client employers. Co-employment (not to be confused with joint employment, a legal concept discussed later in this letter) is a contractual relationship between a small business and a PEO that involves the sharing and allocating of employment responsibilities in accordance with a PEO client service agreement (“CSA”). Through the co-employment relationship, a PEO takes on a broad range of employer responsibilities, which can include the payment of wages and employment taxes, providing workers’ compensation coverage, and responsibility for the sponsorship, maintenance, and administration of benefit plans.

As a result, PEOs are very different from certain associations and sponsors of “open MEPs” that would cover employees of employers with no tangible relationship (other than their participation in the same MEP). PEO client employers can be assured that their PEO is not operating the plan for purely entrepreneurial purposes; rather, the provision of benefits is a valuable service that ties to other services the PEO is performing on behalf of their clients’ and worksite employees’ interests. As explained in more detail later in this letter, in many cases, these employees will be receiving wage payments, tax forms, workers’ compensation coverage, and health benefits through the PEO. It is entirely consistent that the employee should also have access to retirement benefits through a PEO-sponsored MEP as well.

As the preamble to the Proposed Rule notes, neither ERISA nor existing federal regulations clearly address what it means to act “indirectly in the interest of an employer, in relation to an employee benefit plan” in order to be considered an “employer” under section 3(5) of ERISA. However, for this phrase to have any meaning, it should certainly encompass an entity such as a PEO whose very mission is to partner with employers in the management and administration of their business. The Proposed Rule correctly acknowledges that reality.

Ability of a “bona fide” PEO to sponsor a single plan

Building off past DOL guidance holding that certain organizations can sponsor a single MEP for the benefit of its member or client employees, the Proposed Rule extends the ability to sponsor a single MEP to a “bona fide” PEO (based on criteria discussed later in this letter). NAPEO strongly supports the Department’s position that a “bona fide” PEO may sponsor a single MEP. PEOs have a longstanding history of sponsoring retirement plans, and the introduction to this letter reviews some of the PEO industry’s successes in expanding access to retirement savings to millions of American workers. In addition, PEO-sponsored plans

⁵ ERISA section 3(5).

have helped ensure access to lower-fee investments (because of better share classes than small employer plans), as well as better participant education and investment support. Finally, the experience that PEOs bring to plan sponsorship (and plan fiduciary status) also facilitates increased compliance, tax reporting, and overall sound plan governance.

The Proposed Rule recognizes the important value provided by PEO retirement plans to America's employers and their employees. It does so by making clear that a retirement plan, when sponsored by a "bona fide" PEO, should be entitled to treatment as a single plan, with the sponsoring PEO as a section 3(5) employer. NAPEO and its members applaud the recognition afforded PEOs and PEO-sponsored retirement plans in the Proposed Rule and urge that the final rule retain this concept.

Treatment as single plan and reduced fiduciary/compliance role for participating employers

The Proposed Rule provides that a MEP sponsored by a "bona fide" PEO would be treated as a single plan, and thus would be subject to ERISA's rules as a single plan, (such as the requirement to file a single Form 5500). Additionally, the PEO as sponsor, named fiduciary, and ERISA "plan administrator" would have principal settlor and fiduciary authority over the plan, including plan investments. The preamble to the Proposed Rule does contemplate that client employers would have some limited fiduciary and compliance role: Specifically, they would "retain some fiduciary responsibility for choosing and monitoring the arrangement and forwarding the required contributions to the MEP."

NAPEO appreciates the Department's position that a MEP sponsored by a "bona fide" PEO would be treated as a single plan for purposes of ERISA. The primary impact of this position will be reduced compliance/fiduciary burdens on participating client employers with appropriate protections still in place. We also believe the guidance will help alleviate uncertainty regarding the status of PEO-sponsored plans under ERISA and also facilitate uptake of such plans by small employers (which will, in turn, facilitate increased retirement plan participation and savings by American workers).

Definition/Status as a "bona fide" PEO

Under the Proposed Rule, in order for a PEO to sponsor a MEP it must be a "bona fide" PEO. A "bona fide" PEO is defined as an entity that:

- i. The organization performs substantial employment functions, as described in paragraph (c)(2) of this section, on behalf of its client employers, and maintains adequate records relating to such functions;
- ii. The organization has substantial control over the functions and activities of the MEP, as the plan sponsor (within the meaning of section 3(16)(B) of the Act), the plan administrator (within the meaning of section 3(16)(A) of the Act), and a named fiduciary (within the meaning of section 402 of the Act);
- iii. The organization ensures that each client employer that adopts the MEP acts directly as an employer of at least one employee who is a participant covered under the defined contribution MEP; and
- iv. The organization ensures that participation in the MEP is available only to employees and former employees of the organization and client employers, and their beneficiaries.

The Proposed Rule also provides that whether a PEO performs "substantial employment functions" is based on the relevant facts and circumstances. The Proposed Rule lists nine criteria, which may be indicative of substantial employment functions. They are:

- A. The organization is responsible for payment of wages to employees of its client-employers that adopt the plan without regard to the receipt or adequacy of payment from those client-employers;
- B. The organization is responsible for reporting, withholding, and paying any applicable federal employment taxes for its client employers that adopt the plan, without regard to the receipt or adequacy of payment from those client-employers;
- C. The organization is responsible for recruiting, hiring, and firing workers of its client-employers that adopt the plan in addition to the client-employer's responsibility for recruiting, hiring, and firing workers;
- D. The organization is responsible for establishing employment policies, establishing conditions of employment, and supervising employees of its client-employers that adopt the plan in addition to the client-employer's responsibility to perform these same functions;
- E. The organization is responsible for determining employee compensation, including method and amount, of employees of its client-employers that adopt the plan in addition to the client-employers' responsibility to determine employee compensation;
- F. The organization is responsible for providing workers' compensation coverage in satisfaction of applicable state law to employees of its client-employers that adopt the plan, without regard to the receipt or adequacy of payment from those client-employers;
- G. The organization is responsible for integral human-resource functions of its client-employers that adopt the plan, such as job-description development, background screening, drug testing, employee-handbook preparation, performance review, paid time-off tracking, employee grievances, or exit interviews, in addition to the client employer's responsibility to perform these same functions;
- H. The organization is responsible for regulatory compliance of its client-employers participating in the plan in the areas of workplace discrimination, family-and-medical leave, citizenship or immigration status, workplace safety and health, or Program Electronic Review Management labor certification, in addition to the client-employer's responsibility for regulatory compliance; or
- I. The organization continues to have employee-benefit-plan obligations to MEP participants after the client employer no longer contracts with the organization.

Notably, the Proposed Rule makes clear that a PEO need not meet all of the specified criteria and that meeting even just a single criterion may be sufficient. Additionally, the Department has proposed two safe harbors for purposes of determining whether a PEO meets the “substantial employment functions” test: one for “certified” PEOs (“CPEOs”) as defined by Internal Revenue Code (“Code”) section 7705(a), and one for PEOs that are not CPEOs.

Under the first of the safe harbors, a CPEO will be considered to perform “substantial employment functions” where it has a service contract (within the meaning of Code section 7705(e)(2)) with the participating employer, and under that contract it is responsible for (i) the payment of wages to employees of client-employers, (ii) reporting, withholding, and paying any applicable employment taxes, and (iii) the recruiting, hiring, and firing workers. In addition, the CPEO must meet at least two of the other “substantial employment function” criteria listed above. The second safe harbor permits a PEO not certified as a CPEO to satisfy the “substantial employment functions” test if the PEO meets five of the nine substantial employment function criteria referenced above.

NAPEO supports the general framework that the Department has set forth in the Proposed Rule which would require a PEO to establish “bona fide” status before it could sponsor a MEP. We also specifically

endorse the following criteria as useful for establishing that a PEO is performing “substantial employment functions”:

- The organization is responsible for payment of wages to employees of its client-employers that adopt the plan without regard to the receipt or adequacy of payment from those client-employers;
- The organization is responsible for reporting, withholding, and paying any applicable federal employment taxes for its client employers that adopt the plan, without regard to the receipt or adequacy of payment from those client-employers;
- The organization is responsible for providing workers' compensation coverage in satisfaction of applicable state law to employees of its client-employers that adopt the plan, without regard to the receipt or adequacy of payment from those client-employers;
- The organization continues to have employee benefit plan obligations to MEP participants after the client employer no longer contracts with the organization.

Additionally, we respectfully request that the Department consider certain suggested changes to the Proposed Rule as described below. Absent adoption of these proposed changes, NAPEO is concerned that non-certified PEOs may be unable to meet numerous “substantial employment functions,” as proposed, and thus be unable to satisfy the terms of the non-CPEO safe harbor provided in the Proposed Rule. The proposed modifications will ensure that all PEOs - not just those certified as a CPEO - are able to meet a majority of the “substantial employment functions” criteria and thus avail themselves of the non-CPEO safe harbor. The members of NAPEO believe these proposed changes, if adopted, will allow the rule to work for the entire PEO industry, and we ask that the DOL give serious consideration to the proposed changes set forth below.

Suggested Change 1 - All CPEOs should be considered to have satisfied the “substantial employment functions” test where the service contract between the client and CPEO meets the requirements established in the Internal Revenue Code

NAPEO requests that the final rule state clearly that CPEO status alone is sufficient to establish that the “substantial employment functions” safe harbor is met in those situations where the service contract between the client and the CPEO meets the requirements established in the Internal Revenue Code. This would be appropriate because in order to become a CPEO, a PEO has to meet a variety of rigorous criteria in order to be certified as a CPEO by the IRS.

Federal statute⁶ and Treasury/IRS guidance creating the CPEO program, require that for a PEO to obtain and maintain IRS certification the PEO must:

- Meet detailed requirements established by the Secretary of the Treasury with respect to tax status, background, experience, and business location;
- Maintain a \$50,000 bond, or, if greater, a bond in an amount that is equal to 5 percent of the CPEO’s federal employment tax liabilities for the previous year (not to exceed \$1 million);
- Prepare and provide the IRS with annual independent financial statement audits prepared by a CPA;
- Provide quarterly assertions to the IRS regarding payment of all employment taxes, accompanied by an examination-level attestation by an independent CPA with respect to each such assertion;

⁶ 26 U.S. Code § 3511 and 26 U.S. Code § 7705

- Pay an annual fee of up to \$1,000 per year to be (and remain) certified;
- Assume sole liability for the collection and remission of the federal payroll taxes with respect to wages paid by the CPEO to worksite employees; and
- Verify periodically that it meets the requirements for certification and notify the IRS of any material modifications.

Further, in order for a particular customer/CPEO relationship to benefit from the certification process, the written service agreement between a customer and the CPEO must provide that the CPEO will:

1. Assume responsibility for payment of wages to such individual, without regard to the receipt or adequacy of payment from the customer for such services;
2. Assume responsibility for reporting, withholding, and paying any applicable taxes under subtitle C of the Internal Revenue Code, with respect to such individual's wages, without regard to the receipt or adequacy of payment from the customer for such services;
3. Assume responsibility for any employee benefits which the service contract may require the certified professional employer organization to provide, without regard to the receipt or adequacy of payment from the customer for such benefits;
4. Assume responsibility for recruiting, hiring, and firing workers in addition to the customer's responsibility for recruiting, hiring, and firing workers;
5. Maintain employee records relating to such individual; and
6. Agree to be treated as a certified professional employer organization for purposes of section 3511 with respect to such individual.⁷

The statutorily-required assumption of these responsibilities by CPEOs, satisfy the Proposed Rule's contemplated assumption of "substantial employment functions."

In addition to these statutory requirements, CPEOs are required by administrative guidance to also demonstrate positive cash flow on a quarterly basis; file numerous forms with the IRS about their clients, and subject their senior company leadership to FBI criminal background checks.

Given that CPEOs are statutorily required to assume requisite "substantial employment functions" and undergo significant regulatory oversight, NAPEO encourages the Department to amend the requirements of its safe harbor to make IRS PEO certification with respect to qualified service contracts the only requirement for CPEOs to qualify for the safe harbor. The requirements of CPEO certification are rigorous, and should give the Department comfort in providing a safe harbor with respect to employees of worksite employers who are covered by a CPEO's qualified service contract. The combination of all of these certification criteria provide CPEO clients and their shared employees with substantial safeguards and significant certainty with respect to federal tax rules. That same certainty should be provided under the ERISA rules with respect to the Proposed Rule.

Suggested Change 2 - Changes to certain "substantial employment functions" criteria

NAPEO appreciates the Department's efforts to create a second safe harbor under which a PEO only needs to meet a majority of the "substantial employment functions" listed. Such a safe harbor should help ensure that even those PEOs that are not certified as CPEOs by the IRS have a means to qualify (with certainty) as a "bona fide" PEO for purposes of the Proposed Rule.

⁷ 26 U.S.C. 7705(e)(2).

Per the comments that follow, NAPEO requests that the Department further refine the “substantial employment functions” for PEOs as part of final rulemaking. This should accord with the ERISA section 3(5) definition of “employer” while ensuring that the criteria accurately reflect typical PEO operations and functions.

As described previously, a PEO/client relationship involves a contractual allocation and sharing of certain employer responsibilities between the PEO and the client, as delineated in the CSA. For the obligations contractually allocated to a PEO, the PEO assumes specific employer rights, responsibilities, and risks through the establishment and maintenance of a relationship with the employees performing services for the client. More specifically, a PEO establishes a contractual relationship with its clients whereby the PEO:

- Remits wages and withholdings for employees subject to the PEO arrangement;
- Issues Form W-2s for the compensation paid under its Employer Identification Number; and
- Reports, collects and deposits employment taxes with local, state and federal authorities.

In addition, a PEO may in many instances:

- Assume certain employment responsibilities for specified purposes regarding the workers at the client locations;
- Reserve a right of direction and control of the employees with respect to particular matters; and
- Share or allocate employment responsibilities with the client in a manner consistent with the client maintaining its responsibility for its product or service.

The specific roles of the PEO and the client depend upon the facts and circumstances of each relationship - that is, each obligation should be examined individually as employment responsibilities are assigned in the parties' CSA. Each party may assume responsibility for certain obligations of employment, while both parties might share responsibility for other obligations and be considered “an” employer.

There are three “substantial employment functions” criteria that NAPEO recommends revising slightly to better reflect industry practice, and how PEOs and their clients share employer functions.

First, we recommend revising the following:

- The organization is responsible for recruiting, hiring, and firing workers of its client-employers that adopt the plan in addition to the client-employer's responsibility for recruiting, hiring, and firing workers;

to:

- The organization retains the right to recruit, hire, and fire workers in addition to the client employer's responsibility for recruiting, hiring, and firing workers.

This change would better reflect how PEOs exercise this employer responsibility with their client employers on matters of recruiting, hiring, and firing shared employees, as well as aligning with many of the state licensing requirements.

Second, we recommend revising:

- The organization is responsible for integral human-resource functions of its client-employers that adopt the plan, such as job-description development, background screening, drug testing, employee-handbook preparation, performance review, paid time-off tracking, employee grievances, or exit interviews, in addition to the client employer's responsibility to perform these same functions;

to:

- The organization is responsible for providing integral human-resource services to its client, such as job description development, background screening, drug testing, employee-handbook preparation, performance review, paid time-off tracking, employee grievances.

This change better describes how most PEOs interact with their small and mid-sized business clients. PEOs may offer these, and other human resources, services based on their clients' needs. And while these services are seamlessly integrated into a client's workspace, the client may be responsible for any actions resulting from the performance of these functions.

Third, we recommend revising:

- The organization is responsible for regulatory compliance of its client-employers participating in the plan in the areas of workplace discrimination, family-and-medical leave, citizenship or immigration status, workplace safety and health, or Program Electronic Review Management labor certification, in addition to the client-employer's responsibility for regulatory compliance;

to:

- The organization is responsible for providing regulatory compliance assistance in areas such as workplace discrimination, family and medical leave, citizenship or immigration status, workplace safety and health, or Program Electronic Review Management labor certification.

Providing regulatory compliance assistance is a valuable service provided by PEOs to their clients. PEOs help small and mid-sized companies comply with a myriad of federal and state employment laws. The PEO's role is advisory, and the client ultimately retains the responsibility for compliance since these functions are appropriately performed by the employer "on site". Therefore, adding the word "assistance" better clarifies the role the overwhelming majority of PEOs assume with their clients.

Suggested Change 3 - Elimination of certain "substantial employment functions" criteria

NAPEO suggests that two "substantial employment functions" criteria be eliminated, as they do not generally reflect how PEOs interact with their clients. These are functions performed almost exclusively by client employers when they have a relationship with a PEO:

- The organization is responsible for establishing employment policies, conditions of employment, and supervising employees in addition to the client-employer's responsibility to perform these same functions; and
- The organization is responsible for determining employee compensation, including method and amount, in addition to the client employer's responsibility to determine employee compensation.

Suggested Change 4 - Addition of new “substantial employment functions” criteria

Finally, NAPEO is recommending that the following be added to the final rule as an additional “substantial employment function”:

- The organization is licensed and/or registered to do business as a PEO in a state where specific requirements are mandated in order for a PEO to operate in that jurisdiction.

Currently 42 states require PEOs to be licensed and/or registered in the state in order to operate in the respective jurisdiction. Many states have operational and licensing requirements similar to the federal CPEO program, such as payment of wages; remittance of taxes; annual audits; and bonding. Most PEOs are licensed or registered in at least one state, and the fact that a PEO has gone through that process of licensing or registration would be a good criterion for establishing that a PEO is performing “substantial employment functions.”

NAPEO believes that with these changes to the “substantial employment functions” criteria, the Department will have a meaningful set of standards to establish “bona fide” status based on the employment functions the overwhelming majority of PEOs perform.

Potential for “Joint Employment” Relationship

The issue of whether two separate entities can be considered “joint employers” of the same employee is a complicated one, as the analysis is heavily fact-specific and also depends on which specific statutory rule is being applied.

The preamble to the Proposed Rule states that, “[t]he [Proposed Rule] would not affect whether ... PEOs assume joint employment relationships with ... client employers.” It further states that, “[a] PEO’s status under this proposal and whether a PEO performs substantial employment functions as described herein, however, is not tantamount to the PEO’s assumption or creation of an employment relationship (whether referred to as joint employment or otherwise) with the client-employer, for purposes of other laws or liabilities. The question of joint employment for purposes of other laws and liabilities is an independent inquiry wholly unaffected by a PEO’s potential status as an “employer” within the meaning of ERISA section 3(5). Whether a PEO qualifies as an ERISA section 3(5) ‘employer’ under the ‘indirectly’ provision has no effect on the rights or responsibilities of any party under any other law, including the Code, and neither supports nor prohibits a finding of an employment relationship.”

NAPEO is in full agreement with the Department’s analysis as set forth in the preamble to the Proposed Rule and requests that it be retained as part of any final rulemaking. This clarification should help protect PEOs from being subject to unintended liability (such as tort liability, or under other federal or state statutes) that might otherwise discourage PEO sponsorship of retirement plans, thus undermining the purpose of the Proposed Rule.

Notice Requirements Regarding “Bona Fide” PEO Plans

The preamble to the Proposed Rule requests comments “on whether any notice or reporting requirements are needed to ensure that participating employers, participants, and beneficiaries of MEPs, are adequately

informed of their rights or responsibilities with respect to MEP coverage and that the public has adequate information regarding the existence and operations of MEPs.”

NAPEO does not believe that additional notice requirements are necessary with respect to “bona fide” PEO plans. ERISA already imposes extensive notice and disclosure requirements upon benefit plans, including through the required disclosure of written plan documents and Form 5500s (upon request), and the automatic disclosure of SPDs, SMMs, and annual fee disclosures, to name a few. The SPD and the Form 5500 will clearly disclose that a plan is a MEP. This, along with other disclosures (including the annual fee disclosures and schedule C information to the annual Form 5500) should be sufficient to inform participating employers, participants and beneficiaries that their retirement plan is a MEP. In addition, while participating employers, participants, and beneficiaries certainly have the right to know and understand that their retirement plan is a MEP, as a practical matter the benefits and rights available to them should not be affected by the fact that the plan is a MEP as opposed to a single-employer retirement plan (or a MEP that is considered multiple plans).

Department Statements Regarding Allocation/Administration of Plan-Related Fees

In the preamble to the Proposed Rule, the Department states that the PEO as the plan sponsor, plan administrator and named fiduciary of the MEP will have “considerable discretion in determining, as a matter of plan design or a matter of plan administration, how to treat the different interests of the multiple participating employers and their employees. Accordingly, this person, in distributing, investing, and managing the MEP’s assets, must be neutral and fair, dealing impartially with the participating employers and their employees, taking into account any differing interests.” The Department goes on to state: “For example, when the fiduciary of a large MEP uses its size to negotiate and secure discounted prices on investments and other services from plan services providers, as is generally required by ERISA, the fiduciary is bargaining on behalf of all participants regardless of the size of their employer and should take care to see that these advantages are allocated among participants in an evenhanded manner. Treating participating employers and their employees differently without a reasonable and equitable basis would raise serious concerns for the Department.”

The Department has requested comments “on whether there is a need for guidance or clarification on the application of this principle to the various aspects of MEP administration, including investment management, recordkeeping, and allocating plan costs and expenses among the participants and beneficiaries of participating employers.” NAPEO does not believe that such additional guidance is necessary. As noted above, PEOs have significant experience administering retirement plans and acting as plan fiduciaries, and they are certainly aware of the general principles espoused above. To the extent additional guidance becomes warranted, the Department can always then exercise its interpretive authority as needed.

Additional Comments: Form 5500 – Alternative Methods of Compliance

While not specifically included as part of the Proposed Rule, there is an additional issue that NAPEO would like to bring to the attention of the Department as part of our comments. Specifically, NAPEO would like the rule to address and clarify the Form 5500 filing requirements to multiple employer plans.

In 2014, the Department issued an Interim Final Rule⁸ implementing an amendment to ERISA section 103(g) made by legislation enacted in 2014 (Public Law 113–97) to change the annual reporting requirements with

⁸ 79 Fed. Reg. 66617 (Nov. 10, 2014).

respect to multiple-employer plans. As a result of the Interim Final Rule, any plan that checks the “multiple-employer plan” box is required to list each of its participating employers during the plan year by name and employer identification number (“EIN”) and include a good faith estimate of the percentage of total contributions made by each participating employer during the plan year. Because Form 5500 information is available to the general public, this participating employer information is accessible by competitors of any association, financial institution, or other entity sponsoring a multiple-employer plan.

We ask that the Department, either as part of final rulemaking regarding the Proposed Rule or otherwise, revise the Interim Final Rule and Form 5500 instructions to give multiple employer plans the option of separately submitting their lists of participating employers and estimates of the percentage of total contributions in a manner that keeps such information confidential.

Specifically, NAPEO proposes that a multiple-employer plan that has no objection to publicly disclosing this information continue to be permitted to file such information as an attachment to the Form 5500 consistent with the current reporting requirement. However, if a multiple-employer plan is a “bona fide” PEO plan and determines that publicly disclosing this information could cause harm to the plan and participants, the plan administrator should have the option of indicating in the Form 5500 filing that this information will be disclosed to the Department in a separate mailing, and should have the ability to mail the information to the Department under separate cover, outside of the Form 5500 filing itself. NAPEO believes that this alternative method of filing provides the Department with the information it wants to receive about participating employers, while allowing multiple-employer plans to protect themselves from competitors if they determine hardships could result.

PEOs rigorously guard the names of their clients, as they are among the company’s most valuable assets. This requirement is akin to forcing a PEO to list publicly its clients – something no PEO would otherwise ever choose to do. However, it is not just the PEO that may be harmed in this situation. Keeping the participating employer list from getting into the hands of competitors also is in the interest of plan participants. If, as a result of marketing activities related to publication of the PEO client list, a small business is convinced to switch from its existing PEO multiple-employer plan to another plan, the move to a new plan is likely to result in a disruption in plan benefits and administrative expenses that will be borne by plan participants. Such a change also could result in adverse tax and other consequences to small business employees (*e.g.*, changes in investment options and blackout periods; causing outstanding loans to become deemed distributions; increasing the possibility of lost benefits or orphaned retirement savings).

Further, as a result of these negative consequences of the existing reporting requirements, there currently are great inconsistencies in how multiple-employer plans are reporting the participating employer information in their Form 5500 filings. NAPEO believes there needs to be clear, consistent rules on how multiple-employer plans can comply with the participating employer reporting rules and submit the required information to the Department but at the same protecting participating employers and their employees from adverse consequences.

The Department has ample authority to provide alternative methods of compliance with this reporting requirement. ERISA section 110 provides generally that the Department may grant plan administrators relief from “any requirement” of Part 1 of ERISA for a pension plan provided that it determines that (1) use of the alternative method is consistent with ERISA and provides adequate disclosure to plan participants and beneficiaries and adequate reporting to the Department, (2) the application of the requirement would increase the costs to the plan or impose unreasonable administrative burdens with respect to the operation of the plan, and (3) the application of the requirement would be adverse to the interests of plan participants in the aggregate. Providing multiple-employer plans with the option of separately submitting

their participating employer and estimated contribution information in a manner that keeps such information confidential satisfies these criteria. This approach is consistent with ERISA and provides adequate reporting to the Department.

Conclusion

NAPEO members believe this Proposed Rule provides additional certainty for small businesses and the employees who benefit from the valuable services offered by PEOs. The Department has done an excellent job structuring a rule that allows PEOs to provide 401(k) benefits to these employees, in a manner that is not burdensome to the PEO industry or the small and medium-sized businesses it serves. The rule also protects those individuals who rely on PEO-sponsored 401(k) plans for their retirement security and will enhance access to 401(k) retirement benefits.

NAPEO – and its nearly 500 PEO and service partner members - appreciate the opportunity to comment on this proposed rule. If you have any questions, feel free to contact Thom Stohler, Vice President of Federal Government Affairs at (703) 739-8167.

Sincerely,

A handwritten signature in black ink, appearing to read 'Pat Cleary', with a horizontal line underneath the signature.

Pat Cleary
President and CEO