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DOL opens door to wider MEP availability; but how much?

Advocates of expanding access to retirement plans through a multiple employer plan (MEP) approach have been hoping for a relaxation of existing rules that govern these cooperative arrangements. Now, the Department of Labor (DOL) has obliged—at least to a degree. But if MEP proponents were looking for a magic bullet to significantly expand worker coverage and saving within employer plans, that outcome—at least as it can be influenced by MEPs—will only be determined with time and employers' response to the following guidance.

DOL Responds to President's Executive Order

On October 23, 2018, the DOL published in the *Federal Register* much-anticipated proposed regulations on "association retirement plans," new terminology for arrangements that have historically been called MEPs. Not only is the terminology new, but the regulations relax somewhat prior DOL guidance that restricted the ability of several employers to join together in a commonly-administered plan. A key objective in such arrangements is to share expense, labor, and responsibility, yet retain the ability of each participating employer to tailor plan features to its own needs.

These proposed regulations are a response to President Trump's August 2018, Executive Order directing the DOL and Treasury Department to craft and issue guidance intended to increase participation in employer-sponsored retirement plans. Central to this were the Order's instructions to provide guidance that would ease restrictions on employers wishing to participate in a MEP. Notably, the new guidance applies only to ERISA-governed *defined contribution* plans. No effective date is proposed, and public comments are being accepted through December 24, 2018.

Treasury Guidance is Still Missing

Not yet responding to the Order is the Treasury Department. Current Treasury regulations as they apply to MEPs do not insulate an employer from undesirable consequences—including plan disqualification—for compliance failures by one or more participating employers. This remains a missing piece to the MEP puzzle, much-desired protection against a so-called "bad apple" employer that could threaten an entire plan. But given the prominence of MEPs in Trump administration priorities, predictions of Treasury regulations being issued "in the near future" could mean just that.

What's the Attraction of a MEP?

Why would an employer choose participation in a MEP, rather than having its own plan that covers only its own employees? There are numerous reasons, which may include the following.

- One plan audit, covering all participating employers
- Common Form 5500, *Annual Return/Report of Employee Benefit Plan*, covering all participating employers
- Delegation of plan administration duties to the plan sponsor

- Less fiduciary liability for participating employers
- Potential for reduced investment fees, based on pooling of plan assets to achieve more bargaining power

Will High MEP Expectations be Met?

While some expect the new DOL guidance to lead to more employers thinking seriously about establishing and participating in a retirement plan, some expectations may not be fully met. The following examples show why.

- Investment fees have been declining, even for small plans, for various reasons (e.g., increased scrutiny of fees and sales charges)
- Recordkeeping has become very automated. The industry's largest recordkeepers have wrung much—if not all—of the "scalable" efficiencies and savings out of the system.
- MEPs often allow each participating employer to have different provisions (e.g., eligibility, vesting, entitlement to allocations), there could be more complexity in MEP plan administration.
- Withdrawal from a MEP arrangement is an administrative process, not a mere declaration. It generally involves spinning-off that employer's portion to form a stand-alone plan, which is not free of time and expense.

Defining "Employer" is Key

The Employee Retirement Income Security Act (ERISA) defines an "employee pension benefit plan" as a "plan …established or maintained by an employer or employee organization...that … provides retirement income…" ERISA Sec. 3(4) provides examples of an employee organization; e.g., "any labor union."

But it is not the definition of employee organization—rather, the definition of *employer*—that has been at the heart of the debate over which groups or associations can sponsor a MEP. ERISA Sec. 3(5) recognizes the ability of "a group or association of employers" to "act[ing] directly as an employer" for plan purposes. If conditions are met, the group or association may sponsor a plan in which certain other employers may choose to participate. If conditions are not met, the de facto result is each employer having to sponsor its own plan.

Previous guidance defining "employer" for MEP purposes has relied heavily on DOL Advisory Opinions.* In these, the agency has considered not only the provisions of ERISA, but also the Internal Revenue Code, and judicial review. These opinions date back to at least 1980, and—as a whole—have generally been considered restrictive.

The most recent and familiar is Advisory Opinion 2012-04A. It's instructive for its illustration of past DOL rulings. The arrangement proposed under Advisory Opinion 2012-04A would have allowed unrelated employers to participate in a single 401(k)/profit sharing MEP, their only common links being the investment advisory firm, and a shell corporation formed to sponsor the plan. The DOL found the proposal unacceptable, inasmuch as the applicants met neither the criteria of being an "employee organization," nor the meaning of "employer" under ERISA. The DOL noted the fact that the participating employers would have no "substantial common ownership, control, or organizational connections" sufficient to treat them as one employer.

How the New Regulations Redefine "Employer"

The preamble to the proposed regulations states that their purpose "is to clarify which persons may act as an employer …in sponsoring a multiple employer defined contribution pension plan." The regulations describe a "bona fide group or association of employers," and "bona fide professional employer association" as meeting the ERISA definition of "employer," and thus—if these regulations are made final—entitled to act as an employer for MEP purposes.

What is a Bona Fide Group of Employers?

The elements necessary to be considered a bona fide group or association of employers are as follows (quotations indicate regulations language).

- "The primary purpose of the group or association may be to offer and provide MEP coverage to its employer members and their employees," and must have "at least one substantial business purpose…" (as for this purpose, it "is not required to be a for-profit activity," and the regulations do not require a business purpose *in-common* among the participating employers).
- Each participating employer must employ at least one person covered under the plan (see *Special Rules for Owner-Employees*, below).
- The group must have an organizational structure, with bylaws or other indications of a formal structure.
- The plan must be controlled by participating members (not a coordinating organization or service provider).
- The group must have a "commonality of interest," which can be satisfied by 1) being in the same trade, industry, line-of-business, or profession; or 2) having "a principal place of business in the same region". A region may be as large as a single state, or can be a "metropolitan area" that spans state borders. *(Region as a definition of commonality is a significant expansion of conditions that can enable creation of a MEP).*
- Only employees, former employees, or their beneficiaries may participate in the plan.
- The group of employers cannot be "a bank or trust company, insurance issuer, broker-dealer, or other financial services firm (including pension recordkeepers and third-party administrators)…".

What is a Bona Fide Professional Employer Organization?

A professional employer organization—also known as a PEO—generally provides personnel that perform human resource functions for client businesses on a contract basis. A PEO can be considered a "bona fide" PEO for MEP purposes based on facts and circumstances, or by meeting the conditions of a "Certified PEO" (the latter is a certification granted by the IRS).

Facts-and-circumstances conditions for a "bona fide" PEO are as follows.

- The PEO organization performs substantial business functions for its member clients (may include a combination of payroll, income tax withholding and reporting, recruiting, hiring and firing, employment policies, human resource functions, regulatory compliance, executing benefit plan obligations, etc…).
- The PEO has "substantial control over the functions and activities of the MEP.
- Employer-clients of the PEO must be acting directly as an employer for at least one employee participating in the MEP.
- Participation must be limited to current and former employees of the PEO and its client-employers, and their beneficiaries.

Special Rules for Owner-Employees

A noteworthy element of President Trump's August Executive Order was its DOL directive to consider how sole proprietors, working owners, and other "entrepreneurial workers with nontraditional employer-employee relationships" might be included in MEP arrangements. These proposed regulations state that "a working owner of a trade or business without common law employees may qualify as both an employer and as an employee …"and thus be eligible to participate in a MEP as defined in these regulations.

Such person must have an ownership interest in the trade or business, have income from providing personal services, and meet minimum work time or earnings tests in order to qualify for MEP participation. (It is noteworthy that in doing so, an owner-only employer—generally exempt from ERISA—would be opting to participate in an ERISA-governed plan.)

Conclusion

Broadening employers' ability to reap the full benefits of MEP participation has been a galvanizing issue for several years. DOL regulations intended to do just that have now been proposed. It remains to be seen whether this guidance will have the intended effect of extending employer plan benefits to more American workers. These regulations stop well short of permitting "open MEPs"—arrangements with no employer-affiliating criteria other than having a common service provider. Yet they may be a step in the right direction. Ascensus will continue to monitor the status of these regulations, and the industry's response to them. Visit ascensus.com for the latest developments.

[*] Advisory Opinions shaping DOL employer/MEP policy have included 80-42A, 94-07A, 96-25A, 2001-04A, 2003-17A, and 2008-07A.