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Washington Pulse

August 2019

Final Regulations Expand MEP Options

In 2018, roughly 38 million private-sector employees did not have access to a retirement plan*. This troubling statistic led the Trump Administration to issue an Executive Order, directing the Department of Labor (DOL) and the Treasury Department to issue guidance that would help increase participation levels in employer-sponsored retirement plans.

On July 31, 2019, the DOL fulfilled this directive by releasing final regulations on association retirement plans (ARPs)—also known as multiple employer plans, or MEPs. A MEP typically allows multiple employers to participate in a single retirement plan, which may—among other things—help reduce plan administrative and fiduciary responsibilities for participating employers. The final regulations are substantially similar to the proposed regulations, which were covered in detail in a previous *Washington Pulse*.

Why the Final Regulations are Important

One of the most important outcomes of the final regulations is the expanded interpretation of the term "employer." The current definition of "employer" under ERISA Section 3(5) is unclear because the term "group or association of employers" is not defined. As a result, many in the retirement industry have relied on various DOL advisory opinions that seemed unnecessarily narrow.

The final regulations clarify that a "bona fide group or association of employers," and a "bona fide professional employer organization" that satisfy certain criteria are deemed to be able to act in the interest of an employer for MEP purposes. Although the final regulations expand the term "employer," the guidance does not create "open MEPs," under which multiple participating employers share no common characteristic, affiliation, or purpose (as has been proposed in pending legislation).

Commonality of Interest Requirement Remains

To qualify as a "bona fide group or association of employers," the group or association of employers must meet seven requirements—one of which is the "commonality of interest" requirement. To meet this requirement, the employers within the group or association must

- be in the same industry, trade, line-of-business, or profession; or
- have a business in the same region.

The DOL is taking a "middle-of-the-road" approach toward expanding or restricting the commonality requirement. Responding to the proposed regulations, some commenters asked the DOL to impose a less restrictive test by eliminating the commonality of interest requirement. The elimination of this requirement would essentially allow groups or associations of employers to form open MEPs. The DOL, however, decided to keep the commonality of interest requirement. Although this provision is not required by statute, the DOL believes that keeping this

requirement is important for several reasons—one of which is that it aligns the final ARP regulations with the final association health plan (AHP) regulations.

In the preamble to the final ARP regulations, the DOL stated that it would "construe[ ] broadly" what constitutes an industry, trade, line-of-business, or profession. The DOL believes that this broad interpretation will help expand access to MEPs. The DOL also indicated that, in general, it will not challenge

- any "reasonable and good faith" industry classification or categorization of employers, or
- the inclusion of businesses that share an economic or representational interest with other members of the group or association.

Special Rules for Owner-Employees

The 2018 Executive Order directed the DOL to consider how working owners (e.g., sole proprietors without employees) might be included in MEP arrangements. The final regulations clarify that working owners without common law employees may consider themselves to be both an employer and an employee, and therefore eligible to participate in a MEP. To qualify for MEP participation, an owner-employee must 1) have an ownership interest in the trade or business, 2) have income from providing personal services to the trade or business, and 3) meet minimum work hours or earnings tests.

New PEO Requirements

Under the final regulations, a professional employer organization (PEO) must meet four requirements in order to qualify as a "bona fide PEO." A bona fide PEO may act as an "employer" for purposes of sponsoring a MEP that covers the employees of its client employers. To qualify as a bona fide PEO, a PEO must

- perform substantial employment functions for its client employers;
- have substantial control over the MEP's functions and activities and continue to have employee-benefit-plan obligations to MEP participants after the contract between the PEO and its client employers ends;
- ensure that each client employer has at least one participant covered under the MEP; and
- limit MEP participation only to current and former employees of the PEO and the PEO's client employers, to former client employers, and to beneficiaries.

Whether a PEO performs "substantial employment functions" on behalf of its client employers is generally based on the facts and circumstances. But PEOs needing more regulatory certainty can take advantage of a new safe harbor, which is separate from the facts-and-circumstances test. (The proposed regulations contained a complicated regimen of safe harbors; the final regulations contain a single, simplified safe harbor with four conditions that PEOs must meet.)

Miscellaneous Provisions

Severability Provision Provides Safety Net

The final ARP regulations include a severability clause. Under this clause, if any provisions are found to be unenforceable, or stayed by court action, the remaining provisions of the regulations would remain operative and enforceable. (The regulations include examples of how this severability provision would be applied.)

The severability clause is similar to the one found in the final AHP regulations, which were released in June 2018. Since then, the final AHP regulations have encountered legal obstacles—including having certain provisions

vacated by the U.S. District Court for the District of Columbia. Whether the ARP guidance generates similar concerns remains to be seen.

States Can Still Establish MEPs

The DOL received numerous comments questioning how the final regulations would affect other guidance—including DOL Interpretive Bulletin 2015-02, which gives states the authority to establish state-facilitated MEPs. The DOL clarified that, although the final regulations do supersede other preexisting DOL guidance, the regulations do not supersede this interpretive bulletin.

Open MEPs Still a Possibility

Although the final regulations don't allow for open MEPs, the DOL has not ruled out future rulemaking that may permit them. Following the release of the proposed regulations, the DOL received approximately 60 comments; more than half of those comments addressed this issue, and the majority supported the creation of open MEPs or pooled employer plans.

Because of the comments received, the DOL has issued a request for information (RFI) that asks for responses on several questions addressing such issues as 1) the cost and complexity of open MEPs, 2) whether the DOL should allow financial institutions to sponsor open MEPs for unrelated employers, and 3) whether the DOL should expand its regulatory definition of employer to include "corporate MEPs" and affiliated service groups.

Although not officially defined, a corporate MEP typically consists of a plan that covers a group of employers related by some level of common ownership—but not enough ownership to constitute a controlled group or affiliated service group. There were three reasons the DOL included corporate MEP questions in the RFI.

- To obtain information on the level of common ownership that would indicate enough genuine interests to permit members to act in the interests of other group members for purposes of sponsoring a MEP.
- To determine whether the DOL should consider other facts and circumstances in addition to the level of common ownership between employers.
- To determine what criteria two or more tax-exempt organizations or a tax-exempt organization and another organization must meet to be considered an employer under ERISA Section 3(5).

No Additional Reporting Requirements

The proposed regulations solicited comments on whether it should modify the current reporting and disclosure requirements. Because of the comments received, the DOL decided not to modify the current reporting and disclosure requirements. It also clarified that the MEP plan administrator is responsible for meeting these requirements.

The Pros and Cons of Joining a MEP

Some employers may benefit from joining a MEP—especially smaller employers that may not have the time or money to offer their own retirement plan. For example, participating employers may benefit by delegating plan duties to the MEP plan sponsor, incurring less fiduciary liability and sharing reporting responsibilities. But MEPs may not provide a substantial benefit to all who join. For example, proponents claim that participating employers could file one Form 5500 information return collectively. While this is true, many small employers don't have to file this form, so this benefit could be minimal at best. Cost savings is another commonly perceived benefit. But

because plan administration fees and investment fees have lessened in recent years, employers may not incur substantial cost savings after joining a MEP.

More to Come . . .

This year has seen a substantial increase in MEP-related activity. In addition to the DOL's final regulations, the IRS released proposed regulations eliminating the "one bad apple rule," which would provide an important improvement for MEPs. And earlier this year the U.S. House of Representatives passed the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019. If enacted, this proposed legislation would eliminate the current commonality requirement—resulting in open MEPs.

While the final ARP regulations may not go as far as some in the industry would like, the regulations do give employers participating in MEPs more certainty about their status under ERISA. And based on the information contained in the RFI, it appears that the DOL is at least preparing for the possibility of open MEPs sometime in the future.

The final ARP regulations are effective September 30, 2019. Those looking for additional information may refer to the DOL's fact sheet. And, as always, visit ascensus.com for any new developments.

* "National Compensation Survey: Employee Benefits in the United States", The U.S. Department of Labor's Employee Benefits Security Administration, March 2018