

MEMO# 31451

October 23, 2018

DOL Proposes Rule on Association Retirement Plans and Other Multiple Employer Plans

[31451]

October 23, 2018 TO: ICI Members
Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: DOL Proposes Rule on Association Retirement Plans and Other Multiple Employer Plans

The Department of Labor (DOL) has proposed a regulation intended to expand the use of multiple employer plans (MEPs) to provide workplace retirement benefits.[\[1\]](#) As described later, the proposal is narrower in scope than the “open” MEP legislative proposals currently under consideration by Congress. The proposed rule would clarify that groups or associations of employers and professional employer organizations (PEOs) can, when satisfying certain criteria, constitute “employers” within the meaning of section 3(5) of ERISA for purposes of establishing or maintaining an individual account “employee pension benefit plan” within the meaning of ERISA section 3(2).[\[2\]](#) The proposal also would permit certain working owners without employees to participate in a MEP sponsored by a group or association.

The proposal comes on the heels of the President’s August 31, 2018 Executive Order[\[3\]](#) directing DOL to examine policies that would expand availability of MEPs, particularly for small and mid-sized businesses, and expand access to workplace plans generally (including MEPs) for part-time workers, sole proprietors, and others with “non-traditional” employment relationships. Although the proposal is aimed at increasing small business plan sponsorship, it is not limited to employers of any particular size. Comments on the proposed regulation will be due 60 days after the date the proposal is published in the Federal Register.

Under the proposal, a “bona fide group or association of employers” and a “bona fide professional employer organization” would be deemed to be able to act in the interest of an employer under section 3(5), and thereby sponsor a defined contribution MEP, by satisfying certain criteria described below.

- A “bona fide group or association of employers” must meet the following criteria:[\[4\]](#)
 - The primary purpose of the group or association may be to offer and provide MEP coverage to its employer members and their employees; however, the group or

association also must have at least one substantial business purpose unrelated to offering and providing MEP coverage or other employee benefits to its employer members and their employees.

- Each employer member of the group or association participating in the plan is a person acting directly as an employer of at least one employee who is a participant covered under the plan.
- The group or association has a formal organizational structure with a governing body and has by-laws or other similar indications of formality.
- The functions and activities of the group or association are controlled by its employer members, and the group's or association's employer members that participate in the plan control the plan. Control must be present both in form and in substance.
- The employer members have a commonality of interest. Employer members of a group or association will be treated as having a commonality of interest if either:
 - a. The employers are in the same trade, industry, line of business or profession; or
 - b. Each employer has 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).
- The group or association does not make plan participation through the association available other than to certain employees and former employees of employer members (and their beneficiaries).
- The group or association is not a bank or trust company, insurance issuer, broker-dealer, or other similar financial services firm (including pension recordkeepers and third party administrators), or owned or controlled by such an entity or any subsidiary or affiliate of such an entity, other than to the extent such an entity (or subsidiary or affiliate) participates in the group or association in its capacity as an employer member of the group or association.
- A “bona fide professional employer organization”[\[5\]](#) must meet the following criteria:
 - The organization performs “substantial employment functions” on behalf of its client employers, and maintains adequate records relating to such functions.
 - a. The criteria relevant to whether a PEO performs substantial employment functions on behalf of its client employers include the PEO being responsible for (among other things): payment of wages; reporting and withholding federal employment taxes; recruiting, hiring and firing; determining employee compensation; providing workers' compensation coverage; certain integral human resources functions; and certain regulatory compliance functions.
 - b. The proposal states that the presence of a single criterion alone may, depending on the facts and circumstances of the particular situation and the particular criterion, be sufficient to satisfy the “substantial employment functions” requirement.
 - c. The proposal also provides a safe harbor under which a PEO shall be considered to perform substantial employment functions on behalf of its client employers if the organization meets any five or more of the enumerated criteria.

- d. In addition, certain “certified professional employer organizations” (CPEOs) as defined in section 7705(a) of the Internal Revenue Code could also meet a separate safe harbor for the “substantial employment functions” requirement.
- The organization has substantial control over the functions and activities of the MEP, as the plan sponsor, the plan administrator, and a named fiduciary.
 - 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 MEP.
 - 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 proposal also provides that a working owner of a trade or business without common law employees may qualify as both an employer and as an employee of the trade or business for purposes of meeting the requirements for a “bona fide group or association of employers” described above.

Although the proposal represents an expansion of DOL’s existing interpretive guidance relating to the type of group or association able to act in the interest of an employer under ERISA section 3(5) in sponsoring a MEP—particularly with the addition of a geographic-based commonality of interest—the proposal would not permit the broader variety of “open” MEP contemplated under various legislative proposals pending in Congress.^[6] These proposals would amend ERISA to eliminate the commonality of interest requirement that DOL has interpreted as necessary for a group of employers to adopt a single plan qualifying as a MEP. In the preamble to the proposal, DOL explains its view that the proposal is more limited than the legislative proposals relating to open MEPs because DOL is limited by its statutory authority under ERISA.

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endnotes

[1] The proposed regulation is available at:
<https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-23065.pdf>.

[2] An “employer” under section 3(5) of ERISA includes “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.”

[3] The Executive Order is available at:
<https://www.whitehouse.gov/presidential-actions/executive-order-strengthening-retirement-security-america/>. The Order specifies that within 180 days, DOL must consider whether to propose a rulemaking or issue other guidance regarding the availability of a MEP to a group or association of employers. Also in regard to MEPs, the Order directs Treasury to consider proposing regulations or other guidance for MEPs on satisfying tax-qualification requirements when one or more adopting employers fails to meet such requirements (i.e., to address the so-called “one bad apple” rule).

[4] The criteria proposed for a “bona fide group or association of employers” to exist are consistent with the criteria enumerated in DOL’s final rule on the definition of “employer” for Association Health Plans issued earlier this year. See 83 Fed. Reg. 28912 (June 21, 2018).

[5] A professional employer organization (PEO) is described as a human-resource company that contractually assumes certain employer responsibilities of its client employers.

[6] See, e.g., the Family Savings Act of 2018 ([H.R. 6757](#)), approved by the US House of Representatives on September 27, 2018, and the Retirement Enhancement and Savings Act of 2018 (known as “RESA”), introduced in the US Senate as [S. 2526](#) and in the House as [H.R. 5282](#). For a description of the Family Savings Act, see ICI Memorandum No. 31402, dated September 24, 2018. Available at https://www.ici.org/my_ici/memorandum/memo31402.

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