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DOL Issues Final Rule on Association Retirement Plans and RFI on Open MEPs

[31881]

August 1, 2019 TO: ICI Members
Pension Committee
Pension Operations Advisory Committee SUBJECTS: Pension RE: DOL Issues Final Rule on Association Retirement Plans and RFI on Open MEPs

The Department of Labor (DOL) published a final regulation[1] intended to expand the use of multiple employer plans (MEPs) to provide workplace retirement benefits and a Request for Information (RFI)[2] on "open MEPs" (i.e., MEPs adopted by otherwise unrelated employers).[3]

Like the proposed regulation issued in October 2018,[4] the final rule clarifies the circumstances under which an employer can join a MEP through either a group or association of employers or a professional employer organization (PEO). More specifically, it provides that groups or associations of employers and 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).[5] The rule also permits certain working owners without employees to participate in a MEP sponsored by a group or association.

The final regulation largely follows the proposed regulation, with some changes to the criteria for PEO plans. Notably, the final rule retains the commonality of interest requirement for participating employers (either a common industry/trade/business or a common geographic area) and—like the proposal—prohibits financial services firms from sponsoring a group or association MEP (except to the extent a financial services firm participates in a MEP as an employer member of the group or association). The final rule is effective September 30, 2019.

In our comment letter filed in December 2018,[6] we expressed support for expanding access to MEPs, particularly for small employers, and we recommended that DOL go further by permitting unrelated employers to participate in open MEPs sponsored by financial services firms. Our letter explained that financial services firms offer unique qualifications that make them ideal candidates to sponsor MEPs and that, in preventing the use of open MEPs, the proposal is unlikely to have a significant impact on coverage. As expected, DOL declined to expand the final rule, opting instead to retain the proposed "group or association" criteria consistent with DOL's Association Health Plan (AHP) regulation (which

likewise prohibited health insurance companies from sponsoring AHPs).

DOL did, however, recognize the numerous comments it received in support of allowing open MEPs and sponsorship of open MEPs by financial services firms, by concurrently publishing an RFI on open MEPs. The RFI is intended to further develop the public record on a broad range of issues related to open MEPs, including the potential conflicts of interest raised if a commercial entity, such as a financial services firm, could sponsor an open MEP and how to mitigate those conflicts. Comments responding to the RFI are due October 29, 2019.

More detail on the final rule and RFI is provided below.

Final Rule

Under the final rule, 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:[7]
  - 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:

?. The employers are in the same trade, industry, line of business or profession, or
a. 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).

1. The group or association does not make plan participation through the association available other than to employees and former employees of employer members (and their beneficiaries).
2. 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.
   The rule also provides that a working owner of a trade or business without common law employees may qualify as both an employer and an employee of the trade or business for

purposes of meeting the requirements for a "bona fide group or association of employers." Such "working owners" must satisfy specified criteria, including either meeting an hours worked test or receiving a particular level of wages or self-employment income from the trade or business.

- A "bona fide professional employer organization"[8] must meet the following criteria:
  - The organization performs "substantial employment functions" on behalf of its client employers (determined by the facts and circumstances of a particular situation), and maintains adequate records relating to such functions. In a change from the proposal, the final rule provides a streamlined safe harbor for performing "substantial employment functions," with four required elements:[9]

?. The PEO assumes responsibility for and pays wages to employees of its client-employers that adopt the MEP, without regard to the receipt or adequacy of payment from those client employers;

a. The PEO assumes responsibility for and reports, withholds, and pays any applicable federal employment taxes for its client employers that adopt the MEP, without regard to the receipt or adequacy of payment from those client employers;

b. The PEO plays a definite and contractually specified role in recruiting, hiring, and firing workers of its client-employers that adopt the MEP, in addition to the client-employer's responsibility for recruiting, hiring, and firing workers; and

c. The PEO assumes responsibility for and has substantial control over the functions and activities of any employee benefits which the service contract may require the PEO to provide, without regard to the receipt or adequacy of payment from those client employers for such benefits.

3. The organization has substantial control over the functions and activities of the MEP, as the plan sponsor, the plan administrator, and a named fiduciary.
4. 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.
5. 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), and to employees and former employees of former client employers who became participants during the contract period between the PEO and former client (and their beneficiaries).

In the preamble to the final rule, DOL provided its views on the allocation of fiduciary and other responsibilities associated with offering a MEP, stating that:

> As an operational matter, the MEP's sponsor [whether a group or association or a PEO]—and not the participating employers—would generally be designated as the plan administrator responsible for compliance with the requirements of title I of ERISA, including reporting, disclosure, and fiduciary obligations. Under this structure, the individual employers would not each have to act as plan administrators under ERISA section 3(16) or as named fiduciaries under section 402 of ERISA. Although participating employers would retain fiduciary responsibility for choosing and monitoring the arrangement and forwarding required contributions to the MEP, a participating employer could keep more of its day-to-day focus on managing its business, rather than on its plan. In the MEP context, although a participating employer would no longer have the day-to-day responsibilities of plan administration, the business owner would still need to prudently select and monitor the MEP sponsor and get periodic reports on the fiduciaries' management and administration of the MEP, consistent with prior Department guidance on MEPs. [Footnotes omitted][10]

DOL also noted that the final rule does not affect prior guidance (Interpretive Bulletin

2015-02)[11] regarding how a state may act as a MEP sponsor.[12]

RFI

Although the rule represents an expansion of DOL's prior 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 rule does not permit the broader variety of "open" MEP contemplated under various legislative proposals pending in Congress.[13] 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 its original proposed rule, DOL explained its view that the proposal was more limited than the legislative proposals relating to open MEPs because DOL is limited by its statutory authority under ERISA.

As mentioned earlier, however, DOL does appear to be open to considering guidance that would permit open MEP arrangements even in the absence of legislation. As explained in the RFI, many commenters on the proposed rule argued in support of DOL's authority to interpret ERISA's definition of employer more broadly to permit open MEPs and to permit financial services firms to offer MEPs. DOL noted that commenters had different views of how the criteria in the proposed rule could be modified to accommodate open MEPs. In light of these differing views, as well as contrary views expressed that open MEPs should not be permitted, DOL determined that issuing an RFI would be the appropriate next step.

The RFI asks a series of questions about open MEPs, corporate MEPs,[14] and the economic impact associated with allowing open MEPs and corporate MEPs. These questions include (but are not limited to) the following:

- Should DOL amend the rule to expressly permit financial institutions or other persons to maintain a MEP on behalf of multiple unrelated employers?
- If a "Commercial Entity" (e.g., a financial institution) could sponsor an open MEP, what conflicts of interest, if any, would the Commercial Entity, affiliates, and related parties likely have with respect to the plan and its participants?
    - To what extent could a Commercial Entity that sponsors the open MEP affect its own compensation or the compensation of affiliates or related parties through its actions as a sponsor, fiduciary, or service provider to the plan?
    - What categories of fees and compensation, direct or indirect, would Commercial Entities, affiliates, and related parties likely receive as a result of sponsoring the MEP, rendering services to the MEP, or offering investments (including proprietary products) to the MEP?
    - How could these or other such conflicts of interest be appropriately mitigated?
    - How effective would the suggested conflict-mitigation approaches likely be in safeguarding MEPs from conduct that favors the interests of the Commercial Entity, affiliates, or related parties at the plan's expense?
    - Would prohibited transaction exemptions be necessary to avoid violations of Section 406 of ERISA and imposition of excise taxes under Section 4975(c) of the Internal Revenue Code?
    - Are different mitigating provisions appropriate for different Commercial Entities, and why or why not?
- Are limiting principles or conditions (such as the control requirements contained in the bona fide group or association plan context) needed in the case of open MEPs?
- If DOL allowed open MEPs, what would the impact be on MEPs offered by existing

groups or associations of employers or by existing PEOs? Is there a risk that open MEPs would undermine or destabilize these existing arrangements?

- What costs and benefits would be associated with allowing an open MEP consisting of employers with no relationship other than their joint participation in the MEP to be operated as a single ERISA-covered plan? How would the costs and benefits of open MEPs compare to those associated with MEPs sponsored by bona fide groups and associations and PEOs?
- What types of entities would have business motives to sponsor open MEPs?
- What types of employers would join open MEPs? What size would they be (i.e., would large employers, mid-size employers, or small employers be particularly interested in joining an open MEP)? How many would join open MEPs to begin offering retirement benefits to workers who previously did not have access to them? How many employers would be switching away from another type of retirement savings vehicle or plan?
- Please compare the overall cost of providing defined contribution retirement benefits among the following types of retirement plans:

    a. Open MEPs
    b. MEPs sponsored by bona fide groups and associations
    c. MEPs sponsored by PEOs
    d. Single-employer plans sponsored by small businesses

  Additionally, please compare what the likely total plan fees will be for a-d. Please compare the likely costs and fees for various component services, such as asset management, recordkeeping, and marketing and distribution, across a-d.

Comments on the RFI are due on or before October 29, 2019.

Elena Barone Chism
Associate General Counsel - Retirement Policy

endnotes

[1] The final rule is available at: https://www.govinfo.gov/content/pkg/FR-2019-07-31/pdf/2019-16074.pdf.

[2] The RFI is available at: https://www.govinfo.gov/content/pkg/FR-2019-07-31/pdf/2019-16072.pdf.

[3] Also related to MEPs, DOL recently published Field Assistance Bulletin 2019-01, which provides temporary relief for existing MEPs that have failed to follow certain Form 5500 Annual Return/Report requirements—specifically the obligation under section 103(g) of ERISA to file complete and accurate lists of participating employers with their Forms 5500. The FAB gives transition relief for MEPs that have failed to file a complete and accurate list of participating employers for the 2017 plan year and before. Specifically, DOL will not reject a Form 5500 or Form 5500-SF filed on behalf of a MEP for the 2017 plan year, or any prior plan year, or seek to assess civil penalties against the plan administrator under ERISA section 502(c)(2) with respect to such filings, solely on the basis that the plan administrator failed to include complete and accurate participating employer information in accordance with ERISA section 103(g), provided that the annual reports filed for the plan for the 2018 and following plan years comply with the requirement in ERISA section 103(g), the Form

5500 or Form 5500-SF, as applicable, and the accompanying instructions.

[4] For a description of the proposal, *see* ICI Memorandum No. 31451, dated October 23, 2018. Available at: https://www.ici.org/my_ici/memorandum/memo31451. The proposal responds to the President's August 31, 2018 Executive Order 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 rulemaking is aimed at increasing small business plan sponsorship, it is not limited to employers of any particular size. 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). Treasury issued its proposal in July 2019. *See* ICI Memorandum No. 31843, dated July 9, 2019. Available at: https://www.ici.org/my_ici/memorandum/memo31843.

[5] 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."

[6] For a copy of the ICI comment letter, *see* ICI Memorandum No. 31534, dated December 21, 2018. Available at: https://www.ici.org/my_ici/memorandum/memo31534.

[7] The criteria 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).

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

[9] The proposal included a separate safe harbor for certain "certified professional employer organizations" (CPEOs) as defined in section 7705(a) of the Internal Revenue Code. The final rule eliminates the separate safe harbor and applies the general safe harbor for the "substantial employment functions" requirement to all PEOs.

[10] 84 Fed. Reg. 37522 (July 31, 2019).

[11] See ICI Memorandum No. 29502, dated November 18, 2015. Available at https://www.ici.org/my_ici/memorandum/memo29502.

[12] 84 Fed. Reg. 37526 (July 31, 2019).

[13] See, e.g., the SECURE Act (H.R. 1994), approved by the US House of Representatives on May 23, 2019; 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 2019 (known as "RESA"), introduced in the US Senate as S. 972 and in the House as H.R. 1007. For a description of the SECURE Act, see ICI Memorandum No. 31774, dated May 24, 2019. Available at https://www.ici.org/my_ici/memorandum/memo31774. 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.

[14] A corporate MEP is described as a defined contribution plan that covers employees of employers related by some level of common ownership, but that are not in the same controlled group or affiliated service group within the meaning of section 414(b), (c), or (m) of the Internal Revenue Code.
