Flashpoint: The DOL Finalizes MEP Regulations

As discussed in our FlashPoint dated October 25, 2018, available here: https://ferenczylaw.com/flashpoint-the-new-mep-meh-proposed-regulations/, the U.S. Department of Labor ("DOL") previously introduced proposed regulations relating to certain defined contribution multiple employer plans ("MEPs"). These regulations were issued in final form on July 29, 2019 (the "Regulation"), and offer the ability of "bona fide" organizations, associations, and professional employer organizations ("PEOs") to offer closed MEPs to their participating employers.

The section of Employee Retirement Income Security Act of 1974, as amended ("ERISA") to which the new guidance relates is that which defines an "employer" for purposes of sponsoring a MEP. Under ERISA, a plan is an employee pension benefit plan only if it is established or maintained by "an employer, employee organization, or by both an employer and an employee organization." An employer is a person acting directly as an employer or acting indirectly in the interest of an employer in relation to an employee benefit plan. So, we must ask: what does that mean?

What the Small Plan Community Wants to Know

Continued Relief for Associations and PEOs, Not So Much for Open MEPs

As with the proposed regulations, the Regulation does not provide any relief for so-called "Open MEPs," particularly those that are sponsored by financial institutions and service providers for their clients. Such organizations are not considered to be "employers" under ERISA and so cannot sponsor MEPs. Open MEPs, therefore, will continue to be treated as groupings of single employer plans (with each adopting employer required to file its own Form 5500).

The DOL notes that it is, at least to some extent, anticipating the passage of legislation to deal with the Open MEP issues. However, chickens cannot be counted before they are hatched, so the preamble to the Regulation (the "Preamble") includes the statement that the DOL is "persuaded that Open MEPs deserve further consideration," but that it "does not believe that it has acquired a sufficient public record on, or a sufficiently thorough understanding of, the complete range of issues presented by the topic." As a result, the DOL is also requesting

considerable input from the practitioner community regarding Open MEPs, as a prelude to considering further regulation.

References to AHP Regulations: Whistling Past the Graveyard?

The Regulation follows many of the roads carved out by the final regulations previously issued by the DOL in relation to Association Health Plans ("AHPs"). In fact, the Regulation refers often to the possible coordination by associations of their health plan offerings with their retirement programs, and how this coordination can result in greater efficiencies and savings for the participating employers. The AHP final regulations were struck down by the D.C. District Court in *State of New York v. U.S. Department of Labor* in March of this year, where the court found that the DOL had not reasonably interpreted ERISA in those rules. The Administration has appealed that court decision.

While the Preamble refers to the case in footnotes, and some of the structure of the Regulation reflects changes meant to resolve some of the elements of the court decision, the DOL also states in a footnote that it disagrees with the court's decision and references its appeal. Furthermore, the Regulation contains a "severability" clause, under which it is made clear that, if any part of the Regulation is found to be inappropriate, the balance of the Regulation remains.

Here Are the Details for Those Who Are Interested

Bona Fide Groups or Associations

The Regulation essentially adopts the proposed rules for MEPs sponsored by Bona Fide Groups or Associations (BFGAs). An organization qualifies as a BFGA (and thereby constitutes an organization that may sponsor a MEP) if it meets the following requirements:

- *While having a retirement plan may be the primary purpose for the group or association, there must be at least one other substantial business purpose unrelated to the plan.* The Regulation provides a safe harbor under which a substantial business purpose is considered to exist if the group or association would be viable in the absence of the plan. The business purpose may include promotion of common business interests or common economic interests of a trade or community, and is not required to be a for-profit activity. The Preamble notes that the "substantial" modifier is important: the business purpose must be of considerable importance to the organization. In a discussion that is reminiscent of Billy Crystal's character, Miracle Max, from "The Princess Bride," explaining the difference between "mostly dead" and "all dead," the Preamble acknowledges that it is hard to distinguish between "merely important" and "considerably important." The Preamble does not, however, give further guidance on this issue.
- *Each participating employer must have at least one employee who is a participant in the plan.*
- *The group or association must have a formal organizational structure with a governing body and bylaws or similar indications of formality.*
- *The group or association must be controlled by its employer members, and the participating employers (who are members of the group) must control the plan.* Control must be in both form and substance. In short, the plan is likely to be run by a committee of participating employers.
- *Plan participation is not offered to anyone other than employees or former employees of group or association members (and their beneficiaries).*
- *The group or association is not a bank or trust company, insurer, broker-dealer, similar financial entity, TPA, or recordkeeper.* The group or association also cannot be owned or

controlled by such an entity or an affiliate of such an entity (except to the extent that such an entity is a member of the group or association).

Having met the above requirements for being a BFGA, there also must be a commonality of interest. This is demonstrated in one of two ways:

- The participating employers are in the same trade, industry, line of business, or profession; or
- Each participating employer must have a principal place of business in the same state or within the same metropolitan area, even if such area crosses state lines.

The Preamble includes a discussion of whether a trade or industry includes those who provide support or services to those companies. The Preamble notes by way of example an association of home builders, that would like to include plumbers, carpenters, and electricians. The Preamble provides that the DOL will not challenge any reasonable and good-faith industry classification or categorization adopted by an association, nor the inclusion of support or allied businesses in the fold.

Changes to the Proposed PEO Rules

As in the proposed regulations, the Regulation provides that Bona Fide PEOs may sponsor MEPs. However, the somewhat complex structure of the proposal, which distinguished between regular PEOs and those that have been certified by the IRS (so called CPEOs) [Okay, does anyone but me wish that these were C3POs? But I digress ….], has been abandoned in favor of a simpler standard without this differentiation. This simpler standard reduces the nine factors delineating a PEO as bona fide (as provided in the proposed regulations) down to merely four. The four factors needed to demonstrate that the PEO is a Bona Fide PEO require that the PEO:

- *Performs substantial employment functions on behalf of its client-employees and maintains adequate records relating to such functions;*
- *Has substantial control over the functions and activities of the MEP, as the plan sponsor, administrator, and named fiduciary, and continues to have responsibilities to the MEP participants after the client-employer no longer contracts with the sponsoring organization;*
- *Ensures that each client-employer that adopts the MEP acts directly as an employer of at least one employee who is a participant in the MEP; and*
- *Ensures that participation in the MEP is available only to employees and former employees of the PEO and its client-employers (whether current or former participants who entered during the period of the client-employer's contract with the PEO).*

For purposes of the first requirement, the determination of whether substantial employment functions exist is based on the facts and circumstances. However, the Regulation provides for a safe harbor. Under the safe harbor, the PEO is deemed to meet the substantial employment functions requirement if it:

- *Assumes responsibility for, and pays wages to, employees of client-employer adopters of the MEP without regard to whether the PEO is fully paid by the client-employer;*
- *Assumes responsibility for and reports, withholds, and pays any applicable federal employment taxes without regard to whether the PEO is fully paid by the client-employer;*
- *Plays a definite and contractually specified role in recruiting, hiring, and firing workers of the client-employers who adopt the MEP in addition to the role in such functions played by the client-employer (The Preamble spends some amount of time explaining this requirement with, in our opinion, very little success. But, what the DOL is apparently*

looking for is a situation in which both the client-employer and the PEO have some responsibility in hiring and firing, even if the PEO simply ratifies the intended actions of the client-employer.); and

- *Assumes responsibility for and has substantial control over the functions and activities of any benefits the service contract requires the PEO to provide, without regard to whether the PEO is fully paid by the client-employer for these benefits.*

The Working Owner Rules: When a Self-Employed Individual Constitutes an Employee

As noted earlier, the MEP requires that each participating employer have at least one employee participating in the plan. Does a self-employed owner of an incorporated business count as such an employee? Yes, says the DOL, if such individual constitutes a "working owner," who is someone who:

- *Has an ownership interest of any nature in a trade or business, whether incorporated or not, including partners or other self-employed individuals;*

- *Earns wages or self-employment income from the trade or business for providing personal services to the trade or business; and*

- *Who either:*
  - *Works at least 20 hours per week or 80 hours per month providing services to the business; or*
  - In the case of a MEP sponsored by a BFGA, has wages or self-employment income from such trade or business that at least equals the working owner's cost of coverage for participation by the working owner and its covered beneficiaries in any group health plan sponsored by the BFGA in which the working owner has a right to participate.

There is discussion in the Preamble about the hours-per-week or -month requirement. Commentators noted that some businesses, such as construction, can be quite cyclical. In those circumstances, it is possible that a business owner might have periods of low hours and low pay. The DOL agrees that averaging of hours of service or compensation over a reasonable period of time is appropriate in those circumstances, but declines to give specific guidance.

The Regulation also notes that the status of the working owner needs to be disclosed at the outset of the participation in the MEP and evaluated over time. The Regulation also notes that the working owner rules do not apply to PEO participation. Companies with no rank-and-file employees generally have no need for a PEO; therefore, there must be at least one rank-and-file employee for a working owner to participate in a PEO MEP.

Other Issues

The Preamble and the Regulation both note that an employer adopting into a MEP bears fiduciary responsibility for deciding to provide benefits through the MEP, and for monitoring the MEP by obtaining and reviewing reports from the MEP administrator. The DOL notes, however, that the MEP sponsor (i.e., the BFGA or PEO) is the plan administrator, with the myriad responsibility that goes with that title.

The Preamble discusses situations where a participating employer severs its relationship with the BFGA or the PEO. At such point, the requirement that only member-employers be participating

employers ceases to be met. In what is an excellent resolution of this problem, the DOL notes that there is no issue at all if the former employer-member ceases to make ongoing contributions to the MEP. In that case, the MEP and its plan administrator still owe responsibilities to the former employer-member's participants, as would any plan administrator to terminated participants. Presumably, the former employer-member will take action to spin off its part of the plan from the MEP.

However, if the former employer-member instead continues to contribute to the MEP, acting as if the participation is ongoing, the part of the plan on behalf of the former employer-member becomes its own single employer plan, and the balance of the MEP remains a multiple employer plan.

Finally, commentators asked the DOL to confirm that so-called "corporate MEPs"—that is, plans sponsored by employers with participating employers that have some common ownership but that is insufficient to constitute a controlled or affiliated service group—are closed MEPs. The DOL declined to do so, leaving this topic as one of the issues on which it is requesting more information.

Conclusion

As we originally stated when the proposed regulation was issued, if you are looking for guidance regarding Open MEPs, there is nothing in this finalized Regulation that will give you satisfaction. There is, of course, some solace to be taken from the fact that even the DOL seems to be hoping for legislative relief, and that it is at least contemplating Open MEP guidance if the legislation does not pass. But, for now, it is all still aspirational in nature.

On the other hand, PEOs can rejoice, as the DOL is finally giving them a roadmap to closed MEP sponsorship. When added to the relief issued earlier in the month from the failure to comply with the reporting and disclosure obligations applicable to MEPs in relation to Forms 5500 and lists of participating employers, July 2019 has been a good month for PEOs.

Last, but assuredly not least, if you are one of the entities setting up MEPs for Chambers of Commerce, you should take encouragement from the fact that the DOL refers to Chambers of Commerce as potential BFGAs at least three times within the Preamble.

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