Flashpoint: The New MEP (MEH!) Proposed Regulations

The Department of Labor ("DOL") issued proposed regulations (the "Proposal") on October 22, 2018, that represent the first major step in changing its restrictions on multiple employer plans ("MEPs"). However, it is just the first step, and does not change the landscape for Open MEPs.

The Proposal was issued in response to the President's August 31, 2018, Executive Order that directed the DOL to examine policies in relation to its historic restrictive stance on MEPs and to consider how these structures could expand access for workers to workplace retirement plans. The Proposal also comes on the heels of a similar proposal in relation to health plans of associations.

The first part of this FlashPoint will give a general description of what the Proposal does. For those who like details, the second part will be the deeper dive.

The Proposal

The Background

There are two main laws affecting retirement plans. The first is the Internal Revenue Code, which regulates tax benefits. The second is ERISA, which describes labor laws. The tax law treatment of a MEP is fairly simple. The MEP is treated as a single plan for tax purposes. Generally, this is a good thing, but there is one problem: the "one bad apple" rule. If any participating employer fails in its responsibilities to the plan, the entire plan is at risk for disqualification, or loss of the tax-exempt status.

Under ERISA, the issue is more confusing. In some situations, a MEP is treated as a single plan. This means the plan needs only one Form 5500, one audit, one bond, etc. However, if the adopting employers aren't sufficiently related to each other, the MEP is treated as a series of separate plans, each sponsored by an adopting employer, and each of which needs a separate Form 5500, a bond, etc.

While the DOL's rulings in this arena are somewhat confusing, the simplified version is as follows: If the plan is sponsored by companies that have some ownership relationship (but not enough to be considered to be one "employer" under tax laws) or are sponsored in limited situations by

associations of employers, the plan would be a single plan under DOL rules. However, if the plan is sponsored by organizations that have members that are not employers (for example, the American Dental Association, which has individual dentist members), or if the plan is sponsored by a service provider on behalf of clients who have no commonality other than that they all work with the provider (usually called "Open MEPs"), the DOL considers the arrangement to be a grouping of plans individually sponsored by the client-companies. The upshot: it's complex and unclear, so MEPs have had limited availability.

Nonetheless, many (including many in Congress and, apparently, the President) believe that MEPs provide an opportunity to reduce both cost and administrative burdens for the adopting employers, particularly for small companies. As a result, there are several bills now pending in Congress, as well as many pleas to the DOL, to make MEPs more accessible.

The Proposal Has Its Limits

It is important to note two things at the outset:

1. The Proposal does *nothing* to change the rules for Open MEPs. Under the Proposal, plans sponsored by service providers (i.e., banks, trust companies, insurance companies, broker-dealers, or similar financial service firms, and specifically including recordkeepers and third-party administrators (TPAs)), do not constitute MEPs under DOL rules.
2. The Proposal does not solve the "one bad apple" rule. The hope is that the IRS will issue guidance dealing with this problem in response to the President's Executive Order.

Furthermore, the Proposal addresses only MEPs that are defined contribution plans.

What the Proposal Does

The Proposal addresses two types of situations and makes the rules for qualifying a MEP as a single plan in those two circumstances easier: plans of Professional Employer Organizations (PEOs) and plans of bona fide associations or groups. In particular, for the latter, the "commonality" requirement, which was very complex and arcane, has been significantly simplified: if you are in the same industry or geographic region, you are good to go (assuming certain other requirements are met).

Is the Proposal Valuable?

Yes, if you are an employer that uses a PEO or has an affiliation to an organization that has the wherewithal to have a plan.

No, if you are a service provider, other than a PEO or bona fide association, who wants to provide a MEP for your clients.

The DOL Wants You!

Several times in the Proposal, the DOL calls out for comments by the public about the Proposal, its features, and the potential of broadening the rules, including coverage of Open MEPs. If you have a vested interest (you should pardon the pun) in the MEP world, you should consider putting pen to paper or fingers to keyboard.

The Deeper Dive

As noted above, the Proposal clarifies and somewhat expands the availability of MEPs in two circumstances: plans sponsored PEOs and associations or group. But, there are still plenty of hoops to jump through.

The MEP for "Bona Fide" PEOs

PEOs are entities that contract to provide the employment or HR-related framework for other companies (which we call the "client-companies"). As part of the framework, PEOs commonly provide employee benefits to the client-company employees, including retirement plans. Prior DOL guidance has carefully avoided discussing PEO retirement plans.

The Proposal treats a PEO plan as one plan, rather than individual plans adopted by each client-employer, if the PEO constitutes a bona fide PEO. To do that, a PEO must:

1. Provide substantial employment functions and maintain adequate records relating to such functions;
2. Have substantial control over the functions and activities of the MEP, as the plan sponsor, the plan administrator, and a named fiduciary of the plan;
3. Ensure that each of its client-employers that adopt the MEP acts directly as an employer of at least one employee who participates in a MEP; and
4. Make the MEP available only to employees and former employees of the PEO and its clients, and their beneficiaries.

To meet the first requirement, i.e., providing substantial employment functions, the PEO must be responsible for at least some of the following, regardless of whether the client-employer shares some or all of such responsibilities or whether the client-employer has fulfilled its obligation to reimburse payments by the PEO:

- Paying wages to the employees;
- Wage reporting, withholding, and employment taxes;
- Recruiting, hiring, and firing workers of the client-employers;
- Establishing employment policies and conditions of employment, and supervising employees;
- Determining employee compensation (including method and amount);
- Providing workers' compensation coverage;
- Providing integral human-resource functions of the employer-clients, such as job-description development, background screening, drug testing, employee-handbook preparation, performance review, PTO tracking, handling employee grievances or exit interviews;
- Complying with regulatory rules for workplace discrimination, family-and-medical leave, citizenship or immigration status, workplace safety and health, or Program Electronic Review Management labor certification;
- Maintaining employee-benefit-plan obligations to participants after the client-employer ceases to contract with the PEO.

The DOL provides two safe harbors related to the first requirement of performing substantial employment functions. If the PEO qualifies as a Certified PEO (CPEO) under Internal Revenue Code Section 7705(a), it must perform only two of the above functions to satisfy the first requirement. Alternatively, if the plan provides five of the nine listed functions, it automatically

satisfies the first requirement. Outside of the two safe harbors, it is a facts-and-circumstances test, but in the right situation, a single function could be adequate to satisfy the first requirement.

The MEP for Bona Fide Groups or Associations of Employers

The DOL has always considered MEPs of certain groups or associations of employers to be single plans, but only if they were "bona fide." The criteria for constituting a bona fide group or association were difficult to understand and meet.

The Proposal would broaden the groups or associations that would qualify to sponsor MEPs and make the rules a little easier to understand. The Proposal closely follows the recently finalized regulations authorizing Association Health Plans. Under the Proposal, the group or association would be "bona fide" if:

- It has at least one substantial business purpose unrelated to offering the MEP. A purpose is substantial if the group would be viable even if there was no employee benefit plan. Examples of substantial business purposes could include promoting common business interests of members or providing continuing education. The business purpose does not need to be for-profit.
- Each employer member of the group participating in the plan acts as an employer of at least one employee who participates in the plan.
- The group has a formal structure with a governing body and bylaws or similar indications of formality.
- The group's functions and activities are controlled by group employer-members and the participating employer-members control the plan, both in form and substance.
- The employer-members have a commonality of interest, which includes:
    - The same trade, industry, or line of business or profession; or
    - Principal places of business in the same region within a single state or metropolitan area (even if the metropolitan area includes more than one state).

This definition of "commonality" is a significant improvement on the existing criteria, under which (in particular) geographic location was not a sufficient nexus between the employers for the plan to constitute a MEP.

- Plan participation is unavailable to anyone who is not an employee or former employee of a group member or their beneficiary.
- The group or association is not a bank, trust company, insurance company, broker-dealer, or similar financial services firm (including recordkeepers and TPAs) or owned or controlled by such an organization (except in its capacity as an employer-member of the group or association).

Covering the Business Owner

A MEP can cover a company and its owner, even if there are no other common law employees, and even if the company is not incorporated. However, the owner must be a "working owner." The "working owner" is treated as both employer and employee for purposes of an association plan.

A "working owner" is someone who:

- Has an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including a partner, sole proprietor, or other self-employed individual;

- Earns wages or self-employment income from the business for providing personal services for the business;
- Who either:
    - Works on average at least 20 hours per week or at least 80 hours per month providing those personal services to the business; or
    - In the case of a group/association plan, has wages or self-employment income from the trade or business that at least equals the working owner's cost of coverage for participation by the owner and any covered beneficiaries in any group health plan sponsored by the group or association in which the individual is participating or has the right to participate.

These qualification rules for a working owner must be met when the owner first becomes eligible to be in the plan, and must be periodically confirmed through "reasonable monitoring procedures." The concept of a working owner is novel for DOL rules and is an important step to allowing independent contractors and other sole proprietors to enjoy the efficiencies of a MEP.

Conclusion

It must be stressed that these are only proposed regulations. However, their "cousin," the Association Health Plan regulations, went from proposed to final in just a few months. The Proposal does nothing to change existing single employer plans; it just provides additional options for an employer, particularly a small employer, to participate in a MEP.

Nonetheless, the Proposal does not address the types of MEPs that non-PEO service providers want to make available to their clients. We hope that the comments to the DOL will spur action on that front or that Congress passes one of the pending bills that would give single-plan treatment to Open MEPs.

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