

Legislative and regulatory bulletin

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Multiple employer plans and their potential impact on the retirement plan landscape

Multiple employer plans (MEPs) have been around for decades, but recent developments in Washington are shining a spotlight on them, prompting some industry observers to ask whether this type of retirement plan could become the model of choice for many small employers. Making MEPs more widely available—as policymakers are currently attempting to do—has been touted as a way to encourage employers without retirement plans to provide them for their workers. In any case, it seems a safe bet that MEPs will be a bigger part of the retirement plan landscape in the coming years.

Below is an explanation of what is happening on the legislative and regulatory fronts, and what it means for professionals who work with 401(k)s and other defined contribution plans, and for the plan sponsors they serve.

The basics

First, the fundamentals. A MEP is a single plan adopted by more than one employer. Today the typical MEP is sponsored by a trade or professional organization for its member firms. The group structure of a MEP can result in economies of scale, so an adopting employer and its employees may potentially pay less for administrative and investment services than they would if the employer maintained its own separate plan. Because a MEP is a single plan, there is only one plan document, one annual 5500 and audit and one fidelity bond, resulting in additional cost savings.

An employee's service with *any* employer participating in a MEP counts for some purposes, including employee eligibility, vesting and contribution limits. However, some of the Internal Revenue Code's qualification requirements are applied separately for each employer. For example, coverage and nondiscrimination tests must be performed for each employer using only information about that particular employer's workforce.

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Under many MEP arrangements, employers enjoy reduced fiduciary risk because the MEP sponsor assumes—or hires third parties to assume—fiduciary responsibility under the Employee Retirement Income Security Act (ERISA) for investment selection and other duties. The employer retains fiduciary responsibility for selecting and monitoring the MEP provider. Currently, a potential drawback to participating in a MEP is the so-called one-bad-apple rule, which provides that one employer’s violation of the tax qualification requirements can disqualify the entire plan.

Recent developments

In 2012, the Department of Labor (DOL) ruled that a purported MEP where there was no nexus or common interest among the adopting employers was not a single plan but a collection of separate plans.¹ Under this interpretation, many of the efficiencies that could be realized if unrelated employers were allowed to join a single plan would not be available.

In August 2018, however, the president issued an executive order that directed the DOL to examine policies that would increase access to MEPs. In response, the DOL published a proposed rule in October 2018 that, if adopted, would expand the universe of allowable defined contribution MEP sponsors to include professional employer organizations (PEOs) and certain employer groups, such as chambers of commerce.² But the proposal stopped short of permitting truly “open” MEPs that could be adopted by any employer regardless of its connection to other employers. Under the proposed rule, financial services firms, including plan recordkeepers and third-party administrators, would not be permitted to sponsor MEPs. In addition, the DOL did not address the one-bad-apple rule because this is a tax qualification requirement under the purview of the Treasury Department and the Internal Revenue Service (IRS).

Congress poised to permit open MEPs

Over the past two years, several bipartisan bills have been introduced in Congress that would significantly expand the availability of MEPs by permitting unrelated employers to participate in a single plan. The proposal that has drawn the most attention, and has appeared in many of the bills, would create a new type of MEP called a “pooled employer plan.” A pooled employer plan would be a defined contribution plan sponsored by a “pooled plan provider.” The pooled plan provider would be a named fiduciary of the plan and would be responsible as the administrator for certain administrative duties, including nondiscrimination testing. While the pooled plan provider would assume most of the ERISA fiduciary obligations associated with running the plan, each participating employer would still have fiduciary responsibility for selecting and monitoring the provider.

The pooled plan provider would be required to register with the DOL and IRS, and, in a departure from the proposed DOL rule described above, could be a financial services firm, defined contribution plan recordkeeper, employee benefits provider, third-party administrator, payroll service provider or nearly any other firm willing to take on the fiduciary duties and other responsibilities outlined in the congressional proposal. The bill would

¹DOL Advisory Opinion 2012-04A.

²DOL proposed rule: “Definition of ‘Employer’ under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple Employer Plans,” Federal Register 83, no. 205: 53,534-53,561.

also fix the one-bad-apple rule by requiring the assets of a noncompliant employer to be spun out into a separate plan.

What might the retirement plan landscape look like in an open MEP world?

Open MEPs have the potential to change how small employers obtain 401(k)s or other defined contribution plans and how the retirement plan industry delivers services to this segment of the market. Recordkeepers, financial advisors, asset managers, banks, third-party administrators and other firms might form strategic alliances to provide the necessary services. Through such an alliance, a firm that works with a lot of small companies might consider assembling a 401(k) plan package to offer its clients. Technology companies might see this new type of arrangement as an opportunity to disrupt the marketplace by developing creative solutions that would be difficult for entrenched providers with legacy systems to emulate. Employers with existing defined contribution plans might find a MEP's reduced fiduciary responsibility and potentially lower costs attractive and drop their separate plans in favor of joining a MEP.

The DOL noted in the preamble to its proposed MEP rule that as of 2015, 4,592 defined contribution MEPs covered 5.1 million participants— only 0.7% of U.S. defined contribution plans and 5.3% of participants. It's probably too soon to predict precisely how the retirement plan landscape will change if open MEPs become a reality. But if they do, the number of MEPs and the percentage of American workers covered by these arrangements are almost certain to increase.

NEXT STEPS

We will continue to monitor policymakers' efforts to expand the use of MEPs, along with other important retirement plan legislative and regulatory matters and keep you informed of any significant developments.

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