



DOL Releases Proposed MEP Regulations

A REGULATORY UPDATE by
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On October 22, 2018, the Department of Labor (DOL) released proposed regulations that expand the availability of multiple employer plans (MEPs) that are considered single plans under ERISA purposes. The proposal represents a rapid response to the president's Executive Order on retirement security announced August 31, 2018, and calls for a 60-day public comment period. The gist of the proposed rules is that most associations and Professional Employer Organizations (PEOs) plus groups or associations of employers within a single trade group or geographic area, can sponsor MEPs and have them treated as single plans for ERISA purposes if certain conditions are met.

In summary, the proposal:

- Allows certain associations, trade groups, PEOs, and groups of employers within a single state or metropolitan area to sponsor MEPs.
- Treats such MEPs as single plans for ERISA purposes, which means, for example, that such plans would file a single Form 5500 with a single audit for the entire arrangement (if applicable).
- Calls for groups or associations of employers to be "bona fide" in order to receive this treatment:
 - Substantial business purpose must exist beyond provision of benefits, such as
 - The sponsor would be a viable entity even without the MEP or other employee benefits, or
 - The sponsor meets the "commonality" test (same trade or geographic community).
 - Must have a formal organizational structure with a governing body and bylaws or "other similar indications of formality."
 - The employer members must control the plan, both in form and substance.
 - The employer members must have a commonality of interest, meaning either:
 - "Same trade, industry, line of business or profession," or
 - "Each employer has a principal place of business in the same region that does not exceed the boundaries of a single State or metropolitan area (even if the metropolitan area includes more than one State)."
 - The MEP is only available to members of the group or association (including former employees and beneficiaries)
 - Service providers, in general, cannot be sponsors—the DOL is distinguishing between employer-based arrangements versus commercial arrangements.
- Calls for PEOs to be "bona fide" to receive single plan treatment, and provides detail around the definition of "bona fide" for PEOs (e.g., performs substantial business functions for client employers; the PEO is the plan sponsor and is a named fiduciary and plan administrator with substantial control over the MEP).
- Allows self-employed "working owners" with no common law employees (who would not ordinarily be considered employers for ERISA purposes) to participate in these MEPs

- Does not address whether “corporate MEPs” (those consisting of employers with common ownership that are not “related” for purpose of the controlled group and affiliated service group rules) are single plans, but suggests that the DOL has no doubt that they are, in fact, single plans.
- Does not address, but calls for comment on, whether other types of arrangement should qualify for single plan treatment, including MEPs for unrelated employers “open MEPs.”
- Replaces and supersedes prior sub-regulatory guidance (i.e., DOL Advisory Opinion 2012-04A, which had strictly limited the availability of single plan status of MEPs under ERISA, as well as other guidance on the definition of “employer” for MEPs).

The proposal, as expected, tracks very closely the provisions of the DOL’s Association Health Plan regulations, and it seems likely that final regulations will follow rapidly after the conclusion of the public comment period.

What do the proposed regulations actually mean for the retirement system? Naturally, it is too soon to say with certainty what the final regulations will say or what their full impact will be, but it seems clear that the rules will expand the availability of—and interest in—MEPs.

