NEW DEVELOPMENTS INVOLVING MULTIPLE EMPLOYER PLANS (MEPS)

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In July, there were three significant developments affecting MEPs. A MEP, generally speaking, is a plan under which the employees of multiple unrelated employers may be covered. Participation in a MEP might be attractive to an employer, particularly a small employer, that cannot easily absorb the administrative time and expense needed to properly operate a qualified retirement plan.

Final DOL Regulations. The Department of Labor (DOL) published final regulations on MEPs (84 FR 37508). One category of MEPs covered by the regulations sometimes may be referred to as "association retirement plans" or "ARPs." The regulations prescribe the rules under which it will be easier for a bona fide group or association of employers (e.g., trade associations) with a "commonality of interest" to jointly sponsor an ARP. The "commonality of interest" needed to establish an ARP is satisfied if the employer members of the group or association either (1) are in the same trade, industry, line of business or profession, or (2) have 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).

The primary purpose of the group/association may be to offer and provide MEP coverage, but the group/association also must have at least one other substantial business purpose. The group/association, among other things, must have a formal organizational structure, the group/association must have its functions and activities controlled by the employer members, and plan participation may not be made available to employees of non-members. The final regulations prescribe rules under which a working owner (e.g., sole proprietors) may qualify as both an employer and as an employee of a trade or business for purposes of participating in an ARP.

The final DOL regulations also prescribe rules under which a MEP may be sponsored by a bona fide professional employer organization (PEO). To be a bona fide PEO, the PEO, among other things, must –

- Perform "substantial employment functions" on behalf of the client employers that adopt the MEP;
- Have substantial control over the functions and activities of the MEP, as the plan sponsor, as plan administrator and as a named fiduciary;

- Ensure that each adopting client employer acts directly as an employer of at least one employee who is a participant covered by the MEP; and
- Ensure that MEP participation is restricted to current and former employees (and their beneficiaries) of the PEO and client employers.

The regulations state that whether a PEO performs "substantial employment functions" may be determined on a facts and circumstances basis, but the regulations also offer safe harbor standards under which a PEO will be considered to perform "substantial employment functions."

Request for Information. While the final DOL regulations published in July address MEPs that are in the nature of ARPs where there is some "commonality of interest," those regulations do not yet prescribe a clear path forward for the establishment of so called "open" MEPs (i.e., MEPs for which there would not necessarily be any "commonality of interest"). Currently, the DOL would not treat open MEPs as a single plan for ERISA purposes. The DOL, however, believes open MEPs deserve further consideration. To generate further commentary on open MEPs, the DOL published a request for information (84 FR 37545) pursuant to which the DOL is soliciting comments on a broad range of issues relating to open MEPs. Comments must be submitted to the DOL on or before October 29, 2019.

IRS Regulations. In early July, the Internal Revenue Service (IRS) published a proposed regulation (84 FR 3177) that would provide relief to MEPs from the so-called "one bad apple" rule – the IRS calls it the "unified plan rule." Under the "one bad apple" rule, a qualification failure by one of the participating employers in a MEP could potentially disqualify the entire plan, which some believed might make employers reluctant to join a MEP.

The impetus for the proposed regulation is a 2018 Executive Order intended to expand access to workplace retirement plans. The Executive Order included a directive to the Secretary of the Treasury to consider the issuance of proposed regulations that would expand access to MEPs. Accordingly, the Treasury Department proposed new regulations that would provide an exception to the "one bad apple" rule for certain defined contribution MEPs. A defined contribution MEP would be eligible for the exception to the "one bad apple" rule on account of certain qualification failures due to actions or inaction by a participating employer, if certain conditions are satisfied. To avoid full plan disqualification, the regulations, among other things, would allow, in the case of certain types of failures, for a spinoff of the assets and account balances attributable to participants to a separate plan and a termination of that plan where the participants are employed by a participating employer that is unable or unwilling to correct a qualification failure. Termination distributions from the spinoff plan generally would not lose favorable tax treatment normally available to qualified plan retirement plan distributions, including the availability of tax-deferred rollover treatment.

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