DOL final Association Retirement Plan Regulations

1. Would it not also be an association if a city's Chamber of Commerce sponsored a Plan for its members? Or does this not satisfy the same business industry?

A bona fide group or association of employer can either (1) all be in the same industry/profession or (2) all be in the same state/metropolitan area. A chamber of commerce works perfectly.

2. Are you saying if they are in the same state, that would be considered "bona fide" and they do not need to be part of any sort of association, trade, or even related industry?

Yes. So, if a doctor, a lawyer, a dentist, a carpenter, and a grocer are sitting next to each other at a state chamber of commerce meeting, and each is an employer, the chamber of commerce could potentially be a bona fide group or association of employers.

3. What is considered "bona fide"?

A group defined in the regulations, as discussed in the program.

4. Are we talking about closed MEPS only?

The DOL regulations are defining bona fide groups or associations of employers /bona fide PEOs which can establish plans that will be treated as a single plan under ERISA. If you wish to refer to that as a "closed MEP" be my guest.

5. Isn't this just a re-working of the plans for 103-12 investment entities of days gone by.

No. 103-12 is defining what constitutes a plan asset. This is defining what constitutes a plan for purposes of ERISA. The rules are significantly different from the 103-12 rules.

6. What if you had a group of employers owned by a private equity company but the common ownership was not great enough to be a controlled group would they be considered bona fide

That is uncertain at this juncture, based on the preamble to the regulations.

7. What about a payroll provider that isn't a PEO?

It likely isn't performing the substantial employment functions required to be considered a bona fide PEO. I would be very concerned that the payroll provider is a financial services firm barred from controlling a bona fide group or association.

8. Can a bank that has trust powers and provides 401k plan administration be a sponsor of a MEP for its city or county and fall under the single ERISA plan?

No. The final regulations specifically prohibit this.

9. If an organization exists to help non-profit organizations, can that one organization establish a MEP for the non-profit organizations to take part in. Who must be the plan sponsor?

The mother organization presumably could if it met the other requirements. The organization must be controlled by its employer members, and the participating employers must control the plan.

10. Who must be the Plan Sponsor?

The association or the PEO.

11. What specific fiduciary liabilities are reduced or removed from adopting employers?

Quoting from the preamble to the final regulation:

> As an operational matter, the MEP's sponsor—and not the participating employers—would generally be designated as the plan administrator responsible for compliance with the requirements of title I of ERISA, including reporting, disclosure, and fiduciary obligations. Under this structure, the individual employers would not each have to act as plan administrators under ERISA section 3(16) or as named fiduciaries under section 402 of ERISA. Although participating employers would retain fiduciary responsibility for choosing and monitoring the arrangement and forwarding required contributions to the MEP, a participating employer could keep more of its day-to-day focus on managing its business, rather than on its plan. In the MEP context, although a participating employer would no longer have the day-to-day responsibilities of plan administration, the business owner would still need to prudently select and monitor the MEP sponsor and get periodic reports on the fiduciaries' management and administration of the MEP, consistent with prior Department guidance on MEPs. …
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> The bona fide group or association typically, or the PEO always, is responsible for prudently selecting and monitoring the service providers of the MEP they hire, including any fiduciary service providers. In comparison,

the business owner must prudently select and monitor the MEP sponsor and get periodic reports on the fiduciaries' management and administration of the MEP.

12. Can you please explain "employer plan participants must control plan" from slide 20? Thanks.

Control is a factual matter. Quoting from the regulation itself:

> The functions and activities of the group or association are controlled by its employer members, and the group's or association's employer members that participate in the plan control the plan. Control must be present both in form and in substance;

Historically, control has been an important issue for the DOL, and the fact that it must exist in form and substance has prevented the DOL from ruling on many MEP situations presented in opinion letter requests. The preamble makes the following comments:

> The final rule does not require group or association members to manage the day-to-day affairs of the group or association or the plan in order for the group or association to qualify as bona fide. As has long been the case, the Department will consider all relevant facts and circumstances in determining whether the functions and activities of the group or association are sufficiently controlled by its employer members, and whether the employer members who participate in the group or association's pension plan sufficiently control the group plan. In the Department's view, the following factors, although not exclusive, are particularly relevant for this analysis: (1) Whether employer members regularly nominate and elect directors, officers, trustees, or other similar persons that constitute the governing body or authority of the employer group or association and plan; (2) whether employer members have authority to remove any such director, officer, trustees, or other similar person with or without cause; and (3) whether employer members that participate in the plan have the authority and opportunity to approve or veto decisions or activities which relate to the formation, design, amendment, and termination of the plan, for example, material amendments to the plan, including changes in coverage, benefits, and vesting. The Department ordinarily will consider there to be sufficient control if these three conditions are met.

IRS Proposed Regulations on One Bad Apple Rule

13. How does the IRS know who the participants are?

It doesn't know unless it audits the plan or requests the information as a part of notice required under the regulation.

14. If you have a forced spin-off of the non-responsive clients - who is the "Sponsor/Plan Administrator" of the spinoff plan for purposes of termination? Who signs the documents?

The MEP administrator is the sponsor of the spinoff plan and signs the documents.

15. Who is on the hook for the $7500 SH contribution or otherwise correcting the defect?

The unresponsive employer.

16. Does the notice to participants need to include information about the missing SH contribution?

Yes. The notice must describe the failure.

17. If the Plan Administrator does spin-off and terminate the separate 401(k) plan, then will the deadbeat employer be prevented from starting a new 401(k) plan for 12 months after distribution?

This is a great question that should be clarified in final regulations. I think the answer should be yes, but it is not clear in the proposed regulations.

18. Will both owners and C-suite employees of deadbeat employer be held responsible for the failure?

Quoting from the proposed regulation:

> The IRS reserves the right to pursue appropriate remedies under the Code against any party (such as the owner of the participating employer) who is responsible for the participating employer failure. The IRS may pursue appropriate remedies against a responsible party even in the party's capacity as a participant or beneficiary under the spun-off plan that is terminated . . . (such as by not treating a plan distribution made to the responsible party as an eligible rollover distribution).

So, if the non-owner CFO is "responsible for the participating employer failure," the IRS could "pursue appropriate remedies." If the non-owner CIO had no idea what was happening with the plan, presumably the CIO would be treated as an innocent employee, eligible to roll over, notwithstanding the fact that the CIO may be an HCE. Who determines guilt or innocence? The IRS, of course.

19. What about terminated participants during the 'notice' periods? Should they not be paid out?

Follow all normal distribution rules.

20. Can you spin-off and create a frozen plan that is required to be administered by the client aka “Dudley Deadbeat”?

Only if Dudley agrees to it and requests it.

Other Issues

21. Why didn't the IRS prepare the schedule they wanted attached to the Form 5500 for the additional employers? I have added the 3 columns but not added the extra fancy lines and such.

I think the schedule indicates the information that must be included. Fancy lines can be avoided at your discretion.

22. Can a PPP be provided by a TPA?

Yes.

23. Do MEP participants have to have the same plan selections? For instance, if there are three adopting employers, can one employer choose a Safe Harbor Match, while the other two select a SH Non-Elective 3%?

Yes, because the plans are tested separately for nondiscrimination. That said, if I were the MEP administrator, I’d rather not handle that plan.

24. Under the open MEP proposed in the Secure Act, would each employer have to run its own coverage and non-discrimination testing? I would assume so.

The PPP would run it separately for each participating employer.

25. For the Secure Act could a PEP be started by a Bank or Trust Company?

Yes.