New MEP Rules: Coming Up!

S. Derrin Watson

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Your Presenter Today

- S. Derrin Watson, J.D., APM

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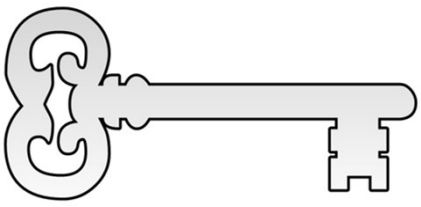

Key Issues

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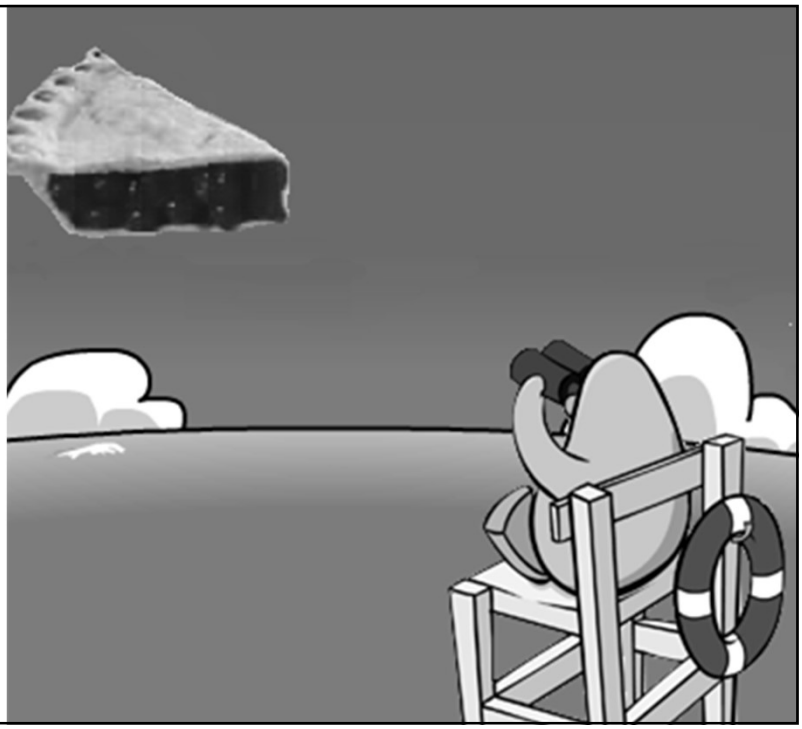
We Want MEPs!

- Washington is convinced that MEPs are good
  - Encourage plan sponsorship
  - More MEPs mean more employees of small employers will have workplace retirement plan access
    - At lower cost



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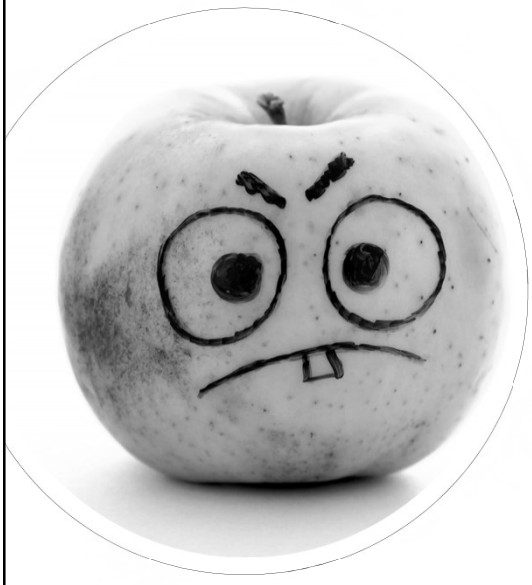

IRS Bad Apple Rule

- By definition, except for coverage and nondiscrimination a multiple employer plan is one plan for IRS purposes
- The entire plan must be qualified, or the plan as a whole is disqualified
  - "The failure by one employer maintaining the plan (or by the plan itself) to satisfy an applicable qualification requirement will result in the disqualification of the section 413(c) plan for all employers maintaining the plan"
  - One bad apple spoils the barrel

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ERISA Stance on MEPs

- Many DOL Advisory Opinions rejected the concept that a given MEP is a single plan under ERISA
- Opinions primarily turn on not the types of benefits provided but on whether the arrangement is established or maintained by an employer or by an employee organization
- Key issue for MEP: are the employers a bona fide group or association?
  - Bona fide group: facts and circumstances test
  - Likely not an issue for shared employee or kissing cousin situations

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The Executive Branch

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October 12, 2017 Exec Order Supporting Association Health Plans

- Within 60 days of the date of this order, the Secretary of Labor shall consider proposing regulations or revising guidance, consistent with law, to expand access to health coverage by allowing more employers to form AHPs. To the extent permitted by law and supported by sound policy, the Secretary should consider expanding the conditions that satisfy the commonality-of-interest requirements under current Department of Labor advisory opinions interpreting the definition of an "employer" under section 3(5) of the Employee Retirement Income Security Act of 1974. The Secretary of Labor should also consider ways to promote AHP formation on the basis of common geography or industry.

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AHP Regulations Issued June 2018

- Limited to health plans
- Effective 9/18 for fully insured plans
- Allows employers to form associations and the associations to offer health coverage
  - Working owners can participate as employer and employee
- Do not replace prior guidance on commonality
  - Give new method to establish single health plan
- Controversial because of PPACA impact

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District Court tossed out regs in March

- Not reasonable interpretation of ERISA
- Went against PPACA
- DOL appealed
  - Will not enforce labor violations resulting from actions before court decision, through the end of 2019 (or policy year if later)

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August 31, 2018 Executive Order

- Increase availability of MEPs
  - DOL:
    - Clarify and expand circumstances under which employers can adopt MEP subject to appropriate safeguards
    - Increase retirement security for part-time workers, sole proprietors, working owners, and other gig economy workers by expanding access to retirement plans
    - Within 180 days consider issuing rules – Proposed Regs now released
  - IRS
    - Within 180 days consider modifying bad apple rule

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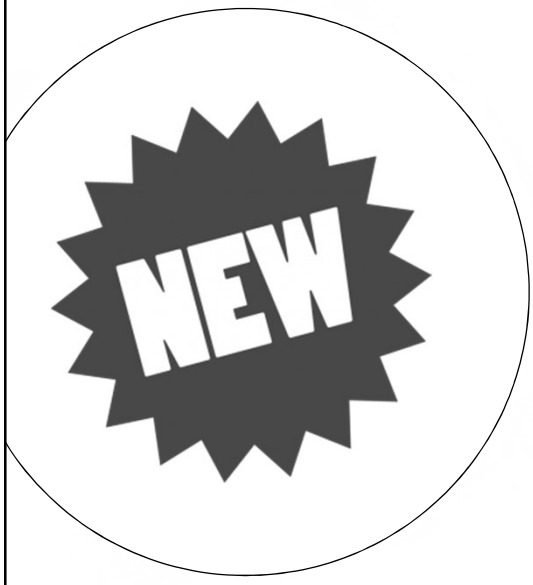

Final DOL regs 2510.5-55

- Limited to defined contribution plans
- Single plan can be established by
  - Bona fide group or association of employers
    - Very similar to association health plan rules
  - Bona fide PEO
- Severability clause
- Effective September 30, 2019

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Requirements

- Association members must either be
  - In same trade, industry, line of business, or profession
  - In same geographical area
    - Within a single state or
    - A single metropolitan area

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Requirements

Association must have substantial purpose other than providing MEP/health or employee benefits

- Such as continuing education or business promotion

MEP/Health program can be primary purpose so long as it isn't the only purpose

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Requirements

Each employer member participating must employ at least one employee participant	Group has formal structure with governing body and by-laws
• Can include working owner	• Helps demonstrate formality and accountability

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Working owner

- Has ownership right in trade or business, whether or not incorporated
- Earns wages/SE income for providing personal services to business
- Either:
  - Works on average at least 20 hours/week or 80 hours/month, or
  - Comp equals or exceeds cost of any AHP

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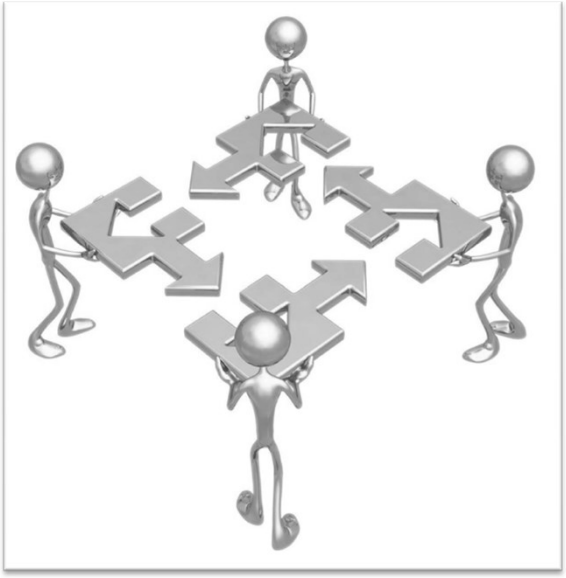
Requirements

- Employer members must control association and employer plan participants must control plan
  - Issue of both form and substance



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Requirements

- Plan participation is limited to employees of a current employer member of the association, former employees of a current employer member and beneficiaries of such individuals.
  - Required COBRA coverage is an exception to this rule for association health plans

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AHP Requirements

Can't be health insurer or owned or controlled by health insurer or affiliates

Must follow nondiscrimination rules

- Cannot condition membership on health factors

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ARP Requirements

- Can't be bank or trust company, insurance issuer, brokerdealer, or other similar financial services firm (including pension record keepers and third-party administrators), or owned or controlled by such an entity or any subsidiary or affiliate of such an entity, other than to the extent such an entity, subsidiary or affiliate participates in the group or association in its capacity as an employer member of the group or association

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Bona fide PEO

A human-resource company that contractually assumes certain employer responsibilities of its client employers

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Requirements

1. The organization performs substantial employment functions on behalf of its client employers, and maintains adequate records relating to such functions;
2. The organization has substantial control over the functions and activities of the MEP, as the plan sponsor, the plan administrator, and a named fiduciary;
   - Continues to have employee benefit obligations to participants after client employer leaves
3. The organization ensures that each client employer that adopts the MEP acts directly as an employer of at least one employee who is a participant covered under the defined contribution MEP; and
4. The organization ensures that participation in the MEP is available only to employees and former employees of the organization and client employers, and their beneficiaries.

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Substantial employment functions

- Facts and circumstances
- Safe harbor: 4 requirements
  - The PEO assumes responsibility for the payment of wages to employees of its client-employers that adopt the plan without regard to client reimbursement;
  - The PEO assumes reporting, withholding, and paying any applicable federal employment taxes for its client employers that adopt the plan without regard to client reimbursement;
  - The PEO must play "a definite and contractually specified role in recruiting, hiring, and firing workers of its client employers that adopt the MEP."
    - This can be exercised in tandem with the client employer.
    - It is sufficient if the PEO simply retains the right to recruit, hire and fire workers of its client employers.
  - The PEO must assume responsibility for and has substantial control over the functions and activities of any employee benefits which the service contract may require the PEO to provide.

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Proposed regs for DC plans

Taxpayers CANNOT rely!

- MEP can be preserved if MEP administrator follows new regs (once finalized)
  - Escalating series of notices to unresponsive employer
  - One of three end results
    - Unresponsive employer responds
      - Provides information
      - Makes contribution
      - Takes other corrective action
    - Unresponsive employer requests spin-off to single employer plan
    - MEP administrator spins off assets of unresponsive employer to separate plan, terminates it, and distributes
- Requires plan amendment to implement rules
- Requires specific plan practices and procedures

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A MEP Administrator's Tale; Act I

- Cast of Characters:
  - MEP Administrator: Diligent Plans
  - Unresponsive Employer: Deadbeat Duds (clothing store owned by Dudley Deadbeat)
  - Plan: 3% Safe Harbor 401(k) MEP, calendar year
  - Known Qualification Failure: Deadbeat Duds failed to contribute $7,500 SH contribution for 2022 by December 31, 2023

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The First Notice "Wake Up and Do Something"

- January 2, 2024, Diligent sends Deadbeat a notice:
  - "You are currently in default of your obligation to make a $7,500 employer contribution to the plan. We ask that, within 90 days, you either: (1) make the required contribution, plus earnings (contact us for an exact number); or (2) tell us to spin off the assets relating to your employees into a single employer plan you establish and maintain. If you take the second option, the law will still require you to make the delinquent contribution to that plan."
- April 1, 2024: 90 days passes with no reply

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The Second Notice
"Just Wait Until Your Father Gets Home"

- Diligent must send a second notice within 30 days after expiration of the first notice
- April 8, 2024: Diligent sends Deadbeat a notice
  - All the information in the first notice, plus
  - "If you do not take action with 90 days, the third (and final) notice will be provided to the Deadbeat Duds participating employees and to the Department of Labor
- July 7, 2024: 90 days of radio silence

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Third Notice
"Now We Mean Business"

- Diligent must send third notice within 30 days after expiration of second notice
- July 22, 2024, Diligent sends notice to Deadbeat, Deadbeat Duds participating employees, and the DOL
  - "We have tried repeatedly to have you make your required $7,500 (plus earnings) contribution for the 2022 plan year. This is your final notice. Ideally, you would make the contribution to this plan within the next 90 days (by October 20). Alternatively, you can choose to have us spin off the assets of your employees to a single employer plan you will administer. You will still need to make the contribution to that plan.
  - "If you do not make the contribution on initiate the spinoff by October 20, 2024, we will stop accepting contributions relating to your employees (including salary deferrals), and we will spin off the assets of your employees to a new plan we administer. We will immediately thereafter terminate that plan and distribute the assets to the employees."

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The Hammer Strikes

- October 20, 2024: Deadbeat lives down to its name
- ASAP: Diligent notifies Deadbeat participants
  - Deadbeat portion of plan is being spun off and terminated
  - No more contributions (including deferrals)
  - ASAP, employees will receive distribution notices; followed by distribution
    - Comply with J&S rules if applicable
  - Contact information for Diligent Plans

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Consequences of spinoff

- Defect follows spinoff to new plan
- MEP administrator must notify IRS of spinoff
- If employer requests spinoff must cure defects or plan subject to disqualification
- If MEP administrator spins off plan, same administrator, trustee, and terms of old plan
  - Rank-and-file participants treat as qualified plan
    - Can roll distributions over
  - IRS reserves right to go after Dudley Deadbeat
    - Deny rollover treatment

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Act 2: Possible Qualification Failure
"What We've Got Is a Failure to Communicate"

- Dr Sly participates in Diligent's MEP
- Diligent learns Sly may be in ASG with Sneaky Surgery Center (SSC)
- Diligent asks Sly for SSC census so Diligent can determine if there is a coverage failure
- Sly doesn't reply
- Possible qualification failure: We don't know that there's a problem

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Results

- Same procedure: 3 notices
  - Demand information or spinoff
- Suppose Sly provides data after second notice
  - Coverage failure exists
- Diligent informs Sly of possible actions to address cover failure; no reply
- Now it's known qualification failure
- Start over with first notice

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Effect on EPCRS

- Timing: MEP cannot be under examination at time of first notice
- If IRS audits plan after first notice, and MEP administrator acts diligently
  - Plan not treated as under examination for EPCRS
    - Can self-correct significant failure
    - Can still use VCP

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MEP schedule required

- Since 2014, every MEP 5500 has required a schedule

Multiple-Employer Plan Participating Employer Information (Insert Name of Plan and EIN/PN as shown on the Form 5500)		
(a) Name of participating employer	(b) EIN	(c) Percent of Total Contributions
(a) Name of participating employer	(b) EIN	(c) Percent of Total Contributions

- Many haven't included the schedule
- Many have incomplete schedules (dummy names, initials, incomplete EINs, no %ages)
- Result: Incomplete return subject to penalties

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FAB 2019-01

- Relief: We won't penalize you for 2014-2017 and you don't have to amend those years
- Condition: Complete and accurate schedule attached to 2018 return
  - Automatic 2½ month extension (Oct 15) to file or amend
  - Check special extension box and enter FAB 2019-01
  - Recommendation: For non-calendar year plans, file 5558 anyway
    - That will also extend 8955-SSA

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Eliminates bad apple rule

- Limited to
  1. Plans maintained by employers with common interest other than having adopted plan, or
  2. Pooled Employer Plan
- Spin off assets related to bad apple

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Pooled Employer Plans (PEPs)

- Pooled Employer Plans ("PEPs")
  - Allows for Open MEPs with no Commonality if certain requirements are met
- PEP Benefits
  - Single Plan Document
  - Single Form 5500 Filing
  - Single Plan Audit
- Significant compliance requirements
- Under SECURE, effective for plan years beginning after 12/31/20. Under RESA 2019, effective for plan years beginning after 12/31/22.

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Pooled Employer Plans (PEPs)

- Single 401(a) individual account plan with a tax-exempt trust or a plan of 408 individual retirement accounts;
- That provides benefits to employees of 2 or more employers;
- The PEP plan document must designate a "pooled plan provider" ("PPP");
- PPP is a named fiduciary under ERISA and acts as the 3(16) plan administrator; and
- Selection (and monitoring) of the PPP is a fiduciary plan sponsor responsibility.

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Pooled Employer Plans (PEPs)

- One or more named trustees who are responsible for:
  - Collecting contributions; and
  - Holding plan assets.
- In collecting contributions, the trustee must follow written procedures that are "reasonable, diligent, and systematic."
- Trustee: Must be a bank or other institution that satisfies 408(a)(2) and could qualify as an IRA custodian.

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Pooled Employer Plans (PEPs)

- PPP must make required disclosures to participating employers.
- Employers must provide the PPP with information necessary to administer the plan and to meet 401(a) or 408 qualification requirements.
- Disclosures and information *may* be provided in electronic form.
- PEPs prohibited from imposing unreasonable restrictions, fees, or penalties for withdrawal or otherwise distributing or transferring assets from the plan.

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Participating Employer Responsibility

Joining a PEP = ERISA fiduciary responsibility

Employers retain fiduciary responsibility for:

Selection and monitoring of PPP and other named fiduciaries

Investment and management of assets attributable to employees of that employer ***unless*** PPP has delegated that 3(38) responsibility to another fiduciary

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Pooled Plan Provider (PPP)

- PPP performs all administrative duties of the plan including:
  - "reasonably necessary" testing to ensure the PEP meets either 401(a) ***or*** 408 individual retirement account qualification requirements whichever is applicable
  - Ensuring that the participating employer provides necessary information for compliance

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Pooled Plan Provider (PPP)

- Registers with both DOL and IRS before operating as a PPP
- Written acknowledgement of named fiduciary and 3(16) plan administrator status
- Ensure proper bonding (cap = $1M)
- DOL and IRS may audit, examine, and investigate PPPs as they wish

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Guidance

- Both DOL and Treasury to issue guidance:
  - No specified time for any of the guidance
  - No restriction on adoption of a PEP before the guidance is issued
  - Both must identify duties of the PPP
  - Both to issue guidance on the spinning off of "bad apple" employers from the PEP to isolate liability to just those employers
  - Both can determine if spinning off of assets is in the best interest of participants

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Guidance

- Both DOL and Treasury to issue guidance:
  - DOL to determine disclosures the PPP must make to participating employers and for information participating employers must make available to the PPP
  - Treasury to issue procedures on plan termination if either PPP or participating employer "demonstrates a lack of commitment to compliance"
  - Treasury to publish model language that can be adopted for a plan to be treated as a PEP

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Reporting Requirements

- PEP annual reports to include:
  - List of participating employers
  - Good faith estimate of % of total contributions attributable to each participating employer
  - Identity of the PPP
- DOL *may* extend small plan audit rules to PEPs with fewer than 1,000 participants (if no employer has more than 100 participants)

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Consolidated Filing of Form 5500

- Included in both RESA and SECURE is a consolidated Form 5500 option under which a single Form 5500 could be filed for a group of plans that have:
  - (1) the same trustee;
  - (2) the same one or more named fiduciaries;
  - (3) the same 3(16) plan administrator;
  - (4) the same plans year; and
  - (5) the same investments or investment options.
- Effective for 2021 plan year returns.

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Thank you!

- S. Derrin Watson
- Attorney at law
- 5631 Kent Place
- Goleta, CA 93117
- sderrin@gmail.com

- Derrin's books available at
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