MULTIPLE EMPLOYER RETIREMENT PLANS: A PETITE PRIMER

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employer plan within the meaning of Treasury Regulation Section 1.414(l)-1(b)(1) should also constitute a single plan within the meaning of ERISA. The potential for fraud and abuse in the case of qualified retirement plans, where the IRS has substantial enforcement authority, is much less than with respect to MEWAs.

There is an irony in the DOL's position. Treating a multiple employer plan covering the employees of many small employers as a constellation of single employer plans, rather than as a single multiple employer plan, means no audit requirement applies to the arrangement (assuming none of the individual employers' "plans" has at least 100 participants). And, at least arguably, the requirement that plans with at least 100 participants include more detailed information on their annual reports (Forms 5500) than smaller plans might not apply, though the IRS could argue that because there is a single multiple employer plan for Tax Code purposes, IRC Section 6058(a) and Treasury Regulation Section 301.6058-1(a)(3) still require inclusion of the more detailed information to be reported by large plans.

V. **Proposed DOL Regulation**. The Department of Labor, in response to Presidential Executive Order 13847, issued on August 31, 2018, has proposed a rule modestly relaxing the Department of Labor's interpretation of who is an "employer" for purposes of establishing a single multiple employer plan. The proposed regulation is found at 83 Fed. Reg. 53534 (Oct. 23, 2018). The proposed expansion of the circumstances in which a multiple employer plan can be treated as a single plan would apply only to defined contribution plans, though it would not appear to be limited to defined contributions plans that are "qualified" or otherwise hold special status under the Tax Code. In the preamble to its proposed regulation, the DOL described its historic position as to what constitutes a single multiple employer plan in this way:

> The Department has long taken the position that, even in the absence of the involvement of an employee organization, a single ''multiple employer plan'' under ERISA may exist where a cognizable group or association of employers, acting in the interest of its employer members, establishes a benefit program for the employees of member employers. To satisfy these criteria, the group or association must exercise control over the amendment process, plan termination, and other similar functions of the plan on behalf of the participating-employer members with respect to the plan and any trust established under the program.[19] DOL guidance generally refers to these entities – *i.e.*, entities that qualify as groups or association, within the meaning of section 3(5) – as ''bona fide'' employer groups or associations.[20] For each employer that adopts for its employees a program of pension or welfare benefits sponsored by an employer group or association that is not ''bona fide,'' such employer establishes its own separate employee benefit plan covered by ERISA.[21] Largely, but not exclusively, in the context of welfare-benefit plans, the Department has previously distinguished employer groups or associations that can act as an ERISA section 3(5) employer in sponsoring a multiple employer plan from those that cannot. To do so, the Department has asked whether the group or association has a sufficiently close economic or representational nexus

to the employers and employees that participate in the welfare plan that is unrelated to the provision of benefits.[22]

DOL advisory opinions and court decisions have long applied a facts-and circumstances approach to determine whether there is a sufficient common economic or representational interest or genuine organizational relationship for there to be a bona fide employer group or association capable of sponsoring an ERISA plan on behalf of its employer members. This analysis has focused on three broad sets of issues, in particular: (1) Whether the group or association is a bona fide organization with business/organizational purposes and functions unrelated to the provision of benefits; (2) whether the employers share some commonality and genuine organizational relationship unrelated to the provision of benefits; and (3) whether the employers that participate in a plan, either directly or indirectly, exercise control over the plan, both in form and substance. This approach has ensured that the Department's regulation of employee benefit plans is focused on employment-based arrangements, as contemplated by ERISA's text. This approach also helps distinguish the establishment by a group or association of an employee benefit plan from ''commercial insurance,'' consonant with ERISA's structure.[23] The Department continues to believe that this approach provides for a sound reading of ERISA and that it represents a sound policy choice. Concerns for simplicity and uniformity in approach justify applying the same requirement to an entity acting as ''a group or association'' in the pension context.

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[19] *See* 83 FR at 28912, 28920.
[20] *See, e.g.*, Advisory Opinions 2008-07A, 2003-17A, and 2001-04A.
[21] *See* 83 FR 28912, 13 (citing Advisory Opinion 96–25A).
[22] *See* 83 FR 28912; *see also* Advisory Opinions 2012-04A, 1983-21A, 1983-15A, and 1981-44A.
[23] 83 FR 28914, 28917.

In its proposal, the DOL notes that for the purpose of being able to establish and maintain a pension plan under ERISA, an "employer" includes any person acting in the interest of an employer in relation to the plan. The proposed regulation would deem a "bona fide group or association of employers" and a "bona fide professional employer organization" to be able to act in the interest of an employer within the meaning of ERISA, and therefore to be able to establish a single multiple employer plan. Again, the proposed expansion of the term "employer" would apply only in the context of sponsoring a multiple employer defined contribution pension plan ("pension plan" as that term is used in ERISA, which is not restricted to defined benefit or money purchase pension plans under the Tax Code).

A. **Bona Fide Group or Association of Employers**. Here is the proposed regulatory language with respect to a bona fide group or association of employers:

> (b)(1) *Bona fide group or association of employers.* For purposes of title I of the Act and this chapter, a bona fide group or

association of employers capable of establishing a MEP shall include a group or association of employers that meets the following requirements:

(i) The primary purpose of the group or association may be to offer and provide MEP coverage to its employer members and their employees; however, the group or association also must have at least one substantial business purpose unrelated to offering and providing MEP coverage or other employee benefits to its employer members and their employees. For purposes of satisfying the standard of this paragraph (b)(1)(i), as a safe harbor, a substantial business purpose is considered to exist if the group or association would be a viable entity in the absence of sponsoring an employee benefit plan. For purposes of this paragraph (b)(1)(i), a business purpose includes promoting common business interests of its members or the common economic interests in a given trade or employer community and is not required to be a for-profit activity;

(ii) Each employer member of the group or association participating in the plan is a person acting directly as an employer of at least one employee who is a participant covered under the plan;

(iii) The group or association has a formal organizational structure with a governing body and has by-laws or other similar indications of formality;

(iv) 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;

(v) The employer members have a commonality of interest as described in paragraph (b)(2) of this section;

(vi) The group or association does not make plan participation through the association available other than to employees and former employees of employer members, and their beneficiaries; and

(vii) The group or association is not a bank or trust company, insurance issuer, broker-dealer, 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.

(2) *Commonality of interest.*

(i) Employer members of a group or association will be treated as having a commonality of interest if either:

(A) The employers are in the same trade, industry, line of business or profession; or

(B) Each employer has 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).

(ii) In the case of a group or association that is sponsoring a MEP under this section and that is itself an employer member of the group or association, the group or association will be deemed for purposes of paragraph (b)(2)(i)(A) of this section to be in the same trade, industry, line of business, or profession, as applicable, as the other employer members of the group or association.

B. **Bona Fide Professional Employer Organization**. The proposed regulation defines "bona fide professional employer organization" in the following fashion:

(c)(1) *Bona fide professional employer organization.* A professional employer organization (PEO) is a human-resource company that contractually assumes certain employer responsibilities of its client employers. For purposes of title I of the Act and this chapter, a bona fide PEO is capable of establishing a MEP. A bona fide PEO is an organization that meets the following requirements:

(i) The organization performs substantial employment functions, as described in paragraph (c)(2) of this section, on behalf of its client employers, and maintains adequate records relating to such functions;

(ii) The organization has substantial control over the functions and activities of the MEP, as the plan sponsor (within the meaning of section 3(16)(B) of the Act), the plan administrator (within the meaning of section 3(16)(A) of the Act), and a named fiduciary (within the meaning of section 402 of the Act);

(iii) 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

(iv) 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.

(2) *Criteria for substantial employment functions.* The criteria in this paragraph (c)(2) are relevant to whether a PEO performs substantial employment functions on behalf of its client employers. Although a single criterion alone may, depending on the facts and circumstances of the particular situation and the particular criterion, be sufficient to satisfy paragraph (c)(1)(i) of this section, as a safe harbor, an organization shall be considered to perform substantial employment functions on behalf of its client employers if –

(i) The organization is a ''certified professional employer organization'' (CPEO) as defined in section 7705(a) of the Internal Revenue Code, and regulations thereunder, the CPEO has entered into a ''service contract'' within the meaning of section 7705(e)(2) of the Internal Revenue Code with respect to its client-employers that adopt the defined contribution MEP with respect to the client-employer employees participating in the MEP, pursuant to which it satisfies the criteria in paragraphs (c)(2)(ii)(A), (B), and (C) of this section, and the organization meets any two or more of the criteria set forth in paragraph (c)(2)(ii)(D) though (I) of this section; or

(ii) The organization meets any five or more of the following criteria with respect to client-employer employees participating in the plan:

(A) The organization is responsible for payment of wages to employees of its client-employers that adopt the plan without regard to the receipt or adequacy of payment from those client-employers;

(B) The organization is responsible for reporting, withholding, and paying any applicable federal employment taxes for its client employers that adopt the plan, without regard to the receipt or adequacy of payment from those client-employers;

(C) The organization is responsible for recruiting, hiring, and firing workers of its client-employers that adopt the plan in addition to the client-employer's responsibility for recruiting, hiring, and firing workers;

(D) The organization is responsible for establishing employment policies, establishing conditions of employment, and supervising employees of its client-employers that adopt the plan in addition to the client-employer's responsibility to perform these same functions;

(E) The organization is responsible for determining employee compensation, including method and amount, of employees of its client-employers that adopt the plan in addition to the client-employers' responsibility to determine employee compensation;

(F) The organization is responsible for providing workers' compensation coverage in satisfaction of applicable state law to employees of its client-employers that adopt the plan, without regard to the receipt or adequacy of payment from those client-employers;

(G) The organization is responsible for integral human-resource functions of its client-employers that adopt the plan, such as job-description development, background screening, drug testing, employee-handbook preparation, performance review, paid time-off tracking, employee grievances, or exit interviews, in addition to the client employer's responsibility to perform these same functions;

(H) The organization is responsible for regulatory compliance of its client-employers participating in the plan in the areas of workplace discrimination, family-and-medical leave, citizenship or immigration status, workplace safety and health, or Program Electronic Review Management labor certification, in addition to the client-employer's responsibility for regulatory compliance; or

(I) The organization continues to have employee-benefit-plan obligations to MEP participants after the client employer no longer contracts with the organization.

C. **<u>Working Owners</u>**. The proposed regulation is intended not only to expand the coverage of common law employees under multiple employer plans, but also to facilitate the coverage under multiple employer plans of owners who are not common law employees. The proposal would do so under the following proposed regulatory language:

(d) *Dual treatment of working owners as employers and employee*s. (1) A working owner of a trade or business without common law employees may qualify as both an employer and as an employee of the trade or business for purposes of the requirements in paragraph (b) of this section, including the requirement in paragraph (b)(1)(ii) of this section that each employer member of the group or association adopting the MEP must be a person acting directly as an employer of one or more employees who are participants covered under the MEP, and the requirement in paragraph (b)(1)(vi) of this section that the group or association does not make participation through the group or association available

other than to certain employees and former employees and their beneficiaries.

(2) The term ''working owner'' as used in this paragraph (d) means any person who a responsible plan fiduciary reasonably determines is an individual:

(i) Who has an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including a partner or other self-employed individual;

(ii) Who is earning wages or self-employment income from the trade or business for providing personal services to the trade or business; and

(iii) Who either:

(A) Works on average at least 20 hours per week or at least 80 hours per month providing personal services to the working owner's trade or business, or

(B) In the case of a MEP described in paragraph (b) of this section, if applicable, has wages or self-employment income from such trade or business that at least equals the working owner's cost of coverage for participation by the working owner and any covered beneficiaries in any group health plan sponsored by the group or association in which the individual is participating or is eligible to participate.

(3) The determination under this paragraph (d) must be made when the working owner first becomes eligible for participation in the defined contribution MEP and continued eligibility must be periodically confirmed pursuant to reasonable monitoring procedures.

VI. **<u>Would the DOL's Proposed Rule Make a Difference</u>?** In admirable candor, the DOL confesses in its proposed rule that it is not sure its proposal would substantially increase the number of persons covered under retirement plans. The DOL's proposal is aimed at, though not restricted to, expanding coverage for employees of smaller employers. The Department notes that small employers may be deterred from offering retirement benefits for reasons of both cost and fear of fiduciary or other liability or responsibility. As to the first point – cost – the hope is that larger multiple employer plans will have lower administrative and investment management expenses, measured on a per-participant basis, than most smaller plans.

The DOL does a nice job in its proposed rule acknowledging the various arguments concerning the regulation's possible effect on plan costs. In doing so, it includes references to a number of helpful surveys and statistical compilations. But as the DOL observes, multiple employer plan costs may not always be lower than those under currently available offerings from bundled financial service providers. More generally, the DOL says the variety of small employer retirement plan options currently available under the Tax Code

"may better serve an employer's needs than a [multiple employer plan] would in some circumstances." Leaving aside administrative and investment costs, if an employer is to make a matching or other contribution, that would, of course, be another, perhaps more substantial, cost.

As to the concern smaller employers, or other employers not offering retirement plans, may have about the legal risks associated with offering a retirement plan, the DOL proposal does not seem to signal any relaxation of the applicable fiduciary standards. The DOL says a multiple employer plan structure may "effectively transfer substantial legal risks to professional fiduciaries responsible for the management of the plan," but notes that "employers would [still] retain some fiduciary responsibility for choosing and monitoring the arrangement and forwarding required contributions to the [multiple employer plan]." This is really little, if any, different than the DOL's general view of one's responsibility in hiring and monitoring any vendor in connection with a retirement plan.

If the DOL's current proposal becomes effective, only time will tell whether it will have the desired effect of increasing retirement plan coverage (or at least availability). The DOL proposal is fair and transparent in expressing its uncertainty about the effect it may have. My view is that with the remarkable reduction in mutual fund investment management fees over the past decade or so, and increasingly competitive pricing by recordkeepers, the hoped-for reduction in administrative and investment costs associated with multiple employer plans may not seem all that impressive to an employer that is already cost conscious.

The argument about relieving small employers of fiduciary responsibility is more interesting. If an employer's primary fiduciary responsibility would be merely to select and monitor a multiple employer plan vendor, the question may become what that selection and monitoring requires. If, in choosing and monitoring a multiple employer plan vendor, ERISA's fiduciary rules require the employer to compare offerings – in terms of service, administrative costs, and investment options – available from a variety of vendors, and require quarterly analysis of the investment options offered by the chosen vendor, this may prove a considerable burden for a small employer. This may particularly be true if the employer feels it must retain an investment, or other retirement plan, consultant to help it with its analysis. Retaining such an expert would, after all, be the norm for larger employers trying to meet their ERISA fiduciary obligation of prudence. My view is that if the DOL's proposal, or some variant of it, is to have the desired effect of substantially expanding retirement coverage, the DOL may need to issue guidance clarifying, and probably relaxing, the fiduciary standards applicable to the choice and monitoring of multiple employer plan vendors.

In considering whether the DOL proposal would substantially change the marketplace, it is worth noting that there are already multiple employer plans available, including some very large ones. Consider, for example, that in the listing of the largest defined contribution multiple employer plans set out in an earlier GAO Report, the third largest such plan (based on 2009 Forms 5500) was the ADP Total Source Group, Inc. plan. At that time, the ADP plan had roughly 150,000 participants and over $1 billion in assets. GAO-12-665,

Appendix I (September 2012). That plan is already available, and apparently has been available since 1988.

Also casting doubt on the effect the DOL proposal may have, remember that the primary practical value of the DOL proposal to a small employer is the ability to avoid the need to file a Form 5500. But with respect to multiple employer plans already in place, such as the ADP plan, if participating employers' understanding, rightly or wrongly, is that they are not obligated to file a Form 5500 (or the multiple employer plan prepares individual Forms 5500 to be filed by the individual participating employers), it is not clear to me the DOL's proposal would increase participation.

That said, it is possible that merely by focusing attention on multiple employer plans, whatever the DOL promulgates as a final rule will spur the adoption of retirement plans by small employers. The DOL's proposal might cause additional parties to sponsor multiple employer plans, and in marketing those plans to small employers the attention brought by the DOL regulation and the President's Executive Order could provide those sponsors with a way to grab employers' attention, and might perhaps (mistakenly) be spun as some type of governmental blessing of the type of plan being marketed.

Again, my hunch, is that it will not be cost savings that will be the primary driver of any success in increasing retirement plan participation. Instead, I suspect it is the convenience and comfort afforded a small employer that comes to believe it can simply "purchase" a turnkey retirement plan for its employees that might meaningfully increase retirement plan participation. Even if the DOL does not issue guidance relaxing, or at least clarifying, the fiduciary standards applicable to the choice and monitoring of multiple employer retirement plan vendors, many smaller employers may fail to rely on an attorney or other advisor who would know to warn the employer of its fiduciary risks. In that circumstance, the fiduciary risks themselves may be little or no impediment to increasing coverage.