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Employee Benefit Plan Review

Multiple Changes for Multiple Employer Plans

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While the Setting Every Community Up for Retirement Enhancement Act (the "SECURE Act"), signed into law on December 20, 2019, and its promise of pooled employer plans ("PEPs") sat with the Senate, the U.S. Department of Labor ("DOL") and Internal Revenue Service ("IRS") both issued guidance addressing traditional multiple employer plans ("MEPs").

DOL Final Regulations – MEPs Open Up for Bona Fide Groups or Associations

Under ERISA, only an "employer" may sponsor a pension plan. ERISA defines the term "employer" to include certain groups or associations of employers. The DOL has interpreted this to mean that only a bona fide group or association of employers may sponsor an MEP, thereby limiting the ability of employers to group together to achieve economies of scale aimed at reducing the administrative costs of establishing and maintaining a retirement plan.

The final regulations provide a safe harbor definition of "bona fide group or association of employers."

On July 31, 2019, the DOL published final regulations addressing the definition of "employer" under ERISA for purposes of its rules on who may sponsor MEPs. These final regulations supersede proposed regulations issued on October 23, 2018, and prior subregulatory guidance.

The final regulations provide a safe harbor definition of "bona fide group or association of employers." If a group of employers satisfies this definition, the DOL will deem the group an "employer" for purposes of being able to sponsor an ERISA pension plan. This safe harbor definition requires the group to satisfy a seven-factor test.

One of these seven factors is "commonality of interest." The regulations define "commonality of interest" as arising where the employers in the group are in the same trade or industry, and where 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 (e.g., if the metropolitan area exceeds a single state). Prior to the final regulations, subregulatory guidance required the application of a complicated multifactor test to determine whether a group of employers possessed commonality of interest.

DOL Request for Information – The DOL May Yet Open the Door to Open MEPs

While the final regulations made MEPs more attractive for some groups of employers, they generally prohibited financial institutions from sponsoring MEPs.

However, the DOL also issued a request for information ("RFI") on whether financial institutions or other entities should be permitted to sponsor defined contribution MEPs on behalf of multiple unrelated employers – similar to PEPs as described in the SECURE Act. Comments on the RFI were due on October 29, 2019.

IRS Proposed Regulations – One Bad Apple Need Not Spoil the Bunch

In addition to seeing MEPs as difficult because of the DOL's complicated subregulatory guidance addressing who may sponsor an MEP, employers have long seen MEPs as dangerous because of the IRS's "one bad apple rule." Broadly, this rule provides that an entire MEP will be disqualified if one of the MEP's sponsoring employers fails to comply with certain IRS requirements. This would result in significant tax consequences for all participants in the MEP, including employees of a compliant participating employer.

On July 3, 2019, the IRS issued proposed regulations that introduce an exception to the "one bad apple rule." To fall within this exception:

(1) The MEP must satisfy certain eligibility requirements (e.g., adopting certain plan language and having established practices and procedures to promote compliance by employers);

(2) The MEP administrator must provide any noncompliant participating employer with notice and an opportunity to cure;

(3) If the noncompliant participating employer fails to cure, the MEP administrator must spin off the MEP assets attributable to such employer's employees; and

(4) The MEP administrator must comply with any information request that the IRS or a representative of the spun-off plan makes with respect to an IRS examination of the spun-off plan.

An Uncertain Landscape for MEPs Going Forward

These regulations help alleviate some of the uncertainty and risk that have made MEPs unpopular in recent years, but a number of questions remain unanswered. What will be the role of traditional MEPs in light of the SECURE Act's creation of PEPs? Will the DOL issue subsequent regulations that permit financial institutions to sponsor MEPs on behalf of related or unrelated employers? How safe are the DOL's final regulations on MEPs now that a court has vacated the DOL's final regulations on association health plans (which used a nearly identical interpretation of the term "employer" under ERISA)? (That court ruling is currently on appeal.) What fiduciary exposure does an MEP administrator have where it spins off assets attributable to a noncompliant employer's employees, without the consent of such employer and in accordance with the proposed IRS regulations?

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