Retirement MEPs
Recent Developments from the DOL

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DOL Regulation 2510.3-55

• Defines ERISA 3(5) employer for multiple employer defined contribution retirement plans (retirement MEPS).
• Supersedes all DOL sub-regulatory guidance on bona fide employer associations.
• Provides pathway for professional employer organizations (PEOs) to establish a MEP.
• Effective Date: September 30, 2019.
Bona Fide Employer Association
Basic Requirements

• ERISA 3(5) permits an employer group or association to establish a single multiple employer plan (MEP).
• 3-55(b)(1) creates a regulatory safe harbor.
• Group or association may have establishment of MEP a primary purpose but must have at least one other unrelated substantial business purpose.
Bona Fide Employer Association cont

Substantial Business Purpose

• Substantial business purpose exists if employer group or association would be (Preamble -- or has in the past been) a viable entity without sponsoring an employee benefit plan.

• Includes promoting common business or economic interests in a given trade or employer community.

• Is not required to be a for-profit activity.
Bona Fide Employer Association
Basic Requirements cont

• Each employer member of the group or association participating in the MEP must be the direct or common law employer of at least one employee/participant in the MEP.

• Group or association has formal organizational structure with a governing body, and has by-laws or other similar indications of formality.
Bona Fide Employer Association
Basic Requirements cont

• Functions and activities of group or association are controlled by employer members.

• MEP controlled by group or association’s employer members that participate in the MEP.

• Control must be present in both form and substance.
Bona Fide Employer Association
Basic Requirements cont

• Employer members have a commonality of interest.

• Employer group or association does not make MEP participation available other than to employees and former employees of employer members and their beneficiaries.

• Group or association is not bank, trust company, insurance issuer, broker dealer, pension record-keeper, TPA, or any affiliate or subsidiary, although these entities may participate as employers.
Bona Fide Employer Association cont
Commonality of Interest

• Member employers must:
  – Be in the same trade, industry, line of business, or profession, or
  – Have principal place of business in same state or metropolitan region.
  – Association itself may participate as an employer
Bona Fide Association cont

Working Owners

• Working owners with no common law employees may participate as employer and employee.
• Must be reasonably determined by a responsible plan fiduciary.
• Must have ownership interest in the trade or business.
• Must earn wages or self-employment income from providing personal service to the trade or business.
Bona Fide Employer Association cont

Working Owners

• Must work in his/her trade or business 20 hours/week or 80 hours per month, or
• has sufficient income from his/her trade or business to cover working owner and beneficiaries in any AHP sponsored by his/her bona fide employer group or association.
• Must satisfy this criteria when first eligible for the DC retirement MEP, and must be confirmed periodically by a reasonable monitoring process.
Bona Fide Professional Employer Organization (PEO)

- PEO defined as a human resource organization that contractually assumes certain employer responsibilities of its client employers.

- Bona fide PEO is defined as an organization that performs substantial employment functions on behalf of its client employers and maintains adequate records relating to such functions.
Bona Fide PEO cont

- PEO must have substantial control over the functions and activities of the MEP as plan sponsor, plan administrator, and as a named fiduciary and has employee benefit plan obligations to MEP participants after client employer no longer contracts with the PEO.

- PEO ensures that each client employer that adopts the MEP has one direct or common law employee of at least one employee who is a participant covered under the MEP.
Bona Fide PEO cont

• PEO must ensure that participation in the MEP is available only to employees and former employees of the PEO and client employers (and their beneficiaries), and employees and former employees (and their beneficiaries) of former client employers who became participants during the contract period between the PEO and client employer.
Bona Fide PEO cont

Substantial Employment Functions

• Safe Harbor - if PEO meets four criteria with respect to each client employer employee that participates in the MEP:
  • without regard to the receipt or adequacy of payment from the client employers, for its client employers who adopt the MEP -
  • PEO assumes responsibility for and pays wages to employees.
  • PEO assumes responsibility for and reports, withholds and pays federal employment taxes.
Bona Fide PEO cont

Substantial Employment Functions

• The PEO plays a definite and contractually specified role in recruiting, hiring, and firing workers of its client employers who adopt the MEP, in addition to the client employer’s responsibility for recruiting, hiring and firing workers.

• PEO considered to satisfy this standard if PEO performs these tasks, assumes responsibility for these tasks, or retains the right to perform these tasks, in addition to client employer.

• PEO assumes responsibility for and has substantial control over employee benefits under its contract with client without regard to receipt or adequacy of payment from client employer.
Severability

• Regulation provides that if any provision is declared invalid, unenforceable by its terms or applied to any person, the provision is still to be given its maximum possible effect, unless the holding is of complete invalidity, the provision is severed and does not affect the remainder of the section.

• Two examples – the substantial business purpose requirement, and the working owner provision.
DOL MEP Reporting Relief  
DOL FAB 2009-01

• DOL Offers Temporary Penalty Relief for All Multiple Employer Plans not Currently in Compliance with the Form 5500 MEP Reporting Requirements.

• In 2014, by interim final rule, the DOL amended the Form 5500 Annual Return/Report, and the related Instructions, to administer the newly enacted ERISA section 103(g).
MEP Reporting Relief cont

• MEPs required to report a list of participating employers with their EINs, and a good-faith estimate of the percentage of each employer’s total contributions (including employer and participant contributions) in relation to the total contributions made by all participating employers during the applicable year.

• The Interim Rule defines the term “participating employer” as employers obligated to contribute to the MEP, employers who made contributions to the MEP, or employers whose employees were covered by the MEP.
MEP Reporting Relief cont

• According to FAB 2019-01A, a recent review by the DOL of Form 5500 data found that some MEPs, including PEO MEPs have not properly included a complete and accurate list of participating employers and other required information with the Form 5500.

• Because of the possibility of misunderstanding, the FAB 2019 announces that temporary transition relief will be provided to MEP plan administrators who voluntarily begin filing 5500s with complete and accurate participating employer information.
the DOL will not reject a MEP Form 5500 or Form 5500-SF filed on behalf of a MEP for the 2017 plan year, or any prior plan year, or seek to assess civil penalties for such filings, solely because the plan administrator failed to file these annual reports in compliance with ERISA Section 103(g) as implemented by the DOL, provided that the annual reports filed for the MEP for the 2018 and following plan years include the necessary complete and accurate employer information.

MEPS which have filed or are preparing to file for the 2018 plan year receive up to a 2 ½ month extension.