PUBLICATION

Department of Labor Expands Accessibility to Multi-Employer Retirement Plans

September 30, 2019

On July 29, 2019, the United States Department of Labor (DOL) issued a Final Rule on Association Retirement Plans (ARPs) (the Final Rule), defining how an employer, association, or professional employer organization (PEO) can sponsor a multiple-employer workplace retirement plan (MEP). By providing new instruction as to how "employer" is defined under the Employee Retirement Income Security Act (ERISA) to include the aforementioned entities, the Final Rule seeks to widen accessibility to affordable retirement savings plans for those working in small and mid-sized businesses. An MEP allows employees of two or more separate employers to be covered by a single plan. Small and mid-size employers can reduce the risk of administering an individual plan by joining with other entities to sponsor an MEP, creating a plan that is more affordable and higher-quality for those involved.

Multi-employer plans are widely and colloquially categorized as either "open" or "closed." An open MEP is as expected – a plan that is "open" to membership by any organization or employer, regardless of whether the employers are similar. Open MEPs are not considered single plans under ERISA; each employer sponsoring these plans must individually satisfy tax and ERISA bond requirements. This hampers the willingness of small to mid-sized businesses to join open MEPs, as they are burdened with the same mandates associated with maintaining a plan on their own. In contrast, closed MEPs are those which have multiple members, but that are treated as a single plan under ERISA for tax and bond purposes. Members of a closed MEP share the risk and administrative burdens associated with such plans, enabling them to provide better and cheaper coverage to employees. Prior to the publication of the Final Rule, closed MEPs, and the benefits flowing therefrom, were only available to "bona fide" groups or associations that had sufficient commonality or were part of the same industry *and* located within the same tri-state area.

To the contrary, under the Final Rule, a set of employers is no longer required to satisfy both relatedness and geographic requirements; a group may *either* operate in the same industry *or* the same geographic region, regardless of industry, to sponsor a closed MEP. Additionally, the DOL altered the locality scope from a tri-state area to "a single State or metropolitan area (even if the metropolitan area includes more than one State)," effectively broadening this zone. 29 C.F.R. § 2510.3-55(b)(2)(A), (B). If not located in the same region, employers can still jointly sponsor an MEP if they are "in the same trade, industry, line of business or profession." *Id.* at (b)(2)(A).

Additionally, under the regulatory landscape prior to the publication of the Final Rule, self-employed individuals could not participate in a closed MEP and utilize group benefits and economies of scale. The Final Rule allows for some "working owners," such as sole proprietors, to participate in an MEP despite that they have no employees. 29 C.F.R. § 2510.3-55(d).

Through the added flexibility to "commonality" and other provisions, the intended effect of the Final Rule is to expand access to closed MEPs. This is also attempted by adopting a broader and more flexible definition of an "employer" that may sponsor such a plan under ERISA. An "employer" is defined by ERISA as "any person acting directly as an employer, or any person acting indirectly in the interest of an employer in relation to an employee benefit plan." *See* 29 C.F.R. § 2510.3-5(a). However, neither ERISA nor interpreting authorities have provided clear definitions for this term in the MEP context.

Arguably most significant is that the Final Rule expands the definition of "employer" for purposes of sponsoring an MEP to expressly include professional employer organizations (PEOs) and association sponsors. A PEO is a third-party entity often utilized by small and mid-sized businesses to outsource human resources administration. Prior to the publication of the Final Rule, there was not clear "existing subregulatory guidance nor judicial authority" articulating whether a PEO constitutes an employer for purposes of sponsoring an MEP. Final Rule, p. 15. Under the Final Rule, if a PEO qualifies as a "bona fide PEO that may act indirectly in the interest of [its client] employers," it may serve as an administrator and sponsor of an MEP. *Id.* A PEO does not qualify without meeting certain express requirements, such as performing "substantial employment functions" on behalf of employer-clients. 29 C.F.R. § 2510.3-55(c)(1)(i).

To address the prior uncertainty surrounding PEOs, the Final Rule provides a "safe harbor," allowing PEOs to ensure legal compliance while also hampering potential abuse by requiring a PEO to handle more than just benefits administration for clients. Under the safe harbor provision, if a PEO pays wages to clients' employees, performs reporting and withholding for federal employment taxes, plays a specified role in recruiting and termination of clients' employees, and has control over the functions of any employee benefits for clients' employees, the PEO categorically meets the "substantial employment functions" requirement. 29 C.F.R. § 2510.3-55(c)(1)(i) – (iv). This expansion of "employers" applies not only to PEOs, but also to associations, such as a local chamber of commerce, allowing such a group to sponsor an MEP for chamber members that wish to opt-in and make the plan available to employees.

The intended practical effect of the Final Rule is that many more Americans employed by small or mid-sized businesses will be covered by an employer-sponsored retirement plan, a desirable outcome for both financial stability of employees and for employers' ability to attract talent. To that end, the DOL made a notable turn from the previously strict interpretation of "commonality of industry" to indicate that "the Department intends for [trade, industry, line of business, or profession] to be construed broadly to expand employer and employee access to MEPs," going so far as to include "businesses that support a particular industry, or that are allied in a particular industry" within the reach of commonality. Final Rule, p. 31.

To acknowledge realistic negative possibilities, the DOL noted that "[b]y their nature, MEPs have the potential to build up a substantial amount of assets quickly and the effect of any abusive schemes on future retirement distributions may be hidden or difficult to detect for a long period." *Id.* The DOL addresses this concern by stating that it "has compliance assistance and enforcement systems in place to safeguard plan assets from fraud and abuse." *Id.* The DOL also emphasized that a PEO is intentionally required to serve as a "named fiduciary" of the plan to avoid such abuse. Final Rule, p. 109.

The 2019 Final Rule exclusively regulates closed MEPs. Commenters to the rule indicated that retirement plan participants will not significantly increase unless the DOL provides similar protections and expansions to "open" MEPs, which it has declined to do in this rule. The DOL has solicited comments as to regulations of open MEPs, with suggestions due on or before October 29, 2019. We will keep you advised of developments.