DOL issues regulations regarding multiple employer pension plans

By Wagner Law Group *Thu, Oct 25, 2018*

The proposal doesn't address 'open MEPs' that would allow retirement plan providers to sponsor plans. It establishes seven requirements for groups or associations that want to co-sponsor a plan for members.

On October 22, 2018, the Department of Labor (DOL) issued a proposed regulation in response to President Trump's August 31, 2018 Executive Order to remove regulatory burdens faced by multiple employer pension plans ("MEPs").

While there are generally four types of MEPs, the proposal modifies the rules for so-called "closed" MEPs and clarifies rules with respect to MEPs sponsored by a professional employer organization ("PEO"). The proposed regulations provide that a bona fide group or association of employers and bona fide PEOs are deemed to be acting in the interests of an employer, and thus, can establish a pension plan so long as they satisfy the DOL's regulatory requirements.

"Closed" MEPs: Bona Fide Employer Groups or Associations

A "closed" MEP refers to a MEP for which the participating employers have a sufficiently close economic or representational nexus allowing it to be treated as a single MEP for ERISA purposes. The advantages of a "closed" MEP structure include the requirement of only a single audit, bond and Form 5500 Annual Returns/Report. DOL guidance refers to the participating entities of closed MEPs as "bona fide" employer groups or associations. Under the proposed regulations, the group or association of employers is considered bona fide if seven requirements are met. The requirements are substantially the same as the requirements applicable to association health plans under recently issued final DOL regulations. They are:

(1) The primary purpose of the group or association may be to offer and provide MEP coverage to its employer members and their employees, provided, however, the organization must have at least one substantial business purpose unrelated to the offering and providing of MEP coverage and benefits. A business purpose includes common business interests of its members or the common economic interests in a given trade or employer community. The proposed regulations contain a safe harbor: a substantial business purpose is deemed to exist if the group or association would be a viable entity in the absence of considering the establishment of a pension plan.

(2) Each employer member of the group participating in the plan is a person acting directly as an employer of at least one employee participating in the plan, including a working

owner.
(3) The group or association has a formal organizational structure with a governing body and has by-laws or other similar indications of formality.
(4) The functions and activities of the group or association are controlled by its employer members, and the group's or association's participating employers control the plan.
(5) The employers have a commonality of interest. A commonality of interest exists if either:

(i) the employers are in the same industry, trade, line of business or profession, or

(ii) have a principal place of business that does not exceed the boundaries of a single state or metropolitan area.

(6) Participation in the plan is restricted to employees and former employees of the employer members, and their beneficiaries.
(7) The group or association is not a bank, trust company, insurance issuer, broker-dealer, or other similar financial services firm, other than participation in the group or association as an employer member.

Bona Fide PEOs

The conditions for a bona fide PEO are different than that for closed MEPs in two respects. First, the PEO must have substantial control over the functions and activities of the MEP as the plan sponsor, plan administrator, and named fiduciary. Second, the PEO must perform "substantial employment functions" on behalf of the employers. Whether a PEO meets this requirement is based on a facts and circumstances test under which nine criteria are considered, but not all must be satisfied. The DOL also proposed two safe harbors in order provide more certainty with respect to the substantial employment functions test.
The preamble to the proposal makes it clear that MEP participating employers would retain limited fiduciary responsibilities. Employers would be required to be prudent in the selection and monitoring of service providers and would also be responsible for the timely remittance of contributions to the plan.
One issue not addressed in the proposed regulations, as it is a Treasury Department rather than a DOL issue, is the "one bad apple rule," under which the action of one participating employer with respect to the MEP can jeopardize the tax qualified status of the MEP for all other participating employers. The Treasury Department is expected to modify this rule. The DOL indicated in the preamble that nothing in the proposed regulations has any effect upon joint employer issues.
As mentioned above, the proposed regulations do not address two other types of MEPs:

“open” MEPS and “corporate” MEPs. An “open” MEP is a MEP that covers employees of employers with no relationship other than their joint participation in the MEP. “Open” MEPs are not single retirement plans for ERISA purposes; each adopting employer is treated as having established a separate ERISA plan. Consequently, audit, bond an annual reporting requirements apply to each ERISA plan. A “corporate” MEP covers employees of related employers that are not in the same controlled group or affiliated service group. In the preamble to the proposed regulation, the DOL solicited comments as to whether the final regulations should, in fact, address one or both of these types of MEPs. Currently, there is proposed legislation in both houses of Congress that would permit “open” MEPs if certain conditions are satisfied.