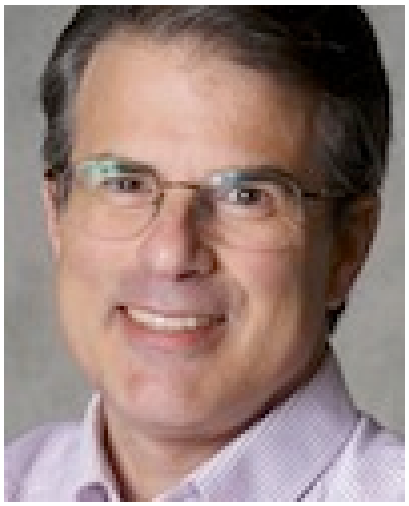
Is a P.E.P. Rally About to Start?

By Kerry Pechter *Thu, Jul 30, 2020*

Willis Towers Watson and Aon both suggested in letters to the Labor Department that they may create defined contribution plans (Pooled Employer Plans, or PEPs) that many employers and companies could join. We may be at a watershed moment in 401(k) history, or not.



Willis Towers Watson and Aon, two publicly-traded, global, diversified human resource and financial consulting firms are looking to create large defined contribution retirement plans—"Pooled Employer Plans," or PEPs—and invite dozens or hundreds of smaller companies to join.

That was my takeaway from reading their comments in response to the Department of Labor's (DOL) Request for Information about potential conflicts of interest as financial services companies take advantage of the 2019 SECURE Act to initiate retirement plans, serve as the plan fiduciary, and also sell their own products to the participants.

"Willis Towers Watson is considering establishing a PEP [Pooled Employer Plan] and becoming a PPP [Pooled Plan Provider]," the firm said in its letter to the DOL. Aon's letter said, "The Aon PEP is designed to be a bundled solution for participating employers, utilizing the expertise of both affiliated and non-affiliated service providers of Aon."

The era when small business owners often relied on their own personal (but not necessarily pension-savvy) financial advisers to help them start tiny, over-priced, labor-intensive 401(k) plans for themselves and a handful of employees—or go without a plan at all—may be ending on January 1, 2021. That's when PEPs can go live.

It's possible that the history of retirement savings in the U.S. is about to turn a corner. The current moment reminds me of the early 1980s, when deregulation began to transform the banking and health insurance businesses.

Or PEPs could turn out to be a small phenomenon, already enabled under current law. In his comment letter, attorney Robert Toth said that the new PEPs, though now formally permitting unrelated employers to join single plans, won't in practice add much to the status quo, beyond offering those employers consolidated annual reporting. In PEPs each employer

will remain a co-sponsor of the plan, rather than ceding sponsorship to the PPP.

“What *could* have happened in SECURE, but did not, was to turn 401(k)s into a pure commodity, with employers not having much of any responsibility other than adopting it,” Toth said in an email to *RIJ*. “AON, for example, is not sponsoring the plan. They are merely a sort of ‘super’ service provider of the type we are already using.”

Instead, the PEP rules specifically kept the traditional obligations of the employer/sponsor; they are treated as if they were sponsoring their own plan, with all the obligations.

It’s confusing, and it’s not at all clear where all this will lead.

Many of the other 30 letters to the DOL—all from law firms, trade associations, or specific companies, plus AARP—attested that financial services companies, or different arms of the same company, should be able to provide oversight to the plan while marketing their products to plan participants.

Some firms said the DOL needs to issue new and specific exemptions from certain existing conflict-of-interest prohibitions before they can legally offer 401(k) plans. Empower Retirement’s letter said, perhaps signaling its interest in marketing group annuities to participants in its own PEP:

“We do not believe there is an existing prohibited transaction exemption that would allow a PPP or an open MEP sponsor, acting with investment manager under ERISA Section 3(38), to retain compensation associated with general account group annuity contracts. Therefore, we recommend the DOL engage with the industry in discussions about a workable prohibited transaction exemption to allow insurance company commercial entities operating as PEP or open MEP sponsors to offer proprietary general account products.”

Empower expressed a definite concern that the DOL rules currently don’t make it clear that existing full-service plan providers like itself can offer retirement plans, be its own primary watchdog, largely determine its own compensation, and offer proprietary products, without committing a conflict-of-interest violation under current law.

Transamerica, which has a history of serving as the recordkeeper for Multiple Employer Plans (a predecessor of PEPs), also submitted a letter. It asked the DOL to ensure that a trustee of a PEP could transfer the chore of collecting participant contributions to a PEP 401(k) account to a recordkeeper like Transamerica. Evidently, Transamerica wants to make sure that it has a seat at the table in PEPs.

I was scouring the letters for references to annuities. A letter from attorney Steve Saxon of the Groom Law Group sought to clarify the rules around the setting of direct or indirect compensation—revenue sharing, for instance—for fixed annuity providers that may or may not be affiliated with the PEP recordkeeper. He seemed to tie fixed annuities with target date funds; adding an annuity to a target date fund is one way that a lifetime income feature could be added to a 401(k) plan.

My sense is that the Trump DOL leans toward deregulating the retirement industry. In effect, that's what the SECURE Act seems to have done by letting a wide variety of companies start offering retirement plans and, to an unprecedented degree, letting them police their own conduct to an unprecedented agree. (As noted above, Bob Toth doesn't agree with my dramatization of the situation.)

This contrasts sharply with the Obama DOL's fiduciary rule, which would have extended the umbrella of consumer protections that govern tax-deferred employer-sponsored retirement plans to include tax-deferred brokerage IRAs. The current Labor Secretary, Eugene Scalia, was part of the legal team that led the successful fight to void the Obama DOL's "fiduciary rule."

I have been wary of the SECURE Act because its public policy goal was never transparently stated. Bipartisan sponsors of the bill said it would help small companies "band together" to bargain for better, less expensive retirement plan services.

That's not quite how the bill was ever meant to foster new economies of scale, in my understanding. Rather, it appears to encourage the creation of industry-led retirement plans, run by a wide variety of companies, that will serve dozens or hundreds of small companies and their employees. I've been told that the two descriptions amount to the same thing, but I disagree.