U.S. Department of Labor

ERISA Advisory Council Testimony

On

"Outsourcing Employee Benefit Plan Services"

Testimony presented by

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Introduction

Mr. Chairman and members of the Council: thank you for allowing me the opportunity to speak to you today on the important topic of *Outsourcing Employee Benefit Plan Services*.

My name is Terrance Power. I am the founder and President of The Platinum 401k, Inc. and American Pension Services, LLC, located in Clearwater, Florida. I have been in the retirement plan industry since 1981, first as a financial advisor, then as a 401k wholesaler with a major insurance company for over ten years, and, since 2000, as the founder and CEO of an independent third-party retirement plan administration firm.

Our company provides administrative and compliance services for employer groups who employ an average of 150 workers each. Some of our clients are smaller, while some have thousands of employees. But the majority of our clients are in the smaller end of the retirement plan market.

I would like to touch on three important items during my testimony today:

First, I would like to provide the Council with some background on this issue as it pertains to the Professional Employer Organization (PEO) firms, since that entire industry (which I have been associated with as a service provider for over 25 years) is structured around providing outsourced employee benefit plan services and solutions;

Secondly, I would like to discuss how today's complex regulatory and compliance environment is driving smaller employers (those with generally less than 1,000 employees) to seek out alternatives to the traditional manner in which qualified retirement plans have been managed in the past;

And finally, I would like to offer some observations and examples of how a multiple employer retirement plan solution can not only broaden retirement plan coverage for America's workers, but also help to insure regulatory compliance, increase fiduciary oversight, and protect plan assets - all of which will help promote a more secure retirement strategy for America's workers.

I will conclude my remarks with several specific recommendations that I believe will help insure the ability for the Employee Benefit Security Administration to properly monitor plan fiduciary compliance while also affording employers the opportunity to focus more of their attention on their businesses, and less on running their 401k plan.

Professional Employer Organizations (PEO's) and Benefit Plan Outsourcing

The PEO industry (also known as the *Employee Leasing* industry), was started in Florida and Texas in the mid-1980's. I began working with these types of clients soon after that. We are currently engaged by several PEO's as a third party retirement plan administrator to their Section 413(c) multiple employer plan.

In 2002, the Internal Revenue Service issued Revenue Procedure 2002-21 (attached), which required PEO's to utilize IRC Section 413(c) Multiple Employer Plans as the exclusive type of retirement plan structure for their PEO clients. There were several reasons for the IRS taking this step, not the least of which dealt with plan testing issues pertaining to which participants were deemed to be a highly compensated or key employee. We fully supported the decision to move PEO's into a multiple employer plan format. It is our opinion that this type of structure remains as an effective tool to deal with coverage, compliance, and other regulatory issues surrounding the clients who have chosen to engage a PEO to handle their employee benefit programs. It works.

The IRS Revenue Procedure did not address what specific contractual arrangement the PEO needed to have with the "worksite employer" in order for the employer to be eligible to adopt onto the PEO's retirement plan. In a traditional structure, the PEO would enter into a "co-employer relationship", where both the PEO and the worksite employer take on legal co-employer status. This is needed in many cases to allow the worksite employer to partake in certain employee benefit programs.

However, there are many, many instances where a worksite employer doesn't wish to enter into a co-employer relationship with the PEO. This might be due to costs, limited benefit choices, regulatory issues, and several other factors. In this situation, the worksite employer might opt to contract with the PEO under an Administrative Services Only (ASO) arrangement. Under this scenario, there is no co-employer relationship. The PEO is simply providing certain services to the worksite employer such as payroll processing, ancillary benefit management, human resource consulting, etc.

One of the ASO services provided might also be the ability for the worksite employer to adopt onto the PEO's multiple employer plan.

By adopting onto a PEO's multiple employer plan, an employer effectively gains the exact same benefits that were in place *prior* to the Department of Labor's Advisory Opinion 2012-04A (attached) that dealt with "Open Multiple Employer Plans", and those benefits remain in place to this very day. The overall PEO plan is subject to just one overall plan audit, just one ERISA bond, and just one Form 5500 filing. In other words, it is business as usual for PEO's and adopting employers under an ASO arrangement as they effectively continue to operate what amounts to an "Open MEP" under the general approval of IRS Rev Proc 2002-21.

It is quite likely that there is no other "nexus" or commonality between the PEO and many of their adopting employers other than that employer's decision to adopt onto the PEO's retirement plan.

Is this a bad thing? I don't think so. Smaller companies, which previously weren't subject to an independent annual audit as part of their Form 5500 submissions, are now subject to testing and sampling by an independent accountant due to their status as being part of the PEO plan. Additionally, the PEO will assume the responsibility for service provider selection, fund

selection and monitoring, compliance and notice requirements, and allow the adopting employer to concentrate on running their business *instead* of their retirement plan.

Small Employers Struggle to Remain Compliant in Today's Economy

My second point deals with the challenge for employers to stay compliant with our increasingly complicated regulatory burdens.

The much-needed 408(b)(2) and 404(a)(5) disclosure requirements are a great step down the path to what I hope will be eventually be a true fiduciary standard for all qualified plans, including individual retirement accounts.

However, the paperwork and disclosure processes associated with these disclosure requirements, in many cases, represent a compliance and regulatory burden on smaller employers as many of them simply lack the technical and/or staffing resources to carry out these mandates in a timely and efficient manner.

I wrote an article in PLAN SPONSOR magazine in August 2011 where I questioned the reasons why an employer couldn't simply handle their company's 401k plan in the same general manner that they run all of their other employee benefit programs.

If an employer wanted to make sure that their employees were protected in the event of an illness or injury, they could – at least in theory – negotiate and contract with a local hospital, a pharmacy, physicians, radiology groups, etc. They would have to insure that all of these companies were properly licensed and accredited, and then dedicate time and internal resources to make sure that everything is working properly.

Or they could simply sign up with a health insurance provider who would handle all of these details for the employer.

The choice to select a health insurance provider is the option that almost all small employers choose, not just for their health care coverage, but also for Group Life Insurance, Worker's Compensation, Group Dental, Medical Spending Accounts, and virtually all other employee benefit programs. They select a qualified provider who assumes the risks and responsibilities for the oversight and compliance of the program, and they monitor the provider and, if necessary, make provider changes as needed.

The traditional single employer 401k plan is the only major employee benefit program that doesn't work this way.

As a result of this singularly unique benefit plan structure, plan participants can suffer due to the lack of expertise and knowledge that many employers have regarding qualified plans. Small business owners should have the same option to outsource 401k operations that they have with their healthcare and other employee benefit programs in order to save them time, money, and to protect their employees.

Benefits to Employers to Outsource Employee Benefit Programs.

Small employers in today's competitive economy are faced with many challenges. There is stiff competition in a sometimes difficult economy, regulatory burdens to deal with, and the need to attract and retain quality employees. One of the continued fallouts from the Great Recession is that human resource departments have been downsized in an effort to lower overhead, even as many of the duties associated with properly running employee benefit plans increase.

Industry business experts and consultants continue to tout the advantages of outsourcing employee benefit programs. A Forbes.com article in 2012 entitled "401k Outsourcing: The Next Big Thing" noted that this growing trend offered several significant benefits to employers, including:

- Reduced Liability
- Increased Objectivity
- Fewer Conflicts of Interest
- Increased Service Level

Employers continue to turn to Professional Employer Organizations as an outsourcing option. They are also turning to their own industry Associations to establish Multiple Employer Association Plans (MEAPs) which will give them a retirement plan with benefits similar to that of a PEO. The MEAP allows the employer to outsource many of the functions of running their 401k, and also eliminates the need for a separate Form 5500, separate plan audits, etc.

The continued growth of both of these alternatives only serves to underscore the strong demand by employers to seek out a regulatory and compliance solution for a complicated employee benefit that many employers simply lack the skill to handle properly on their own.

Conclusion and Recommendations

The demand in the smaller end of the retirement plan marketplace, coupled with legislative proposals to expand the availability of multiple employer type plans to smaller employers, makes a clear case that employee retirement plan outsourcing is a timely solution to expanding retirement plan coverage and lessen the burdens on smaller employers. There are, however, several points that the ERISA Advisory Council should consider when formulating their recommendations on this issue:

1. I would recommend (as has been proposed by pending legislation and through legislation enacted in several states) to remove the "nexus" requirement that is being applied in much the same manner in which multiple employer welfare arrangements (MEWAs) operate. Nearly a dozen states have either already enacted or are reviewing pending legislation to offer a small employer multiple employer

plan type arrangement to the small businesses in their states[1]. These legislators understand the benefits associated with such a program, as do members of the United States Congress[2]. There are very good reasons to maintain a "commonality rule" in the operation of a MEWA. I don't see it as being necessary for a MEP. The ongoing daily operations of ASO arrangements in the PEO industry on a daily basis underscores the point that it isn't necessary.

2. I believe that there needs to be better documentation via the Form 5500 as to who the worksite employer is, and who the authorized representative of the employer is as well. Prior to 2005, the Form 5500 had a separate "Schedule T" submission required for each adopting employer *("Qualified Pension Plan Coverage Information")*. I would suggest reviving and revising this form to allow the EBSA to gather important adopting employer information and include it as part of future Form 5500 submissions for multiple employer plans.

3. I would recommend that a formal sample structure be put in place for multiple employer plans that will help insure that conflicts of interest, prohibited transactions, and true fiduciary independence and disclosure are in place. Service providers should not be acting as a plan sponsor while being compensated from plan assets. Qualified Default Investment Alternatives should be revenue-neutral in all cases. 408(b)(2) disclosure documents - although technically only required to be provided to the overall multiple employer plan sponsor who engaged the service provider – should also be provided to each adopting employer in the interest of full disclosure.

4. A "best practices" recommendations and guidelines for multiple employer plans should be developed by the EBSA to help insure full compliance and disclosure, all of which will be in the best interests of the plan participants. I believe this should include a restriction on the overall MEP plan sponsor receiving any asset-based fees or other revenue from plan assets apart from their being reimbursed for plan expenses to the extent allowed under ERISA.

Thank you again for allowing me the opportunity to express my positions on this important issue. I firmly believe that a properly structured 401k outsourcing program represents the future of the small retirement plan marketplace.

I would welcome your questions and comments on this issue, and I am available to the Council and U.S. Department of Labor officials for further follow, up as you may request.

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[1] Source: Pension Rights Center, May 8, 2014

[2] U.S. Senate Bill S.1970 – *Retirement Security Act of 2014*