December 24, 2018

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave., NW
Attn: RIN 1210-AB88

Re: Definition of Employer—MEPs (RIN 1210-AB88)

To Whom It May Concern:

The U.S. Chamber of Commerce ("Chamber") appreciates the opportunity to comment on the proposed rule on the Definition of "Employer" Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans published by the U.S. Department of Labor's Employee Benefits Security Administration ("DOL" or the "Department").[1] The Chamber believes that the proposal is a significant step toward expanding retirement coverage for employees of small employers and for working owners. We have several recommendations to make the rule even stronger and look forward to working with you to finalize the proposal.

Introduction

For several years, the Chamber has supported increasing retirement coverage through expanding opportunities to use Multiple Employer Plans.[2] According to the U.S. Small Business Administration, small businesses (less than 500 employees) represent 99.9% of the total firms and over half of the workforce in the United States.[3] Clearly, ensuring adequate retirement security for all Americans means encouraging small businesses to participate in the private retirement system. Small businesses, in general, face significant hurdles and may view retirement plans as yet another potential obstacle and therefore, choose not to establish them.[4]

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[1] 83 Fed. Reg. 53534 (Oct. 23, 2018).

[2] Private Retirement Benefits in the 21st Century: Achieving Retirement Security, U.S. Chamber of Commerce, February 4, 2016. https://www.uschamber.com/report/private-retirement-benefits-the-21st-century-achieving-retirement-security.

[3] U.S. Small Business Administration Office of Advocacy estimates based on data from the U.S. Dept. of Commerce, Bureau of the Census, and U.S. Dept. of Labor, Employment and Training Administration.

[4] Part of the reason why small business lags behind in retirement coverage is that the first 4 years of a small businesses' existence, they are generally fighting for their lives. Across all sectors, nearly 40

Despite the obstacles, and due to certain incentives, [5] small businesses are having success in the retirement plan arena. Small businesses with less than 100 employees cover more than 19 million American workers.[6] Nonetheless, small businesses have their own unique issues and can face significant financial and administrative burdens when faced with implementing and maintaining a retirement plan.

The Chamber views Multiple Employer Plans (MEPs) as a possible tool to help small businesses overcome these burdens in maintaining and implementing retirement plans. MEPs can promote better retirement savings behavior for employees by providing them a menu of investment options, better ensuring that plan participants will be able to tailor their portfolios to their needs and retirement goals. MEPs can also provide small businesses with enhanced opportunities for cost-effective retirement planning education programs for employees through the pooling of resources with other small businesses. Another key advantage of a MEP is the centralized functions that the MEP sponsor can provide. Costs are shared among the adopting employers, regardless of the number. This translates to substantial economies of scale and cost efficiencies over stand-alone plans for small businesses.

However, there are currently significant disadvantages to participating in a MEP. A significant concern is the commonality requirement that currently exists. The Proposed Rule expands the commonality definition but we encourage the DOL to expand this definition further to allow for optimum opportunities to take advantage of MEPs. In addition, some employers may be discouraged by the notice and disclosure requirements that are not assumed by the plan administrator. We are encouraged that the DOL has addressed this issue in the preamble to the rule and encourage the Department to include this information in the rule itself. Another significant barrier is that every employer is jointly liable for the qualification failures of every other employer in the MEP (known as the "one bad apple rule.") While this provision is not the jurisdiction of the DOL, we ask the agency to encourage the Treasury Department and Internal Revenue Service to address this issue as quickly as possible. By addressing these issues, as well as the other recommendations below, MEPs can add to the success of the private retirement system and further strengthen retirement security for many American workers.

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percent of new establishments fail after two years and over 50 percent fail after 4 years. Survival and longevity in the Business Employment Dynamics Data, Amy E. Knaup, http://www.bls.gov/opub/mlr/2005/05/ressum.pdf.

[5] Under the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") that was made permanent by the Pension Protection Act of 2006 ("PPA") small businesses may claim a tax credit for establishing a retirement plan equal to 50% of qualifying costs up to $500 per year for the first three years. In addition, the PPA instituted a number of additional positive reforms including the creation of the Roth 401(k), simplification of a number of complex administrative requirements, and the creation of the DB(k) for small businesses.

[6] Patrick J. Purcell, Congressional Research Service (CRS) Report for Congress, Social Security Individual Accounts and Employer-Sponsored Pensions, February 3, 2005, Table 2. Employee Characteristics by Employer Retirement Plan Sponsorship, 2003 at CRS-5.

Comments

The Chamber Encourages the DOL to Allow Open MEPs. The proposal expands the definition of commonality under the employer definition to include employers with a principal place of business in the same region that does not exceed the boundaries of a single state or metropolitan area.[7] The Chamber appreciates that the DOL has expanded this definition which will allow more associations to establish MEPs. In particular we believe that this expansion can reach a potentially different audience than other plan designs because organizations (such as state Chambers) would be able to offer them to members. Thus, the use of MEPs could be expanded through trade associations and other organizations that work closely with small businesses. At the same time, the Chamber believes that there is authority for the DOL to expand the regulation to open MEPs.

Under ERISA, an employer is defined as any person acting directly as an employer, or any person acting indirectly as an employer, or *any person acting indirectly in the interest of an employer in relation to an employee benefit plan*.[8] Thus, under a plain reading of the statute, an independent sponsor of a MEP can be construed as a person "acting indirectly in the interest of an employer in relation to an employee benefit plan." Therefore, we encourage the DOL to further expand the opportunities for MEP creation by allowing open MEPs.

The Proposed Rule asks for the regulatory conditions that should apply to an open MEP. The Chamber believes that open MEPs should be given the same regulatory treatment as proposed for ARPs (as amended with our recommendations). In terms of defining the sponsor of an open MEP, we encourage the DOL to consider the including the requirements for a pooled provider that are spelled out under the Retirement Enhancement and Savings Act of 2018. In general, the legislation requires a pooled plan provider to be designated as the named fiduciary and plan administrator. Moreover, the provider must register with the Secretary of Labor.[9] We believe the Proposed Rule's limits around the definition of "employer" will significantly reduce the opportunity to expand retirement coverage. For example, there are a number of recordkeepers, brokers, insurance issuers, banks and other "commercial service providers" that might choose to sponsor an open MEP if given the opportunity.

While we encourage the DOL to expand the final rule to include open MEPs, we also recommend that organizations be allowed to reasonably restrict participation. For example, a MEP sponsor should be able to choose to restrict plan participation based on geographical or industry parameters. Thus, an association would be able to sponsor a MEP that reflects its membership.

The Chamber Supports the Inclusion of Professional Employer Organization Retirement Benefits in the Proposed Rule. Even though Professional Employer Organizations ("PEOs") have long provided retirement benefits as an offering to its clients, the Department has not—until now—provided clear legal authority for PEOs to offer retirement benefits to its shared employees. With the issuance of this Proposed Rule, the DOL has taken a positive step in

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[7] 83 Fed. Reg. 53560.
[8] ERISA section 3(5).
[9] Retirement Enhancement and Savings Act of 2018 (S. 2526), Section 101(a)(3).

formalizing the legal framework for PEOs to provide 401(k) retirement benefits to their clients and client's shared employees. This action, along with the passage of the Small Business Efficiency Act contained in the Tax Increase Prevention Act,[10] which created the voluntary IRS PEO Certification Program, is an important recognition by the federal government of the PEO industry and the important role it plays in supporting our nation's small businesses.

Additional Notice or Reporting Requirements are Not Needed to Inform Participants of their Rights and Responsibilities Under a MEP. The DOL asks for comments on whether any notice or reporting requirements are needed to ensure that participating employers, participants, and beneficiaries of MEPs, are adequately informed of their rights or responsibilities with respect to MEP coverage and that the public has adequate information regarding the existence and operations of MEPs.[11] Since participants will receive the same fiduciary protections as they would under a 401(k) plan – just under a different structure – it seems unnecessary to require additional notification on this point.

The only notice that might be considered is if the MEP sponsor is sending plan notices directly without the employers name on them. In that case, notice might be needed to identify the MEP sponsor and its role. However, we believe that this information can be included with notices given when the account is opened and does not require separate documentation.

Consideration Should Be Given to Expanding to other Types of Plans and Benefits. The Proposed Rule states that the DOL is limiting the proposal to defined contribution plans since there is a trend away from more traditional defined benefit plans and also because further public comment and consideration would be beneficial.[12] We agree with the Department. In the effort to expand coverage, the DOL should consider expanding the MEP option to other types of plans. In addition, the DOL should also consider extending MEP sponsorship to the offering of other ERISA-covered benefits, such as life and disability insurance. These benefits are critical to ensuring financial security for workers, including working owners in the "gig" economy.[13] However, we understand that there are different issues that might arise under different plan structures and benefit options, such as investment decisions and distribution issues. Therefore, we recommend that the current proposal remain limited to defined contribution plans but that the DOL continue discussion on how the proposal might later be extended to other types of plans and ERISA-covered benefits.

The Final Rule Should Include a Safe-Harbor to Protect ARP Members from Joint-Employer Liability. Although this issue is addressed in the preamble, it should also be

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[10] H.R. 5771, Public Law 113-295.
[11] 83 Fed. Reg. 53543.
[12] 83 Fed. Reg. 53536.
[13] Seventy-seven percent of workers state that missing work for three months due to injury or illness would create a moderate or great financial hardship. For workers that became disabled and unable to work, 44% said they would not have been able to afford to stay in their home without disability insurance, and 33% would have had to apply for government food programs. (Consumer Federation of America and Unum, "Employer-Sponsored Disability Insurance: The Beneficiary's Perspective," September 2013, available at http://forms.unum.com/StreamPDF.aspx?strURL=/FMS_122302-2.pdf&strAudience=StreamByNumber).

addressed in the rule itself.[14] In modifying the definition of employer to allow an association to be treated as a sponsor of a single employer retirement plan, the DOL may be inadvertently exposing businesses and associations to liability under the joint-employer claim. This exposure is not necessary or appropriate and can be mitigated by incorporating a safe-harbor protection.

Federal and state employment laws traditionally defined a joint employer as one who exerts direct and immediate control over essential employment terms of another entity's employees. However, in recent years, a litany of cases have expanded the concept of "control," creating a myriad of disparate precedents and varying judicial decisions at the federal circuit court level. Many cases have held that businesses associated with another business that has taken illegal employment action can also be held liable. The concept of joint employment has been in a constant state of flux creating extreme legal uncertainty for businesses; there remains significant concern that almost any business relationship between or among companies could subject a company to a joint employer claim. Therefore, a safe harbor is essential to protect businesses from an argument that ARPs create joint employer liability.

The Chamber suggests that the DOL include the following safe harbor provision in the Final Rule:

"Provided an ARP is established and maintained in accordance with the provisions set forth in this rule, the ARP, although created pursuant to the expansion of the definition of "employer" under Section 3(5) of ERISA, shall not create or imply joint employer liability among the association employer-members for all federal and state purposes."

Without such a safe-harbor, we remain concerned that the Proposed Rule will not realize its desired goal of expanding retirement coverage. The Chamber also made this request in our comments on the Association Health Plan ("AHP") proposal.[15] In the AHP Final Rule, the Department again addressed joint employer liability in the preamble stating that "nothing in the final rule is intended to indicate that participating in an AHP sponsored by a bona fide group or association of employers gives rise to joint employer status under any federal or State law, rule, or regulation."[16] While we appreciate the DOL's attention to this issue, we continue to believe that this issue is more appropriately addressed in the final rule itself.

The Final Rule Should Specifically State that the MEP will be Treated as One Plan for Purposes of Notice and Disclosure Requirements. The preamble to the Proposed Rule states that the MEP sponsor, and not the individual employer, will be responsible for all notice and disclosure requirements but it is not in the regulation itself.[17] To ensure that this position receives full regulatory authority, it should be included in the rule itself. If not specifically stated, we encourage the DOL to at least include examples in the Final Rule that demonstrate the intent stated in the preamble.

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[14] 83 Fed. Reg. 53537.
[15] https://www.uschamber.com/comment/comments-dol-definition-employer-under-erisa-association-health-plans.
[16] 83 Fed. Reg. 28912, 28936 (June 21, 2018).
[17] 83 Fed. Reg. 53535.

The Chamber Encourages the DOL to Modernize Its Rules on Electronic Delivery. Although not specifically addressed in the regulation, the Chamber believes that modernization of the electronic delivery rules requires the DOL's immediate attention. The Executive Order on Strengthening Retirement Security which directed the DOL to expand retirement opportunities for small businesses, also directed the DOL to review outdated distribution methods.[18] Updating the rules on electronic delivery falls squarely within this directive.

The Chamber recommends that the Department of Labor change its standard for electronic delivery to encourage the use of electronic delivery and to allow, for those plan sponsors that wish, that electronic delivery be the default delivery option for benefit notices. The Chamber believes that modernizing the restrictive rules on electronic delivery in this manner is a critical element in the larger task of reforming employee benefit plan notice and disclosure requirements. These changes can allow for the provision of important information without it being submerged in an avalanche of rarely used information. At the very least, the Chamber urges that the Department's safe harbor for the use of electronic delivery of required disclosures be changed in accordance with the guidance provided under Field Assistance Bulletin 2006-3.

Conclusion

We thank you for your consideration of these comments. Expanding retirement coverage among small businesses and working owners is a critical issue to our membership and we look forward to continuing to work with you on this issue to strengthen retirement security for all workers.

Sincerely,

Executive Director
Retirement Policy
U.S. Chamber of Commerce

[18] Executive Order on Strengthening Retirement Security in America, August 31, 2018. https://www.whitehouse.gov/presidential-actions/executive-order-strengthening-retirement-security-america/.