

December 21, 2018

Mr. Joe Canary, Director
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Submitted via www.regulations.gov

**Re: Definition of “Employer” Under Section (3)(5) of ERISA
Association Retirement Plans and Other Multiple-Employer
Plans
RIN 1210-AB88**

Dear Mr. Canary:

The American Retirement Association (“ARA”) is writing to provide comments with respect to the Notice of Proposed Rulemaking¹ (“Proposal”) regarding the circumstances under which an employer group or association or a professional employer organization (“PEO”) may sponsor a workplace retirement plan that would qualify as a multiple employer plan (“MEP”).

The American Retirement Association is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America’s private retirement system, the American Society of Pension Professionals and Actuaries (“ASPPA”), the National Association of Plan Advisors (“NAPA”), the National Tax-deferred Savings Association (“NTSA”), the ASPPA College of Pension Actuaries (“ACOPA”), and the Plan Sponsor Council of America (“PSCA”). ARA’s members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer sponsored plans. In addition, ARA has more than 25,000 individual members who provide consulting and administrative services to American workers, savers, and the sponsors of retirement plans. ARA’s members are diverse but united in their common dedication to the success of America’s private retirement system.

ARA and its underlying affiliate organizations have long been supportive of initiatives to improve the private retirement system. Expanding access to workplace retirement plans has been a part of ARA’s mission since its inception more than 50 years ago. ARA has worked with both

¹ Definition of “Employer” Under Section (3)(5) of ERISA – Association Retirement Plans and Other Multiple Employer Plans, 83 Fed. Reg. 53534 (October 23, 2018).

Congress and federal regulators to reduce the barriers to plan sponsorship, particularly with regard to small businesses. We believe the Proposal would be a positive development in expanding retirement plan coverage for working Americans. We are happy to provide comments for your consideration.

Discussion

Fiduciary Responsibility

The preamble to the Proposal notes that participating employers who adopt a MEP can “...effectively transfer substantial legal risk to professional fiduciaries responsible for the management of the plan.”² The preamble also notes, “[E]mployers would retain some fiduciary responsibility for choosing and monitoring the arrangement and forwarding required contributions to the MEP.”³ We believe that the participating employer’s obligation to prudently select and monitor the MEP sponsor (and those to whom fiduciary responsibility has been delegated) is a critical function that should be clarified and emphasized in the preamble to the final regulation. The Department of Labor (DOL) website says it best: “Plan sponsors and other fiduciaries have a solemn responsibility to protect the interests of the workers and retirees in their benefit plans.”⁴ Among those fiduciary responsibilities are the prudent selection and monitoring of plan fiduciaries and service providers.

Before the issuance of DOL Advisory Opinion 2012-04A, the promoters of open MEPs often made representations that the selection of a MEP provider was a “settlor function” and therefore free from any ERISA fiduciary responsibility. That position is incorrect as a matter of law and also extremely bad policy. It is important that the participating employers exercise due diligence in the process of selecting and monitoring the MEP provider. Employer fiduciary oversight is absolutely necessary to look out for the interests of plan participants. It should be noted, it was an employer who first raised concerns with regard to the activities of a MEP provider who was ultimately convicted on 17 felony counts of wire fraud and is now in federal prison.⁵

DOL Oversight and Enforcement Activities

As a corollary to the participating employers’ responsibilities, we believe it is important that the DOL exercise an oversight role with regard to MEP providers. The Executive Order mentions that the guidance include “appropriate safeguards.” The DOL has broad authority under ERISA section 103 with regard to the information included in a plan’s annual report (Form 5500) with regard to plan service providers. The Form 5500 should solicit sufficient information so that the

² 83 Fed. Reg. 53534, 53535 (October 23, 2018).

³ *Id.*

⁴ See DOL Fiduciary Education Campaign, available at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/fiduciary-responsibilities/fiduciary-education-campaign> .

⁵ See U.S. Attorney’s Office, District of Idaho, News Release, July 31, 2013, available at <https://www.justice.gov/usao-id/pr/eagle-man-sentenced-over-17-years-prison-theft-retirement-plans>.

MEP providers' activities can be monitored by both the DOL and participating employers. The preamble to the Proposal notes that MEPs are likely to be large plans, subject to the independent audit requirement and will provide more detailed information as a result.⁶ The DOL should closely monitor the annual reports filed by MEPs and exercise the Department's broad authority to conduct investigations and audits of MEP service providers to protect plan participants from fraud and abuse.

Related Corporation MEPs

One area of concern is with regard to so-called "corporate MEPs." A corporate MEP refers to a MEP sponsored by a group of employers related by ownership but at a common ownership level insufficient to constitute a controlled group or affiliated service group under the Internal Revenue Code. Corporate MEPs are the most common form of MEP today, and the Department has never appeared to question the "bona fide" status of the groups of employers participating in such a MEP. The Proposal, however, may inadvertently create a situation in which "corporate MEPs" are no longer single plans for ERISA purposes.

For example, in the simple example of two companies in different industries and different parts of the country, A and B, where A owns 60% of B but the remaining 40% of B is owned by unrelated parties. If A and B jointly maintain a retirement plan for the benefit of their employees, the plan would clearly be treated as a multiple employer plan for purposes of IRC section 413(c). Under the Proposal, however, it does not appear that A and B would have the commonality of interest necessary to qualify the plan as a MEP.

ARA recommends that employers who share common ownership as a result of a merger, acquisition or divestiture or other circumstance that involves a substantial economic, or representational purpose unrelated to the provision of benefits to the employees of separate employers be treated as having a commonality of interest sufficient to sponsor a MEP. In such circumstances, [other "control" structures should be permitted as long as one or more of the participating employers assumes the role and responsibilities required of a plan sponsor.](#)

Bona Fide PEOs

The Proposal establishes 4 criteria that professional employer organization ("PEO") must satisfy in order to qualify as a "bona fide" PEO that may act as an employer under ERISA section 3(5) for purposes of sponsoring a MEP. Of particular concern is the manner in which a PEO can demonstrate that it performs "substantial business functions." The Proposal provides a disjunctive list of nine relevant criteria drawn from the types of services and functions PEOs routinely offer their clients.

ARA believes that the "facts and circumstances" approach to this requirement is overly broad and could lead to abuse. The preamble provides that performing even one of these functions "...may be sufficient to establish substantiality depending on the particular facts and

⁶ 83 Fed. Reg. 53534, 53554 (October 23, 2018).

circumstances and the particular criterion.”⁷ Such a wide open test creates a non-uniform playing field and facilitates confusion among not only service providers but also their potential employer clients. ARA recommends eliminating the “facts and circumstance” approach entirely and instead rely solely on the two safe harbors included in the Proposal. This would provide certainty and insure the PEO provider truly does perform substantial business functions and is acting as a “bona fide” provider.

Additionally, we believe that clarification is needed with regard to the requirement that a “bona fide” PEO must have “substantial control over the functions and activities of the MEP, as the plan sponsor, . . . the plan administrator, . . . and a named fiduciary.”⁸ Because some PEOs today, and possibly many more in the future, will choose to outsource the plan administrator role, in whole or in part, ARA recommends adding the following language to the end of Section (3)(1)(ii): “. . . within the meaning of Section 402 of the Act), though nothing in this Section shall preclude the appointment by the PEO of one or more fiduciaries apart from the PEO to provide services, including plan administrator services; . . .”.

Working Owners

The Department requested comment on the question of how or whether working owners should be permitted in PEO MEPs, and whether additional or different regulatory amendments are needed to confirm or clarify the treatment of retirement plans for the self-employed. ARA makes the following observations:

- MEP practitioners today generally do not permit non-employers to participate in a MEP. A self-employed person with no employees, whose plan would not therefore be covered by ERISA, is therefore excluded from MEP participation today.
- Preventing a PEO MEP from having one or more self-employed owners with no employees as adopting members can be difficult when businesses change. A company with two employees today may have no employees tomorrow.

ARA therefore recommends that the prohibition against working owners participating in a PEO MEP be lifted—there is no harm done in including them and this approach solves the possible problem that occurs when a small employer suddenly has no employees. ARA also believes that a clarifying amendment or other guidance with respect to the treatment of retirement plans for the self-employed might be helpful. In particular, such guidance might spell out that:

- A self-employed person or working owner who participates in a PEO MEP, even if he or she has no employees, is covered by ERISA with respect to his or her participation in the MEP, and
- The inclusion of one or more such persons in a MEP of any kind does not cause the MEP to fail to be treated as a single plan for ERISA purposes solely because it includes such persons.

Interaction with Other Laws

⁷ 83 Fed. Reg. 53534, 53540 (October 23, 2018).

⁸ Prop. Reg. §2510.3-55 (c)(1)(ii), 83 Fed. Reg. 53534, 53560 (October 23, 2018).

ARA does not believe that the proposal in any way interferes or conflicts with existing laws and regulations at the federal or state level. There are areas of law where practitioners have raised questions in the past about MEPs, but these questions are for other regulators. ARA does not see the need for comment in the absence of overlap with the Department.

In particular the Department asked for comment about Internal Revenue Code Section 413(c). Section 413(c) is based on a different statute and very different statutory language than anything pertinent in ERISA, and its effect is merely to levy a handful of relatively minor, additional qualification conditions under the Code for plans operated by multiple employers. Some commentators have opined that the definition of “single plan” should be the same for both ERISA and the Code, but ARA believes the statutes are very different and that attempting to create a unified definition would be problematic.

ARA looks forward to working with the Department on this initiative. We would welcome the opportunity to discuss these comments with you further. Please contact Craig Hoffman, ARA General Counsel, at (703) 516-9300 (ext. 128) or at CHoffman@USARetirement.org if you have any questions. Thank you for your time and consideration.

Sincerely,

/s/

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