



**WORLD FLOOR COVERING
ASSOCIATION**
Simplify Your Success

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655,
U.S. Department of Labor
200 Constitution Avenue NW, Washington, DC 20210
Attention: Definition of Employer – MEPs RIN 1210-AB88

Re: Proposed Regulation on Association Retirement Plans, RIN 1210-AB88

Dear Sir or Madam:

The World Floor Covering Association (“WFCA” or “Association”) welcomes the opportunity to submit these comments in response to the U.S. Department of Labor’s Proposed Regulation to broaden the definition of employer to expand the use of association retirement plans. 83 *Federal Register* 53534 (October 23, 2018). The WFCA supports the Department’s goal of easing the barriers to multiple employer retirement plans (“MEPs”) to make it easier and less expensive for small and medium-sized businesses to offer workplace retirement plans, such as 401(k)s. The Association, however, believes that some modifications are needed to ensure the success and viability of MEPs.

The WFCA focuses its comments on: (1) the change in the commonality of interest requirement; (2) permitting working-owners without employees to participate in a MEP sponsored by a group or association; and (3) the proposal to treat Professional Employer Organizations (PEOs) as a MEP. In addition, WFCA urges that the Department directly address the unified plan rule, known as the “one bad apple” rule. WFCA recognizes that the Department of Treasury will need to address this issue, but suggests that the Department make clear that the action of one participating employer will not jeopardize the MEP for all other participating employers, and that the professionals responsible for the management of the plan assume all fiduciary duties for the plan. Without a change to the one bad apple rule, MEPs are likely to continue to be underutilized.

I. The World Floor Covering Association

The WFCA is a national trade association organized under section 501(c)(6) of the Internal Revenue Code.¹ WFCA’s members include flooring retailers, commercial contractors,

¹ 26 U.S.C. §501(c)(6).

restoration contractors, and inspectors.² WFCFA members operate over 1,255 retail-flooring stores nationwide. In addition, WFCFA has an installer division, the Certified Flooring Installers (“CFI”), which provides education and training for flooring installation. CFI has trained tens of thousands of installers, and the CFI division has over 1,100 active members, most of whom operate as small businesses, with a number being sole proprietors.

The WFCFA provides information and training to its members and supports other organizations that provide training to entities involved in the flooring industry. The WFCFA represents its members’ interests before Congress, state legislative bodies and federal and state agencies. The WFCFA also provides its members with information regarding federal and state legislation and agency action. The WFCFA acts by consensus through a Board of Directors elected by its members and collects data from its members to develop information regarding legislation and agency matters.

II. The Average Retail Flooring Dealer and Installer

National statistics indicate that the average retail-flooring store is a small business. According to the most recent North American Industry Classification System (NAICS) report from the Census Bureau, there were 10,588 retail-flooring establishments in 2015.³ Revenues for the industry were \$20.254 billion in 2016, the last year for which a full report is available.⁴ Applying those statistics, the average retail-flooring store had total sales of \$1,944,465 in 2016. According to The Retail Owner’s Institute, the average pre-tax profit margin for retail flooring stores in 2016 was 3.5%.⁵ Applying that profit margin to 2016 sales, the pre-tax profits for the average retail store would be only \$69,058 in 2016. These margins leave little room for a flooring dealer to pay the cost of setting up a contribution retirement plan for themselves or their employees given the complexity of these plans.

The vast majority of flooring installers are also small businesses. According to the 2015 NAICS report, there were 14,435 flooring contractors with 96% having 20 or fewer employees.⁶

² The WFCFA membership also included flooring manufactures, flooring distributors and other companies involved in the flooring industry as associate members.

³ U.S. Census Bureau, NAICS code 442210 (Floor Covering Stores) *Number of Firms, Number of Establishments, Employment, Annual Payroll, and Estimated Receipts by Enterprise Employment Size for the United States, All Industries: 2015*.

⁴ *Id.* According the Floor Covering Weekly survey, the industry grew to \$25.5 billion in 2017. *Statistical Report Summary: Small gains in 2017*, Floor Covering Weekly (July 23, 2018). Assuming no growth in the number of stores, the average gross income would be \$2.4 million per store.

⁵ The Retail Owner’s Institute Benchmark, Pre-Tax Profit Trends, Floor Covering Stores (2017)

⁶ U.S. Census Bureau, NAICS code 238330 (Flooring Contractors) *Number of Firms, Number of Establishments, Employment, Annual Payroll, and Estimated Receipts by Enterprise Employment Size for the United States, All Industries: 2015*.

The average flooring installer makes \$45,250.00 a year.⁷ As with the flooring retailer, installers often simply cannot afford to establish a retirement plan. These small businesses and their employees need to have access to an affordable retirement plan and expanding the availability of MEPs can significantly expand their options.

While some flooring dealers, installers and their employees may establish individual retirement plans (“IRAs”), the availability of a contribution retirement plan would offer many benefits. Key among them is that employee contribution limits of 401ks are three times higher than those of IRAs. When the employer contributions are added in, the 401k's maximum contribution can be significantly higher than an IRA's, creating a more robust retirement plan.

III. Proposed Regulation

The Proposal addresses two types of organizations that can qualify a MEP as a single plan: *bona fide* associations or employer groups; and Professional Employer Organizations (PEOs). The Proposed Rule also makes association or employer group MEPs available to working-owners. While WFCA supports changes that would make it easier and less expensive for small and medium-sized businesses to offer workplace retirement plans, such as 401(k)s, it is concerned that the Proposed Rule does not go far enough to safeguard retirement plans. WFCA is also concerned with the need to adjust the working-owner hours requirement to account for economic cycles that could impact the average hours worked in certain years. Finally, WFCA believes the one bad apple rule will continue to adversely impact the use of MEPs.

A. Associations and Employer Groups

The Proposed Rule essentially expands what associations and employer groups can sponsor a MEP. The Proposal sets out seven criteria to be a “*bona fide*” association or employer group. With one exception, these criteria parallel those used in the association health plan rule and are intended to have the same meaning and effect here.⁸

One of the criteria is that the employers must have a “commonality of interest” to offering a MEP.⁹ To have a commonality of interest under the current rule, the employers must be in the same trade, industry, line of business, or profession.¹⁰ The main change in the Proposed Rule would add that employers would have a commonality of interest if they have “a principal place of business in the same region that does not exceed the boundaries of a single State or a

⁷ *Id.*

⁸ 29 CFR 2510.3.5

⁹ *Id.* at 2510.3.5(b)(8)(c).

¹⁰ *Id.*

metropolitan area”¹¹ Thus, members of an MEP would not need to be in the same industry as long as they operate in a common geographic area.

B. Professional Employer Organizations (PEOs)

PEOs are entities that contract to provide the employment or HR-related services to client-companies. PEOs commonly provide employee benefits to the client-company employees, including retirement plans. The existing regulatory guidance and judicial authority have not articulated whether or when a PEO retirement plan would be considered a MEP.¹² Under the Proposed Rule, a PEO plan that meets certain criteria will be considered a single employer plan, rather than individual plans adopted by each employer who are clients of the PEO. The Proposed Rule essentially requires that the PEO provide employment functions and control the MEP, and that the MEP be available to and used by its clients’ employees.¹³

The Proposed Rule lists nine employee functions and provides two safe harbors related to the first requirement of performing substantial employment functions.¹⁴ If the PEO qualifies as a Certified PEO (CPEO) under Internal Revenue Code Section 7705(a), it must perform only two of the above functions to satisfy the first requirement. Alternatively, if the plan provides five of the nine listed functions, it automatically satisfies the first requirement.¹⁵

C. Working-Owners

The Proposed Rule also permits certain working-owners without employees to participate in a MEP sponsored by a group or association. To qualify, the proposal requires the working owner to average a minimum number of hours, or has a self-employment income that “equal[s] or exceed[s] the working owner’s cost of coverage to participate in the group or association’s health plan.”¹⁶ This change would not impact PEOs offering MEPs because working-owners without employees would not have a need for a relationship with a PEO.¹⁷ Accordingly, the working-owner provision would only apply to MEPs sponsored by a *bona fide* group or association.¹⁸

¹¹ 83 *Federal Register* 53534, at 53560 (October 23, 2018).

¹² *Id.* at 53560-61.

¹³ *Id.* at 53561.

¹⁴ *Id.* at 53560-61.

¹⁵ *Id.* at 53538.

¹⁶ *Id.* at 53542 and 53561

¹⁷ *Id.* at 53543 and 53561

¹⁸ *Id.*

IV. Comments

WFCA supports any rule changes that would make it easier and less expensive for small and medium-sized businesses to partner in a shared workplace retirement plan, such as 401(k)s, provided it does not jeopardize the safeguards. As more fully explained below, the WFCA believes that a *bona fide* employee group or association should be limited to a nonprofit organization to ensure against potential abuse. Similarly, the Proposal on PEOs needs to include some requirements to ensure the financial viability of the PEO given the potential impact on retirement funds. For working-owners, the minimum average hours requirement needs to accommodate the economic cycles that are likely to impact the hours of a working-owner. In addition, WFCA urges that, in order to expand the availability of contribution retirement plans, the Department and Treasury need to address the one bad apple rule.

A. Commonality of Interest

A primary change in the Proposed Rule is to expand the definition of what constitutes a *bono fide* organization. No longer must members of a *bona fide* group be composed of employers in the same trade, industry, line of business, or profession. Under the Proposed Rule, the definition is expanded to include members of different industries that are in the same geographic area. This revision, however, creates the potential of abuse by which groups are formed solely for commercial purposes, such as creating fees or investing funds for personal gain. Moreover, the elimination that the group must be composed of employers in the same trade, industry, line of business, or profession increases the chance of fraud and abuse. Many employers join a regional group only for the MEP and will likely be less involved than those that are members of a traditional trade association with a common interest in an industry.

The Department recognizes the potential for abuse.¹⁹ As a result, the Department included several requirements to reduce these risks. First, the Proposed Rule requires that a *bono fide* group “must have at least one substantial business purpose unrelated to offering and providing MEP coverage or other employee benefits to its employer members and their employees.”²⁰ Second, the Proposed Rule requires that the employee members have control over the group or association and the MEP.²¹ Third, the Proposal provides that a *bona fide* “group or association [cannot be] a bank or trust company, insurance issuer, broker-dealer, or other similar financial services firm ...”.²²

¹⁹ *Id.* at 53544 (“The Department is aware that MEPs could be the target of fraud or abuse.”); 53554 (“MEPs have the potential to build up a substantial amount of assets quickly, particularly where employers that already offer plans join MEPs and transfer existing retirement assets to the MEP, thus making them a target for fraud and abuse.”).

²⁰ 83 *Federal Register* 53534, at 53560; *also see* 53539 and 53446

²¹ *Id.* at 53560.

²² *Id.*

While these criteria are important, WFCFA is concerned these safeguards are not adequate. The substantial business purpose criterion specifies that the primary purpose of the group or association can be to offer MEP coverage.²³ Thus a commercial entity could create a group and add a secondary purpose just to qualify as a *bono fide* entity. For example, the entity could adopt the code of conduct of the local Chamber of Commerce to which most members would already subscribe claiming that as its other purpose. It would be better to require the substantial business purpose must be the primary purpose to ensure against a token purpose just to satisfy this criterion.

Accordingly, WFCFA recommends that the organization be a non-profit. Such trade and professional associations have established relationships with their members beyond offering a MEP. They are controlled by their members for the benefit of their industries, professions or local business environment. An established non-profit association would not risk its reputation and goodwill, and its other programs, by offering a substandard MEP or failing to fully fill its fiduciary duties to the plan. On the other hand, a for-profit group could be formed primarily to offer a MEP. The impact on its secondary purpose should the MEP falter would not be sufficient to ensure against failure like an established non-profit association. Such commercial groups would operate only as long as they make a profit. A non-profit association, on the other hand, is motivated to help its members and is more likely to ensure its MEPs continue to offer a viable and well managed plan.

Moreover, non-profit organizations are regulated by the IRS to ensure they meet their non-profit purpose, such as having increased capitalization and reserves, insurance coverage, greater oversight and similar mandates. A commercial group would not be subject to the same scrutiny. To the extent that both trade association and commercial groups will be allowed to offer MEPs, the regulation require commercial groups to meet the same IRS regulations.

Limiting MEPs to non-profit organization would not adversely impact the potential availability of MEPs. There are a substantial number of organizations that could offer MEPs at both the national and local level. There are trade associations in virtually every industry. Local groups like Chambers of Commerce, local real estate organizations, and state associations would all be eligible to offer MEPs. To allow commercial groups to enter the market and fracture the market into a host of small MEPs would eliminate many of the benefits envisioned by the new regulation.

B. PEOs

WFCFA does not oppose clarifying when a PEO can qualify to offer a MEP. The criteria in the Proposed Rule to establish that a PEO is *bona fide*, however, address only its ability to provide employment functions. The Proposed Rule does not require any financial safeguards.

²³ *Id.*

Even the safe harbors do not ensure the financial stability of a PEO.²⁴ PEO certification is designed to ensure knowledge or experience regarding federal and state employment tax compliance and business practices, not the financial stability of the PEO.²⁵ Similarly, the five function rule addresses only the PEO's employment functions, not its financial viability. Accordingly, WFCA recommends that the Department include in the Proposed Rule a requirement on the capitalization, reserves, and insurance coverage of a *bona fide* PEO.

In addition, the Proposed Rule is designed to allow a PEO to create a single employer retirement plan with the concomitant economies of scale. By joining together to provide retirement plans through a PEO as a single employer plan, small businesses would benefit from the economies of scale that large employers have in providing retirement benefits to employees. This should reduce the cost of offering a retirement plan through an PEO. To ensure that this goal is achieved, WFCA recommends the Proposed Rule include an obligation for the PEO to pass on these savings to its clients, and to allow the clients the right to review the administrative costs of the MEP.

C. Working-Owners

WFCA supports the working-owner provision in the Proposed Rule to permit working-owners without employees to participate in a MEP sponsored by a group or association. Many of WFCA installer members are working-owners and need access to a choice of retirement plans. The minimum self-employment income is reasonable.²⁶ WFCA, however, recommends that the average a minimum number of hours be lowered to 15 hours a week or 60 hours a month. WFCA also recommends that the Department calculate the average hours worked on at least a bi-annual basis.

Flooring installation, like many others industries, is impacted by economic conditions. In 2008, the recession particularly disrupted the construction industry. According to the Bureau of Labor Statistics, the percentage of jobs lost in that industry, 19.8%, exceeded those of all other nonfarm industries.²⁷ As a result, many construction workers, including flooring installers, had little work. Moreover, it is common for a flooring installer to start an installation business as a part-time job, also working at another job while developing his or her installation business. In addition, there may be down time for many installers. Accordingly, to accommodate these economic realities, the average hours should be lowered and be based on a two-year average.

²⁴ *Id.* at 53560-61.

²⁵ 26 U.S. Code § 3511

²⁶ *Id.* at 53542 and 53561

²⁷ *Construction Employment Peaks Before The Recession And Falls Sharply Throughout It*, Monthly Labor Review at pp. 24-27 (April 2011)(<https://www.bls.gov/opub/mlr/2011/04/art4full.pdf>).

D. Bad Apple Rule

The Employee Retirement Income Security Act (ERISA) places fiduciary responsibility on the company or non-profit offering a retirement plan because they are the plan sponsor.²⁸ The Proposed Regulation permits employers participating in a MEP to reduce their fiduciary liability by allowing the designation of a named fiduciary who will have the responsibility for some but not all fiduciary requirements.²⁹ WFCFA recommends that the Department specify that each employer is responsible only for the administration of the plan to its employees and assumes no fiduciary duties regarding the general administration of the MEP. The Proposed Rule should make clear that the association, employer group or PEO sponsoring a MEP assumes all fiduciary duties. Moreover, the sponsor should be required to demonstrate that it has the capitalization and reserves to cover that fiduciary liability.

By not providing that each employer is responsible only for its plan administration, the Proposed Rule leaves unclear what are the fiduciary duties of each participating employer. Moreover, this means that the administrative error of one sponsoring employer may upset the qualified status of the plan for all employers under the unified plan rule, commonly referred to as the "one bad apple" rule. As the Department recognized, without such a change to the one bad apple rule, MEPs will continue to be underutilized.³⁰ WFCFA recognizes that the Department alone cannot eliminate the one bad apple rule, and the Treasury Department must address the tax issues raised by the rule.³¹ WFCFA, however, recommends that the Department take whatever action it can to eliminate or minimize the one bad apple rule and encourage Treasury to take appropriate action. As explained above, the new rule should specify that each employer is responsible only for the administration of the plan to its employees, and assumes no fiduciary duties regarding the general administration of the MEP.

VI. Conclusion

WFCFA support the Department's goal of easing the barriers to MEPs. To protect against the fraud and mismanagement, WFCFA recommends the following changes and clarification,

1. An organization offering a MEP should meet the following requirements:
 - Be established as a non-profit corporation with a federal tax exemption;
 - Was formed and maintained for purposes other than offering or sponsoring a MEP;

²⁸ 29 U.S. Code § 1101, *et seq.*

²⁹ 83 *Federal Register* 53534, at 53560.

³⁰ *Id.* at 53557.

³¹ *Id.* at 53557, fn. 146.

- Assumes all fiduciary duties, and demonstrate that it has the capitalization and reserves to cover all fiduciary liability;
 - Offer programs, such as education/training programs, beyond a MEP;
 - Have adequate finances to meet its obligations, including adequate capitalization of a MEP;
 - Have a minimum of 50 members; and
 - Provide members with voting rights and participation in the direction and management of the association.
2. As an alternative, the Department should include in the Proposed Rule a requirement on the capitalization, reserves, and insurance coverage of a *bona fide* employer group or association.
 3. Each employer in an association MEP is responsible only for the administration of the plan to its employees and assumes no fiduciary duties regarding the general administration of the MEP.
 4. The average minimum number of hours requirement for working-owners be lowered to 15 hours a week or 60 hours a month base on a two-year average.
 5. A qualified PEO must pass on savings to its clients and must allow the clients the right to review the administrative costs of the MEP.
 6. The Secretary should exercise his authority to eliminate the impact of the one bad apple rule and encourage that the the rule be addressed by the Department of Treasury.
 7. Department include in the Proposed Rule a requirement on the capitalization, reserves, and insurance coverage of a *bona fide* PEO.

On behalf of WFCA and its members, I appreciate this opportunity to comment on the expansion of MEPs and hope that the Department will address the issues raised in our comments and implement the suggested changes to the Proposed Regulation.

Respectfully Submitted,



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President and Chief Executive Officer
World Floor Covering Association

cc: Jeffrey King
Paul Kanitra
Max Perkins