"Open" Multiple Employer Plans After Advisory Opinion 2012-04A: An Assessment

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Helping workers to achieve a dignified and secure retirement means encouraging employers to establish and maintain retirement plans and protecting workers' benefits. We know we must work particularly hard to assist small businesses because of the challenges small businesses face in providing retirement plans. There are six million businesses with fewer than 100 employees employing 42 million workers. Less than half of these businesses offer a retirement plan.

— Phyllis Borzi, Assistant Secretary of Labor for the Employee Benefit Security Administration [Testimony before the Senate Special Committee on Aging (Mar. 7, 2012)]

In Advisory Opinion 2012-04A, the Department of Labor ("DOL") for the first time issued an explicit ruling that an "open" multiple employer plan (an "Open MEP") is not a single employee benefit pension plan under the Employee Retirement Income Security Act of 1974 ("ERISA"), but a group of single employer plans. The DOL previously issued a significant number of Advisory Opinions addressing single ERISA plan status for multiple employer pension plans sponsored by employer associations ("Association MEPs") and multiple employer welfare arrangements ("MEWAs"), and a number of commentators had taken the position that the standards set forth in these prior rulings indicated that Open MEPs were not multiple employer plans. With the issuance of Advisory Opinion 2012-04A, any remaining question about the DOL's position has been put to rest.

In this article, we assess the legal underpinnings of the Opinion and the impact it will have on Open MEP providers and the small employers that participate in them. Our analysis takes into account both the legal issues and the policy considerations that it appears are being applied to Open MEPs. We also address steps that providers and participating employers may take in light of the ruling.

Multiple Employer Plans ("MEPs") are retirement plans that are established or maintained by more than one employer. There are two basic varieties—Association MEPs are sponsored by industry associations and other employer groups where the employers have a significant pre-existing relationship unrelated to benefits (but where the employers are not under common control, which would result in a single employer plan), and

Open MEPs, which are established by providers (which we refer to as "MEP Sponsors") and are open to any of the MEP Sponsor's employer-clients that wish to adopt them. (There is also a third type of MEP that is not the subject of this article—those sponsored by PEDs for the benefit of their employer-clients.) The concept of an Open MEP is to allow the participating employers, which are ordinarily small businesses, to pool their resources and the assets of the plan to obtain higher levels of services and achieve economies of scale that would ordinarily not be available to a small, single employer plan. The assumption is that, by enhancing service levels and reducing costs, plan sponsorship and participation by small employers should increase, consistent with the goals noted in the above quotation from Secretary Borzi.

The DOL's finding in Advisory Opinion 2012-04A was that the Open MEP under consideration

> …does not constitute a single "multiple employer" plan for purposes of ERISA, but rather is an arrangement under which each participating employer establishes and maintains a separate employee benefit plan for the benefit of its own employees.

The reason for the DOL's holding was that a single plan must be maintained by an "employer," as that term is defined in ERISA, and that, in the absence of a relationship among the participating employers that is unrelated to providing the plan, the employers could not in the aggregate be considered an "employer" and the plan they adopt is not a single MEP.

The plan under review was typical of how most Open MEPs operate. Accordingly, there is every reason to believe that the DOL would reach the same conclusion for most Open MEPs. That said, it is important not to overstate the consequences of this holding. It does not in any way forbid plans with an Open MEP-type structure from operating, but rather, contemplates only that they are to be treated as multiple single employer plans for purposes of Title I of ERISA. This treatment is only relevant in a few specific contexts—the most important being the filing of Forms 5500 and the performance of annual plan audits (separate fidelity bonds are also required for multiple plans, and prohibited transaction dynamics may likewise differ). To the extent an Open MEP is a group of smaller plans, each component plan would have to file its own Form 5500 and perform an annual financial audit (for plans with 100 or more participants).

Before examining whether Advisory Opinion 2012-04A is sound from either a technical or policy perspective, some background on the underlying issues is necessary. We should also point out that, despite our criticism of the DOL's position, we do not intend to be overly critical of the agency. We have no doubt that its commonality and other standards discussed later were developed entirely with the motivation of protecting plan participants' interests, and likewise, any new product or model that is brought to market should be carefully scrutinized by regulators. To the extent that Open MEPs are misunderstood to be a means for employers to completely avoid fiduciary responsibilities, this is a potentially dangerous misconception the DOL is entirely right to refute.

Background

The issue of whether an Open MEP can be a single plan or must be considered to be a group of multiple plans hinges on the definition of "employer" in ERISA. Thus, we begin with an examination of the relevant statutory and regulatory language.

Section 3(2)(A) of ERISA defines an "employee benefit pension plan" as being "established or maintained by an employer or by an employee organization (i.e., a union), or by both…" In turn, ERISA Section 3(5) provides that the term "employer" means:

> …any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; *and includes a group or association of employers acting for an employer in such capacity*. (Emphasis added)

Thus, "an employer" that is eligible to establish or maintain an ERISA plan (the same definition above applies to both pension and welfare plans) includes:

1. A person acting directly as an employer in relation to an employee benefit plan;
2. A person acting indirectly in the interest of an employer in relation to an employee benefit plan; and
3. A group or association of employers acting for an employer in relation to an employee benefit plan.

In the context of multiple employer plans, the first possibility that would allow Open MEPs to be single ERISA plans would be if the employers constitute a "group or association" that acts on their behalf under alternative (3).

A second, less obvious possibility would be if the definition of "employee benefit pension plan" is construed to permit them to be maintained either by "an employer" *or multiple employers*, each of which is "acting

directly" under alternative (1) in relation to the adoption of a single, common plan. This latter possibility was the one advocated by the applicant in Advisory Opinion 2012-04A, which the DOL rejected, opting instead for the requirement of "commonality" among the participating employers.

Because ERISA refers to a pension plan as one that is established by "*an* employer," it is tempting to conclude that only alternative (3) is viable and that, therefore, the DOL is correct in saying that multiple employers would have to be members of a group or association that acts on their behalf before establishing or maintaining a single pension plan. This is obviously inconsistent with the Open MEP model, in the sense that employers in an Open MEP generally act separately on their own behalf, rather than acting as a single group or associated unit, with respect to the plan.

The authors respectfully disagree with the DOL. In our view, the second interpretation of Section 3(5) would also appear to be perfectly viable; that is, multiple individual employers may act on their own behalves in adopting a single plan. There are several reasons why we favor this interpretation. To explain why, a further examination of the interrelated Internal Revenue Code ("Code") and ERISA requirements that apply to MEPs is necessary at this point.

Open MEPs appear to be clearly contemplated under the Code. Code Section 413(c) (titled "Plans maintained by more than one employer") and the regulations under that section set forth the requirements to establish a MEP. First, a MEP must be a "single plan," meaning that "all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries," and the plan must be maintained by more than one employer. The term "single plan" is defined by reference to Treas. Reg. 1.414(l)-1(b)(1), which also states that a single plan may have several distinct benefit structures that apply to the same or different participants, among other things. [*Id.*] The Code also imposes the following requirements:

- Employers in the same controlled group or that are otherwise under common control will be treated as only one employer, meaning that a plan sponsored by multiple employers in such a group will be a single-employer plan, not a MEP. [*See* Treas. Reg. 1.413(c)-2(a).] Note also that a MEP is not a multiemployer (union) plan;
- Under a MEP, all employers are treated as one for the purpose of applying the Code's plan eligibility requirements under Section 410(a) (i.e., participants' service performed for all participating employers must be aggregated in determining plan eligibility) [IRC § 413(c)(1)]; and
- Likewise, all employers are treated as one for the purpose of applying the Code's vesting requirements under Section 411 (again, meaning that participants' service performed for all participating employers must be aggregated for this purpose). [IRC § 413(c)(3)]

In addition, Section 413(c)(2) clarifies that all participants are treated as being employed by a single employer for purposes of satisfying the "exclusive benefit" requirement in the plan qualification rules of Section 401(a), and the regulations under Section 413 state that the tax qualification of a MEP is determined with respect to all employers rather than on an employer-by-employer basis. [Treas. Reg. § 1.413-2(a)(3)(iv)]

There is no indication in the Code, the Treasury Regulations, or other IRS pronouncement that employers in a tax-qualified MEP must be members of some type of single group or association in order to sponsor a single, tax-qualified retirement plan, that is, there is no "commonality" requirement for a plan adopted by multiple, unrelated employers to be qualified for tax purposes as a single plan. This is the case even though the qualification requirements under Code Section 401(a) describe a qualified plan trust as one that is "part of a stock bonus, pension, or profit-sharing plan of *an* employer" (which, like ERISA Section (3)(2)(A), seems to contemplate a "single employer/single plan" dynamic), because Section 413(c) provides an exception to this general premise. Treasury regulations likewise confirm that "[a] trust forming part of a plan of several employers for their employees will be qualified if all the requirements are otherwise satisfied." [Treas. Reg. 1.401-1(d)] To the extent that an Open MEP is treated as multiple plans under ERISA, this means that disparate treatment is applied to them under ERISA versus the Code.

From an ERISA perspective, Section 210(a) (also entitled "Plan maintained by more than one employer") likewise provides a clear statutory basis under ERISA for MEPs, and the statute and its regulations contain many of the same requirements as those found under Code Section 413(c). In particular, this section contains the same requirements noted in the three bullet points above: multiple employers under common control are treated as a single employer (and therefore cannot themselves maintain a MEP), all the employers are treated as a single employer for purposes

of determining employees' service for plan eligibility under ERISA Section 202, and the same "aggregation" rule is applied for determining service for vesting and benefit accruals under ERISA Sections 203 and 204. [*See* ERISA §§ 210(d), (a)(1) and (a)(2), respectively.] In addition, the regulations under ERISA Section 210 define a multiple employer plan by reference to Code Section 413(c) and reference the Code provisions for "purposes of determining who is an 'employer or employers maintaining the plan.'" [29 C.F.R. § 2530.210(b)]

Accordingly, there is clear intent that Code Section 413(c) and ERISA Section 210(a) be interpreted in a cooperative, rather than inconsistent, manner. The similarities in form and function of these provisions indicate that there is no statutory intent that a plan sponsored by multiple, unrelated employers should be considered a single plan under the Code but multiple plans under ERISA. Of course, there are situations where ERISA and the Code may differ with respect to their requirements that apply to a particular type of plan. However, in such situations, one expects a clear statutory basis establishing the relevant distinction. This is notably absent with respect to MEP treatment under the Code vs. ERISA.

If it were true that a MEP must be established or maintained by a group or association of employers that acts on behalf of the employers (i.e., where the group or association is itself "an employer") in order to be a single ERISA plan, it would be expected that ERISA Section 210(a) and/or the regulations under Section 210 would include some reference to this requirement. This is not the case. Neither the statute nor its interpretative regulation contains any reference to the concept that a MEP is a plan that is necessarily established or maintained by a "group or association" of employers (i.e., with commonly, etc.), and in fact, the regulation incorporates by reference the Code definition which likewise does not indicate any such requirement. In the view of the authors, a fair reading of these provisions can lead only to the conclusion that an ERISA MEP is just what the regulation's title describes it as being—a "plan maintained by more than one employer" and regardless of whether the employers constitute a group or association that separately qualifies as an employer.

DOL Guidance on Pension Plans

Over the years, the DOL issued a number of other Advisory Opinions holding that pension plans maintained by multiple employers will be single ERISA plans only if the employers constitute a "bona fide" group or association. According to the DOL, this requires both that:

- The employers have a significant degree of "commonality" (this term, which is not actually an ERISA requirement, essentially means a relationship between the employers that both precedes and is *unrelated* to the plan), and
- The employer group (or, at least, the plan) is controlled by the employers.

The issues of "commonality" and "control" are highly interrelated, but for the sake of organization, we will address them separately. When both requirements are satisfied, multiple employers will be treated by the DOL as a bona fide group or association that is therefore an "employer" under ERISA. In turn, the group or association can then maintain a single plan. The language used to describe these requirements in Advisory Opinion 2012-04A is typical of that used in previous Advisory Opinions addressing Association MEPs (and MEWAs). It states that:

> …relevant factors in determining whether a purported plan sponsor is a bona fide group or association of employers include the following: how members are solicited; who is entitled to participate and who actually participates in the association; the process by which the association was formed, the purposes for which it was formed, and what, if any, were the preexisting relationships of its members; the powers, rights, and privileges of employer members that exist by reason of their status as employers; and who actually controls and directs the activities and operations of the benefit program. The employers that participate in a benefit program must, either directly or indirectly, exercise control over the program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the program. There is nothing in your submission to support a conclusion that a bona fide association or group of employers is sponsoring the (Plan).
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> It has been the Department's consistent view that where several unrelated employers merely execute identically worded trust agreements or similar documents as a means to fund or provide benefits, in the absence of any genuine organizational relationship between the employers, no employer group or association exists for purposes of ERISA section 3(5).

In short, the DOL requires nonbenefit based commonality among employers and employer control over the benefit program before the program will be treated

as a single ERISA plan. To illustrate how the DOL historically applied these standards to pension plans, it is instructive to contrast two of its previous Advisory Opinions.

Advisory Opinion 83-21A was issued to the United Way of Greater New Haven (the "United Way Opinion"), which sponsored an employee benefit plan (referred to as the "EBP" in the opinion) providing retirement, life insurance, and other benefits to its employees and other affiliated agencies. In this case, the affiliation was loose—the United Way and the other agencies were affiliated "only in that they (made) a common public appeal for contributions and for purposes of general coordination to prevent duplication of services." Noting that the "United Way does not control in any way the operations of any of the participating agencies and none of the participating agencies controls in any way the operations of United Way," the DOL, in a very short opinion, concluded that:

> Since it appears that there is no formal group or association of employers involved in this matter, the Department of Labor believes that the issue is whether United Way acts "indirectly in the interest of" each participating agency, for purposes of section 3(5), in relation to the EBP. With respect to this issue, the Department believes that a greater organizational nexus than is demonstrated by your submission must exist among the agencies (including United Way) in order that the EBP should be considered a single employee benefit plan for purposes of title I of ERISA.

On the other hand, the DOL issued Advisory Opinion 81-44A in which it found that the Young Women's Christian Association (the "YWCA Opinion") was a bona fide group or association of employers, and that a qualified plan sponsored by the YWCA, in which local YWCA chapters participated (referred to as the "Savings Plan" in the opinion), was a single pension plan under ERISA. The DOL described the pertinent facts it relied upon in reaching this conclusion as follows:

> On the basis of the information provided in your letter and the accompanying submissions, we have concluded that the Savings Plan is an employee pension benefit plan within the meaning of section 3(2) of ERISA. Among the factors that we believe support our conclusion in this regard are the following. By its express terms, the Savings Plan is designed to provide retirement income to employees. The Constitution and by-laws of the Savings Plan restrict the class of employers to whose employees the Plan provides retirement income to YWCA's and, as permitted by resolution, similar organizations. Participation in the Savings Plan is a condition of affiliation with the national association of YWCA's.
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> The Constitution of the Savings Plan provides for election by participating employers of the board of trustees that, among other duties, manages the Savings Plan corporation and handles the funds of the Plan, makes and amends by-laws, and elects officers. It appears, moreover, that the Savings Plan does not issue annuity contracts or policies to its member employers, but rather provides benefits to their employees on the basis specified in its by-laws. In addition, the Savings Plan is a qualified plan under section 401(a) of the Internal Revenue Code.

These opinions illustrate how the DOL applies the commonality and control requirements in determining whether a bona fide group or association of employers exists, and therefore, whether the group or association is an "employer" that can establish or maintain a single ERISA pension plan.

Prior to the issuance of Advisory Opinion 2012-04A, the Open MEP industry (and the authors) hoped that the DOL would recognize differences between Open MEPs and the Association MEPs on which it had previously ruled. In particular, and for the reasons set forth in more detail in the next sections of this article, because Open MEPs operate under a structure where each employer acts on its own behalf and does not rely on an association to do so, the hope was that the DOL would recognize this structural difference and not apply its commonality and control standards to Open MEPs. This would permit the employers to achieve the benefits of a multiple employer plan while each acting on their own behalf with respect to the plan. This hope did not materialize; Advisory Opinion 2012-04A applied the commonality and control requirements of its prior opinions to the Open MEP.

Commonality. To reiterate, there is in fact no commonality requirement in ERISA, or even any DOL regulation. There are no regulations interpreting the definition of "employer" under Section 3(5), and those under Section 210, which addresses MEPs, do not indicate in any way that multiple employers maintaining a single pension plan must have some significant pre-existing relationship for reasons unrelated to benefits. In Advisory Opinion 2012-04A, the DOL acknowledged this lack of regulatory support, turning instead to its own precedents.

Rather, the concept of commonality appears to be a policy consideration that has been read into the statute by the DOL and for which both the legal basis and actual standards applied are uncertain. For example, in the YWCA Opinion, the DOL found that the organizational nexus between the employers was sufficient for the reasons described above, even though merely "similar" organizations were permitted to join the plan, so long as the plan's board of trustees permitted it by resolution.

From our perspective, the notion that a "group" of employers must have significant commonality is likewise problematic. The use of the separate terms "group" and "association" in Section 3(5)—especially when separated by the disjunctive "or"—indicates that the terms are not intended to mean the same thing, even though the DOL treats them as being synonymous in this context. It does not seem likely that Congress intended to require that a group or association must have some significant, pre-existing organizational relationship outside of the establishment or maintenance of a plan in order to constitute an ERISA "employer" but simply neglected to mention it. Indeed, the definition on its face would seem to indicate that nonbenefit based commonality is not required, in that it specifically states that the group must act on behalf of the employers in relation to the plan, but does not require this representative relationship in any other context. And again, there is likewise no reference to any commonality requirement in the DOL's regulation under ERISA Section 210.

While there is no statutory or regulatory basis for imposing the commonality "requirement" in any context, there is at least arguably a policy basis for doing so with respect to an Association MEP. In an Association MEP, the association acts on behalf of the employers with respect to the plan, which in turn, could require that the employers in the association have some type of organizational relationship to ensure the plan is properly governed (although we would argue that any such relationship should pertain to the plan only, not other issues). There is no reason to apply the requirement to an Open MEP, where the employers do not rely on an association for any purpose.

If commonality were removed from the equation, a group of small, unrelated employers that worked together to manage a plan on a basis of fiduciary prudence could take advantage of the cost savings of single plan sponsorship. The commonality requirement ensures that this cannot happen outside of the "association" context.

Control. On the issue of employer control, relevant language in Advisory Opinion 2012-04A states that the factors determining whether a bona fide group or association exists include:

> the powers, rights, and privileges of employer members that exist by reason of their status as employers; and who actually controls and directs the activities and operations of the benefit program…

The Opinion states further that:

> The employers that participate in a benefit program must, either directly or indirectly, exercise control over the program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the program.

The above language is typical of Advisory Opinions regarding these issues generally. An examination of previous Opinions indicates that there are two general control dynamics with which the DOL is likely concerned—the relationship between the employers in the group and the relationship with the sponsor or other vendors.

With respect to the former, in the context of a retirement vehicle offered by the American Dental Association (ADA), the DOL opined that:

> From the information submitted with your inquiry, it appears that members of the ADA who are also employers enjoy no special powers, rights or privileges because of their employer status. It is the Department's position that where membership in a group or association is open to anyone engaged in a particular trade or profession regardless of employer status, *and where control of such a group or association is not vested solely in employer members, such group or association is not a bona fide group or association of employers within the meaning of section 3(5) of the Act.* [ERISA Adv. Op. 83-15A (Emphasis added)]

For many of the same reasons noted above with regard to the commonality issue, these concerns are not applicable to Open MEPs, although they may have some policy basis for Association MEPs. We agree that, as a general premise, an employer must at least indirectly control its plan, and in an Association MEP, the member employers arguably must control the association as well. In an Open MEP there is no third party association with nonemployer members that purports to act on behalf of the employers, so concerns about those without an employment-related "stake" controlling the plan simply do not apply.

The DOL has expressed concerns over a vendor unduly controlling the plan. In this context, it is instructive to examine ERISA Advisory Opinion 80-42A, which related to a welfare trust arrangement established to provide hospital and medical benefits to clergy, religious, and lay employees of certain affiliates of the Catholic Church. In that Opinion, the DOL cited to a Congressional Committee Report in which the Committee stated that benefit arrangements "established and maintained by insurance entrepreneurs for the purpose of marketing insurance products to employers and employees at large are not ERISA plans." With respect to the arrangement in question, the DOL noted that there were favorable factors for a finding that the trust involved was an ERISA plan, but refused to rule because other factors indicated that the trust "might, in fact, be a vehicle for marketing insurance products and might, in fact, be controlled by the contract administrators, not the employers."

This, likewise, has questionable application to Open MEPs. While Open MEPs are marketed by their sponsors, they are qualified plans, not products marketed for welfare benefit purposes "to employers and employees at large." Furthermore, any vehicle offered to "employers and employees at large" will never constitute a plan "established or maintained by an employer" under ERISA. By contrast, Open MEPs are available to employers only. We discuss the application of Advisory Opinions on MEWAs in the next section.

With respect to the issue of whether a MEP Sponsor has an impermissible level of control over a benefit arrangement, one argument that has been brought both in favor of and against Open MEPs is that they are designed to allow employers to completely avoid their fiduciary responsibilities under ERISA. This argument ignores the structure of ERISA, under which an employer establishing a single employer plan may avoid fiduciary responsibility to essentially the same degree as in an Open MEP. While the decision by an employer to adopt an Open MEP is a nonfiduciary "settlor" function, the employer is nonetheless exercising discretion and acting in a fiduciary capacity—and thus must act prudently and in the best interests of its employees—in selecting the service provider that controls the MEP. {ERISA Adv. Op. 83-15A}

Consider an employer in the single employer plan context that wishes to avoid as much responsibility as possible. It can adopt a master or prototype plan document that is maintained by a provider. It can engage a discretionary trustee for the plan and appoint a third party as the Plan Administrator. It can delegate to the trustee the power, as a Named Fiduciary, to appoint an investment manager (and investment advisor) for the plan assets. It can, essentially, delegate to third parties the responsibility for maintaining the plan document and managing the plan and its assets. The authors are aware of a number of entities that will, for a fee, take on all of these roles.

Now consider an Open MEP. The employer selects a sponsor that maintains the plan document. It will generally appoint the MEP Sponsor as the Plan Administrator and Named Fiduciary for the plan. In turn, the MEP Sponsor can delegate fiduciary and administrative responsibilities to other third party providers, such as investment managers, investment advisers, recordkeepers, and the like.

Participating employers in an Open MEP have the obligation to prudently select the MEP Sponsor, monitor its performance, and periodically review the reasonableness of its fees, as is the case for any employer that appoints third party providers to manage its plan.

Inasmuch as the participating employer that adopts an Open MEP retains fiduciary oversight over the MEP Sponsor to the same degree that an employer in a single employer plan retains that fiduciary oversight role over the third party or parties it engages to manage its plan (and possibly the plan's assets), we submit that the participating employers retain the same degree of "control" as the employer in the single employer plan context. In our view, the "control" issue should not be considered a barrier to the creation of an Open MEP.

Open MEPs Versus MEWAs

Where a requirement imposed by a regulatory body is not provided for in the statute it is charged with enforcing, there is likely a very good policy reason for it. In this case, there is a significant policy consideration that can go a long way toward providing a logical explanation for the difference between ERISA's actual requirements, which do not include commonality, etc., and the DOL's interpretation of them. In this case, it is the DOL's efforts to prevent MEWA abuses.

MEWAs have, for years, been under severe regulatory disfavor from the DOL. This arose because certain providers offered MEWAs to provide health benefits at relatively low cost but without sufficient capital or backing to pay all of the promised benefits. Until the mid-1980s, the MEWA providers were able to argue that their products were welfare plans covered by ERISA's preemption clause under Section 514, and therefore were exempt from state insurance regulations mandating minimum reserve levels and similar

requirements designed to ensure financial solvency. Predictably, many of them collected premiums and then, faced with benefit obligations that they could not meet, they became insolvent and left employees with no health benefits. While not all MEWA providers were (or are) dishonest, the abuses that occurred were sufficiently severe to require Congressional action: ERISA was amended in 1983 to provide an exception to ERISA preemption that subjected MEWAs to state insurance regulation in an effort to prevent this abusive practice from reoccurring. [*See* ERISA § 514(b)(6).]

The earliest ERISA Advisory Opinions on single ERISA plan status for multiple employer benefit arrangements were issued in the MEWA context during the few years preceding the 1983 ERISA amendments noted above. Accordingly, the DOL's insistence that multiple employers must be members of a "bona fide" group or association (where there is commonality among the employers and the employers control the group or plan) in order to sponsor an ERISA plan begins to make more sense if one contemplates that the DOL's motivation was to prevent MEWA abuses.

While the DOL's holdings with respect to MEWAs and pension plans have been relatively consistent, there is one significant regulatory and one significant policy basis for treating MEPs and MEWAs differently with respect to the issue of single ERISA plan status.

First, as noted earlier, MEPs are creatures of both the Code and ERISA, and the ERISA regulations under Section 210 indicate that a MEP under the Code is a MEP under ERISA. Conversely, there is no analog in the Code or in ERISA or its regulations for examining when a MEWA is a single plan. Accordingly, while we do not believe that the "bona fide" group or association test is legally supportable in either context, the legal basis for objecting to this position in the MEWA context is less compelling.

Perhaps more importantly, there are also clear policy differences between Open MEPs and MEWAs that support disparate treatment. In more than one of its Advisory Opinions (including Advisory Opinion 2012-04A), the DOL cites to certain case law in support of the contention that employers sponsoring a plan must have an organizational nexus unrelated to the plan, but time and time again, the cases themselves, as well as the legislative records to which they cite, are concerned with the need to avoid allowing *insurers* offering purported welfare plans to avoid state insurance regulation under a guise of ERISA preemption. One such case is *MDPhysicians & Associates, Inc. v. State Bd. Ins.*, in which the court found that an entrepreneur offering a MEWA to a large number of employers was not an employer that could maintain an ERISA welfare plan (and thus, could not evade state insurance regulation). [957 F.2d 178 (5th Cir.), *cert. denied*, 506 U.S. 861 (1992)] In so finding, it noted that ERISA does not define what a "group or association of employers" is, and turned to legislative history to fill the gap:

> In reaction to the broad range of "persons" claiming "employer" status to gain the protection of ERISA's broad preemption against application of state regulations, Congress evidenced its intent shortly after the passage of ERISA. The Activity Report of the Committee on Education and Labor revealed that certain *entrepreneurs have undertaken to market insurance products* to employers and employees at large, claiming these products to be ERISA covered plans. For instance, persons whose primary interest is in profiting from the provision of administrative services are *establishing insurance companies* and related enterprises. The entrepreneur will then argue that (it) is an ERISA benefit plan which is protected, under ERISA's preemption provision, from state regulation....(W)e are of the opinion that these programs are not "employee benefit plans"....(T)hese plans are established and maintained by entrepreneurs for the purpose of *marketing insurance products or services* to others. They are not established or maintained by the appropriate parties to confer ERISA jurisdiction.... They are no more ERISA plans than is any other *insurance policy* sold to an employee benefit plan. (Emphasis added)

This issue has nothing to do with Open MEPs, whose providers are not subject to state insurance laws, and do not become subject to (or avoid) any state laws on the basis of whether the arrangements are single ERISA plans or a group of ERISA plans. Of course, one could analogize an Open MEP sponsor to an insurer in the sense that they both want to make money (of course, regular service providers to any plan suffer from the same "defect"), but this is a largely superficial comparison—Open MEP providers, unlike MEWA providers, are not attempting to evade the very state laws that are designed to protect plan beneficiaries by ensuring the financial solvency of the arrangements.

Open MEPs have to be funded according to the same rules that apply to single employer plans. Likewise, Open MEP providers, unlike insurers, cannot increase their profits by denying benefit claims and the like (most Open MEPs are 401(k) and other individual

account plans), and their interests are therefore not adverse to those of plan participants in the same sense as MEWA promoters. In short, the need for a protective "organizational nexus" is much more pronounced where insured and insurance-related products are used to provide benefits, versus qualified individual account plans with traditional investment vehicles. (This conclusion is apparently shared by the DOL, given the factors weighed in the YWCA Opinion we noted earlier.) Despite this, consider the following statement by Assistant Secretary Borzi, which was part of the same testimony cited at the beginning of this article:

> The idea of "open MEPs," however, is not an established concept in ERISA. Indeed, EBSA has had difficult experiences with similar "open" employee benefit structures in the group health area. These arrangements, called "MEWAs," or multiple employer welfare arrangements, can be provided through legitimate organizations, but they sometimes are marketed using attractive, but unsound, organizational structures and generate large, often hidden, administrative fees for the promoters. In addition, certain promoters try to use ERISA's general preemption of state laws as a way to avoid state insurance or other regulation. That fact, together with the claimed separation of the employer from accountability for the plan's administration, too often put workers at risk of not getting the benefits they were promised.

It is plain, therefore, that the DOL's distrust of Open MEPs has much more to do with its experience with MEWAs than anything particular to Open MEPs. Stated another way, it is apparent that very specific concerns about abuses by insurance entrepreneurs have been morphed into a broader attitude of distrust that is being unjustifiably turned against other entities.

Of course, as we noted previously, employers participating in an Open MEP do have a responsibility to monitor the reasonableness of provider compensation, whether it is direct or indirect, in accordance with ERISA Section 408(b)(2). This is the exact same obligation imposed on single employer plan sponsors, so requiring that an Open MEP be treated as multiple single employer plans makes no practical difference, and if anything, will increase fees by destroying some of the economies of scale a single plan offers. It is ironic that, despite the DOL's stated concern over unduly large and hidden fees in the welfare plan context, its service provider fee disclosure regulation under Section 408(b)(2) currently applies only to retirement plans and not welfare plans.

Advisory Opinion 2012-04A

The DOL applied its historical standards and precedents to the Open MEP in question in Advisory Opinion 2012-04A. According to the Opinion, the "bona fide" group or association requirements were not met, and the DOL found that the arrangement constituted multiple plans rather than a single one. We believe this was ultimately incorrect for the reasons set forth previously, which relate to the fundamental differences between the Open MEP model and those of Association MEPs and MEWAs. In this section, we examine the Advisory Opinion in more depth.

Unlike previous Advisory Opinions addressing pension arrangements, Advisory Opinion 2012-04A addressed the relationship between Code Section 413(c) and ERISA Section 210(a). The applicant had urged that this relationship naturally led to the conclusion that a single MEP under the Code is a single MEP under ERISA. The DOL rejected this argument without any convincing reason, noting that:

> Code section 413(c) addresses the tax qualified status of certain pension "plans" that cover the employees of multiple employers. Section 413 of the Code, however, does not control whether an arrangement is an "employee benefit plan" under ERISA. *Cf. In re Sewell*, 180 F.3d 707, 711 (5th Cir. 1999) (there is no requirement under ERISA that to be a plan governed by ERISA, a plan must be tax-qualified). Contrary to your suggestion, section 210 of ERISA and the regulations implementing the minimum coverage and participation rules of Part 2 of ERISA do not dictate a different conclusion. While those regulations refer to section 413 of the Code at various points (*see, e.g.,* 29 CFR 2530.210(c)), they do not purport to make questions of ERISA coverage turn on section 413 of the Internal Revenue Code.

Put in context, this statement stands for the proposition that a MEP under the Code, which constitutes a single qualified plan adopted by multiple employers, can be multiple ERISA plans. We submit that this position is inconsistent with the plain language of the DOL's own regulation under Section 210, which states that:

> For purposes of this section, *the term "multiple employer plan" shall mean* a multiemployer plan as defined in section 3(37) of the Act and section 414(f) of the Code or a *multiple employer plan within the meaning of sections 413(b) and (c) of the Code and the regulations issued thereunder*. [29 CFR § 2530.210(c)(3) (Emphasis added). Code Section 413(b) applies to collectively bargained plans, whereas Section 413(c) applies to MEPs, as defined in this article.]

This could hardly be more clear. A MEP under Code Section 413(c) is a MEP under ERISA, and the ERISA regulation shows obvious deference to the definition in the Code and its regulations. While the primary purpose of the regulation is not determining whether one or multiple plans is involved, there is no fair reading of it that would support a different conclusion. The ERISA regulation uses the term "shall mean" which indicates a complete list—it does not state that an ERISA MEP "may include" a Code MEP. Likewise, there is no indication that an ERISA MEP can be only a portion of a Code MEP, or that the DOL is empowered (through Advisory Opinions or otherwise) to either add to or take away from this definition.

In Advisory Opinion 2012-04A, the DOL attempts to minimize the relationship between the regulations under ERISA and the Code by stating that the former merely "refers to" the latter, but this is an understatement. If the relationship were actually so casual, the above passage in the ERISA regulation surely would have been drafted differently. To be fair, this complication may not have been taken into account when the ERISA regulation was issued in 1976, but this possibility does not justify issuing a ruling that is flatly inconsistent with the regulation's plain language. It is difficult to see how the words "shall mean," which is customarily interpreted to be a mandatory requirement, can be construed as a loose reference that is subject to change in other contexts. If the DOL wishes to impose additional requirements for ERISA MEPs than those that apply to Code MEPs, fairness dictates that it write its own regulation describing those requirements, and not rely on the Code's definition and then deny that it did so.

The conclusion that the relationship between ERISA Section 210 and Code Section 413 requires an Open MEP to be treated as a single ERISA plan is not at all inconsistent with the Congressional intent discussed earlier, since these statutory provisions pertain only to retirement plans, not to insured (and self-insured) welfare plan products for which the key issue is the evasion of state insurance laws.

In addition, the *Sewell* case cited by the DOL does not support its conclusion. This case states only that an ERISA plan may or may not be tax-qualified (such that ERISA protections would still attach to a disqualified plan). Of course, ERISA and Code standards may differ. The mere fact that they may differ, however, does not mean that they actually do differ, particularly where every indication in the respective statutes and regulations is that they are the same.

The DOL points out in the Advisory Opinion that "the determination of ERISA coverage is a multiple step process" and in order for Section 210 to apply, there must be an ERISA pension plan in the first place. The DOL cites its regulation under ERISA Section 201, 29 C.F.R. 2530.201-1, for this proposition. The problem with this argument is that the regulation does little more than indicate that the plan must be a pension, as opposed to a welfare benefit plan, and must not otherwise be exempt from ERISA. The first requirement cited in the regulation is that the plan must provide benefits for "employees," citing to 29 C.F.R. 2510.3-2, which indicates that a plan covering only a business owner and his or her spouse but no common law employees is not a plan for purposes of ERISA.

While the regulation then states that "the employee benefit plan must be subject to Title I of the Act," it goes on to explain that the determination of whether such coverage exists is made under ERISA Section 4. Section 4 provides that to be a plan subject to ERISA, it must be "established or maintained" by an employer engaged in commerce, by a union or by both; it also provides various exceptions, including governmental plans, church plans, plans providing workers' compensation, plans for nonresident aliens, and excess benefit plans.

Nothing in this "multiple step process" addresses the issue of what it means for a plan to be "established or maintained" by an "employer," so we must look to other sources for this definition. Stated somewhat differently, while it is true that we must determine whether the plan is subject to Title I of ERISA before applying Section 210, there is nothing in part 2 of ERISA (which contains Section 210) or the regulation under Section 201 that provides any particular clarity on this determination.

Accordingly, we see no statutory or regulatory basis for excluding Open MEPs from part 2 of Title I. The DOL seems to be aware of this lack of specific support for its position, in that it cites to the "multiple step process" described in 29 C.F.R. 2530.201-1 only generally in the Opinion, and does not cite to any specific language it believes supports its conclusion. In our view, the argument that Section 210 is irrelevant until a determination of Title I coverage is made is not dispositive, and indeed has little bearing on the issue.

The DOL also rejected the applicant's argument that the historical definition of "employer" (i.e., including commonality, etc.) should be applied to MEWAs but not Open MEPs. In rejecting the

argument, the DOL cited to a Supreme Court case involving child support payments that calls for consistency in statutory interpretation. This, of course, brings us full circle to the problem at hand. It is true that the DOL has been consistent in this regard, but this does not equate to proper statutory interpretation since the specifics of the definition the DOL has applied have no statutory basis in the first place. It is also true that there is no indication in ERISA that "employer" means something different for retirement plans and welfare plans, but this is not a satisfactory response since there is likewise no indication of a commonality requirement in ERISA. The argument that "employer" is a universal definition that requires commonality, etc. for all multiple employer benefit plans means that the DOL is picking and choosing when it stays true to statutory language and when it does not.

Finally, in concluding that the Open MEP constituted multiple ERISA plans, the DOL noted that:

> Importantly, we note that persons who operate the arrangement would be subject to the fiduciary provisions of Title I to the extent they have control over plan assets or have discretionary control over the administration or management of the participating employers' separate plans. They would also be subject to the prohibited transaction provisions in ERISA section 406 to the extent they are "parties in interest" within the meaning of ERISA section 3(14) either as service providers to the separate employer plans or otherwise. Similarly, each employer sponsor of a plan that participates in the arrangement will be subject to ERISA's fiduciary provisions.

We do not dispute this statement. At the same time, it is unclear how this explanation of the fiduciary and prohibited transaction rules of ERISA require a conclusion that an Open MEP is not permitted under ERISA. This language, while true on its face, seems to imply—incorrectly—that the rules and responsibilities of the respective parties would change if the Open MEP were treated as a single plan. This is not the case. As noted above, fiduciary status arises by operation of law rather than title, and the MEP Sponsor can continue to act as both the Plan Administrator and Named Fiduciary under the component plans, since ERISA (in Sections 3(16) and 402(a) respectively) permit these parties to be designated in the plan document, and do not require them to be the employer regardless of whether the plan is a single employer or multiple employer plan. The MEP sponsor will continue to maintain the plan's governing documents, as any prototype plan sponsor does. With respect to the prohibited transaction rules, the fiduciaries and parties-in-interest will likewise remain unchanged. In short, the responsibilities of the employer and all other parties to the arrangement will not change, and the general operational model can continue on. From a practical perspective, plan sponsors who are engaged in their fiduciary role will presumably continue to be so, and those that are not will not likely leap into action simply because of the single employer plan versus MEP technicality.

Implications of the Opinion

The practical consequences of the Opinion will be relatively minor, though they may increase the cost of operation of plans that have attempted to use the Open MEP model. Plan documents and service provider agreements will need to be changed, and it may be more difficult to negotiate lower fees with service providers with respect to a group of smaller plans—costs which may have to be passed through to the plan participants. The loss of administrative streamlining will likely also increase costs. The same is true with respect to the separate Form 5500 filings, and the comprehensiveness of this reporting will suffer. This is because many of the component plans will have fewer than 100 participants, so that they will not have to complete an annual financial audit, and will likewise not have to file Schedule C, on which service provider compensation is disclosed (which is deleterious to the policy interests the DOL advocates). The separate plans of participating employers may need to obtain separate fidelity bonds, which will also increase cost. Of course, the consequences will be greater if the increased costs cause participating employers to withdraw, in which case they may not sponsor a plan at all. If they do adopt their own single employer plan, they will almost certainly be unable to duplicate the cost savings of the Open MEP, which is why they joined the Open MEP in the first place.

In our view, Advisory Opinion 2012-04A will be disadvantageous to small employers and their employees, and is not likely to advance any sound policy consideration.

Conclusion

For the reasons set forth above, we submit that the relationship between the Code and ERISA, as they relate to MEPs, is significant, and that the most fair reading of the actual statutory and regulatory language supports the conclusion that multiple employers may

each act on their own behalf with respect to a single combined plan without being members of a group or association. Just as Code Section 413(c) provides an exception to the general rule that a qualified plan must be one sponsored by "an employer," ERISA Section 210(a) provides an analogous exception to this dynamic for ERISA pension plans.

In our view, multiple, unrelated employers may likewise constitute a "group" that can act as an employer with respect to a single plan, so long as the group acts on the employers' behalf with respect to the plan, which is all that ERISA requires. While the latter is not consistent with the Open MEP model, it would at least afford small employers the opportunity to take advantage of the cost reduction of maintaining a single plan rather than separate individual plans.

The significance of Advisory Opinion 2012-04A is that the plan adopted by each participating employer in an Open MEP must be treated as a separate single employer plan under ERISA, and this result will make plan reporting less comprehensive and will increase costs for small businesses, while failing to advance policy interests in any meaningful way.

Even if Open MEPs must be treated as multiple ERISA plans rather than actual MEPs, they still offer a number of significant potential advantages, including reducing plan costs, helping to ensure access to professional administrative services, and enhancing plan sponsorship. Therefore, we hope that the DOL will take an active role in issuing guidance on the necessary fiduciary process that employers must follow with regard to the prudent selection of providers for these types of arrangements, and monitoring their performance and fees. This will assist employers and those providers that offer quality products at a fair price.

In light of Advisory Opinion 2012-04A, it seems unlikely that the DOL will reverse its position and endorse the Open MEP model through future Advisory Opinions, so we hope that this can be achieved through the legislative process. The DOL indicated in the Opinion that:

> There are several bills pending in Congress which call for the Department, in coordination with the Treasury Department, to provide fiduciary relief and simplified administrative, reporting and disclosure obligations for multiple employer plans. We are currently analyzing these proposals.

The necessary legislation should clarify that a single pension plan can be maintained by multiple employers regardless of commonality, etc., which is consistent with ERISA's terms as they exist now. If enacted, this legislation, coupled with the necessary fiduciary guidance from the DOL, will achieve a positive result. ■