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Client Alert

August 12, 2019

DOL's Final Rule on Association Retirement Plans: What It Means for the Retirement Industry

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The DOL's newly released final regulation on "Association Retirement Plans" (ARPs) will make it easier for groups and associations of employers to jointly sponsor a combined 401(k) or other defined contribution plan. (These plans are also referred to as multiple employer plans or "MEPs.") In recent years, there has been a push to permit service providers to create "Open MEPs," which are plans of unrelated employers having no business connection, or what the DOL refers to as "commonality" (*i.e.*, a relationship unrelated to employee benefits). The hope is that these plans will provide small businesses with a cost-efficient and minimally burdensome avenue for offering retirement savings opportunities to workers.

In 2012, the DOL opined that Open MEPs, which are open to any employer that wishes to participate (without a requirement for commonality among the participating employers), would not constitute a single plan for ERISA purposes. The final ARP regulation does not reverse, but does modify, this ruling. However, it stops short of approving Open MEPs. On the other hand, it does significantly relax the standards for determining whether a group or association of employers has sufficient "commonality" to sponsor a single retirement plan.

Under the Internal Revenue Code, a plan sponsored by more than one unrelated employer can be tax-qualified, irrespective of any business connection between them. ERISA also says that a single plan can be established and maintained by a group or association of employers acting in concert. However, through a number of Advisory Opinions, the DOL previously took the position that a *bona fide* group or association of employers must have significant commonality to act as sponsoring employers of a combined ERISA plan.

Groups of companies having only a loose affiliation or merely working in a common industry have been found not to have the requisite relationships. And without sufficient commonality, a MEP that is a single plan under the Code qualification rules will nonetheless be treated as a combination of multiple single-employer plans under ERISA. This inconsistent treatment between the two regulatory schemes creates additional costs and burdens, including, for example, the need to file multiple Forms 5500.

Summary of the ARP Regulation

The final ARP regulation relaxes the "commonality" threshold by requiring only that the employer-members of the group or association either:

- Be in the same trade, industry, line of business or profession, or
- Have a principal place of business within a single state or single metropolitan area (even if crossing state lines).

The regulation also makes clear that the primary purpose of the group or association can be MEP sponsorship, as long as there is at least one other substantial business purpose. It goes on to explain that a "substantial" business purpose can include the promotion of common business interests within the employers' industry or geographic community.

There are still some restrictions. For example, the group or association must have a formal organizational structure (*e.g.*, as evidenced through by-laws or otherwise) and must be controlled by the employer-members, and participation in the ARP cannot be open to the workforces of non-members. Also, to ensure that the ARP is actually sponsored by employers for the purpose of providing benefits – and not by a service provider as a business enterprise – the regulation makes clear that financial services firms, recordkeepers and third party administrators cannot act in the "group or association" capacity.

What It Means

Given the fact that the ARP regulation still has a commonality requirement, though relaxed, and a limitation on the ability of service providers to establish multiple employer plans for potential customers, we think the response to the new guidance will be somewhat measured. Certainly, trade associations and other employer groups where the more liberal commonality threshold can be comfortably satisfied – for example, fast food franchisors in a geographic area or independent real estate agents who operate through a common broker – may choose to create a MEP under the regulation in order to obtain savings through economies of scale. But a greater expansion of the MEP market – specifically the Open MEP market – will need to wait for the passage of additional laws or regulations. We should note that contemporaneous with the ARP regulation, the DOL issued a request for information (RFI) soliciting public comments as to whether Open MEPs should be allowed under DOL regulations, in addition to a number of other issues relating to Open MEP provider compensation, prohibited transaction issues and other areas where DOL guidance is needed.

On the last point, a key provision in the Setting Every Community Up for Retirement Enhancement (SECURE) Act would provide for the establishment of entirely open MEPs – referred to as "pooled" plans – irrespective of any commonality among participating employers. If the SECURE Act becomes law in its current form – it passed by an overwhelming majority in the House, but has been delayed in the Senate – it would abolish the DOL's commonality requirement. This would (1) provide employer groups and associations and professional service providers the opportunity to offer a MEP without the need to satisfy even the relaxed commonality standard under the ARP regulation and (2) render the new regulation largely moot – at least in cases where the MEP would otherwise satisfy the SECURE Act's provisions related to pooled plans.

Conclusion

To avoid the MEP commonality requirement entirely, employers and service providers will have to wait and see if the SECURE Act (or other statutory relief) becomes law. In the meantime, the DOL's Association Retirement Plans Rule provides relief for – and a clear path toward – plan sponsorship by trade associations and similar employer groups the members of which have industry or geographic ties.

Employee Benefits and Executive Compensation Team

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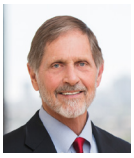

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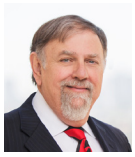

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