OPENING UP MEPS: PROPOSED DOL RULE EXPANDS MULTIPLE EMPLOYER PLANS, BUT LEGISLATION WOULD GO FURTHER

Date: 8 November 2018

Public Policy and Law Alert

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On October 23, the Department of Labor ("DOL") published a proposed rule intended to make it easier for small businesses to join together to offer employee retirement benefits through defined-contribution Association Retirement Plans ("ARPs") or other types of multiple employer plans ("MEPs"). The rule expands the definition of "employer" under Section 3(5) of the Employee Retirement Income Security Act ("ERISA"). Since an association or organization can only sponsor a MEP if it meets the definition of an "employer" under ERISA, the proposed rule's expansion of the definition would potentially help to increase access to workplace retirement accounts, particularly for those employed by small businesses. Currently, less than half of businesses with fewer than 50 employees offer retirement plans.

THE BENEFITS OF MEPS

If a MEP is deemed to be a single plan under ERISA (as opposed to each participating employer being treated as sponsoring their own separate plan), member entities can shift a great deal of their administrative and fiduciary responsibilities (and liabilities) to the lead sponsor or sponsoring organization — a significant incentive to form a MEP. Such treatment also simplifies reporting and audit obligations, allowing a single Form 5500 to be filed for the MEP, in addition to potentially achieving lower costs through economies of scale.

BROADENING THE DEFINITION OF "EMPLOYER"

Under DOL's current interpretive position [1], for a MEP to be treated as a single plan, the member entities and the MEP-sponsor must, amongst other restrictions, have an "employment based common nexus or other genuine organizational relationship that is unrelated to the provision of benefits." Thus, under current guidance, companies can only come together to form a MEP if they have a pre-existing affiliation, such as shared ownership or membership in the same industry trade association.

Under the proposed rule, the ERISA section 3(5) definition of "employer" — for purposes of determining eligibility to sponsor a MEP — would include a broadened range of "bona fide employer groups or associations." These groups could either be within the "same trade, industry, line of business, or profession …" and exist nationwide or, alternatively, be connected only geographically, having their principal places of business in the same city, county, state, or multi-state metropolitan area. Geographically based groups such as local chambers of commerce that have been restricted from sponsoring MEPs would be "strong candidates to sponsor MEPs" under the proposal.

Further, in place of the previous requirement that groups or associations sponsoring MEPs be formed for purposes "unrelated to the provision of benefits," under the proposed rule, such groups or associations must only have "one substantial business purpose unrelated to offering and providing employee benefits to its employer members." According to DOL, that substantial purpose requirement need not be the earning of a profit and will be found to exist "if the group or association would be a viable entity in the absence of sponsoring an employee benefit plan." The proposed rule would also allow sole proprietors and their families to join such plans. Finally, professional employer organizations, groups that take on certain human resources responsibilities for their client employers, could also become plan sponsors.

The proposed rule from DOL advances an August 31 Executive Order by President Trump that called on DOL to "clarify and expand the circumstances under which United States employers, especially small and mid-sized businesses, may sponsor or adopt a MEP as a workplace retirement option for their employees … ." Secretary of Labor Alexander Acosta acknowledged the president's efforts in announcing the proposed rule, saying that the President was "moving quickly to expand quality, affordable workplace retirement plan options for America's small businesses and their employees … [ARPs] give these employers a simple and less burdensome way to offer valuable retirement benefits..."

COMMENTS DUE DECEMBER 24

The DOL has asked for comments on "all aspects" of the proposed rule to be made by December 24. Specifically, comments are requested regarding the proposal's interaction with state and other federal laws, its inclusion of working owners in ERISA-covered ARPs, and notice and reporting requirements that should apply to such plans. Additionally, DOL requests comments on two related issues not otherwise addressed in the proposed rule: (1) whether further regulations should address so-called "corporate MEPs," which cover employees of related employers; and (2) whether regulations should address "open MEPs," which provide benefits to employees of employers with no relation to one another beyond their membership in the MEP.

PROPOSED RULE PART OF BROADER RETIREMENT REFORM EFFORT

The DOL proposal would not allow for true "open" MEPs, where participation would not be limited by locality or industry. The proposal also does not eliminate one of the stumbling blocks to employer participation in MEPs — the "unified plan rule" (also known as the "one bad apple" rule) where, under current Treasury regulations [2], one legally noncompliant employer could cause the entire MEP to be disqualified. A change to this rule would need to come from the Treasury Department or Congress [3]. As DOL states, its proposal is "limited because it relies solely on the Department's authority to promulgate regulations administering title I of ERISA."

On the other hand, the proposal also makes clear that "Congress has authority to make statutory changes to ERISA and other areas of law that govern retirement savings, such as the Internal Revenue Code." Notably, there is also open MEPs legislation currently pending before Congress, which addresses some of the statutory hurdles to establishing open MEPs that are beyond the scope of the proposed rule. Although the DOL's proposed rule may make it easier for many businesses to form MEPs, it is limited in that there are current-law provisions that restrict certain entities from doing so, such as banks, trust companies, insurance issuers, and broker-dealers. In September, however, the House of Representatives passed H.R. 6757, the Family Savings Act of 2018, which

would create fully open MEPs that would include those entities. The bipartisan S. 2526, the Retirement Enhancement and Savings Act of 2018 (“RESA”), currently before the Senate, would likewise provide for open MEPs.

Moving forward, the House's passage of H.R. 6757, along with continued interest in RESA, has created optimism that a compromise retirement package could pass Congress before the end of 2018. A number of additional retirement issues impacting MEPs could be addressed in such a bill. For example, legislation currently before Congress would address the “one bad apple” rule.

Please contact any member of the K&L Gates' ERISA fiduciary group and the K&L Gates financial services policy team for assistance in determining the impact on you and your business of DOL's proposed rule or of broader retirement reform proposals in Congress.

NOTES:

[1] *See* Advisory Opinion 2012-04A (May 25, 2012).
[2] Treas. Reg. § 1.413–2(a)(3)(iv).
[3] The Department of the Treasury has indicated it plans to issue a proposed rulemaking on the topic.

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