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Narrowing the Coverage Gap by Expanding Access to MEPs

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For decades, policymakers in Washington have been trying to improve the retirement preparedness of American workers by narrowing the so-called retirement savings coverage gap. Some researchers estimate that only about half of all full-time workers are employed by an employer that sponsors a retirement plan, although many studies point to the lack of reliable coverage data about full-time workers who are likely to want to save for retirement.[1] There does seem to be general agreement, however, that more can be done to promote plan adoption, simplify plan administration, and create new avenues for employees to participate in retirement savings arrangements facilitated by their employers.

In recent years, one proposal to narrow the coverage gap has uniquely received consistent and universal support — expanded access to multiple employer retirement plans (MEPs). MEPs are a type of pooled retirement arrangement that allows multiple employers to join together under a single retirement plan, thereby simplifying plan administration and reducing costs. Notwithstanding these benefits, however, MEPs only occupy a very small slice of the current retirement plan marketplace because regulatory obstacles prevent unrelated employers from reaping the most important benefits associated with MEPs.

Those regulatory obstacles and the days of limited MEP participation may soon be drawing to a close as lawmakers on both sides of the aisle have been working to create solutions that will expand access to MEPs and promote their adoption. In this article, we will explore the legal underpinnings of MEPs, the benefits conferred upon employers participating in MEPs, the current obstacles to MEP participation, and a widely-supported legislative solution aimed at eliminating those obstacles (the Retirement Enhancement and Savings Act of 2018 (RESA)). The ''elevator pitch'' for increased MEP adoption is that MEPs reduce the cost of plan sponsorship because they allow small employers to share the fixed costs of offering a plan. In this article, we will look a bit deeper at what is gained by participating in a MEP, as compared to other currently available retirement plan arrangements.

WHAT ARE MEPs?

Simply put, MEPs are a type of pooled retirement arrangement that allows multiple employers to join together under a single retirement plan. MEPs are often referred to under the oxymoronic designation of ''**single** multiple employer plans.'' This designation is used because the most significant legal advantage derived from MEP participation is the arrangement's treatment as a single plan for various compliance purposes, especially under the Employee Retirement Income Security Act of 1974 (ERISA).

The term MEP is not used, however, for a plan in which multiple corporate **affiliates** participate. Nor is the term used for a plan in which multiple employers

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[1] EBRI, Another Year After the Current Population Survey Redesign and More Questions About the Survey's Retirement Plan Participation Estimates (Nov. 21, 2016); Investment Company Institute, Who Participates in Retirement Plans, 2014 (Apr. 2018).

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participate in a collectively bargained plan, which is confusingly called a multiemployer plan.

The single MEP designation under ERISA only tells part of the story. Under the Internal Revenue Code (Code), MEPs are treated as a single plan for some qualification purposes and as separate plans for other qualification purposes.[2] For example, MEPs are treated as a single plan for purposes of the arrangement's overall qualification and the Code's exclusive benefit, minimum participation, and vesting rules.[3] (Similar rules apply under the parallel provisions of ERISA.[4]) Additionally, a MEP is treated as a single plan for purposes of the annual limits on contributions and benefits, and for determining the compensation that is taken into account when testing those limits.[5]

Thus, MEPs have unique administrative issues that must be dealt with. For example, hours of service credited to an employee of any employer participating in a MEP must be counted across participating employers for purposes of determining the employee's participation and vesting rights. This requires tracking at the plan level and comes up frequently with MEPs covering employers in the same industry because, in that case, employees are more likely to move from one participating employer to another.

Conversely, MEPs are treated as separate plans for purposes of the Code's nondiscrimination, top-heavy, and minimum coverage rules.[6] Moreover, the deduction limits applicable to employer retirement plan contributions are determined and tested as if each participating employer had established a separate plan.[7] This separate plan treatment for MEPs also creates unique administrative issues that are not faced by plans sponsored by a single employer. For example, each employer's demographics are tested separately in a MEP, but a single failure under the nondiscrimination rules could disqualify the entire plan.[8]

BENEFITS UNIQUE TO MEPs

To understand the benefits of MEPs, it is important to compare them with the most common way that retirement plans are currently structured and offered to employers, particularly small employers. Most small employers that sponsor retirement plans — particularly 401(k) plans — do so using an ''off-the-shelf'' program designed by service providers. This consists of a pre-approved plan document with few design choices and a limited menu of investments. Most, if not all, administrative and investment services are outsourced to third parties. By standardizing most plan features, this type of arrangement already achieves economies of scale, thereby making plan sponsorship more affordable. So, in comparison to this off-the-shelf model, what additional benefits do MEPs offer to small employers?

The main legal benefits extended to arrangements that are treated as a single MEP are the ability to file a single Form 5500, to undergo a single audit, and to only be subject to one fidelity bond.[9] By comparison, off-the-shelf arrangements require a Form 5500 filing for each plan and, if the plan covers more than 100 employees, separate audits.

In practice, however, MEPs simplify and streamline plan administration in ways that go well beyond Form 5500 filings. For example, most MEP decision-making is done centrally, which means that participating employers can concentrate on running their businesses. And while off-the-shelf arrangements often require an adviser to help guide small employers, MEPs typically handle investment decisions at the MEP level.

Perhaps the most misunderstood cost of plan sponsorship is **the cost of getting the employer to adopt a plan in the first place**. Here, MEPs have a significant cost advantage. Under current rules, MEPs are frequently offered through trade associations. These associations have a natural and existing communications pipeline to their members. As a result, these preexisting networks significantly reduce the costs associated with finding employers to participate in a MEP. Moreover, trade associations have generally already earned the **trust** of their members, making it easier to convince individual employers to join an association's MEP. The benefits associated with this sort of framework are difficult to quantify but play a significant role in facilitating plan adoption.

Lastly, it is often pointed out that a MEP can allow participating employers to hand over certain fiduciary responsibilities and therefore liability.[10] While this is theoretically possible with an off-the-shelf arrangement, in practice, this is much less common. Also, under current law, and even under the legislative proposal described below, it is unlikely that employers participating in a MEP can relinquish all fiduciary responsibility. Participating employers likely must, at a

[2] *See* §413(c) and Reg. §1.413-2. All section references are to the Internal Revenue Code of 1986, as amended (the Code), and the regulations thereunder, unless otherwise specified.

[3] Reg. §1.413-2(a)(3)(iv); §413(c)(1)–§413(c)(3).

[4] ERISA §210.

[5] Reg. §1.415(a)-1(e).

[6] Reg. §1.413-2(a)(3)(ii)–§1.413-2(a)(3)(iii) and §1.416-1(g), Q&A 2.

[7] §413(c)(6).

[8] *See* Reg. §1.413-2(a)(3)(iv).

[9] *See* ERISA §103(a)(1), §103(a)(3), §412.

[10] *See* ERISA §405(c)(1).

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minimum, retain responsibility for selecting and monitoring the MEP's fiduciaries.[11]

The foregoing discussion of MEP advantages, as compared to off-the-shelf arrangements, is summarized in the following chart.

Feature	MEP	"Off-the-Shelf" Plan Design
Single plan investment line-up	Yes	Yes, but usually some customization required
Identical plan documentation	Yes	Yes, some customization required
Single fiduciary oversight	Yes	Yes, but less common
Distribution to small plans through partner	Yes	Maybe
Single audit	Yes	No, but small plans may not require audit
Single 5500, fidelity bond	Yes	No

ERISA AND TAX OBSTACLES TO EXPANDED MEP PARTICIPATION

The most significant obstacle preventing more employers from joining a MEP is the Department of Labor's (DOL's) interpretation of ERISA to generally prohibit unrelated employers from being treated as if they have joined a single retirement plan. This is true even when an arrangement can be treated as a single MEP for certain purposes under the Code (as described above). Additionally, there are also obstacles under the Code that have discouraged widespread MEP adoption. We discuss each of these obstacles below.

Advisory Opinion 2012-04A

DOL has been issuing guidance on MEPs for many years, but the most significant authority discussing the DOL's position with respect to unrelated employers participating in a single MEP is Adv. Op. 2012-04A. Very generally, the arrangement at issue in this advisory opinion involved a pooled 401(k) plan permitting unrelated employers to join the plan by executing a participation agreement.

In Adv. Op. 2012-04A, the DOL mechanically considered whether that arrangement could be treated as a single plan for purposes of ERISA by considering whether, **as a whole**, it was an "employee pension benefit plan" within the meaning of ERISA §3(2). Beginning with ERISA's definition of "employee pension benefit plan," the DOL noted that "employee pension benefit plans" may only be established or maintained by an employer, an employee organization, or both.[12] As the arrangement at issue in Adv. Op. 2012-04A clearly was not established or maintained by an employee organization, such as a labor union, the DOL went on to consider what ERISA means by the term "employer."

The term "employer," for ERISA purposes, 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."[13] While Adv. Op. 2012-04A summarily dismisses any suggestion that the entity administering the pooled 401(k) plan was acting directly as an employer for most participants, the opinion provides a substantial explanation of why the entity administering that arrangement was not "acting indirectly in the interest of an employer" and not as "a group or association of employers acting for an employer in such capacity."

Specifically, Adv. Op. 2012-04A explains that "bona fide employer associations," for purposes of ERISA §3(5), must be tied by a "common nexus or other genuine organizational relationship that is unrelated to the provision of benefits." This principle is generally referred to as the "commonality of interest" or "common nexus" requirement. It can be satisfied, for example, by an industry trade association controlled by similar employers, but cannot be satisfied by "unrelated employers merely execut[ing] identically worded trust agreements or similar documents as a means to fund or provide benefits."[14] Other considerations, like employer control, were also relevant to the DOL's conclusion in Adv. Op. 2012-04A, but the "commonality of interest" requirement is the most challenging obstacle to overcome by unrelated employers interested in joining an arrangement that can be treated as a single plan.

One-Bad-Apple Rule

A less significant, but nevertheless important, obstacle for employers interested in joining a MEP is the Code's "one-bad-apple rule." According to that rule, if a MEP is disqualified as a result of the failure of one participating employer, the entire plan can be disqualified as to all employers.[15] Of course, "[a]s a practical matter . . . the IRS rarely disqualifies a

[11] *See* Adv. Op. 2012-04A ("Similarly, each employer sponsor of a plan that participates in the arrangement will be subject to ERISA's fiduciary provisions.").

[12] ERISA §3(2).

[13] ERISA §3(5).

[14] *See, e.g.,* Adv. Op. 2012-04A, 2003-17A, 2001-04A.

[15] Reg. §1.413-2(a)(3)(iv).

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plan.''[16] In addition, in the absence of bad faith, most qualification failures can be corrected through the Employee Plans Compliance Resolution System.[17]

The one-bad-apple rule tends to create more problems when a MEP **tries to deal with an unresponsive employer**. It is very common for small employers to stop responding to communications, stop sending contributions, or otherwise act in ways that jeopardize the entire MEP's qualification. Current law gives MEPs few tools to deal with this problem, which puts all participating employers in jeopardy.

WHY DOES THE DOL REQUIRE A COMMONALITY OF INTEREST?

Adv. Op. 2012-04A expressly states that the ''commonality of interest'' requirement ''distinguish[es] an employee benefit plan from other entities that underwrite benefits or provide administrative services.'' This line of demarcation was certainly an important consideration for the DOL in reaching its conclusions in Adv. Op. 2012-04A and prior similar rulings. However, line-drawing alone cannot fully explain why the DOL requires a special ''commonality of interest'' among employers participating in a single MEP.

In reality, the outcome in Adv. Op. 2012-04A is more appropriately attributable to the DOL's mistrust of benefit arrangements that pool together minimally involved employers through an association. These programs, especially multiple employer welfare arrangements (MEWAs), have historically experienced greater mismanagement and abuse than single employer plans. For example, these pooled arrangements have been more susceptible to unreasonably high fees and embezzlement.[18] In the case of self-funded MEWAs, pooled benefit plans ''have been unable to pay claims as a result of insufficient funding and inadequate reserves.''[19] By emphasizing a need for meaningful employer involvement — whether directly or through an association controlled by related employers — the DOL's conclusion in Adv. Op. 2012-04A seeks to protect individual employees from an arrangement that has a demonstrated potential for abuse.

To date, the DOL has been resistant to the argument that a 401(k) plan MEP does not present the same concerns as a MEWA.[20] Nevertheless, a 401(k) plan, by definition, cannot be underfunded for its promised benefits. And while the DOL should rightly worry about improper fiduciary oversight or the risk of embezzlement, the fact that multiple employers participate in an arrangement that is considered a single plan for ERISA purposes does not increase that risk. If anything, it is decreased because a MEP will almost always be large enough to require an annual audit (which is not required of small individual plans).

The legislative proposal discussed in the following section is designed to mitigate what many have viewed as the historical concerns regarding MEPs, while harnessing their benefits.

RESA PROPOSAL TO FACILITATE MEPs

The most prominent proposal currently being considered to expand MEP participation is the signature proposal contained in the Retirement Enhancement and Savings Act of 2018 (RESA).[21] That proposal, which unanimously passed the Senate Finance Committee with bipartisan support at the end of 2016, would exempt certain arrangements from the DOL's ''commonality of interest'' requirement and provide relief from the Code's ''one-bad-apple rule.'' Both types of relief, however, would only be available for qualified defined contribution plans and plans that consist of individual retirement accounts.

Pooled Plan Providers

In most cases, RESA's MEP relief would be conditioned on a MEP using a ''pooled plan provider'' — a new kind of entity created by the legislation. Pooled plan providers are designed to safeguard against the potential for abuse that has led the DOL to previously limit the ability of unrelated employers to join a MEP. Pooled plan providers would also generally serve to facilitate compliance with ERISA and the Code.

Pooled plan providers would be a named plan fiduciary, the plan administrator, and responsible for performing all administrative duties necessary to ensure

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[16] Staff of the Joint Committee on Taxation, *Description of the Chairman's Modification of the Retirement Enhancement and Savings Act of 2016* (JCX-87-16), at 6 (Sept. 21, 2016).

[17] *See* Rev. Proc. 2016-51, §10.11.

[18] *See, e.g.,* Multiple Employer Welfare Arrangements under the Employee Retirement Income Security Act: A Guide to Federal and State Regulation, U.S. Department of Labor, p. 3 (Aug. 2013).

[19] *Id.*

[20] *See* Adv. Op. 2012-04A (''The Department is of the view, however, that the term 'employer' should have the same meaning in this context whether applied to the term welfare plan or pension plan.'').

[21] S. 2526 and H.R. 5282, 115th Cong. §101 (2018). A number of standalone bills containing language that is identical, or very similar, to RESA's MEP provisions have also been introduced. *See, e.g.,* The Retirement Security Act of 2017, S. 1383, 115th Cong. (2017); The Automatic Retirement Plan Act of 2017, H.R. 4523, 115th Cong. (2017); The Retirement Security for American Workers Act, H.R. 854, 115th Cong. (2017); The SAVE Act of 2017, H.R. 4637, 115th Cong. (2017).

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that the plan complies with ERISA and the Code. This responsibility would require pooled plan providers to: (1) ensure that participating employers take any actions necessary to comply with ERISA and the Code; and (2) ensure that any person who is a plan fiduciary, or who handles plan assets, is properly bonded in accordance with ERISA. Moreover, pooled plan providers would be subject to registration, audit, examination, and investigation by the Treasury Department and the DOL.

RESA's MEP provisions would also task Treasury and the DOL with issuing guidance on how pooled plan providers are to carry out their duties under the law — e.g., how pooled plan providers can ensure that employers take actions necessary to comply with ERISA and the Code. While RESA' statutory language provides few details on the substance of that important guidance, it does make clear that the such guidance would require information sharing between participating employers and pooled plan providers.

Single MEPs for Unrelated Employers: PEPs

Under RESA's MEP provisions, unrelated employers using a pooled plan provider could be treated as if they have joined a single plan for purposes of ERISA, even when they do not have a ''commonality of interest'' or ''common nexus'' other than providing benefits to their employees. Accordingly, the arrangement would only require one Form 5500 and one audit. MEPs eligible for this type of relief would be referred to as ''pooled employer plans'' (PEPs).

Individual employers participating in a PEP would retain fiduciary responsibility for selecting and monitoring the pooled plan provider, any other named fiduciaries, and plan investments attributable to their own employees. Investment responsibility could, however, be delegated to another fiduciary by the pooled plan provider.

In addition to using a pooled plan provider, RESA's relief from the ''commonality of interest'' requirement would require PEPs to designate one or more trustees to be responsible for collecting contributions to, and holding assets of, the plan. (A participating employer could not be the trustee for this purpose.) PEPs would also be prohibited from imposing any unreasonable restrictions, fees, or penalties upon employers or participants who discontinue participation in the plan.

One-Bad-Apple Relief

RESA's MEP provisions would also provide ''one-bad-apple'' relief for plans that already satisfy the ''commonality of interest'' requirement and for plans that use a pooled plan provider. This means that the disqualifying actions of one employer would not cause the entire arrangement to be disqualified.

As a condition for this relief, assets attributable to employees of any ''bad-apple employers'' would generally need to be ''spun off'' from the MEP. For this purpose, assets could be spun off to a separate plan, IRA, or other arrangement deemed appropriate by the Secretary of the Treasury. Any employers that have assets spun off would be responsible for any associated liabilities to their employees.

IMPRESSIONS OF RESA's MEP PROVISIONS

RESA's MEP provisions would help narrow the coverage gap for American workers by permitting employers, especially small employers, to pool their retirement savings arrangements together under a single plan. This would promote plan adoption and simplify plan administration, while utilizing a framework that encourages employees to participate in a retirement savings arrangement facilitated by their employers — implementing many long sought-after policy goals.

At the same time, the legislation would help reduce some of the negative aspects of pooled employee benefit arrangements by establishing certain safeguards for employees participating in MEPs. By limiting relief to defined contribution retirement plans, RESA's MEP proposal would avoid the underfunding problems that have beleaguered certain pooled employee benefit arrangements in the past. By clearly requiring participating employers to retain fiduciary responsibility over named fiduciaries and plan investments attributable to their employees, the proposal encourages proper fiduciary controls. Finally, by subjecting pooled plan providers to additional oversight from the DOL and Treasury, the proposal increases accountability for entities promoting MEPs and discourages abuse.

RESA's MEP ALTERNATIVES

Even if RESA's signature MEP proposal does not become law, RESA contains another proposal that could help narrow the coverage gap without permitting single MEPs to be maintained by unrelated employers. Specifically, RESA contains a provision that directs the DOL and Treasury to permit multiple defined contributions plans to file a single Form 5500 if the plans have the same trustee, named fiduciary, ad-

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ministrator, plan year, and investments.[22] Although that proposal would not provide one-bad-apple relief, like RESA's MEP provisions, it would help lower costs and reduce administrative complexity for employers participating in plans eligible for the relief.

[22] S. 2526 and H.R. 5282, 115th Cong. §202 (2018).

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