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# DOL Proposal Regulation Would (Somewhat) Expand Access to MEPs

## But Why Is It All So Complicated?

The three Cs of retirement plans—they're complex, costly, and confusing—have kept many employers from offering a plan. And the unfortunate one-third of private sector workers whose employer doesn't offer a plan are unlikely to save anything on their own. Why not make it easier for employers to do what's right for their workers?

One solution that has been around for a while is the multiple employer plan (MEP). An MEP allows a group of unrelated businesses to join forces and adopt a single plan for their respective workers. The MEP would enjoy a higher asset base generating the lower investment and recordkeeping fees and access to more investment products and services. Perhaps more important, joining an MEP would allow employers to offload most of the heavy regulatory and administrative lifting to the MEP's sponsor. All the business owner would have to do is choose the MEP, enroll its workers, process salary withholdings, and make any company contributions. [Note: While it is technically possible to have a traditional defined benefit MEP, as a practical matter it is not doable, and this column only covers 401(k) and other defined contribution plans.]

Yet MEPs have never gotten much traction. The DOL estimates that there are fewer than 5,000 MEPs covering roughly 1.4 million workers with some $232 billion in assets, a drop in the nation's retirement bucket. One reason for the low take-up is guidance by the Department of Labor (DOL) restricting MEP membership to employers that are "tied together" by "genuine economic or representational interest."

That strict standard has made it difficult to find enough employers eligible to join forces in an MEP.

On August 31, the White House issued an executive order directing the DOL to make it better. In record time, the DOL proposed a regulation expanding the types of organizations that can sponsor and participate in a MEP. To understand the proposal, we need to first look at where the DOL is coming from.

ERISA only allows an employer or someone acting "indirectly in the interests of an employer" to sponsor a retirement plan. For an employer willing and able to do it alone, this is an easy test to meet: they simply sponsor their own retirement plan covering only their workers. Of course, a regular single employer plan sponsor would not take on extra responsibility and liability by opening its plan to another business's workers. That leaves a nonemployer as the only possible candidate to sponsor an MEP. The obvious candidates would be a company in the investment or recordkeeping business; a not-for-profit organization, such as a chamber of commerce or business association, with a goal of assisting businesses; or a state or local governmental body wishing to promote retirement security of its citizens.

The DOL has always been suspicious of MEPS. The fear is that unsophisticated, overworked, multitasking employers will join an MEP without proper vetting and, once in, will fail to adequately monitor the plan. The DOL is particularly concerned that commercial sponsors would create MEPs with high fees and stocked with in-house or otherwise inappropriate investments benefiting the sponsor, not the workers. Or, worse, the MEPs could be sponsored by outright fraudsters who will abscond with participants' savings. Fraud and mismanagement have been serious problems with MEPs' ugly cousin, multiple employee health associations, and the DOL has regulated MEPs with rules intended to protect health plan participants. The bottom line is that the DOL has not allowed commercial sponsors, limiting MEPs to related affinity groups and, recently, certain state and local governments.

The proposed regulations would open the door a bit, allowing any "bona fide" group of employers to sponsor a defined contribution MEP. To the DOL, bona fide means the employers are in the same trade or business, or the same state or municipal region. So, a nationwide group of plumbers could start an MEP or all employers in the state of Vermont could start an MEP, while the plumbers and bakers of the United States could not. The DOL's thinking is that the organization sponsor will be neutral, fair, and impartial in organizing and running the MEP. But there's a bit more: the group must have at least one purpose for existing besides the MEP—say to promote general business interests—as well as a formal organizational structure in which

the employer-members select leadership. Importantly, while nonmembers could not adopt the MEP, self-employed and gig workers could join. Under the proposed regulation, companies in the recordkeeping or investment business and other commercial entities still would not be able to sponsor an MEP.

The DOL considers MEPs to be more vulnerable to abuse because members of a group tend to rely on the others to handle the due diligence. In one sense, the DOL has been successful; there has been little reported MEP abuse. Of course, that success may be unrelated to the strict DOL standards, and instead be simply because MEPs are not as vulnerable as feared. Indeed, abuses can occur just as easily when an employer establishes its own plan.

Not mentioned in the proposed regulations is whether a state or local government could sponsor a MEP for private sector businesses within its borders. In 2015, the DOL issued guidance that states and local governments, because of their concern for their citizens' welfare, also could sponsor an MEP, regardless of whether the participating employers otherwise had anything else in common. The proposed regulations do not mention government-sponsored MEPs at all. This silence is apparently because the regulations are intended to only cover which employer groups are MEP-worthy; state and local governments would still be able to sponsors MEPs without the needed extra protections applicable to other entities. Indeed, informal comments by DOL officials express this view. Still, more formal guidance on this question would be helpful.

What would be really helpful would be a complete regulatory rethink of why MEPs have to be so complicated. Isn't the plethora of existing ERISA fiduciary and prohibited transactions rules enough to protect MEP participants? It's high time to revisit the layers of well-intended ERISA and Tax Code rules intended to protect savers from abuse to see if they help or hurt.

The President's executive order also directed the IRS to action. Indeed, the IRS's own strict regulations also have stymied MEPs. Particularly troublesome is the "bad apple rule," that a violation of a Tax Code qualification requirement by one employer participating in a MEP can infect all employers. There is simply no reason to punish the innocent with the guilty. In responding to the executive order, the IRS should extend its plan correction procedures to give an automatic pass to all nonoffending employers in the MEP.

What's really called for is an attitude change by the regulators in favor of simplicity. Of course, it would be even better if Congress lead the way by finally passing reform legislation simplifying the rules and making retirement plans user-friendly for both employers and employees.

*The views set forth herein are the personal views of the author and do not necessarily reflect those of the law firm with which he is associated.*

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