

SWBA

Benefits Administration Workshop

February 23 | 25 • March 2 | 4

2021

VIRTUAL

Tuesday, March 2, 2021
2:00 PM – 4:30 PM

SESSION 1: Pooled Employer Plan Update

Introduction: **Stefan Smith**, Partner, Locke Lord

Speakers: **Susan Rees**, Of Counsel, The Wagner Law Group

Robert Toth, Partner, Law Office of Robert J. Toth, Jr., LLC

Don Patterson, Supervisory Investigator, U.S. Department of Labor, EBSA

SESSION 2: Executive Compensation Overview – Compliance Check

Introduction: **Robert Pesch**, USI

Speaker: **Anthony Eppert**, Partner, Hunton Andrews Kurth, LLP



Continuing Education

Please be prepared to answer live polling questions during each session to verify attendance.

Approved Credit

- SHRM 8 Hours - Activity ID: 21-FYYUE
- HRCI 8 Hours - Activity ID: 549056
- TX Department of Insurance 4 Hours – Course ID: 125836
- OK Bar 9.5 Hours – Course ID: 98795
- TX Bar - Pending



Today's Speakers – Session 1

Susan Rees has over 30 years of extensive experience with ERISA and other federal employment laws. In her capacity as a Division Chief for the Office of Regulations and Interpretations of the Employee Benefits Security Administration at the U.S. Department of Labor in Washington D.C., she provided advice to state and federal agencies, the public, and lawmakers and their staff, on ERISA interaction with state legislation involving all types of governmental plans and state retirement program alternatives. Throughout the course of her career, Ms. Rees has authored and provided valuable advice in the creation of many ERISA-related regulations, advisory opinions, field assistance bulletins, and other technical legal memoranda on complicated issues including ERISA preemption and employee benefit plan definitions.

Robert Toth has practiced employee benefits law since 1983. His practice focuses on the design, administration and distribution of financial products and services for retirement plans, one which combines elements of ERISA, tax law, insurance law, securities law and investment law for both 401(a) and 403(b) plans. Bob's experience includes the design of lifetime income programs for defined contribution plans; multiple employer plans; implementing and maintaining 403(b) programs; designing investment products for 401(k) plans; advising on prohibited transactions issues related to retirement plan products and services and their distribution and writing and implementing standards for fiduciary and advisory practices.

Don Patterson has worked for the Employee Benefits Security Administration of the United States Department of Labor since May 1998. Don served EBSA as an Investigator, Senior Investigator, and is currently a Supervisory Investigator. Prior to joining EBSA, Don worked for the Office of the General Counsel, Social Security Administration. Don holds a B.A. from Texas A&M, and a JD from the University of Oklahoma College of Law.





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**SECURE Act MEPS and PEPs
&
Current MEP Guidance**

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SECURE Act – MEPS and PEPs

- Amends Tax Code and Title I to permit certain MEPS be treated as single plans:
 1. “plans maintained by employers with a common interest other than having adopted the plan,” possibly “association” plans - MEPS under Title I of ERISA, and
 2. A new type of MEP called a PEP - an unrelated employer arrangement with a “pooled plan provider.”
- Effective 12-31-2020.

Required Agency Regulations

- ◆ IRS/Treasury and DOL required to issue regulations.
- ◆ Not yet clear which regulations are intended to be jointly issued.
- ◆ Status of Pre-SECURE Act Agency regulations and other guidance not clear.
- ◆ Employers and pooled plan providers who comply in good faith with a reasonable interpretation of the new provisions may operate before the Agencies issue guidance.

Two purposes of SECURE Act

Removing the “bad apple” rule under 413(c) of the Code under which the disqualification errors of one participating employer could disqualify the MEP.

Now MEPS will have a method to require all participating employers to comply with tax qualification and Title I of ERISA.

Equally important was to conform the IRS and DOL definitions of single “multiple employer” plans (MEPs and PEPs).

“Bad Apple” compliance

- ◆ The PEP or MEP’s terms must require that the plan assets attributable to an employer who fails to comply with Code requirements must be spun off to an existing or new plan of the employer, and the employer becomes completely liable.
- ◆ Agencies given authority to define circumstances when it is more appropriate to require that the MEP or PEP retain those assets.
- ◆ IRS required to issue guidance on procedures to terminate, including treatment of and actions needed by employers..

Pooled Employer Plan with Pooled Plan Provider

Provides that a PEP, a retirement arrangement for multiple unrelated employers with a “pooled plan provider” (PPP) will be treated as a single “multiple employer” plan for Code and Title I purposes.

IRS to publish model language for PEPs.

Pooled Plan Provider

- PEP required to have a “pooled plan provider” (PPP) as named fiduciary, plan administrator, who acknowledges in writing its status, and registers with the Agencies.
- ◆ Pooled plan provider is also responsible for the PEP’s and the employers’ compliance with the Code and Title I.
- ◆ New disclosures and bonding are to be required.
- ◆ Each employer retains fiduciary responsibility to select and monitor the PPP.

Pooled Plan Provider Responsibilities

- ◆ Participating employers remain plan sponsor of their interest in the plan, except to the extent of the pooled plan provider's required "administrative duties."
- ◆ The DOL and IRS share guidance authority to identify the administrative duties required of a pooled plan provider.
- ◆ Will IRS/DOL guidance define division of sponsor obligations and fiduciary duties with respect to "bad apple" compliance?

Pooled Plan Provider Registration

- ◆ Over 70 PPPs began operations 01/01/21.
- ◆ Required to register 30 days in advance of beginning operations by filing EBSA Form PR (Pooled Plan Provider Registration) electronically with the DOL at <https://www.efast.dol.gov/>.
- ◆ DOL filing also satisfies Treasury filing requirement.

PPP Registration cont'd

- ◆ DOL issued a registration regulation on 11/16/2020 to be codified at 29 CFR 2510.3-44.
- ◆ Under the regulation, PPP begins operations when the first employer executes or adopts a participation, subscription, or similar agreement for the plan specifying that it is a pooled employer plan, or, if earlier, when the trustee of the PEP first holds any asset in trust.

PPP Registration cont'd

- ◆ requires identifying information, and listing of administrative, investment, and fiduciary services that will be provided to PEP, including a description of the role of any affiliate.
- ◆ Disclose Information about any related criminal convictions and ongoing civil or criminal proceedings.
- ◆ Ongoing obligation to file updates for new PEPs, significant changes in the PPP corporate structure or a bankruptcy, for terminations, and for new related civil or criminal enforcement matters.

Pooled Plan Provider

The Secretary of the Treasury will determine whether the PEP remains a tax qualified plan if the PPP fails to substantially comply with any required administrative duties.

SECURE ACT Amendments to Title I of ERISA -- Pooled Employer Plan

Defines PEP requirements:

- ◆ designate a pooled plan provider.
- ◆ designate one or more trustees (other than an employer in the plan) to be responsible for collection of contributions, and holding the plan's assets, and implementing contribution collection procedures that are "reasonable, diligent and systematic."

Pooled Employer Plan under Title I

- ◆ Employers will retain all investment responsibility unless delegated to another fiduciary by the pooled provider, or done in compliance with ERISA section 404(c).
- ◆ PEP must provide that employers, and participants and beneficiaries, are not subject to unreasonable restrictions, fees, or penalties with regard to ceasing participation, receipt of distributions, or otherwise transferring assets of the plan.
- ◆ Each employer in the plan retains fiduciary responsibility for the selection and monitoring of the pooled plan provider.

Pooled Plan Provider under Title I of ERISA

- ◆ Under existing DOL guidance, commercial entities are not permitted to sponsor an association retirement MEP.
- ◆ DOL - Commercial entities may only sponsor the PEO retirement MEP.
- ◆ Now, the pooled plan provider is likely to be a commercial entity.
- ◆ Will existing PEO MEPs become pooled provider plans, or can PEOs continue to use the existing DOL PEO retirement MEP regulation??

ERISA Title I MEPS

- ◆ Secure Act refers to plans maintained by employers “with a common interest other than having adopted the plan.”
- ◆ Assuming this refers to current “association” plans, as defined by the DOL, will the other existing DOL requirements for “association” retirement MEPS still apply?
- ◆ Does the SECURE Act permit the pooled plan to include self-employed individuals, including working owners?

Title I Questions for PPPs

- ◆ How will ERISA 408(b)(2) apply? Does each participating employer approve the pooled plan provider fees, or is more required?
- ◆ Can a PPP hire its affiliates as service providers? use its own investment products? Are existing exemptions sufficient?

Pooled Plan 5500 Reporting

- ◆ Similar to existing MEP reporting rules – Annual Report/Return lists all participating employers.
- ◆ With good faith estimate of percent of total contributions made by each employer (if existing DOL rules applied, this includes employer and employee contributions).
- ◆ New - aggregate account balances attributable to each employer.

Simplified Pooled Plan Reporting

- ◆ ERISA section 104 is amended to permit the DOL to permit Pooled Plans to file simplified reports.
 - If the Plan is under 1000 participants.
 - And no single employer has over 100 participants.
- ◆ Current DOL regulations waive the auditor report requirements for Plans under 100 participants, under certain circumstances.

Questions on Simplified PEP Reporting

- ◆ Does size limit mean that large employers in a Pooled Plan must file separately with an audit?
- ◆ Or the Pooled Plan itself will not qualify for simplified reporting?
- ◆ If so – Will the Pooled Plan have an audit covering all participating employers?

Additional SECURE Act “Group of Plans” Annual Reporting

- ◆ ERISA Section 104 and IRC 6058 are amended to permit unrelated employers with separate plans but with common fiduciaries, trustees, and investment options to file a single Form 5500 by a common Plan Administrator.
- ◆ With a single audit report by a single IQPA selected by the Plan Administrator?
- ◆ DOL and IRS must issue “necessary and appropriate” regulations.

SECURE Act Increased Reporting Penalties

- ◆ Code amended to increase penalties for failure to file Form 5500.
- ◆ \$250 per day, not to exceed \$150,000.
- ◆ No increase in the Title I filing penalties.

Other Relevant Existing DOL and IRS Guidance or Proposed Guidance

- ◆ DOL Association Health Plan (AHP) regulation.
- ◆ DOL Association Retirement Plan and PEO MEP regulation.
- ◆ DOL FAB 2019- 01 - Conditional Reporting relief for all MEPs, including PEO MEPs.
- ◆ IRS proposed “bad apple” regulation.

Existing DOL Guidance

- ◆ Association Retirement MEPS will be affected by litigation on DOL 2018 AHP regulation because of new shared definitions of “bona fide employer group.”
- ◆ In 2019 a District Court held that new definitions in the AHP regulation are not within the DOL’s authority.
- ◆ DOL recently asked Court of Appeals to hold its appeal in abeyance.
- ◆ At risk – participation of self-employed individuals in an association sponsored plan, and the relaxed standard for a “bona fide” association plan.

DOL Retirement MEP Regulation

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C.F.R 2510.3-55

- ◆ Defines ERISA 3(5) employer for multiple employer defined contribution retirement plans (retirement MEPS).
- ◆ Codifies safe harbor for MEPs sponsored by bona fide employer associations.
- ◆ Also provides new safe harbor for professional employer organizations (PEOs) to establish a MEP.
- ◆ Effective Date: September 30, 2019.

Bona Fide Employer Association Basic Requirements

- ◆ Employer members have
 - a commonality of interest.
 - a substantial business purpose other than sponsoring the plan..
 - control over the association and the MEP.
- ◆ Group or association is not bank, trust company, insurance issuer, broker dealer, pension record-keeper, TPA, or any affiliate or subsidiary, although these entities may participate as employers.

Bona Fide Association Working Owners

- ◆ Working owners with no common law employees may participate as employer and employee.
- ◆ Must have ownership interest in the trade or business.
- ◆ Must earn minimum amount of wages or self-employment income from providing personal service to the trade or business.
- ◆ Has sufficient income from his/her trade or business to cover working owner and beneficiaries in any AHP sponsored by his/her bona fide employer group or association.