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Investors Seek More Substantive PEP Guidance from DOL

Though they applaud the direction the Department of Labor is taking, expert ERISA attorneys say a new proposed rule does not sufficiently explain how pooled employer plans can be structured like existing multiple employer plans.

Reported by JOHN MANGANARO

Last week, the U.S. Department of Labor (DOL) published a Notice of Proposed Rulemaking (NPRM) that seeks to implement various registration requirements for emerging pooled plan providers, pursuant to the Setting Every Community Up for Retirement Enhancement (SECURE) Act.

At the end of 2019, the passage of the SECURE Act amended the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (IRC) to establish a new type of multiple employer plan (MEP) called a pooled employer plan, or “PEP,” that must be administered by a person called a “pooled plan provider.” The SECURE Act allows pooled plan providers to start operating PEPs beginning on January 1, 2021, but it also requires pooled plan providers to register with the Secretary of Labor and the Secretary of the Treasury before they begin operations.

One important part of the proposal is the creation of a new Form PR, which will serve as the primary registration form for pooled plan providers. Under the proposal, Form PR must be filed electronically with the DOL no earlier than 90 days and no later than 30 days before an entity begins operations as a pooled plan provider, which the proposed regulation defines as “publicly marketing services as a pooled plan provider or publicly offering a pooled employer plan.” This means that activities such as filing for a tax identification number or adopting a business plan are not taken into account for registration purposes.

Now that they have had some time to digest the DOL’s proposed registration rulemaking, expert ERISA attorneys are offering their initial analysis. In commentary shared with PLANADVISER by Barry Salkin and Susan Rees, both of counsel at the Wagner Law Group, the attorneys applaud the DOL and Treasury leadership for proposing this registration guidance well ahead of the date that pooled employer plans may be established. However, they say, even more substantive guidance is needed on how pooled employer plans and pooled plan providers are to operate. The attorneys are concerned that the DOL has not and may not sufficiently explain the differences between existing MEP types and the new type of PEP authorized by the SECURE Act.

“On that, the DOL tells us that although it does not have specific details as to how pooled employer plans authorized under the SECURE Act will be structured and operated, the DOL has assumed that such plans ‘may be similar to other currently operating multiple employer plans,’” Salkin and Rees write. “Additionally there may be [additional] challenges associated with these new types of plans that the DOL, the Treasury Department or Internal Revenue Service [IRS], as the federal agencies charged with oversight of private-sector pension plans, may need to address.”

The Wagner attorneys say it is sensible that the DOL is at this stage being candid about the lack of guidance currently available. This is a new and evolving area and the DOL, under the leadership of President Donald Trump and his appointees, is seemingly interested in allowing the business community to innovate in this area with relatively little prescriptive direction. But the clock is ticking, the attorneys warn, and they will be watching closely for more fleshed out information about how pooled employer plans can be structured like existing multiple employer plans.

employer plans that comply with the SECURE Act. To this end, the attorneys say, there is still "major operational confusion" for existing multiple employer plans that must be resolved. Given the lack of specific guidance in the new proposed regulations, the attorneys say, it stands to reason that PEPs and their operators will face similar confusion as they seek to get moving in early 2021.

"The [DOL proposal's] preamble asks for comment on additional types of information to require on the Form PR," the Wagner attorneys note. "For instance, the DOL asks if it would be useful to employers for the pooled plan provider to report investigations by and/or informal settlements of fiduciary matters with the DOL and the PBGC [Pension Benefit Guaranty Corporation]. These suggestions or other comments on the proposed regulation are due on or before 30 days after its publication date in the Federal Register."

Even as ERISA experts voice such concerns, the retirement plan services industry is gearing up for the emergence of PEPs. Several weeks ago, for example, Aon and Voya Financial announced plans to team up to launch a pooled employer plan of the type authorized by the SECURE Act. Aon will technically operate the PEP, while Voya Financial will serve as the recordkeeper for the new plan. The firms say they are on track for a January 1 launch date.

Echoing the language used by regulators to explain why such plans are appealing, Aon's and Voya's leadership say the PEP will relieve employers of many fiduciary duties they have today. Due to the economies of scale, it also has the potential to lower fees for plan participants and provide access to state-of-the-art features that may be difficult for individual employers and fiduciary committees to both assess and access independently, they say.

According to David Kaleda, a principal in the fiduciary responsibility practice group at Groom Law Group, in deciding whether and how to work with PEPs, advisers should consider a number of issues. For example, participating employers act as fiduciaries in selecting and monitoring any party that acts as the PEP's named fiduciary; thus, employers likely will evaluate a number of pooled plan providers before selecting a PEP. Also, the PEP must have a trustee that is a financial institution responsible for collecting plan contributions and assuring plan assets are held in trust. The PEP must be registered and meet a number of requirements in the statute, which will be affected by future DOL and Treasury regulations and guidance.

Tags	Department of Labor, DOL, MEP, multiple employer plans, PEP, pooled employer plan
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