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Thursday, May 31, 2012

## The DoL Speaks and MEPsters Hope For More

By Neil Anderson

A top Department of Labor (DoL) official just offered more insight into the regulatory agency's perspective on multiple employer plans (MEPs). **Susan Rees** -- chief of the Employee Benefits Security Administration's (EBSA) division of coverage, reporting and disclosure in the office of regulations and interpretations -- issued a pair of advisory opinions on so-called open MEPs that include unrelated employers.

Now MEP industry insiders are debating the import of Rees' words, even as they clamor for further clarification, possibly from Congress.

The move follows a panel discussion in March kicked off by comments made by EBSA Deputy Assistant Secretary of Labor **Michael Davis**.

Davis warned plan providers that "the concept of an open multiple employer plan is not an established one in ERISA." Also in March, retiring U.S. Senator **Herb Kohl** (D-Wisconsin) revealed plans to introduce legislation to support MEPs.

Rees' advisory opinions are direct responses to requests from two ERISA attorneys, **Mark Sletto** and **Bob Toth** [2012-03A and 2012-04A, respectively]. Sletto's query related to a proposed open MEP called *National Retirement Plan, Inc.*, while Toth asked for feedback in connection with **TAG Resources** and its open MEP, whom he represents.

**401kWire** could not immediately reach Sletto for comment.

TAG president **Troy Tisue** issued a statement, excerpted below:

We approached the DOL for clarity on the issue, advocating that it issue guidance recognizing the ability of employers to act together -- using specific statutory language in ERISA -- to jointly co-sponsor a plan without otherwise having to be a member of association. The DOL declined this request, and instead issued critical guidance for all sponsors of multiple employer plans ...



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With just a few adjustments which our model was designed to accommodate, this opinion enables us to continue to provide the professional plan management services to a broader spectrum of the market which had heretofore been uncomfortable with the lack of clarity under MEP arrangements.

**Transamerica** is the provider backing TAG's MEP. A Transamerica spokeswoman sent an e-mailed statement to **401kWire**:

As a service provider and recordkeeper for ERISA-covered retirement plans, Transamerica Retirement Services is a longtime advocate for the small employer and the expansion of plan coverage for workers. We are a proponent of the need for clarity regarding both the types of organizations that may sponsor Multiple Employer Plans, and the ways that Multiple Employer Plans can be offered as a solution to provide more workers with an opportunity to save for retirement. Transamerica appreciates the DOL's added clarity regarding Multiple Employer Plans. We look forward to continuing our interactions with the government to further discuss ways to expand retirement plan coverage.

MEPsters' offered varied reactions to the advisory opinion. Several, like **American Pensions** president and *Platinum 401(k)* administrator **Terry Power**, argued that the opinions mean that employers using open MEPs, unlike "closed" or association MEPs for employers who are already connected, will need to file their own audits and 5500s (instead of relying on the plan overall). Others see the opinions as a warning to MEP sponsors who turn around and take money directly from plan assets, instead of charging the employers directly.

"You can't sponsor a 401(k) plan and receive any type of financial benefits from the plan assets," one MEPster told **401kWire**. "You can't have your hand in the cookie jar."

"They got shot down," **DCS Retirement Group** president **John McCrary** said of Sletto's and Tombs' inquiries. "It appears there was no plan sponsor. Someone has to be in charge of the MEP ... There has to be one chief."

Other MEPsters see broader implications to the DoL's words.

"They significantly increased the incremental cost to the employers in an open MEP," **Pete Swisher**, director of national sales at MEP provider **Pentegra**, told **401kWire**. "What certainty does any given group or association have that they'll meet the DoL's requirement? ... They need to

engage counsel and they may want to seek an advisory opinion."

Swisher and **Robert Allin**, Pentegra's general counsel, just released a white paper this week on open MEPs, and they even updated it before release to reflect the new advisory opinions.

**Scott Becker of Benefits & Business Law Advisors**, former partner to Sletto, pointed to open MEPs as a key way of addressing abandoned plans and the retirement plan coverage gap among employees of small businesses.

"We gave them a way to maybe remedy some of that situation," Becker said. "Obviously they turned us down."

"The DoL said that two or more unrelated employers cannot jointly sponsor a single ERISA plan unless the group or association rules are met," Toth added. "This nexus has to be plan-related ... We got clarification. It's not what we wanted."

**Marcia Wagner of the Wagner Law Group** described the new advisory opinions as the DoL's way of putting "a bureaucratic big toe into the ocean to figure out what it should or shouldn't be doing."

"I don't think it's shooting them down. I think it's finally starting to understand institutionally that they have a place," Wagner told **401kWire**. "This is a beginning ... The DoL is starting to really try to get its arms around MEPs. They're conflicted."

"There's a lot of ambiguity in that advisory opinion," one MEPster agreed.

Going forward, though, MEPsters agreed that the industry needs further action, even a new law.

"Now we know what the rules of the road are," Power told **401kWire**. "We are ripe for some legislative action."

"There are ways for the DoL or Congress to cure the problem and that would be good for everyone," Swisher said.

"Prudential insists changes in the law are required to solve the current retirement savings coverage gap," **Jamie Kalamarides**, senior vice president of institutional investment solutions at **Prudential Retirement**, told **401kWire** in an e-mailed statement. "For example, open MEPs should be allowed, fiduciary liability should be assigned to a professional fiduciary and a model plan should be written that enables simplification of plan design, administration and adopts best practices."

"I think we're just turning a page in the evolution of MEPs," said **Mike Montgomery**, who works with the Platinum

401(k) MEP, "and those who regroup and continue to innovate will look back on this as an event that purged most of the bad actors from the field." ■

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