

LEGAL UPDATE

DOL “Clarifies” Guidance on the Bonding Requirements to PEPs and Their Pooled Plan Providers

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A recent Information Letter from Eric Berger, Chief, Division of Coverage, Reporting and Disclosure, in the Office of Regulations and Interpretations of the Employee Benefit Security Administration (EBSA) of the Department of Labor (Department), addressed the bonding requirements under the Employee Retirement Income Security Act of 1974, as amended (ERISA) applicable to a pooled employer plan (PEP) established under the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act). The Information Letter may be accessed at: <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/09-07-2022>.

Specifically, the Information Letter clarifies three important points:

- The SECURE Act did not expand the bonding requirements under section 412 of ERISA applicable to PEPs to include fiduciaries or other persons who handle “plan assets” of the PEP, but do not “handle funds or other property” of the PEP within the meaning of section 412 of ERISA;
- The employees of employers who participate in the PEP do not have to be bonded while collecting and transmitting participant contributions from their employers to the PEP; and
- Independent contractors to a plan or a plan sponsor (such as the PEP’s pooled plan provider) are required to be bonded under section 412 of ERISA if handling funds or other property of the PEP.

Background

Section 412 of ERISA requires that “every person who handles funds or other property” of an employee benefit plan be bonded to protect the plan against the risk that plan assets could be lost in the event of fraud or dishonesty on the part of persons that “handle” them. The bond must provide protection to the plan against loss by reason of acts of fraud or dishonesty on the part of fiduciaries or plan officials handling plan funds or property. In previous Field Assistance Bulletins, the Department has clarified that plan fiduciaries must be bonded only if they “handle” funds or other property of the plan and do not fall within one of the exceptions to section 412 of ERISA. In determining whether a person is handling plan funds or property, the Department has focused on whether the person’s duties and activities are such that there is a “risk” that plan funds or other property could be lost in the event of fraud or dishonesty by the person to be bonded. Those persons charged with the duty of receipt, safekeeping or disbursement of plan funds will generally be deemed to present such a risk and, therefore, must be bonded.

Information Letter

The SECURE Act did not expand the bonding requirements under section 412 of ERISA applicable to PEPs to include persons who handle plan assets or who are fiduciaries of the PEP, but who do not “handle funds or other property” of the PEP.

The Information Letter addressed the SECURE Act provision that seemed to apply to PEP fiduciaries or other persons who handle “assets” of the PEP, whether or not the person “handled funds or other property” of the PEP within the meaning of section 412 of ERISA. According to the Information Letter, the Department does not view the SECURE Act as expanding the bonding requirements for PEPs in this manner. In the Department’s view, the appropriate reading of the SECURE Act provision is that the normal ERISA section 412 rules that govern the bonding requirements should apply to PEPs.

The employees of employers who participate in the PEP do not have to be bonded while collecting and transmitting participant contributions from their employers to the PEP.

The Department’s interpretation of the regulation at 29 CFR 2580.412-5(a) in conjunction with section 3(44)(A)(i) of ERISA concluded that participant contributions prior to transmittal to the PEP are not considered plan “funds or other property.” As such, in the Department’s view, employees of employers participating in a PEP who assist in collecting and transmitting participant contributions to the PEP would not by reason of such conduct be required to be bonded under section 412 of ERISA because they would not be handling “plan funds or other property.”

As with most Department interpretations, the Information Letter stated that this is not a steadfast rule and that certain circumstances may lead to a different interpretation.

“Independent contractor administrators or managers” to a plan or a plan sponsor (such as the PEP and the PEP’s pooled plan provider) are required to be bonded under section 412 of ERISA if handling funds or other property of the PEP.

The Information Letter further rejected the position that a PEP sponsor would not need to provide section 412 of ERISA bonding coverage to any independent contractor

administrator or manager of the PEP or the sponsor organization such as the PEP’s pooled plan provider.

Here the Department reiterated that the bonding requirements of section 412 of ERISA apply to “every” person who handles funds or property of an employee benefit plan within the meaning of the regulations. According to the Information Letter, these bonding requirements are not limited to trustees, officers, administrators or managers and there is no exception for independent contractor administrators or managers of the plan or plan sponsor. Citing existing guidance, the Information Letter states that plan officials required to be bonded “will usually include the plan administrator and those officers and employees of the plan or plan sponsor who handle plan funds by virtue of their duties relating to the receipt, safekeeping and disbursement of funds.” See, FAB 2008-04, Q-5. However that FAB goes on to provide that, “plan officials may also include other persons, such as service providers, whose duties and functions involve access to plan funds or decision-making authority that can give rise to a risk of loss through fraud or dishonesty.”

According to the Information Letter, applying these basic rules, the pooled plan provider would be required to ensure that an independent contractor administrator or manager who handles plan funds or other property is properly bonded. The Information Letter notes that proper bonding could include being covered by the bond of the PEP or by a separate bond obtained by the independent contractor administrator or manager that names the plan as an insured and meets the other requirements for bonds under section 412 of ERISA.

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