THE WAGNER LAW GROUP

LAW ALERT
July 1, 2020

Multiple Employer Plans and Participating Employers Given the Opportunity to Contribute to Guidance Development on Pooled Employer Plans under the SECURE Act

On June 18, 2020, the Department of Labor took the next step toward providing guidance for multiple employer plans (MEPs) by issuing a Request for Information (RFI) seeking public comment on whether the DOL should issue a class exemption to provide a safe harbor for fiduciaries of MEPS, including a new type of "open" MEP known as a pooled employer plan (PEP), which was created by the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act). The SECURE Act amended ERISA and the Internal Revenue Code to allow for PEPs, effective in 2021. Among other requirements, PEPs are required to designate a pooled plan provider who is a named fiduciary of the PEP. As a fiduciary, the pooled plan provider is subject to the standards and restrictions of ERISA and the Code, including the prohibited transaction provisions restricting fiduciaries of plans from engaging in conflict of interest transactions. The RFI also requests information on issues facing two other types of multiple employer plans for which the DOL provided guidance in 2019 – multiple employer plans sponsored by employer groups or associations with "commonality of interest" ("Association Plans") and those sponsored by professional employer organizations ("PEO MEPs") (together "MEPs").

The RFI asks 14 questions, consisting of multiple parts, under three categories: (1) MEP sponsors and pooled plan providers, (2) plan investments, and (3) PEP and MEP participating employers.

Pooled Plan Providers and MEP Sponsors

The RFI noted that entities interested in becoming pooled plan providers may be banks, insurance companies, broker-dealers, and similar financial services firms (including pension recordkeepers and third-party administrators). These entities, with their complex financial arrangements with employee benefit plans, have in the past needed and been given exemptive relief by the DOL through its statutory authority under ERISA and the Code, in order to avoid prohibited transactions and conflicts of interest. Before granting an exemption, the DOL must find that the exemption is administratively feasible, in the interests of plans and their participants and beneficiaries, and protective of the rights of participants and beneficiaries of plans.

The PEP created by the SECURE Act is an individual account plan established or maintained for the purpose of providing benefits to the employees of two or more unrelated employers that is treated as a single employee benefit plan or single pension plan for purposes of ERISA and the Code. The PEP's pooled plan provider, also designated as a named fiduciary and plan administrator, is responsible for certain specified administrative duties to be determined in guidance by the DOL and the IRS. Each PEP participating employer remains the plan sponsor of its portion of the PEP except for those enumerated duties. The

PEP's governing documents and operations must include certain specified terms, including terms relating to the designation of trustees and terms providing that employers, participants, and beneficiaries may not be subject to unreasonable restrictions, fees, or penalties for ceasing participation, receiving distributions, or transferring assets to another plan. Further, the PEP's governing documents must provide that each employer in the plan retains fiduciary responsibility for the selection and monitoring of the pooled plan provider and any other named fiduciaries of the plan.

The RFI requests information on the types of potential pooled plan providers, the possible business models, conflicts of interest and prohibited transactions that might exist in connection with PEPs, for the purpose of assessing the need for new prohibited transaction exemptions or amendments to existing exemptions. The requests focus on several aspects of potential operations – whether pooled plan providers are likely to rely on affiliates as service providers, whether they will offer proprietary investment products, and to what extent a pooled plan provider would be able to set or increase its own fees for the services it provides, or to influence its compensation, through the investment options offered to the participating employers.

The RFI asks whether respondents anticipate that the DOL's existing prohibited transaction exemptions will be relied on by pooled plan providers, and if so, which exemptions are most relevant, and whether any amendments are needed to address unique issues with respect to PEPs. If so, the RFI requests the respondents to describe the specific transactions and the prohibited transaction provisions that would be violated in connection with the transactions.

On the other hand, the RFI asks, to the extent respondents do not believe additional prohibited transaction relief is necessary, why that is so and how would the conflicts of interest be appropriately addressed to avoid prohibited transactions.

PEP and MEP Employers

With respect to the MEPs addressed in the DOL's MEP 2019 final rule, the RFI requests information on whether their sponsors face similar prohibited transactions to those of a PEP's pooled plan provider, whether these MEPs have a similar need for additional prohibited transaction relief, and whether there are prohibited transaction issues unique to employer groups or associations, or to PEOs.

The RFI also asks commenters to provide general demographic information about employers likely to join a MEP or a PEP – information that may be needed for regulatory guidance – such as how many employers are likely to join, will joining be more appealing to large or small employers, and whether there are any estimates of the total number of employers and participants likely to be covered by or migrate to newly formed PEPs and MEPs.

Coordination with the SECURE Act Amendments to the Code?

The RFI notes that on the same day the DOL issued its MEP regulations in 2019, it issued an RFI soliciting information as to whether the DOL should amend the regulations to permit the operation of "open" MEPs, i.e., generally, arrangements maintained by financial institutions or other commercial entities covering employees of unrelated employers. These arrangements are treated as a single plan under section 413(c)

of the Code, but not under Title I of ERISA. According to the RFI, the DOL received valuable information in response to its requests concerning potential conflicts of interest of "open" MEP operators, and the possible need for additional prohibited transaction relief, but noted that the 2019 RFI was issued prior to the passage of the SECURE Act and therefore the comments did not specifically address the structure of PEPs as created by the SECURE Act or the Act's amendment to Code section 413.

Thus, the RFI raises another important aspect of the SECURE Act amendments to ERISA and the Code necessary for MEPS to move forward, and gives interested parties a chance to weigh in on this as well. The Code amendment – 413(e) – provides the Secretary of the Treasury with the authority to define the terms under which PEPs, and MEPs maintained by employers with a common interest other than adopting the MEP for their employees, may remain single plans even if one or more employers of employees covered by the plan fail to take actions required for the MEP or PEP to meet the tax qualification requirements. In order to maintain that status, under 413(e), the MEP or PEP plan document must require that the assets attributable to the noncompliant employer will be transferred to a plan maintained only by the noncompliant employer (or its successor) unless the Agencies provide guidance to determine when it is in the best interest of the employees and beneficiaries to retain the assets in the MEP or PEP.

Despite noting the importance of this aspect of operating a MEP or PEP, the DOL's RFI asks only two related questions – whether respondents anticipate that prohibited transactions will occur in connection with a decision to move assets of a noncompliant employer from a PEP or MEP to another plan or IRA, and whether respondents anticipate that any other prohibited transactions will occur in connection with the execution of that decision. The RFI asks no questions as to whether respondents believe that exemptive relief is not necessary, whether there are existing exemptions that would cover these plan termination practices, or how such exemptive relief could be fashioned. And the RFI makes no mention of coordination with the IRS on the SECURE Act provisions under the Agencies' joint authority.

Conclusion

Over time, some commentators have suggested that MEPs in general, whether "open" or not, may not need exemptive relief, but may use negative consent provisions to avoid conflicted fee and investment decisions, and perhaps use a similar concept for terminating a noncompliant participating employer – by having the employer's consent in the contract with the MEP. Whether or not either of these practices passes muster with the IRS or DOL, the SECURE Act now provides clear authority for terminating noncompliant participating employers, and now the DOL is suggesting that it may be able to provide exemptive relief for the conflicted financial decisions.

If you are an employer considering whether, and what type of MEP to join, you will want to monitor the progress of the DOL and IRS as the Agencies provide guidance. If you are already a MEP entity, you may want to join the process now, and comments are due on this RFI by July 30, 2020. However, there will be later opportunities: if and when DOL issues a proposed class exemption, and if and when the Agencies determine that they need to republish their final, or in the case of the IRS, proposed, rules on MEPs, to conform to the SECURE Act.

In addition, you will have opportunities to make your views known when the DOL and the IRS propose guidance on the issues the SECURE Act requires them to address, such as the scope of the permitted or required duties of a pooled plan provider, and the circumstances under which a pooled employer plan should retain the assets of a noncompliant participating employer. Both the Code and ERISA sections of the SECURE Act provide that employers and pooled plan providers may operate in good faith with a reasonable interpretation of the statute itself, prior to the issuance of any guidance, but it seems unlikely to us that it is possible to begin operating as a PEP without guidance from EBSA and the IRS.

We would be happy to help with advice and submissions. The RFI can be found by here: https://www.govinfo.gov/content/pkg/FR-2020-06-18/pdf/2020-13142.pdf

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