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Relief For Multiple Employer Plans May Not Spur Their Growth

By **Amy Lee Rosen**

Law360 (July 25, 2019, 7:20 PM EDT) -- Regulatory and legislative efforts to make it easier for multiple companies to join together to offer retirement packages may not spark a rash of additional plan offerings due to lingering administrative burdens and the costs of maintaining them.

The SECURE Act, currently stalled in the Senate, is intended to encourage multiple employer plans. (AP)

Earlier this month, the Internal Revenue Service proposed regulations meant to encourage businesses to participate in multiple employer plans by allowing them to continue to receive the tax benefits under Internal Revenue Code Section 413(c) even if one plan participant is disqualified, which, under the current "one bad apple" rule, disqualifies all employers in the group from receiving tax benefits.

The proposed regulations come on the heels of the U.S. House of Representatives' **passing** of H.R. 1994, the Setting Every Community Up for Retirement Enhancement Act, by a 417-3 vote in May. The bill, which is currently stalled in the Senate, is intended to encourage MEPs by relaxing the common characteristic requirement under which employers can band together to offer a plan and, similar to the IRS regulations, ensuring that one pooled employer's qualification problem would not disqualify the entire group.

But the regulations and legislation may not alleviate the greatest hurdle to offering a retirement plan for businesses that still may be too unstable or unprofitable to set them up, according to Paula Calimafde, a principal at Paley Rothman.

Calimafde pointed to a 2015 Social Security Bulletin that showed a relationship between a company's number of employees and whether it sponsored a retirement plan. The study found that businesses with fewer than 10 workers had lower sponsorship of retirement plans but as the number of employees increased, plan sponsorship increased significantly.

"It seems clear that the smallest, newest, most unstable and unprofitable companies are not able to take on the burden of sponsoring a retirement plan," Calimafde said. "Thus, it is not a foregone conclusion that a MEP will provide enough of an inducement to a micro business to sponsor a

retirement plan."

The SECURE Act is designed to encourage businesses to offer retirement plans when they have not done so in the past, but it does not alleviate certain fiduciary responsibilities of the employer. Language in the bill explicitly says employers still have a fiduciary responsibility to select and monitor the person who is designated as the provider of the pooled plan in accordance with the Employee Retirement Income Security Act .

That burden may discourage employers from entering MEPs, according to Brigen L. Winters, a principal at Groom Law Group.

"The idea behind this is that the employer is not completely off the hook," Winters said. "It still has fiduciary duties in terms of picking a provider."

The IRS guidance, while helpful, also includes requirements that may be burdensome, Winters said.

The IRS' proposed rules require a MEP to have established practices and procedures to promote compliance and to adopt relevant plan language. To qualify for an exception to the one bad apple rule, which is also known as the unified plan rule, a MEP's plan administrator must also provide up to three notices to the unresponsive participating employer to take remedial action, according to the proposed regulations.

If the unresponsive employer still does not act after receiving the notices, the retirement plan administrator has to execute a spinoff of the unresponsive employer's plan assets and account balances held on behalf of employees of that employer to a separate single-employer plan, the proposed regulations said. In addition, the plan administrator must also comply with any information request from the IRS, the rules said.

Completing a spinoff can be potentially cumbersome because of financial and resource costs to initiate and complete it in order to be exempted from the one bad apple rule, but only time will tell if the proposed regulations will increase the use of MEPs, Winters said.

"It seemed to us that there still could be some obstacles for plan sponsors using these arrangements," he said. "The proposed rules contain a series of detailed new requirements — including requiring up to three notices to the noncompliant employer — that could create big obstacles to plan sponsors using them."

It is difficult to determine the extent to which the bill and rules' objectives will be met because neither measure may address the real reasons that employers are not sponsoring defined contribution retirement plans or participating in MEPs, according to Marcia Wagner, founder of the Wagner Law Group.

For example, it's unclear how much the one bad apple rule really acted as a disincentive to adopt a MEP as opposed to other reasons, such as the costs and burdens of nondiscrimination testing, record-keeping, processing distributions and tax withholding, Wagner said.

"Both H.R. 1994 and the proposed IRS regulations were intended to encourage pooling, and I do not see any provision that will discourage pooling," she said. But "the extent to which employers will take advantage of these provisions is a separate matter."

--Editing by Tim Ruel and John Oudens.

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