DOL Advisory Opinions Only a Speed Bump for Open MEPs?

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Needs Filled by Open MEPs. It is a commonplace observation that many small and medium sized 401(k) plan sponsors do not have the experience or resources to deal with the administrative complexities and fiduciary responsibilities required by such plans. To meet their plan duties, plan sponsors must have access to professional investment advisory, recordkeeping, and other plan services. Open multiple employer plans (Open MEPs) are an alternative that has developed to enable sponsors to administer plan provisions and compliance requirements, including plan amendments, selection and oversight of investments, and evaluation of plan expenses. A pair of DOL advisory opinions recently concluded that a popular variant of this technique involving unrelated plan sponsors constitutes a series of separate plans sponsored by each employer rather than a single plan. While reducing the appeal of Open MEPs, the DOL's position is not likely to stop their growth because the burdens on plan sponsors are increasing and the need for professional plan management that Open MEPs satisfy is real.

Open MEP Structure. Small and mid-sized employers may adopt an Open MEP structured as a 401(k) plan by executing a participation agreement prepared by an independent provider that might be an investment advisory firm, plan administrator, or other service provider. The MEP's governing document establishes its general operating rules and usually designates the provider as the plan sponsor, plan administrator, and named fiduciary of the plan. The provider is generally responsible for performing most of the plan's administrative and fiduciary functions, such as furnishing disclosures to participants, selecting and monitoring investment alternatives, and appointing service providers. The participation agreement allows the employer to choose the benefit structure, eligibility, and vesting provisions that will apply to its own employees—there being no requirement of uniformity among the participating employers that are designated as "co-sponsors" of the plan.

Tax Rules. MEPs must contend with different statutory rules under ERISA and the Internal Revenue Code. Under Section 413(c) of the Code and the applicable Treasury Regulations, a plan is an MEP if it is a "single plan" and "maintained by more than one employer." To meet the single plan requirement, all of the plan's assets must be available to pay benefits to all employees covered by the plan and their beneficiaries. Restricting a portion of the plan's assets to the payment of benefits for a subset of the plan's participants would mean that there is more than one plan.

Assuming that these conditions are met, certain specified Code requirements applicable to 401(k) plans are applied on a plan-wide basis, while other requirements are applied employer-by-employer. Accordingly, rules relating to eligibility, vesting, the contribution limitations under Code Section 415, and plan qualification generally are administered as if the Open MEP were a single plan, taking into account all of the participants' service with any of the participating employers. For purposes of the exclusive benefit rule, which requires that a plan be maintained only for the benefit of the employer's own employees, Code Section 413(c)(2) provides that all plan participants are considered to be employees of all the employers that maintain the plan. Code provisions that are applied individually as to each participating employer include coverage and nondiscrimination testing, as well as the limits on employer tax deductions for plan contributions. In Revenue Procedure 2002-21, the IRS approved the concept of a defined contribution MEP maintained by a professional employer organization covering employees of unaffiliated employers that were clients of the PEO.

ERISA Requirements. ERISA requires that a plan be established by an employer or an employee organization such as a union. For this purpose, an employer is defined to mean any person acting as an employer and includes a "group or association of employers acting for an employer." The DOL has historically taken the position that the existence of a single plan to which more than one unrelated employer contributes is contingent on a "cognizable group or association of employers" acting in the interest of its employer members to establish the plan for the benefit of employees of the employer members. For multiple employers to constitute a bona fide group or association, the DOL requires an employment-based common nexus or other "genuine organizational relationship" that is unrelated to the purpose of providing employee benefits. For example, in Advisory Opinion 2003-17A, the DOL found such commonality in the fact that employers were Department of Energy contractors that worked on a specific environmental cleanup and engaged in interconnecting operations at a specific site.

In the two new Advisory Opinions, however, the DOL was unable to find the requisite commonality among the participating employers in an Open MEP. In Advisory Opinion 2012-04A,

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the DOL considered an Open MEP 401(k) plan operated by a limited purpose corporation named 401(k) Advantage LLC (Advantage) that termed itself the plan sponsor and purported to assume the risks and liability associated with the MEP's trustee responsibilities. Participating employers signed a participation agreement under which they were described as co-sponsors but also acknowledged that Advantage retained complete authority regarding the MEP's amendment. Each participating employer also represented that it had independently exercised its fiduciary judgment in selecting the plan and its initial investment offerings. Participating employers further acknowledged their ongoing fiduciary responsibility to periodically review the performance of the MEP's administrator, a second entity named TAG Resources LLC that operated the MEP's 401(k) program in conjunction with Advantage.

Advisory Opinion 2012-04A held that the Open MEP under consideration did not constitute a single multiple employer plan, but rather was an arrangement under which each participating employer established a separate employee benefit plan for the benefit of its own employees. The DOL reasoned that "the mere execution of identically worded trust agreements or similar documents by unrelated employers as a means to fund or provide benefits for their employees, is not a sufficient basis for concluding that the employers have established or maintained a single plan for purposes of ERISA."

Advisory Opinion 2012-03A reached the same result with respect to another Open MEP operating an individual account plan. In this opinion, National Retirement Plan, Inc., (NRP) the MEP sponsor, intended to merge unrelated abandoned individual account plans into a single plan which it would manage and administer. The DOL noted that NRP would not have a direct employment relationship with MEP's participants other than its own employees who might be covered under the MEP. Moreover, it found no support for the conclusion that a formal association or group of employers was involved in the MEP.

Consequences of DOL Position. The DOL's view that an Open MEP is merely a collection of single plans sponsored by each participating employer means that each participating employer is obligated to file an annual report on Form 5500. Many, but not all, Open MEPs have, until now, taken the position that only a single Form 5500 is due. Another consequence of the view expressed by the DOL is that each of an Open MEP's constituent plans will need to individually satisfy ERISA's plan audit requirement, although this would be a nonissue for small participating employers with fewer than 100 eligible participants. The division of an Open MEP into individual plans may also complicate the way in which ERISA bond coverage is acquired, although the parties that "handle" plan assets under the single plan and multiple plans scenarios should be largely the same individuals. Open MEPs have lost the ability to claim that they provide employers with complete relief from fiduciary responsibility, but they continue to enable employers to reduce the administrative burdens of operating a 401(k) plan and do allow employers to partially mitigate their fiduciary exposure in a time when it is rapidly increasing. ❖

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