

LEGAL UPDATE

DOL Issues Guidance to Encourage Small Employers to Participate in Pooled Employer Plans

Marcia S. Wagner, Esq., Camille Castro, Esq., Barry L. Salkin, Esq. and Stephen P. Wilkes, Esq.

We have another example of Department of Labor (DOL) action pursuant to an Executive Order. As called for under *Delivering Emergency Price Relief for American Families and Defeating the Cost-of-Living Crisis*, issued on January 20, 2025, the DOL issued limited interpretive guidance on July 28th on Pooled Employer Plans (PEPs) through a request for information with respect to PEPs. Unlike some agency requests for information and comments, the request was not neutral in tone or content. It was unnecessary to proceed past the title of the document – “Pooled Employer Plans: Big Plans for Small Employers” – to draw that conclusion. Its limited, although important, guidance on minimizing potential fiduciary liability for plan sponsors was intended to help small employers select high-quality, low-cost PEPs. The White House and DOL clearly

see PEPs as a way to save money, especially when the savings are compounded over the long period of time that is normally associated with retirement plan operations.

The request for information detailed the statutory provisions governing PEPs, and then described the current PEP market, based on Form 5500 filings. It then provided interpretive guidance for investment selection and management, as participating employers in PEPs have a fiduciary obligation with respect to both the selection and monitoring of pooled plan providers, as well as the statutory responsibility for the investment of plan assets attributable to their employees. However, the terms of the PEP may grant the pooled plan provider, a named fiduciary under the plan, the authority to delegate investment and management responsibilities to another fiduciary, such as an investment manager described in

section 3(38) of ERISA. If the pooled plan provider takes such action, it must prudently select the fiduciary and monitor the selection. In the DOL's view, this "common sense" arrangement minimizes participating employers' fiduciary liability risk, if the pooled plan provider, as named fiduciary, expressly assumed full responsibility for and exercised sole discretion and judgment in selecting and retaining the manager, and "did not attempt to reduce its responsibility by relying on the authorization or ratification for the selection and retention, such as an adhesive participation agreement." Participating employers must still prudently monitor the pooled plan provider.

It next provided fiduciary tips for small employers selecting a PEP, advising them on issues and questions that should be addressed, such as the experience and qualifications of the pooled plan provider, fees and expenses under the PEP, potential fiduciary liability both in joining the plan and with respect to plan investments, available investment options under the plan, and understanding the implications of exiting the plan. It then posed a series of questions for public response as part of the DOL's examination of whether additional PEP-related guidance is needed. The DOL indicated that

it was considering a regulatory safe harbor option for small businesses, based upon its limited guidance on minimizing fiduciary liability with respect to plan investments and its fiduciary tips, and asked for public input on considerations related to such a safe harbor. The document also raised questions about the need for a prohibited transaction exemption, including a prohibited transaction exemption for the pooled plan provider. Public comments to these questions are due no later than September 29, 2025.

Occasionally, an agency will request and receive comments on an issue, and no further action is taken. It is highly unlikely that this will be the case in this instance. This matter appears to be an important initiative for the current administration, and the DOL is expected to elaborate on this request for guidance and comments in the future. We will keep you informed.

Marcia S. Wagner is the Managing Director of The Wagner Law Group. She can be reached at 617-357-5200 or Marcia@WagnerLawGroup.com.