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DOL ready for DC multiple employer plans

Volume 42

Issue 70

August 6, 2019

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DOL final regulations and supplementary guidance relax limits on access to, and reporting requirements for, PEO and association-type defined contribution multiple employer plans. This includes relief for plans that had failed to submit participating employer information on prior Form 5500 filings.

Background

Employers seeking to use multiple employer plans to cut costs and limit fiduciary liability have faced challenges from both the DOL and IRS on the nature of these plans, reporting and fiduciary responsibilities for these plans, and tax law compliance for these plans. See issues of *FYI* from October 30, 2018 and July 16, 2019 on reporting issues, exclusive benefit concerns, and compliance due to errors by individual participating employers (the “one bad apple” rule).

Both IRS and DOL, as well as Congress, have proposed changes for making these plans readily available to small employers. Large employers that use leased employees through Professional Employer Organizations (PEO) — human-resource companies that contractually assume certain employment responsibilities for client employers — may also benefit from enhancements for these plans.

DOL final regulations are here

Citing the benefits of expanding coverage, cost savings due to economies of scale, and improved portability, DOL’s final regulation allows small businesses to offer defined contribution retirement savings benefits to employees through association retirement plans (ARPs). ARPs can be offered by associations of employers in a city, county, state, or a multi-state metropolitan area, or in an industry nationwide. In addition to association sponsors, the plans may be offered through PEOs. The final regulation does not extend to defined benefit or other types of ERISA plans, nor does it extend to “open MEPs,” also known as “pooled employer plans” where there is no relationship other than joint participation in the MEP. DOL intends to investigate future rulemaking on open MEPs as indicated in a separate Request for Information.

DOL's final rule is effective September 30, 2019 and generally retains nearly the same criteria for these plans that had been included in their proposal (refer to our October 30, 2018 *FYI*). DOL also carefully considered harmonizing the final rule for MEPs with their recent rule for association health plans (See our September 5, 2018 *FYI*). Many comments, however, will be considered in their ongoing deliberations for open MEPs.

Streamlined safe harbor for PEOs

In response to comments, DOL adopted a single safe harbor for all PEOs. The new safe harbor contains only four criteria, and instead of allowing the PEO the choice of selecting five from among the nine criteria, the new safe harbor requires that the PEO satisfy all four. These requirements include:

- The PEO assumes responsibility for and pays wages to employees of its client-employers that adopt the MEP, without regard to the receipt or adequacy of payment from those client-employers.
- The PEO assumes responsibility to pay and perform reporting and withholding for all applicable federal employment taxes for its client-employers that adopt the MEP, without regard to the receipt or adequacy of payment from those client-employers.
- The PEO plays a definite and contractually specified role in recruiting, hiring, and firing workers of its client-employers that adopt the MEP, in addition to the client-employer's responsibility for recruiting, hiring, and firing workers.
- The PEO assumes responsibility for and has substantial control over the functions and activities of any employee benefits that the contract with a client-employer may require the PEO to provide, without regard to the receipt or adequacy of payment from those client-employers for such benefits.

List of participating employers required by October 15

The Cooperative and Small Employer Charity Pension Flexibility Act mandated that multiple employer plans file lists of participating employers. The lists were to be filed with Form 5500 beginning with the 2014 plan year and needed to include EINs and contribution information. DOL encountered resistance to this requirement in the form of redacted lists and promises to file the information upon request. In Field Assistance Bulletin 2019-1, DOL says it has no choice but to enforce the requirement but will forgive penalties for pre-2018 plan years if MEP administrators provide the information for 2018 and subsequent years. The FAB includes an automatic extension for supplying the information for the 2018 plan year.

Corporate MEPs

Although corporate MEPs (multiple employer plans maintained by employers that are related but not enough to be in a controlled group) were not directly addressed in the proposed rule, the DOL indicated that they did not intend to convey that a corporate MEP could not be a single employer benefit plan under ERISA. The preamble for the final regulation addressed comments on the status of

these plans. Rather than affirm single employer MEP status for these situations, DOL said they intend to think about this some more and have included the topic in the separate request for information that also covers questions concerning open MEPs.

In closing

Employers will want to continue monitoring developments about MEPs if they have nontraditional workers providing services. Hopefully the team effort by the agencies, Congress, and the administration will point to better options for these workers to address their retirement dreams.

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