

Will 2019 Be the Year of the Multiple Employer Plan (MEP)?



INTRODUCTION

The more the merrier? Would more employers offer retirement plans if they could join other employers in a multiple employer plan (MEP)? Will service providers like advisors and third party administrators (TPAs) expand their services to support MEPs? Maybe – and perhaps sooner than we think.

Expanding access to MEPs is being advocated as a significant opportunity to expand access to retirement plans – especially for employees of small businesses. This paper explores the features of MEPs today as compared to traditional single employer plans, then analyzes the potential impact opening MEPs up to more plans could have on the retirement savings landscape.

WHAT IS A MEP?

Unlike traditional single employer plans that are designed to cover the employees of one business or a group of businesses with common ownership interests, MEPs are designed to cover the employees of many different employers. Pooling the assets of multiple businesses into a single plan provides the critical mass needed to negotiate more favorable investment and service fees, like those available to larger plans. MEPs also relieve participating employers of many of the fiduciary and operational duties associated with offering a retirement plan.

WITH A MEP, THE ENTITY SPONSORING THE PLAN TAKES ON MOST OF THE DUTIES TYPICALLY ASSIGNED TO A PLAN SPONSOR INCLUDING:

Keeping plan documents up-to-date and in compliance

Selecting and monitoring a universe of investments to offer to plan participants

Collecting service provider fee disclosures and analyzing and benchmarking plan fees

Engaging service providers and monitoring their work

Authorizing distributions and loans

Today, the rules require that businesses participating in a MEP have a connection, for example shared ownership or some other common interest such as an association sponsoring a plan for its members (e.g., state dental association). The DOL calls this “commonality” and these plans are referred to as “Association MEPs.”

Many legislators and industry experts believe that making MEPs available without requiring a common interest, other than participating in the same plan, would offer an affordable, attractive solution for businesses that don’t offer plans today. This arrangement is referred to as an “Open MEP.”

ARE MEPS THE SAME AS 81-100 GROUP TRUSTS?

Group trusts provide unrelated employers the option to pool their retirement plan assets, but each plan continues to operate as a single employer plan, separately administered. In 1981, the IRS issued Revenue Ruling 81-100 recognizing the option to pool the assets of unrelated employers into a single group trust. Each plan must adopt the group trust as part of its governing documents and agree the trust assets will be used for the exclusive benefit of the retirement plan participants and beneficiaries. Each participating plan owns a proportionate share of the group trust. The types of plans eligible to participate in these group trusts has been expanded through subsequent IRS revenue rulings.¹

WHY IS THE FOCUS ON MEPS BECOMING MORE INTENSE?

There is a retirement savings shortfall among today's workers. Most workers rely on their employer to provide a vehicle for retirement savings such as a 401(k) plan. Unfortunately, in small businesses (50 or fewer employees) those benefits are often unavailable:



THERE ARE SOME BARRIERS TO ADOPTING A RETIREMENT PLAN THAT TEND TO BE MORE PROMINENT AMONG SMALL BUSINESSES.

Competing priorities

Small businesses often have competing financial demands that put retirement plans on the back burner. In addition to funding daily operations and using profits to grow the business, benefits such as paid time off or health insurance are typically higher priority benefits than retirement savings.

Costs

Retirement plan fees can also be a barrier because smaller plans pay higher fees as a percentage of plan assets, as compared to larger plans. Small plans lack the bargaining power of plans with larger assets and participant numbers and may fall below the threshold needed to qualify for certain institutionally-priced share classes.

Resources

Small businesses may lack dedicated human resource or finance staff that can be devoted to managing a retirement plan. Concerns about the lack of resources to manage a retirement plan were cited by 22% of employers who did not offer a plan to their employees.³

WHAT STANDS IN THE WAY OF OPEN MEPS TODAY?

During the early 2000s, some firms began offering Open MEP solutions and there was growing interest in these types of arrangements. In 2012, the DOL issued an advisory opinion stating that although an Association MEP would be treated as a “single” plan, an Open MEP is actually a series of separate plans for purposes of the DOL rules.⁴ The DOL said that ERISA requires employers to be related to each other by more than just their joint sponsorship of the MEP. Because the only link among participating employers in an Open MEP is the plan itself, the DOL does not consider an Open MEP a single plan. The DOL advisory opinion and proposed regulations do not invalidate Open MEPs or prohibit employers from participating in Open MEPs, but they prevent the MEP sponsor from treating the arrangement as a single plan.

This restriction eliminates some of the financial benefits and administrative relief most employers are seeking when they choose a MEP by requiring each business participating in the MEP to

- **File a separate Form 5500**, Annual Return, for their portion of the MEP assets
- **Engage an independent qualified plan auditor** to audit their portion of the plan (if they have 100 or more participants)
- **Secure an ERISA bond** to protect their portion of the plan assets from fraud and embezzlement.

The current rules under which MEPs operate also present a risk that if one participating employer does not manage its duties properly, the other employers could be held responsible. This is sometimes referred to as the “one bad apple” rule.

WHAT EFFORTS ARE BEING MADE TO EXPAND MEPS?

White House

In September 2018, the White House issued a directive to the DOL to consider policies that would expand access to retirement plans, including participation in MEPs.⁵

DOL

In response to the White House directive, the DOL issued proposed regulations that clarify and slightly broaden the definition of employers that can participate in a MEP but

stop short of allowing Open MEPs.⁶ The DOL affirmed its interpretation of the law that limits MEPs to businesses that have common interests. For example, the DOL's proposed regulations clarify that businesses in the same trade, industry or geographical location may join a MEP offered by a group member, and the MEP would be treated as one plan under ERISA. Additionally, a Professional Employer Organization (or PEO), a company that provides employment and other human resource services for other companies, may sponsor a MEP for its business clients if it meets certain requirements. The DOL has taken the position that without a law change, they did not have the authority to expand MEPs to unrelated employers.

Congress

Any big changes in the MEP rules are most likely to come from Congress rather than the DOL or IRS. The concept of an "Open MEP" has appeared in several recent legislative proposals addressing retirement savings. These legislative proposals would treat Open MEPs as a single plan and streamline plan requirements to one Form 5500 and one audit as well as treat the plan as one entity for the fidelity bond. In addition to eliminating the "commonality" requirement, most proposals would eliminate the "one bad apple" rule as well.⁷ The new chair of the House Committee on Ways and Means, Rep. Richie Neal (D-MA), stated publicly that providing "new ways for Americans to save for retirement" is one of his priorities, so it seems certain the debate regarding Open MEPs will get additional attention on Capitol Hill in 2019.⁸ Neal has introduced several proposals in recent years to enhance retirement savings.

State-Sponsored MEPs

Absent federal legislation to expand access to retirement plans, several states are adopting MEP programs for employers within their state. Because of the states' connections to the businesses within their borders, the DOL has interpreted this type of Open MEP as a single plan. In an interpretive bulletin, the DOL acknowledged that an Open MEP covering unrelated employers would be treated as a single plan when sponsored by a state.⁹ Until the federal government provides solutions to the retirement savings crisis and fiduciary oversight, states will continue to step in and fill the gap. One significant

challenge with state-sponsored programs is that no two are alike. Unlike ERISA which provides some uniformity for businesses that do business in multiple states or have workers in multiple states, the patchwork of state solutions can be very challenging for a plan sponsor or retirement services provider to navigate.

WHAT TYPES OF INDUSTRY SERVICE PROVIDERS WILL SPONSOR MEP PROGRAMS?

Recordkeepers and TPAs

Service providers that support association MEPs today are certain to expand their offerings to include Open MEPs. These organizations already have the infrastructure and experience of rolling up plan activity from multiple businesses into one plan.

With relaxed MEP rules, more recordkeepers and third-party administrators are likely to offer the MEP administration services alongside their single employer solutions.

TPAs that provide fiduciary services as an ERISA 3(16) plan administrator may also be in a strategic position to support Open MEPs. One of the benefits to joining a MEP is that the participating employers can rely on the entity overseeing the entire MEP to shoulder the fiduciary responsibilities associated with plan administration. Firms already providing ERISA 3(16) services may be well-positioned to take on these duties for MEPs.

Advisory Firms

Prior to the DOL's 2012 ruling that derailed the Open MEP option, advisory firms were one of the entities that offered MEP solutions. These firms served as the ERISA investment fiduciary with respect to creating a menu of investment alternatives for the plan and in some cases took on investment management responsibilities for plan participants, serving as an ERISA 3(38) investment manager. If Open MEPs become a reality, firms that provide ERISA fiduciary investment services seem likely candidates to serve as the sponsoring organization for a MEP with administrative and systems support from a recordkeeper or TPA.

IF OPEN MEPS BECOME AVAILABLE, WILL PLAN SPONSORS WITHOUT PLANS ADOPT MEPS?

Some likely will if the products are well-designed and affordable. MEPs could be a viable solution for some small businesses, such as those that are either risk averse or have found small plan product fees to be a barrier to adoption. It is not likely to be the one silver bullet that provides retirement plan access to all employees of small businesses, however. None of the bills that are getting traction include a mandate to offer a MEP if an employer does not offer a retirement plan. Making MEPs mandatory would face stiff opposition, so participation in an Open MEP is likely to be voluntary. Given the many competing financial realities faced by small businesses, there will still be many that choose not to join an Open MEP, if it becomes available.

WILL EMPLOYERS WITH A SINGLE PLAN TODAY SWITCH TO A MEP?

It depends on the plan's objectives and the products that become available. Changing providers is hard work for a plan sponsor, so the decision to move to a new solution should be carefully considered. There are a number of single employer products in the marketplace today designed for small employers. If the solution is appropriately priced, and is meeting the client's needs, a small plan sponsor may be best-served by staying put.

But, as with any innovation in the market, some of the perceived benefits of an Open MEP may become part of single plan solutions, to remain competitive. For example, if plan sponsors rate the additional fiduciary oversight of the MEP as a strong factor making the MEP more favorable, expanded fiduciary services may become a more common component of small plan solutions. The industry is already seeing a growth in ERISA 3(16) solutions. Perhaps open MEPs will accelerate the focus on services designed to help plan sponsors meet their fiduciary duties.

Open MEPs will continue to be a hot topic in the retirement plan industry in the coming months. It just may turn out that 2019 is the year of the MEP.



FOOTNOTES

- 1 IRS, Revenue Ruling 81-100, 2011-1, 2014-24
- 2 U.S. Bureau of Labor Statistics, TED: The Economics Daily, "The benefits of working for a small business," May 4, 2018, <https://www.bls.gov/opub/ted/2018/the-benefits-of-working-for-a-small-business.htm>
- 3 The Pew Charitable Trusts, Employer Barriers to and Motivations for Offering Retirement Benefits, June 21, 2017, http://www.pewtrusts.org/~media/assets/2017/06/employer_barriers_to_and_motivations_final_v2.pdf
- 4 Department of Labor, Advisory Opinion 2012-04A, May 25, 2012, <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2012-04a>
- 5 White House, Executive Order on Strengthening Retirement Security in America, August 31, 2018, <https://www.whitehouse.gov/presidential-actions/executive-order-strengthening-retirement-security-america/>
- 6 Department of Labor, Proposed Regulations, Definition of "Employer" Under Section 3(5) of ERISA – Association Retirement Plans and Other Multiple-Employer Plans, 29 CFR 2510, 83 Fed. Reg. 53534, October, 23, 2018, <https://www.federalregister.gov/documents/2018/10/23/2018-23065/definition-of-employer-under-section-35-of-erisa-association-retirement-plans-and-other>
- 7 U.S. Congress, Retirement Enhancement and Savings Act of 2018 (RESA), Family Savings Act (H.R. 6757), Small Business Employees Retirement Enhancement Act (S. 3219)
- 8 Congressman Richard Neal (D-MA), Press Release, December 20, 2018, <https://neal.house.gov/press-releases/neal-statement-becoming-chairman-designate-ways-means-committee>
- 9 Department of Labor, Interpretive Bulletin 2015-02, November 18, 2015, <https://www.federalregister.gov/documents/2015/11/18/2015-29427/interpretive-bulletin-relating-to-state-savings-programs-that-sponsor-or-facilitate-plans>

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