Strafford

Presenting a live 90-minute webinar with interactive Q&A

New DOL Final Regulations on Multiple Employer Plans: Determining Which Employers Can Sponsor MEPs Under ERISA

Association-Run Retirement Plans, PEOs, ERISA, and IRS Limitations; FAB 2019-01 Transition Relief; Fiduciary Duties; Working Owners

Tuesday, November 12, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

David Levine, Principal, **Groom Law Group**, Washington, D.C.

Lisa Rhein Carrasco, Partner, **Smith, Gambrell & Russell**, Jacksonville, Fla.

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1**.

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail **sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

Program Materials

FOR LIVE EVENT ONLY

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

November 12, 2019

New Regulations on Multiple Employer Plans

David N. Levine
Principal

GROOM LAW GROUP

Overview

- A Brief History of MEPs
- The MEP Legislative Landscape
- Statutory Framework
- The Executive Order
- DOL Association Retirement Plan Rule
- Proposed IRS Rule
- Future Compliance

A Brief History of MEPs

- Historical Types of MEPs
  - "Corporate" MEPs
    - Ownership of less than 80% but still a common affiliation
  - "Association" MEPs
    - Bona fide association of employers
  - "PEO" MEPs
    - Professional employer association plans
  - "Open" MEPs
    - AO 2012-03A and AO 2012-04A

The MEP Legislative Landscape

- SECURE Act Legislation
- Creates "pooled employer plans"
  - Eliminates commonality requirement
  - Plan must have a "pooled plan provider"
- Allocation of fiduciary responsibility
  - PPP must be a fiduciary with respect to administration
  - Employers retain investment responsibility unless delegated to an investment manager
- Current status of SECURE Act

Statutory Framework

- Key Statutory Provisions
  - ERISA 3(2): Employee Pension Benefit Plan
    "[A]ny plan, fund, or program . . . established or maintained by an employer or employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program . . . provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond . . ."

Statutory Framework

- Key Statutory Provisions
  - ERISA 3(4): Employee Organization
    "any labor union or any organization of any kind . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan."

Statutory Framework

- Key Statutory Provisions
  - ERISA 3(5): Employer
    "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity."

Statutory Framework

- Key Statutory Provisions
  - Code Section 413(c) and Treas. Reg. 1.413(c)-2
    - Participation - Code Section 410(a): All employees treated as if employed by one employer
    - Service Crediting: All service must generally be taken into account
    - Maximum Benefits: Code Section 415 applies across all employers
    - Nondiscrimination Testing: Each controlled group tested separately
    - Top Heavy Testing: Each controlled group tested separately
    - Compensation Limit: Each controlled group tested separately

The Executive Order

- Executive Order 12857 (September 3, 2018)
  - Direction to the Department of Labor and Treasury Department
- Key issues
  - Expansion of multiple employer plans – especially for small and medium sized businesses
  - "One bad apple" rule complicates tax compliance

DOL Association Retirement Plan Rule

- Overview
  - Finalized on July 31, 2019; Effective September 30, 2019
  - Mostly codifies existing DOL guidance except .. .
    - Expands what constitutes commonality – adds geography
    - Allows working owners to participate
    - Ban on financial institutions acting as sponsor
  - Future uncertain
    - Court recently blocked similar Association Health Plan rule
  - RFI for "Open MEPs"

DOL Association Retirement Plan Rule

- Bona Fide Association
  - One substantial business purpose
    - Sponsoring a MEP may be a primary business purpose
  - Each employer must be acting directly for at least one employee who is covered by the MEP
    - Special rules can count working owners
  - Commonality of interest required
    - Same trade, industry, line of business or profession
    - Single state or metropolitan area

DOL Association Retirement Plan Rule

- Bona Fide Association (Continued)
  - The group or association must have a formal organizational structure with a governing body and by-laws (or similar indications of formality).
  - In both form and substance, the group or association must be controlled by its employer members, who must control the MEP.
  - Participation in the MEP must be limited to employees and former employees of the group or association's employer members and their beneficiaries.
  - A financial institution (bank, trust company, broker-dealer, insurance issuer, financial services organization or an affiliate) may not sponsor a MEP

DOL Association Retirement Plan Rule

- Fiduciary governance requirements
  - MEP sponsor (the association) is responsible for the administration of a MEP and fiduciary oversight – including Form 5500s and plan administrator functions under ERIAS section 3(16)
  - MEP sponsor must act impartially among employers and employees with a requirement of ”evenhandedness” in allocating discounts
  - Participating employers still need to monitor the MEP sponsor – much like an ERISA section 3(38) appointment

DOL Association Retirement Plan Rule

- Termination of MEP Participation
  - Termination of a participating employer's "affiliation" doesn't undermine "single plan" for a period of time
  - If no action to move out, the terminated employer is treated as if it has its own plan

DOL Association Retirement Plan Rule

- The RFI on Open MEPs
  - 18 specific topics
  - Comment period ending October 29, 2019
  - Questions include:
    - Should financial institutions and other entities be allowed to sponsor MEPs?
    - Where a commercial entity MEP would have conflict of interest concerns?
    - The impact of open MEPs on existing MEP structures?
    - Costs and benefits of open MEPs?
    - Expected participating employer in open MEPs?
    - Expected fees for open MEPs?

Proposed IRS Rule

- Addresses the "one bad apple" Rule Pursuant to the Executive Order
- Proposed Regulation Issued July 3, 2019
- Comments Were Due By October 1, 2019

Proposed IRS Rule

- A MEP Can Avoid Disqualification If:
  - The plan administrator for the MEP must have established practices and procedures that are reasonably designed to promote and facilitate overall compliance with applicable Code requirements, including procedures for obtaining information from participating employers
  - The MEP plan document must include language that describes the procedures that the plan will follow to address qualification failures by participating employers

Proposed IRS Rule

- A MEP Can Avoid Disqualification If: (Continued)
  - The MEP cannot be under examination by the IRS's Employee Plans division or Criminal Investigation division
  - The following actions are taken:
    - Notice #1: Notice to participating employer of qualification failure, steps to fix it, and spin-off options. Also, a disclosure of potential remedial action – including a spin-off/termination of that employer's "plan".
    - Notice #2: Within 30 days after 90 day window after first notice, a new notice to the participating employer with same information and notice if no action is taken in 90 days, notice of the failure to correct will be given to participants and the DOL

Proposed IRS Rule

- A MEP Can Avoid Disqualification If: (Continued)
  - The following actions are taken: (Continued)
    - Notice #3: Within 30 days after 90 day window after second notice, a new notice to the participating employer, DOL and participants needs to be provided along with a deadline for action and potential adverse consequences of termination
    - Spin-off occurs within 90 days following the date of the final notice and termination follows
  - The process could be complex and the IRS reserves the right to take action against any party responsible for the failure

Future Compliance

- Significant number of DOL and IRS requirements
- Understanding ARP providers and options
- Monitoring
- Addressing one bad apple
- Lawsuit risk?
- Other enforcement risk?

Questions?

David N. Levine
dlevine@groom.com
(202) 306-1867

GROOM LAW GROUP

SMITH, GAMBRELL & RUSSELL, LLP
Attorneys at Law

New DOL Final Regulations on Multiple Employer Plans: PEOs

Lisa Rhein Carrasco
lcarrasco@sgrlaw.com
904-598-6106

SMITH, GAMBRELL & RUSSELL, LLP
Attorneys at Law

Overview

- Background on PEOs / Current legal authority
- New DOL Final Rule / Applicability to PEOs
  - Bona fide criteria
  - Substantial employment functions
  - Fiduciary obligations
  - Termination / Severance
- Key compliance challenges and next steps

Background – PEOs

- IRS defines the term “PEO” generally as an organization that:
  - “enters into an agreement with a client to perform some or all of the federal employment tax withholding, reporting, and payment functions related to workers performing services for the client”
- A PEO may also manage:
  - Human resources
  - Employee benefits
  - Workers’ compensation claims
  - Unemployment insurance claims for the client

Final Rule Overview - PEOs

- Clarifies the circumstances under which a PEO "may sponsor a multiple employer workplace retirement plan under title I of ERISA (as opposed to providing an arrangement that constitutes multiple separate retirement plans)"
- Provides that a PEO can constitute an "employer" when satisfying certain criteria

Current Legal Authority – PEOs

- ERISA §3(5) defines the term "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity"
- Whether a PEO is an "employer" under ERISA §3(5) depends on the "indirectly in the interest of an employer" provision—not the "group or association of employers" provision

Current Legal Authority – PEOs

- There is little direct authority on what it means to act "indirectly in the interest" of client-employers with regard to an employee benefit plan
- There is no specific test to determine when a PEO is sufficiently tied to its client-employer to be considered as acting "indirectly in the interest of an employer, in relation to an employee benefit plan"

Current Legal Authority – PEOs

- Some federal statutes treat a PEO as an "employer" for certain limited purposes in other circumstances.
  - Example: FMLA regulations specifically recognize that a PEO may, under certain circumstances, enter into a relationship with the employees of its client companies such that it is considered a "joint employer" for purposes of determining FMLA coverage and eligibility, enforcing the FMLA's anti-retaliation provisions, and in limited situations, providing job restoration

Current Legal Authority – PEOs

- IRS established a voluntary certification program for such PEOs—the CPEO Program
- CPEOs are treated as "employers" under the Code for employment tax purposes with regard to remuneration paid to their customers' employees under CPEO service contracts

Final Rule – PEOs

- Final Rule clarifies when a PEO may be an ERISA "employer" for purposes of sponsoring a single MEP
  - "to the extent that PEOs stand in the shoes of their client employers for certain purposes and perform substantial employment functions on their client's behalf, the final rule merely recognizes that such PEOs are acting 'indirectly in the interest of [their client] employers' under ERISA section 3(5) for purposes of sponsoring a MEP"
- A bona fide PEO will be an ERISA "employer" for purposes of sponsoring a MEP

Final Rule Limitations

- Limited to a defined contribution plan within the meaning of ERISA §3(34)
- Does not extend to health & welfare plans

Bona Fide PEO

- To be "bona fide," a PEO must meet the following four requirements:
  1. Perform substantial employment functions on behalf of its client employers (and maintain adequate records relating to such functions)
  2. Have substantial control over the functions and activities of the MEP, as the plan sponsor, the plan administrator, and a named fiduciary
  3. Ensure that each MEP-adopting client employer has at least one employee who is a MEP participant
  4. Ensure that MEP participation is available only to employees and former employees (and their beneficiaries) of the PEO and of current and former client employers

Substantial Employment Functions – Safe Harbor Criteria

- Facts and circumstances test, but a four-requirement safe harbor is provided:
  1. Must assume responsibility for, and pay wages to, its client-employers' employees
  2. Must assume responsibility for, and report, withhold, and pay, its client-employers' federal employment taxes
  3. Must play a definite and contractually specified role in recruiting, hiring, and firing its client-employers' workers
  4. Must assume responsibility for, and have substantial control over, the functions and activities of any its service contract-required employee benefits

Safe Harbor - Third Requirement

- Is considered to satisfy the requirement if it, in addition to its client-employer's responsibility for recruiting, hiring, and firing workers:
  - recruits, hires, and fires;
  - assumes responsibility for recruiting, hiring, and firing, **or**
  - retains the right to recruit, hire, and fire its client-employers' workers

PEOs and Working Owners

- Similarly to the Proposed Rule, does not extend the working-owner provisions to bona fide PEOs
- Thus, a working owner's trade or business must have at least one common law employee to participate in a PEO's MEP
  - DOL explains that without employees, a working owner generally would not have a need for the PEO's employment services

ERISA Fiduciary Obligations

- PEO Responsibilities
  - Plan Sponsor
  - Plan Administrator
  - Named Fiduciary
  - Reporting and disclosure
  - Selecting and monitoring the service providers of the MEP
- Preamble
  - "in distributing, investing, and managing the MEP's assets, must be neutral and fair, dealing impartially with the participating employers and their employees, taking into account any differing interests"

ERISA Fiduciary Obligations

- Client Responsibilities
  - must prudently select and monitor the MEP sponsor and get periodic reports on the fiduciaries' management and administration of the MEP

Termination or Severance

- What happens to the benefits of a terminating employer's employees?
  - ➢Should be memorialized in the plan document
- Fiduciary obligations owed to participants as the plan administrator and named fiduciary of the MEP remain
- What if no action is taken to spin-off or transfer the assets?
  - ➢No longer constitutes a single plan

Compliance Challenges & Next Steps

- Impact of AHP Final Rule litigation
- Implications of “employer” status for purposes of other laws
- Addressing fiduciary obligations
- Client Service Agreements (“CSA”)
  - Review and update
  - Indemnification

Lisa Rhein Carrasco

Smith, Gambrell & Russell, LLP

lcarrasco@sgrlaw.com

www.sgrlaw.com