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Pooled Employer Plans: New DOL Final Rules, Pooled Plan Providers, Fiduciary Liability, Administration, Reporting

WEDNESDAY, FEBRUARY 10, 2021

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

Today's faculty features:

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Pooled Employer Plans: New Final DOL Rules

February 10, 2021

GROOM LAW GROUP

Presenters



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Background

- Desire to allow employers to pool their resources
 - Expand coverage
 - Lower expenses
 - “Professionalize” plans
- Potential benefits of “pooled” plans
 - Economies of scale
 - Standardization

Multiple Employer Plans (MEPs)

- The Internal Revenue Code permits MEPs (Code § 413(c))
- ERISA does not contemplate MEPs
- Definition of employer (ERISA § 3(5))
 - Directly acting as an employer
 - Indirectly in the interest of an employer
 - Group or association of employers
- DOL guidance imposed additional requirements
 - *E.g.*, Commonality

DOL Actions to Expand MEPs

- Interpretative Bulletin 2015-02
 - Permitted states to sponsor MEPs
- Association Retirement Plans (ARPs)
 - Executive order 12857
 - Final rule issued on July 29, 2019
- ARP rule slightly expanded availability but...
 - Prohibition on financial institutions sponsoring plan
 - Association Health Plan Litigation

SECURE Act of 2019

- Created a new type of plan – a Pooled Employer Plan (PEP)
 - PEPs “shall be treated as a single employee benefit plan...”
 - No common interest required
- Directs the regulators to –
 - Issue certain registration rules
 - Address the “one bad apple” rule
 - Develop model plan language
- Effective on January 1, 2021

Pooled Employer Plans

- Treated as a single employer plan
 - One audit
 - One 5500
 - One bond
- Must have a Pooled Plan Provider (PPP)
- Must have a trustee
- No unreasonable restrictions on employers

Pooled Employer Plans

- Responsibilities
 - Named fiduciary
 - Plan administrator
 - Providing certain disclosures to employers
 - Ensure PEP meets certain legal requirements
- Must register with DOL
 - Before “beginning operations”
 - DOL registration requirements finalized
- Financial institutions not prohibited

PEP Trustees

- Unique responsibilities
 - Collecting contributions
 - Implement contribution procedures
- Contributions procedures must be
 - Written
 - Diligent
 - Systematic
- More than a normal directed trustee or custodian

Employers Responsibility

- Selection and monitoring of -
 - PPP
 - Any other named fiduciary
- Investment selection
 - Unless the PPP delegates responsibility
- Can you still use an investment manager without a PPP delegation?

Plan Testing

- PEPs subject to non-discrimination, other testing
 - Mostly done on an employer-by-employer basis
 - Creates administrative challenges
 - Creates risk one employer could disqualify entire PEP
- IRS/Treasury regulations
 - Expected to be similar to recent proposed regulation

Securities Law Issues

- Plans rely on exemptions from the securities laws
 - Investment Company Act § 3(c)(11)
 - Securities Act § 3(c)(2)
- SEC interpretations
 - Similar position to DOL
 - Have not caught up to the law

PEP Lite

- SECURE Act § 202 permits “combined reporting”
 - One Form 5500 for multiple plans
- Plans must have same –
 - Trustee
 - One or more named fiduciaries
 - Administrator
 - Plan year
 - Investment options
- Effective January 1, 2022
 - Requires implementing regulations

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