Multiple Employer Plans—Reduce Liability and Increase Effectiveness

A WHITE PAPER BY

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Multiple employer plans—or MEPs—have been around for many years in the defined contribution plan context. More recently, 403(b) plans have been invited to the MEP party.

In short, MEPs allow employers with some common "nexus," or interest, to be covered under one retirement plan while still maintaining some autonomy. This structure can result in cost savings and other efficiencies. In addition, many MEP sponsors provide services that each employer would normally be responsible for. This can further lessen costs and potential fiduciary liability for employers, making MEPs even more attractive.

Brief History

MEPs have been a fixture for businesses that are related by some common interest. This commonality is not necessarily an ownership interest. Instead, the common interest, or nexus, can be geographic or may be related to the similarity of their businesses. For example, businesses in the greater metropolitan area of a city may be eligible for participation in the same MEP, or perhaps private schools may be invited to participate in a particular multiple employer plan.

The MEP concept was expanded through the Setting Every Community Up for Retirement Enhancement (SECURE) 2.0 Act, enacted at the very end of 2022. This provision, effective starting in 2023, now permits eligible employers to adopt a 403(b) plan (or move an existing one) as a participating employer in a MEP. Because no statutory authority previously existed for 403(b) plans to benefit from the advantages of MEPs, MEPs were practically available only to those adopting 401(k) plans. But SECURE 2.0 has changed this arbitrary restriction. And now those eligible for 403(b) plans have been placed on equal footing with 401(k) plans regarding access to MEPs.

MEP Rules—Some Basic Background

MEPs must comply with all the qualification requirements under Internal Revenue Code Section 401(a). This includes a variety of rules.

- The plan must exist for the exclusive benefit of plan participants and beneficiaries.

- Employees must become eligible to participate after certain periods of service.
- Participants must become fully vested under specific vesting schedules.
- The plan must adhere to limits on benefits and contributions.

Other qualification requirements also apply, including general nondiscrimination rules.

MEP Benefits

Any retirement plan that an employer establishes requires compliance with various qualification rules, so anything that employers can do to reduce this administrative burden is usually welcomed. Lessening these compliance obligations is one of the main advantages of MEPs. Plan operations can be simplified, and expenses reduced, by adopting a multiple employer plan when compared to sponsoring a single employer plan. Before fully appreciating the benefits of MEPs, however, it might be worth exploring some of the duties that the Internal Revenue Service (IRS) and Department of Labor (DOL) impose.

Fiduciary Concerns

Both the IRS and DOL are actively involved with retirement plan administration. The IRS is charged with enforcing plan qualification provisions while the DOL is responsible for enforcing provisions that protect participants' benefits. For example, because employers enjoy certain tax advantages through their retirement plans, the IRS insists that they adhere to detailed rules. If they fail to abide by these requirements (including correcting such failures), the IRS could eliminate that plan's tax-exempt status and disqualify the plan. Similarly, the DOL enforces rules that specify how plan administrators must act in the best interests of participants. This includes prohibitions on certain types of transactions that might benefit the employer outside of the plan (known imaginatively as "prohibited transactions"). There is some overlap with the IRS and DOL rules, and these federal entities work hard to coordinate their enforcement efforts.

For our purposes here, let's focus on the DOL's fiduciary rules and how MEPs can help employers meet their obligations under those rules. The Employee Retirement Income Security Act of 1974 (ERISA) requires, among other things, that plan fiduciaries act in the best interests of plan participants and beneficiaries.

This fiduciary standard is the highest standard of duty in the law, and it means several things. For one, it means that fiduciaries must subordinate their own interests—and elevate plan participants' interests above their own.

They must also act as "prudent experts" when performing their duties. And fiduciaries can be held personally liable for breaching their duties to the plan and to participants and beneficiaries.

Who Is a Fiduciary?

ERISA defines "fiduciary" as (among other things) anyone who has "discretionary authority or discretionary responsibility in the administration of [a] plan." This definition clearly includes the employer, who would necessarily have the authority to establish and run the retirement plan.

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ERISA also requires that a *named* fiduciary appear in the plan document. This is typically the employer, who is always considered a plan fiduciary. But the employer could name some other person or entity. The mere act of the employer naming someone else, however, is also a fiduciary act because it entails using discretionary authority in administering the plan. So despite being able to delegate authority to others, employers still retain the duty to choose any other service providers carefully—and to monitor them regularly to ensure that they are still meeting the best interests of plan participants and beneficiaries.

Why Does It Matter?

Often, employers—once they establish a retirement plan—tend to step back and let things run their course. This can prove costly. For instance, consider a small employer who starts a plan. Initially, a small array of investment options may have been appropriate for the plan. But as the business grows and the economy changes, more appropriate investment options (with lower expense ratios) may be available. And as we have seen in recent years, employers who do not regularly revisit plan investments and expenses may be inviting DOL scrutiny, or worse, litigation.

Knowing about—and fulfilling—fiduciary duties matters for many reasons. Employers certainly want to run their plans in a way that satisfies participants' best interests. But they also want to avoid personal liability for any fiduciary breach. Now granted, a scenario resulting in such personal liability is not likely to arise often. Yet federal statutes do authorize this option, so there are teeth in ERISA's enforcement provisions.

MEPs Can Mitigate Fiduciary Liability

The IRS and DOL want retirement plans to succeed. In practice, they generally don't seek sanctions against fiduciaries except as a final recourse. They want compliant programs that benefit participants. So instead of punishing employers, they emphasize restoring participants to the position they would have been in had an error not occurred. And one of the surest ways to avoid administrative errors is to engage experts to help run your plan.

MEPs Can Reduce Liability

Let's be clear: whether an employer chooses to join a multiple employer plan or to go it alone, the employer will be held to a high standard of accountability. So the employer should either become expert at administering the plan or should consider hiring experts to fulfill

various responsibilities. Some larger employers have the resources—both financial and human resources—to go it alone. Many others choose to outsource at least some of these functions. For these employers, MEPs may make sense.

MEPs Can Save Money and Create Peace of Mind

Once the advantages of MEPs are understood, an obvious question comes to mind: what's the cost? Of course, this question must be placed in the proper context. Perhaps the next question might be this: compared to what? As you might imagine, the costs of noncompliance can be high, not only in having to rectify improper plan administration, but also in terms of creating dissatisfaction with employees. And think about the cost difference between hiring experts on your own to service your plan versus using a MEP with experts already in place. When considering alternatives, MEPs may seem more and more like the most cost-effective approach. What's more, entrusting your plan to a competent MEP sponsor will free up time and energy to run your institution instead of worrying about avoiding plan pitfalls.

Summary

The multiple employer plan concept is simple: allow many employers with some geographical or business commonality to combine their resources into one plan. MEPs can provide many of the services that employers would normally have to arrange for themselves, reducing both costs and possible exposure to fiduciary liability. And as MEPs are now available for employers that are eligible for 403(b) plans, it might be time to consider whether this option is right for you. **For more information on Pentegra's 403(b) MEP solutions and whether they may be right for your institution, contact the Pentegra Solutions Center at 855-549-6689 or solutions@pentegra.com.**

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