A Closer Look at the SECURE Act PEP, MEP, and "Group of Plans" Provisions

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Agenda

- Recap of the SECURE Act provisions
  - What are PEPs?
  - Pooled Plan Provider (PPP) provisions
  - Mirror Code provisions
- What does all this mean?

Types of Group Retirement Programs

Endorsement	• Pure marketing arrangement
"Aggregation"	• Marketing arrangement but with bundled services
Group Trust	• Separate, individual plans investing in a single trust
MEP/ARP	• Multiple employer plan—central governance, one plan
PEP	• MEP controlled by a service provider who is the "PPP"
Group of Plans	• Same funds, fiduciaries, plan years allow filing a single Form 5500

PEP Provisions

- Changes to ERISA definitions (Section 3)
  - 3(2), definition of "pension benefit plan" includes PEPs as single plans under ERISA
  - 3(16)(B), definition of "plan sponsor"
  - 3(43), definition of PEP
  - 3(44), definition of PPP
- Other changes
  - Audit relief for small PEPs (under 1,000 participants when all employers have fewer than 100 participants)
  - $1 million bond for PEPs (for plan as a whole)
  - Special Form 5500 rules (report adopters and their contributions/assets)

What are PEPs?

- Under new ERISA Section 3(43), a PEP:
  - Is an individual account plan with 2+ adopting employers
  - Is an IRC Sec. 401(a) qualified plan or Sec. 408(c) IRA trust
  - Has plan terms which:
    - ✓ Identify a PPP who is a named fiduciary of the plan
    - ✓ Designate one or more trustees for safekeeping and also for "reasonable, diligent, and systematic" procedures for ensuring timely remission of deferrals and loan repayments and other contributions owed to the trust

What are PEPs? (cont.)

- IOW, SECURE Act creates a new kind of "Open MEP" called a PEP
  - Will be treated as a single plan for ERISA purposes
    - ✓ This means a PEP avoids multiple Forms 5500, multiple audits and multiple fidelity bonds
  - Under DOL guidance, to be treated as a single plan, DOL said there has to be commonality among the participating employers, so PEPs change that
    - ✓ Note: Open MEPs have been legal but were treated as multiple ERISA plans, each component "plan" maintained by its particular employer.

PEP Provisions

- Sections 101(b) and (c) of the SECURE Act amend ERISA to provide that a "Pooled Employer Plan" (PEP) will constitute a single ERISA plan
- A PEP is defined as:
  - a defined contribution plan that is designed to benefit employees of two or more employers;
  - which is either qualified under Code Section 401(a) (such as a 401(k) or profit sharing plan) or IRA-based under Section 408; and
  - which has certain terms
  - but it doesn't need to be a plan sponsored by a group of employers having "commonality."

PEP Provisions (cont.)

- To constitute a PEP, the plan terms must:
  - designate a PPP that acts as a named fiduciary;
  - designate one or more trustees who will collect contributions using "reasonable, diligent, and systematic" procedures, and otherwise to hold plan assets;
  - provide that each adopting employer will retain fiduciary responsibility for
    - ✓ selecting and monitoring the PPP and any other named fiduciaries, and
    - ✓ except as delegated to others by the PPP (and subject to the fiduciary relief of ERISA Section 404(c)), investment and management of the assets attributable to the employer's employees

continued

PEP Provisions (cont.)

- The plan terms must also:
  - prohibit unreasonable "restrictions, fees, or penalties" on employers and individuals with respect to leaving or transferring assets from the PEP, or receiving distributions;
  - require the PPP to provide employers with certain disclosures and information (to be determined by the DOL), and require employers to take certain actions (determined by the PPP or DOL) necessary for plan administration; and
  - provide that such disclosures and information may be furnished electronically, and must be designed to ensure the imposition of only reasonable costs on employers and participants.

PEP Provisions (cont.)

- Remedial amendments not required until 12/31/2022 at earliest (2024 for certain governmental and union plans)
- Plan terms must provide:
  - each adopting employer retains fiduciary responsibility for
    - ✓ Prudent selection and monitoring of the PPP and other named fiduciaries
    - ✓ Investments and investment management of the employer's portion of the assets (unless the PPP does it or hires a 3(38) to do it)
  - Provide that employers and employees are not subject to unreasonable restrictions, fees, or penalties for leaving

What is a PPP ("Pooled Plan Provider)?

- Named fiduciary (named in plan document)
- ERISA Sec. 3(16) plan administrator (named in document)
  - And the "Person responsible to perform all administrative duties" necessary to ensure the plan is compliant
  - Must acknowledge plan administrator and named fiduciary status in writing
- Registers with Treasury and DOL
- Ensures proper bonding

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What is a PPP? (cont.)

- A PPP can include members of the same controlled, each of which can provide a portion of the PPP services
- However, it appears that PPP duties and status cannot be split among multiple non-affiliated entities.
- There are some functions the PPP need not undertake.
  - *E.g.*, a PEP can designate a different trustee and can appoint third-party investment providers.

What is a PPP? (cont.)

- DOL is expressly authorized to perform investigations of PPPs as necessary for enforcement and compliance purposes.
- DOL is also is directed to issue guidance for when a PPP would be required to "spin off" the portion of a PEP attributable to an adopting employer that has committed a disqualifying failure (a "bad apple")
  - *E.g.*, not funding corrective contributions necessary due to a testing or other failure

Mirror Code Provisions

- SECURE Act section 101(a) adds a new subsection 413(e) to the Code
- This is designed to protect PEPs (and certain MEPs) from disqualification under the "one bad apple" or "unified plan" rule
  - IOW, the entire arrangement cannot lose its tax-advantaged status due to the disqualifying failures of a participating employer
  - This can happen now under Code section 413(c).

Mirror Code Provisions (cont.)

- This relief applies to defined contribution plans (DB and other plans are not covered) that
  - Are maintained by employers having a common interest other than the plan (commonality), or
  - Are PEPs.
- IOW, the relief is available to MEPs that qualify for treatment as single ERISA plans without being PEPs, such as Association Retirement Plans and PEO MEPs.

Mirror Code Provisions (cont.)

- The relief from disqualification requires that the MEP/PEP terms provide that:
  - the "bad" employer's share of the MEP/PEP assets be spun off into a single employer plan, an IRA, or other separate plan; and
  - the bad employer, and not the MEP/PEP or other adopting employers, must be responsible for all liabilities that are attributable to the bad employer's employees within the arrangement.

What does this all mean?

- What's the mood of the industry? How do people feel about the new provisions?

What does this all mean? (cont.)

- Explain the different types of group plans
- Ok, but what's the difference between PEPs, MEPs and ARPs?
- Why would you want one versus another?

What does this all mean? (cont.)

- Who can be a PPP?
- Who is likely to elect to be a PPP and why would they want to?
- What is the exposure?

What does this all mean? (cont.)

- How will PEP be different from a 413(c) plan?
- What is the effect of elimination of the one bad apple rule?
- How will it really work to deal with a "bad" participating employer?

Questions

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