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The SECURE Act's PEP, MEP and "Group of Plans" Provisions: A Practical Summary

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For years, the formation of "Open" multiple employer plans (MEPs) has been stymied by a host of regulatory challenges and risk factors (both perceived and actual). Effective for plan years beginning after December 31, 2020, the SECURE Act (SECURE) establishes a new type of Open MEP, called a pooled employer plan (PEP), which must be operated by a pooled plan provider (PPP). And while further guidance from the IRS and DOL is both required and forthcoming, the PEP model will provide a clear path to legal and regulatory compliance.

However, the statement that "the SECURE Act makes Open MEPs legal," while not without some truth, is overly simplistic and misleading. On one hand, PEPs will be a very specific type of Open MEP, having a number of special requirements. On the other hand, the implication that Open MEPs were previously "illegal" is not true in any real sense. And in any case, this statement does not tell the whole story with respect to SECURE's provisions relating to MEPs and MEP-like arrangements.

This article is intended to provide a high-level summary of SECURE's MEP, PEP and "Group of Plans" provisions … or at least those that we regard as most important for readers. Here is a brief synopsis:

1. SECURE creates a new kind of Open MEP called a PEP, which will be treated as a single plan for ERISA purposes. "Single plan" status under ERISA is relevant because it avoids the need to file multiple Forms 5500 annually (and to perform a separate financial audit for each employer's component "plan") and maintain duplicative fidelity bonds, etc. Historically, Open MEPs (and other MEPs that lack commonality among the participating employers), while legal, have been regarded as multiple ERISA plans by the DOL — each component "plan" maintained by its particular employer.

2. PEPs must be operated by PPPs, which will be required to have broad fiduciary responsibilities under ERISA and will be subject to a number of special requirements designed to protect plan participants.

3. Even prior to SECURE, MEPs could be single tax-qualified plans under the Internal Revenue Code (Code), irrespective of any "commonality" or lack thereof. SECURE adds additional protections for PEPs and other "single plan" MEPs against plan-wide disqualification due to a "bad apple" — meaning violations of the qualification requirements by a particular adopting employer, rather than by the plan as a whole.

4. Further in the future, certain groups of plans that are not PEPs or MEPs, but nonetheless share certain common service providers and other factors, will be entitled to "MEP-like" Form 5500 relief, meaning they will be entitled to file one joint report.

PEPs as Single ERISA Plans

First, sections 101(b) and (c) of the SECURE Act amend ERISA to (1) provide that a PEP will constitute a single ERISA plan and (2) define a "pooled employer plan."

Historically, the DOL has interpreted ERISA to mean that there must be a significant interest (unrelated to benefit plans) among a group of employers in order to jointly maintain a single ERISA plan. SECURE abolishes this "commonality" requirement — but just for PEPs. More specifically, it states that a PEP will be treated as a single pension plan, and a plan to which section 210(a) of ERISA applies (section 210(a) addresses how certain other ERISA provisions are applied where a plan is maintained by more than one employer), without any need for a "common interest" among the participating employers.

In turn, a "Pooled Employer Plan" is defined as a defined contribution plan that:

- Is designed to benefit employees of two or more employers
- Is either qualified under Code section 401(a) (such as a 401(k) or profit-sharing plan) or IRA-based under section 408
- Has certain terms (summarized below), but is not a plan sponsored by a group of employers having "commonality."

Note that 403(b) and defined benefit plans will not qualify as PEPs. This does not preclude the possibility of 403(b) and DB MEPs, however … but to constitute single ERISA plans, they would need to have the requisite commonality among employers.

Next, to constitute a PEP, the plan terms must do all of the following:

- 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 hold plan assets
- Provide that each adopting employer will retain fiduciary responsibility for (1) selecting and monitoring the PPP and any other named fiduciaries and (2) 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
- 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
- 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.

We summarize the requirements that apply to PPPs in the following section. Clearly, though, while the PEP model will constitute a "legally endorsed" form of Open MEP, there are a number of key issues for which further regulations will be needed. At least some of this guidance will be forthcoming in 2020, and the Act also provides relief for good faith compliance with its provisions (including those applicable to PPPs discussed below) prior to the issuance of additional guidance.

At this point, we also should be clear that, while a qualifying PEP will constitute a single plan for ERISA purposes, this does not mean that every other type of MEP must be treated as a group of ERISA plans. For example, DOL regulations finalized in 2019 provide a relaxed "commonality" (and thus, single plan) standard for association retirement plans (ARPs) and professional employer organizations (PEOs) MEPs, and SECURE does not change this. Open MEPs that are not PEPs, however, will not constitute single ERISA plans. And they will not otherwise be entitled to rely on the statutorily "endorsed" governance model and other relief that is unique to PEPs.

Finally, while our primary focus in this section is to define what a PEP "is," we should note that SECURE makes a handful of other changes to ERISA pertaining to PEPs and/or MEPs. For example, it establishes a $1 million fidelity bond requirement for PEPs (but not other MEPs). It also establishes certain special Form 5500 reporting rules for PEPs and certain other MEPs, including potential simplified reporting relief for those covering fewer than 1,000 participants in total and fewer than 100 participants per employer.

PPPs: What They Are and What They Must Do

A PEP under ERISA must be operated by a "Pooled Plan Provider," which means a provider that:

- Is designated by the terms of the plan as both the plan administrator and "named fiduciary" of the PEP (and acknowledges both roles in writing)
- Is designated as the party responsible for the performance of all administrative duties, including coverage and nondiscrimination testing, that are "reasonably necessary" to maintain the PEP's tax-advantaged status and ensure that the adopting employers carry out their obligations
- Registers as a PPP (before beginning to act in that role for any PEP) with the DOL, according to requirements the DOL will establish
- Is responsible for ensuring required fidelity bonding for all other fiduciaries and parties who handle plan (PEP) assets.

In defining the PPP, all parties providing services to a PEP who are members of the same controlled group are aggregated. In other words, a group of affiliated providers can act in concert as a PPP, and need not merge or otherwise combine into one just to ensure PPP status. Presumably, the inverse is intended as well: PPP duties and status cannot be split among multiple non-affiliated entities.

The various provisions of SECURE make clear that there are some functions the PPP need not undertake. For example, a PEP can designate a different trustee, and a PPP can appoint third-party investment providers.

Otherwise, and perhaps more than any other provision of SECURE, further guidance is needed on the precise scope of a PPP's mandatory responsibilities, and the Department is instructed in the statute to provide this guidance. Obviously, the exact list of "administrative duties" that must remain the province of the PPP is a key issue. Another crucial consideration is whether, and to what extent, the PPP is permitted to outsource day-to-day responsibility for these functions. A literal reading of the statute could indicate that the PPP must perform all required functions itself, but more traditional notions of ERISA practice would favor a reading that the PPP could outsource at least some ministerial and even fiduciary

tasks, so long as it remained responsible (and thus, ultimately liable) as the "top of the pyramid" fiduciary.

Finally, the DOL is expressly authorized to perform investigations and examinations of PPPs as necessary for enforcement and compliance purposes. This is not surprising. However, in addition to the other regulations noted above, the Department is directed to issue guidance concerning the circumstances under which a PPP would be required to "spin off" the portion of a PEP attributable to an adopting employer that has committed a disqualifying failure (for example, not funding corrective contributions necessary due to a testing or other failure). These regulations also will address situations where the employer or the PPP itself may have demonstrated a "lack of commitment to compliance."

PEPs and "Single Plan" MEPs — One Bad Apple Relief

Section 101(a) adds new subsection 413(e) to the Code, which protects PEPs and certain MEPs from disqualification under the "one bad apple" or "unified plan" rule, meaning the concept that the entire arrangement can lose its tax-advantaged status due to the disqualifying failures of a participating employer.

In the view of the authors, the prospect of whole-MEP disqualification due to the acts of a single recalcitrant employer was more of a theoretical risk than an actual one, even prior to SECURE. We say this in view of the availability of the IRS Employee Plans Compliance Resolution System (EPCRS) and certain other factors. Nonetheless, the relief provided by the Act is valuable and addresses a widely held concern, even if it is somewhat overstated.

Specifically, the relief applies to defined contribution plans (that are tax-qualified under Code section 401(a) or IRA-based under section 408) that are "section 413(c) plans" (*i.e.*, MEPs under the Code) and that are either (1) maintained by employers having a common interest other than the plan (commonality) or (2) PEPs. Stated a bit differently, the relief is available to MEPs that qualify for treatment as single ERISA plans without being PEPs, such as ARPs and PEO MEPs that satisfy the applicable regulatory requirements, as well as PEPs.

Where an adopting employer to such a MEP or PEP fails to satisfy the Code's qualification requirements that apply to the employer, the relief from disqualification requires that the MEP/PEP terms must provide that:

- The assets attributable to the offending employer's share of the MEP/PEP be spun off into a single employer plan, an IRA or other separate arrangement, and
- The offending employer, and not the MEP/PEP or other adopting employers, must be responsible for all liabilities that are attributable to the offending employer's employees within the arrangement.

The Department of the Treasury (Treasury) is authorized to establish exceptions to the general "spin-off" requirement where the best interests of affected employees may be best served otherwise. It also may adopt rules relating to the "sole liability" requirement.

For PEPs, the statutory relief against disqualification does not attach unless the PPP provides "substantially all" of the functions required of the PPP. The definition of a PPP set forth for this purpose in the Code, including the functions it is required to carry out, are largely the same as the ERISA definitions summarized above. An entity that qualifies as a PPP under the Code definition is likewise subject to registration requirements and examinations by the IRS, in much the same manner as an "ERISA PPP" is with respect to the DOL.

Finally, the newly minted Code section 413(e) requires Treasury to issue model plan language to give effect to the above provisions, as well as the PEP (and PPP) provisions added by SECURE to ERISA.

We should point out — again — that while the "one bad apple" relief afforded by SECURE is valuable, it is not the only safety net available to MEPs and similar arrangements. Of note, a MEP that lacks the requisite commonality to be treated as a single ERISA plan (and is not a PEP) could still seek (and would very likely get) relief under EPCRS if its tax qualification were endangered by the acts of a single adopting employer.

Groups of Plans — Form 5500 Filing Relief

Section 202 of SECURE requires Treasury and the DOL to amend the Form 5500 requirements to allow certain groups of plans to file a single, consolidated return. This relief will be available beginning in 2022, and only with respect to defined contribution plans that (all) have the same:

- Trustee
- Named fiduciaries (one or more)
- Administrator
- Plan Year beginning date (*i.e.*, a plan does not become excluded from the group just because it has a different Plan Year ending date, such as in the case of a plan that terminates mid-year)
- Investments/investment options available to participants and beneficiaries.

There are a number of technical points and questions that Treasury and the DOL will need to resolve in developing the new, consolidated reporting format. For example, the Act states that the consolidated filing may require employer-specific information as needed for compliance purposes, and mandates that it "must enable" a participant to identify the applicable report (i.e., on the DOL's searchable Form 5500 online database).

Likewise, the presumptive intent is that the audit requirement would be applied to the group (and not each plan separately), but the DOL will need to define the precise contours of the audit component.

This relief is closely related to MEPs and PEPs because it allows groups of plans that are "MEP-like," but lack the commonality to be treated as single ERISA plans (and are not PEPs), to nonetheless benefit from the cost savings of a single annual report. In fact, prior to SECURE, one of the most often cited cost inefficiencies associated with Open MEPs was the need to file a separate Form 5500 for each adopting employer's share of the MEP.

Conclusion

It seems clear that Congress wishes to encourage the formation of PEPs, MEPs and similar arrangements in the hope that they will help narrow the country's retirement savings coverage gap. However, the distinctions between these various types of arrangements, and more importantly the requirements that apply to them, are more complicated than first meets the eye. Further, additional guidance and possible prohibited transaction exemptions are needed on a number of key points, some of which are noted in this summary and some of which involve different issues such as provider compensation, use of proprietary investments and so on.

We encourage readers who may be interested in joining a PEP or other MEP, and particularly those interested in establishing one, to stay on top of these issues and the many developments we expect in the coming year.

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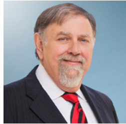

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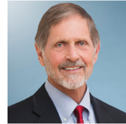

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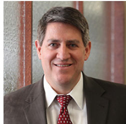

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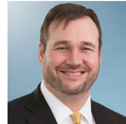

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