

To PEP or Not To PEP For 401(k) Plan Sponsors

By Ary Rosenbaum, Esq.

If you are a 401(k) plan sponsor or plan to sponsor one, you can go it alone with your own plan or you can join with other companies in being a part of a Pooled Employer Plan (PEP). There are many reasons why you would join one and many reasons why you may not.

PEP, what's it all about?

A PEP is (1) an individual account plan (2) established or maintained by a "Pooled Plan Provider" to provide benefits to the employees of two or more employers, and (3) is a plan described in Section 401(a) of the Internal Revenue Code of 1986, as amended (the Code) or which consists of individual retirement accounts under Code Section 408, and (4) includes certain specified terms in its plan document. The reason behind PEPs was because of a Department of Labor (DOL) ruling in 2012 that said that a MEP, made up of adopting employers with no commonality was not a single plan for ERISA and Form 5500 purposes. The push for PEPs is the idea that the promulgation of this type of plan will get smaller employers to

offer a retirement plan for their employees through a PEP, that they might not have offered on their own. One of the biggest concerns for the retirement savings for employees is that many have no access to a workplace retirement plan, a PEP is just another avenue to deliver a retirement plan to employers around the country.

What is a Pooled Plan Provider (PPP)?

The major difference between a MEP and a PEP is the PPP. A PPP has several requirements such as: (1) The PPP is designated by the terms of the PEP plan document as the named fiduciary, the plan administrator, and the person responsible for performing all administrative duties (to make sure the PEP abides by ERISA and the Internal Revenue Code; (2) Before beginning op-



erations as a PPP, the entity registers with Treasury and the DOL and provides such information as Treasury and the DOL may require; (3) The entity acknowledges in writing that it is the PEP's named fiduciary and plan administrator; and (4) the entity is responsible for ensuring that all persons who handle plan assets, or otherwise plan

fiduciaries, are bonded per ERISA Section 412. While the DOL has laid out the proposal on how PPPs register to serve as a PPP, we are waiting on more guidance regarding third-party administrators (TPAs) and financial advisors in serving that role and the prohibited transaction rules that it might come close to violating. The PPP is responsible for the day-to-day plan administration of the PEP, employers that join a PEP will have considered as delegating their fiduciary function for day-to-day plan administration to the PPP. As someone who might be interested in joining a PEP, you should understand that hiring a PPP is a fiduciary decision and you certainly must vet the PPP to make sure they won't walk off with your employees' retirement savings.

Cost savings? Maybe

The idea behind a PEP is similar to the ideas of a MEP, where collating retirement plan assets from small employers into a larger plan will bring in cost savings. I always compare it to shopping at Costco, where you save by buying in bulk. In theory, grouping assets from unaffiliated employers into a larger plan

should achieve economies of scale when it comes to retirement plan administration and investments. Remember, I said theory. It's a great idea to join a PEP if it will help lower your plan's administrative expenses by joining one on paper. In actuality, most PEPs will lack the asset size to truly lower expenses and the major reason is that PEPs

that have more than 1,000 participants or an employer with more than 100 participants will require an audit. An audit could run anywhere between \$10,000 and \$20,000, costs you would have to share that you wouldn't have had as a single employer plan (if you have less than 100 participants). Most Open MEPs failed because of a lack of size and I believe the same fate is there for most PEPs. Almost 2 years in with PEPs, very few have achieved the size needed for true cost savings and some have already closed their doors. So the savings may not be there yet and with some pricing, I've seen, it could

be cheaper to be on their own. Plan providers may reach out to you and stress the cost savings in trying to cajole you into joining a PEP, but for most of these plans, the cost savings will never materialize for the plan sponsors that join them. I'm not going to stress that PEPs are a bad idea, I just think you should focus on their real attractiveness and I don't believe the cost is it.

The real selling point of PEPs

When it comes to marketing, you need to delineate between the sizzle and the steak. When it comes to PEPs, cost savings is the sizzle. It's the biggest point that most plan providers will stress and fail to deliver. As a 401(k) plan sponsor or potential sponsor, you should focus on the steak of PEPs. The steak of PEPs is fiduciary delegation where you take your fiduciary liability of running a plan and delegating that authority and the problems that go with it, to the PPP. Being a 401(k) plan sponsor is a tough and thankless job. More importantly, you don't have the background or training to be a fiduciary, it's a job foisted on you because of your role as a 401(k) plan sponsor. The PEP will allow you to delegate that thankless job to the PPP. Also, the PEP frees you from filing a Form 5500 every year as the PEP files one 5500 for the entire plan,



regardless of the amount of adopting employers that are part of a PEP. The PPP is responsible for Form 5500, the delivery of notices, and the hiring and firing of plan providers. Treat the PEP as a concierge service, where you join a PEP and hire a PPP to do all the work you would have ordinarily done. As stated before, hiring a PPP is a fiduciary decision and you need to choose one wisely. There could be some questionable people who act as a PPP, so vet the individual or company serving in that role.

Forced into offering a plan? A PEP might be a great idea

Both the Federal and state governments are concerned about retirement plan coverage and that many private employers don't offer one. Therefore, a lot of state and local governments have required employers to offer a plan of their own or become part of a government-run SIMPLE-IRA plan. The problems with joining a SIMPLE-IRA plan are that you would be participating in a state-run program (there is a wariness of joining a government-run plan) and the retirement savings limits are way less than what you can offer under a 401(k) plan. Would you rather work with a PEP than the state? That's your call. If you're forced to offer a 401(k) plan, why not offer a 401(k) plan under a PEP?

Can you give up control or do you want it?

There is no solution in the retirement plan business that is the right choice for everyone and the PEP is no exception. You might currently have a 401(k) plan with enough assets to justify current cost savings that you might not have if you were part of a PEP. Another reason not to join a PEP is that you crave control of the retirement assets of your employees and you want to retain control. Another reason is that you or your staff might have the requisite background or training to properly serve as a plan fiduciary that you don't need to delegate to

anyone. Some companies are happy to give up control of their 401(k) plan to someone else and some crave it and will never surrender it. You have to decide what you want. Not everyone wants a concierge service. If you don't offer a 401(k) plan or have one micro in size, maybe a PEP can offer cost savings for you. If you are considering joining a PEP, you need to ponder the plusses and minuses of joining one.

THE ROSENBAUM LAW FIRM P.C.

Copyright, 2023 The Rosenbaum Law Firm P.C. All rights reserved.

Attorney Advertising. Prior results do not guarantee similar outcome.

The Rosenbaum Law Firm P.C.
734 Franklin Avenue, Suite 302
Garden City, New York 11530
(516) 594-1557

<http://www.therosenbaumlawfirm.com>
Follow us on Twitter @rosenbaumlaw