MEPs And PEPs For Plan Providers After The SECURE Act

By Ary Rosenbaum, Esq.

My favorite law school professor, Bernie Corr once said in hi advanced bankruptcy class that the reason we change the bankruptcy law every few years is to give bankruptcy law some business. If Professor Corr was an ERISA lawyer, he'd probably say the same thing about retirement plan laws. The Setting Every Community Up for Retirement Enhancement Act of 2019 (the SECURE Act) is the biggest change in retirement plan laws since 2006 and one of the biggest changes corners the "reinstatement" of open multiple employer plans (MEPs) through something called pooled employer plans (PEPs). This article is for plan providers such as yourselves who are thinking about how PEPs may or may not augment your retirement plan book of business with a lot of points to consider.

The SECURE Act's first provision

While everyone talks about MEPs and PEPs, it's funny to note that the very first section of the SECURE Act, Section 101 deals with amending the Internal Revenue Code and ERISA concerning multiple employer plans. There are many more provisions of the SECURE Act that will have more importance as to the day to day running of retirement plans such as the added flexibility for plans that offer a safe harbor non-elective 401(k) plan or the requirements of allowing long-time, part-time employees to be eligible for salary deferrals. The reason I say that is because, despite the new change, PEPs and closed MEPs still suffer the same challenges they did before the SECURE Act such as asset size and cost.

What is a PEP?

The SECURE Act amended the Internal Revenue Code and ERISA to reflect that there are two types of MEPs, a MEP where there is commonality between adopting employers (the closed MEP) and a PEP. The Open MEP concept has been replaced by a PEP. Like the old Open MEP, you have one Form 5500 and there doesn't have to be a commonality between adopting employers. You can bring together unrelated employers into a plan and have the luxury of that one Form 5500 (and audit when needed). The main difference between the defunct Open MEP and the PEP is that the ideas concerning administration and fiduciary liability are no longer the wild, wild, west, it's codified what a PEP must be to maintain qualification under the Internal Revenue Code and ERISA.

The Pooled Plan Provider

A PEP must be run by a pooled plan provider. The pooled plan provider is identified as a named plan fiduciary by the terms of the plan document and will serve as the plan administrator. The pooled plan provider has to also accept their fiduciary responsibility in writing. A third-party administrator (TPA), a financial services company, and yours truly (more on that later) can serve as a pooled plan provider. The pooled plan provider is responsible for plan administration. Decisions about investment options in the PEP may sit with the pooled plan provider, the participating employers under the plan, or an entity such as a committee or an ERISA §3(38) fiduciary who has investment authority for the pooled plan provider. In addition to day-to-day plan administration, pooled plan providers have the responsibility for ensuring that ERISA's bonding requirements are met for plan fiduciaries. Pooled plan providers are also responsible for filing that Form 5500 annual report with an audit if required (which includes a list of participating employers), and responding to any Department of Labor (DOL) or Internal Revenue Service (IRS) audit or investigation. Pooled plan providers also have a registration requirement, where they need to register with the DOL and the IRS. I call this, the "Matt Hutcheson" rule in dishonor of the retirement plan fiduciary who was convicted of stealing millions of dollars from two multiple employer plans he controlled. I believe this registration requirement (depending on what the DOL requires) will be a strong deterrent in keeping some bad players out from serving as pooled plan providers.

Plan documents need to be specific

Prior rules for MEPs were just vague on what should be contained in the plan documents. The SECURE Act provision on MEPs is pretty specific on what needs to be in PEPs. The plan document for a PEP needs to explain the different roles for entities involved in the operation of

the PEP. That means designating the pooled plan provider and designating one or more trustees who are responsible for collecting contributions and holding assets. The plan also must also contain language stating that certain disclosures (such as the fee disclosure rules) will be provided and that the participating employers agree to take actions necessary for compliance with tax laws. The disclosures may be provided electronically. Also, the plan document can't impose unreasonable fees or penalties if employers cease to participate or if funds are transferred from the PEP. The IRS will release a model plan document language for PEPs.

Fiduciary responsibility for adopting employers

One of the biggest problems for MEPs before the SECURE Act was the issue of fiduciary responsibility. There was a question on whether a participating employer had any fiduciary responsibility when joining and being a part of the MEP. There were plan providers advertising MEPs that adopting employers eliminated all of their fiduciary responsibility when they joined one. I always felt that advertising was a bit misleading because it was debatable whether joining a MEP was a fiduciary or settlor function. At the very least, adopting employers were responsible for selecting the MEP. It might not be a fiduciary function, but it was a function that could certainly involve liability exposure to the participating employer. The SECURE Act makes it clear that participating employers retain fiduciary responsibility for monitoring the pooled plan provider Adopting employers would also retain fiduciary responsibility for decisions about the investment options in the plan unless that responsibility is delegated to an ERISA §3(38) fiduciary.

The one bad apple rule is dead

One of the biggest knocks against MEPs that its detractors would point to is the concept of the "one bad apple rule." The rule means that if one participating employer fails to meet their obligations under the MEP (such as late deferrals, failing to fix compliance failures), the entire MEP could be disqualified and lose its tax-qualified status, which would negatively affect the other unrelated participating employers that had complied. The IRS proposed eliminating that one bad apple rule, but it hasn't been finalized, but the SECURE Act eliminates much of this risk for PEPs. A PEP isn't going be treated as failing to meet the PEP requirements (and its tax status threatened) just because a participating employer failed to meet their obligations under the PEP. The PEP's plan document must provide that in the event of such a failure, assets attributable to that employer are transferred out of the PEP to another retirement plan or account, which may be (1) a single-employer plan sponsored by that employer, (2) IRAs or other eligible individual retirement plans of the affected employees, or (3) any other arrangement determined appropriate by the IRS and/or the DOL unless the government determines that it is in the "best interests" of the employees to retain the assets in the PEP. In addition, the offending employer, and not the PEP or other participating employers, will be responsible for any associated liabilities resulting from the failure. The one bad apple rule was something I called the boogeyman because it was unlikely that the IRS would ever disqualify a MEP because of the malfeasance of one participating employer. Thankfully, the SECURE Act took the teeth out of that one bad apple rule.

The problems with starting your own MEP is still there

As a plan provider, starting what will be known as a PEP in 2021 might look like a great option in getting the branded MEP you always wanted. The problem is that the SECURE Act hasn't eliminated the biggest problems with plan providers in dealing with MEPs. First off, you might not be interested in having the liability that goes with being a pooled plan provider. Just like with the TPAs who wanted no part of going into the ERISA §3(16) business, you might not with the headaches and liabilities of being responsible as a pooled plan provider for a PEP. The second problem deals with assets. From my experience, MEPs have the success rate of a restaurant. MEPs' biggest problem is growing assets. It is a slow and tedious process and if you don't achieve the asset size you need, costs will never be manageable. Nothing worse for participants to pay for a plan audit when the MEP just hits the 100 or 120 number. From time to time, I will hear from a MEP sponsor how they may have a connection to thousands of employers through an affiliation or through a payroll company. The conversion rate of these opportunities is quite low. It's not as easy as you think to get plan sponsors to move over their plan assets into a MEP. So whether you are interested in starting a PEP or want someone like me to serve as a planned pool provider, feel free to contact me if a PEP.

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