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Employer Opportunities In New Pooled Retirement Plan Rules

By **David Eckhardt and Craig Kovarik** (January 27, 2020, 2:36 PM EST)

Last month, the U.S. Senate passed and President Donald Trump signed into law the Setting Every Community Up for Retirement Enhancement, or SECURE, Act, generally effective as of Jan. 1. The SECURE Act was enacted in part to expand the opportunities for individuals to increase their savings and make administrative simplifications to the retirement system.


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One of the major pieces of the SECURE Act allows two or more unrelated employers to establish or join a common retirement plan, generally known in the industry as an open multiple-employer plan.

Pre-SECURE Act Rules


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Multiple-employer plans are commonly maintained by employers in the same industry or used by professional employer organizations, or PEOs, to provide qualified retirement plan benefits to employees working for the PEO's clients. Under older guidance from the U.S. Department of Labor, employers generally had to be in the same industry to be considered a single plan for purposes of the Employee Retirement Income Security Act.

Earlier in 2019, the Department of Labor issued final regulations that allowed a group of employers to create an association to sponsor a multiple-employer retirement plan. The government indicated that a bona fide association that follows the Department of Labor guidelines will constitute an employer under ERISA, and therefore could sponsor a multiple-employer retirement plan, which is a single plan under ERISA (a generally favorable result).

To qualify as a bona fide association, the association needed to have a formal governance structure, the employer members needed to control the association, and there still needed to be a commonality of interest among the employer members (or the employers had to be in the same geographic region), among other requirements. In addition, an association retirement plan could not be sponsored by a bank, insurance company, trust company or similar financial service provider.

Importantly, in the absence of a bona fide association, a multiple-employer retirement plan would not be viewed as a single plan for purposes of ERISA but rather a conglomerate of separate plans sponsored by each participating employer. This in turn would defeat many of the reasons that employers have to participate in a joint plan. For example, if a plan does not constitute a single plan under ERISA, then each participating employer is required to file its own Form 5500 (including audit if applicable), and each employer is responsible for its own fiduciary duties.

In addition to the association retirement plan rules discussed above, recent proposed regulations issued by the U.S. Department of the Treasury provided relief from the so-called one bad apple rule, which provided that a failure by one employer (or by the plan itself) to satisfy an applicable qualification requirement under the Internal Revenue Code may result in disqualification of the entire plan with respect to all employers participating in the common plan.

New Rules Under the SECURE Act

The SECURE Act codifies the relief from the one bad apple rule for covered multiple-employer plans. A covered multiple-employer plan is a plan that either (1) is maintained by employers that have a common interest other than having adopted the plan; or (2) has a pooled plan provider, also known as a pooled employer plan, or PEP, and which meets certain other requirements. PEPs can be established for plan years effective Jan. 1, 2021.

A major benefit of a PEP is that unrelated employers in unrelated industries in unrelated geographies will be able to come together to participate in a retirement plan and the plan will be considered a single plan for ERISA purposes. By treating the plan as a single plan, the plan can minimize administrative and compliance costs and potentially shed some of the related fiduciary responsibilities under ERISA.

We anticipate PEPs to be an intriguing option for smaller and some mid-size companies. Large companies may also be interested in a PEP if they wish to outsource many of the fiduciary functions and liability, or if they have high turnover and do not want to take on the administrative burdens of such high turnover. In addition, we anticipate that financial service providers, including banks, trust companies and investment advisers, will explore whether to offer a PEP for their clients.

Pooled Employer Plan Document Requirements Under SECURE Act

The SECURE Act outlines various requirements that apply to a PEP under the Internal Revenue Code and ERISA.

A PEP is defined as a plan that:

- Is an individual account plan established or maintained for the purpose of providing benefits to the employees of two or more unrelated employers;
- Is a qualified retirement plan or an individual retirement account; and
- Meets other specified requirements, as discussed further below.

A PEP is required to be sponsored by either a group of unrelated employers or a pooled plan provider, or PPP.

Note that a PEP does not exist if the participating employers in the plan constitute a controlled group of businesses under the Internal Revenue Code requirements. In that case, the plan would already be a single plan for ERISA purposes and would not need to satisfy any of the PEP requirements.

With respect to the PEP itself, the act provides that the PEP document contain language that:

- Designates the PPP and names the PPP as the ERISA plan administrator in a fiduciary capacity;
- Designates one or more trustees (other than an employer under the plan) to be responsible for collecting contributions to, and holding assets of, the plan;
- Requires the trustees to implement written contribution collection procedures;
- Provides that each employer retains fiduciary responsibility for selecting and monitoring the PPP and any other fiduciaries;
- Provides that each employer retains fiduciary responsibility for the investment management of assets attributable to such employer, unless this activity is delegated to another fiduciary by the PPP; and
- Provides that employers and participants are not subject to unreasonable restrictions, fees or penalties with regard to ceasing participation, receipt of distributions or otherwise transferring assets of the plan.

Although participating employers in the PEP retain some fiduciary liability, the act also amends ERISA to require the PPP to provide to employers any disclosures or other information, including any disclosures or other information to facilitate the selection or any monitoring of the PPP by employers.

Some preapproved plan documents contain provisions to accommodate a multiple-employer plan. However, those plans will not contain the language that is required by the SECURE Act. Thus, we anticipate that any new PEPs will be individually designed, at least until the next round of submissions for preapproved plans.

Pooled Plan Provider Requirements

A provider must satisfy the following requirements to be a PPP:

- Must be named as a designated fiduciary under ERISA as the plan administrator in the plan documents;
- Must be responsible to perform all administrative functions, including proper testing of the plan and employees of each employer;
- Must be responsible for ensuring the plan meets applicable ERISA and Internal Revenue Code requirements;
- Must be responsible for ensuring that each employer satisfy ERISA and the Internal Revenue Code, including compliance with applicable disclosures;
- Must register with the IRS;
- Must acknowledge its fiduciary status in writing; and

- Must be responsible for that all parties that handle plan assets or who are fiduciaries are bonded under ERISA.

Note that a PPP could consist of more than one company that is in a controlled group. Thus, for example, multiple entities of a financial service provider, such as a separate financial advisory firm and administration firm, could constitute a PPP if such entities are related under subsection (b), (c), (m) or (o) of Section 414 of the Internal Revenue Code.

The act provides that the Treasury Department will issue additional regulatory guidance with respect to PPP requirements and the procedures to terminate a plan that fails to meet ERISA or Internal Revenue Code requirements. Until such time, employers and PPPs must comply with the act's rules in good faith.

Many institutions custody ERISA plan assets and act as fiduciaries. However, providers will need to increase their duties and responsibilities, and thereby their potential liability, to become a PPP for a PEP. For example, most banks, trustees and investment fiduciaries do not currently take responsibility for an employer's compliance with ERISA or the Internal Revenue Code. In addition, as required in the PEP document (see above), the trustee must have a process to collect contributions. Many trust documents specifically disclaim any such responsibility.

Accordingly, we anticipate that financial institutions will change their practices if they want to be a PPP, or other service providers will enter the market.

Pooled Employer Plans: Failures of the Provider or Participating Employers

One of the key aspects is that a PEP will not become tax-disqualified if one of the participating employers in the PEP take, or fail to take, action that are required to maintain tax-qualified status. However, as a condition for such relief, the terms of the PEP must provide that in the case of a participating employer that takes or fails to take requisite action, the following events will occur:

- The assets of such employer must be transferred to a separate plan established by such employer or an individual retirement account; and

- Such employer will be liable for any penalties or consequences of taking or failing to take the requisite action.

If the PPP is responsible for the plan failure as a whole, the act provides that the entire plan could become tax-disqualified.

The act further provides that with respect to PEP for which a PPP performs the administrative and fiduciary functions, each participating employer is considered the sponsor for ERISA purposes for the portion of the plan attributable to that employer's employees.

While the act provides much-desired relief from the one bad apple rule, there are significant responsibilities and actions that the PPP will have to take. The PPP will need to be able to establish another employer-sponsored plan, or set up IRAs for each participant, with respect to the plan assets of a participating employer that fails to comply with its responsibilities.

That means the PPP will have to monitor the activities of each sponsor and then take appropriate action.

In addition, it is not clear whether a participating employer will have an opportunity to cure any wrongdoing.

We anticipate that the process for compliance and actions for noncompliance will be set forth in the plan document, along with financial penalties and indemnifications by participating employers.

Conclusion

The SECURE Act provides an interesting opportunity for employers of all sizes, industries and locations to join a common retirement plan. The legislation has been promoted by many people in the industry as a method to increase the access of retirement plans to more individuals while simultaneously reducing costs and administrative responsibilities of employers. We generally believe this to be true.

However, there are many rules yet to be issued with respect to PEPs and PPPs by the DOL and Treasury Department. Service providers that wish to be early adopters should start to think about the plan structure and documentation to be ready for Jan. 1, 2021.

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