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General Comment

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Attachments

OPEN MEP

The Open Multiple Employer Plan concept has been talked about for a decade with many interpretations of how it should work. In the proposed final rule 29 CFR 2510.3-5, ERISA section 3(5)-like associations (non PEOs) sponsoring closed MEP plans have been given clarity, with the caveat that banks, brokers, financial advisors, TPAs------in other words vendors----------cannot sponsor closed MEP plans, although they are pushing legislators to give the ok to sponsor the "open plan" architecture. Even if the "commonality rule" is completely repealed, it would be almost impossible for a vendor to establish an open plan and fulfill it's 3(16) duties without giving back most of the fiduciary liability to the employers using a contract. Crucial to compliance is the on-going obligation of an employer, free from conflicts of interest, to monitor the service providers and investment options of the plan, and make prudent decisions. The lawsuits against plans and fiduciaries stem from that liability and are not about the "commonality" qualifications of the plan sponsor. In that regard, it is our opinion that an open plan could be sponsored by any bona fide organization other than a service or investment-option provider. "Bona fide" should include a net capital and bonding requirement, as well as the assumption of most of the 3(16) fiduciary liability, much like the PEOs assume in sponsoring a closed MEP. The difference in operation of the two different plan arrangements is that PEOs handle payroll and the aggregate contributions sent via TPAs to the Trusts. In an association "closed" MEP plan, as with an "open" MEP, contributions are collected and transmitted by each individual adopting employer; and often contributions are deemed late, or worse, may not come at all. That is the primary compliance issue associated with those type of plans, that the PEO sponsored plan does not face. That is the primary efficiency and cost effectiveness the PEO brings to plan administration, other than serving as the 3(16) Fiduciary and discretionary Trustee.

With that background, following is our recommendation for structuring an open MEP plan. First, one plan document should be utilized, and the settler of the Trust --------i.e., the first adopter and "lead employer" establishing the Trust with an institutional custodian----------should accept the 3(16) status and be the discretionary trustee on its' segregated employee assets held in the trust; and the custodian must be able to accept multiple trustees on a trust going forward. Subsequently, each adopting employer would be the 3(16) and Trustee on their employees' assets in the plan, which are separately accounted for by both the TPA and the custodian for reporting purposes, and to comply with SEC rule 206(4) if an Investment Advisor is involved. Functionally, the TPA would perform the CFR 2509.75-8 ministerial duties of the plan and the adopting employers would retain the obligation to monitor fees and performance; and, as a Trustee, each of them would have the power to order their assets moved from the Trust to another provider and Trust. Therefore, the Trust would be a co-mingled employer trust authorized by Revenue Ruling 81-100. The only difference between a closed PEO MEP plan Trust and an "Open" one is there is only one Trustee on a closed plan; however, the custodian of the open plan must maintain a segregated accounting of each employers' assets, in order to track multiple trustee reports for individual employer 5500 filings, bonding, and audit application of the 100-eligible rule. Currently, there is no audit requirement that an 81-100 trust be audited; the rule is applied at the employer level, unless it is a closed MEP. With the segregated 3(16) role and Trusteeship, there is no reason the nexus or commonality rule should be a requirement, nor the "bad apple" rule. It should be possible for an SEC registered Investment Advisor be the sponsor of an Open MEP, since custodian and TPA reports would flow directly to the adopting employers to fulfil their monitoring obligation.

However, for an Advisor to be a lead employer would require it to adopt the plan for its' employees and participate, which would also entail each adopting employer signing a trust participation agreement in addition to an adoption agreement.

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