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December 21, 2018

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

RE: RIN 1210-AB88—Definition of Employer Under Section 3(5) of ERISA—MEPs

To Whom It May Concern,

The Retirement System Assessment and Policy Committee of the American Academy of Actuaries¹ (Academy) respectfully submits the following comments related to the proposed rule on the definition of “Employer” under Section 3(5) of the Employee Retirement Income Security Act of 1974, as amended (ERISA).

Background

In response to the Aug. 31 [Executive Order](#), the Department of Labor (DOL) has proposed the rule under 25CFR Part 2510 on Oct. 23 that would clarify that an employer group, association, or professional employer organization (PEO) can constitute an “Employer” under ERISA if it satisfies certain criteria. The proposed rule is similar to regulations the DOL issued earlier this year with regard to association health plans.

Analysis

The proposed rule could help expand access to employer-sponsored retirement plans by making it more affordable for small companies to offer plans to their employees. For many smaller employers, the cost and complexity of establishing and maintaining a single-employer defined contribution plan is a significant disincentive to adopting such a plan. Multiple Employer Plans (MEPs) allow smaller employers the opportunity to collectively participate in plans that are more affordable than they could offer on their own, since MEPs can benefit from economies of scale and access higher quality administrative and investment services.

¹ The American Academy of Actuaries is a 19,500-member professional association whose mission is to serve the public and the U.S. actuarial profession. For more than 50 years, the Academy has assisted public policymakers on all levels by providing leadership, objective expertise, and actuarial advice on risk and financial security issues. The Academy also sets qualification, practice, and professionalism standards for actuaries in the United States.

Under the proposed rule, MEPs would still be treated as a collection of individual plans made up of unrelated employers, with each employer being subject to many of the requirements and expenses of complying with ERISA. Allowing a MEP to be treated as a single plan for all ERISA purposes could more effectively expand access to employer-sponsored plans. Current law and regulation do not permit this treatment unless the employers are related through common ownership or another connection so that they can be considered an “Employer” under Section 3(5) of ERISA. While the proposed rule is a step toward expanding retirement plan coverage, policymakers may erroneously view it as “solving” the challenges facing smaller employers, when additional barriers would remain.

A broader approach to the ERISA “Employer” standard that enables a group of otherwise unrelated employers to participate in a MEP would have greater potential to increase access to employer-sponsored retirement plans. The DOL noted in the preamble to the proposed rule that it considered including such “open MEPs” or “pooled employer plans” in its proposal, but decided not to do so due to other policy concerns. We note that certain proposed legislation such as the Retirement Enhancement and Savings Act of 2018 (RESA) would explicitly enable such plans.²

To the extent the DOL is looking for ways to encourage expanded access to employer-sponsored retirement plans, guidance that removes barriers to “open MEPs,” should be a regulatory priority. Making it easier and less costly for such plans to operate in compliance with ERISA will encourage their adoption.

We appreciate your attention to these comments. We would be happy to meet with you at your convenience to provide additional perspectives on this issue. If you have any questions or need further information, please contact Monica Konaté, the Academy’s pension policy analyst (konate@actuary.org; 202-223-8196).

Sincerely,

Eric Keener, MAAA, FSA, EA, FCA
Chairperson, Retirement System Assessment and Policy Committee
American Academy of Actuaries

² The Academy’s comment letter on RESA is available at the following link:
http://www.actuary.org/files/publications/RESA_Comment_Letter_09072018.pdf.