PEO-SPONSORED BENEFIT PLANS: MIXED MESSAGES

BY ERIN M. O'NEAL, ESQ. AND BRIAN NUGENT, ESQ.

This has been an active, albeit inconsistent, year for guidance about multiple-employer health and retirement plans. This increase in guidance can largely be attributed to a pair of executive orders (Executive Order 13813, Promoting Healthcare Choice and Competition Across the United States, and Executive Order 13847, Executive Order on Strengthening Retirement Security in America, collectively, the "executive orders," or EOs), through which the Trump administration signaled its interest in promoting multiple-employer health and retirement plans and charged the agencies responsible for regulating them to consider policies that would expand their availability to small employers.

An uptick in guidance followed these executive orders. However, despite the Trump administration's clear support for multiple-employer plans, the guidance suggests some internal inconsistency about how regulatory agencies view them and how plans sponsored by PEOs may be treated.

REGULATORY LANDSCAPE

Association Health Plan (AHP) Final Rule (published June 21, 2018)

This guidance was one of the earliest outgrowths from the EOs, expanding upon prior Department of Labor (DOL) sub-regulatory guidance about the circumstances in which a bona fide group or association may act as an "employer" for purposes of sponsoring an AHP.

Notably, the AHP final rule did not contemplate or otherwise authorize health plans offered by PEOs to their employer clients, adding to the existing uncertainty about whether the DOL considers health plans sponsored by PEOs to be multiple-employer welfare arrangements (MEWAs), and if so, whether such plans could qualify as AHPs.

Adding to the ambiguity is the decision by the U.S. District Court for the District of Columbia on March 28, 2019, in *State of New York v. United States Department of Labor*, 363 F. Supp. 3d 109 (D.D.C. 2019), vacating parts of the AHP final rule on the grounds that employer groups or associations may be treated as "employers" for Employee Retirement Income Security Act (ERISA) purposes is an unreasonable interpretation of the statute. The DOL has filed an appeal, but there has not yet been any decision.

Proposed Treasury Regulations Regarding Application of the 'Unified Plan Rule' to Defined Contribution Multiple-Employer Retirement Plans (published July 3, 2019)

The Treasury Department issued proposed regulations that would provide relief from their historic Unified Plan Rule, or as it has come to be known, the "one bad apple" rule. The Unified Plan Rule provides that qualification failure of one employer participating in a multiple-employer retirement plan will result in the disqualification of the entire plan. This rule has always been a concern for multiple-employer retirement plans, including those sponsored by PEOs, that have limited recourse against non-compliant participating employers.

The proposed regulation set forth the conditions under which a participating employer's failure to follow tax qualification requirements for a defined contribution multiple-employer retirement plan (i.e., a 401(k) plan), would not threaten the qualified status of the plan as a whole. Although an in-depth analysis of the conditions is outside the scope of this article, generally, the guidance would require:

- An amendment to the plan to document the employer's practices and procedures for addressing non-compliant employers;
- Issuing a series of three notices to the non-compliant employer (and for the final notice, to the non-compliant employer's participating employees); and
- In some cases, spinning-off a separate plan for the non-compliant employer's employees.

Although the regulations may be viewed by some as a welcome signal that Treasury will not seek to punish all participating employers in a multiple-employer plan for the actions of one bad actor, the conditions contained in the proposed regulation may be viewed as overly burdensome for existing multiple-employer plans that have already put their own control measures in place.

PEOs should consider amending their retirement plan documents and internal operating procedures to satisfy the conditions outlined in the proposed regulation.

DOL Field Assistance Bulletin Providing Transition Relief from Historic Form 5500 Reporting Failures (July 24, 2019)

The DOL provided transition relief to the administrators of multiple-employer plans that may have previously failed to include certain information (namely, a complete and accurate list of their participating employers) with their Forms 5500.

Under the transition relief, the DOL will not reject previous years' Forms 5500, or seek civil penalties, for failure to include participating employer information, so long as the 2018 Form 5500 filings and future filings include such information.

In addition, the Field Assistance Bulletin provides a two-and-a-half month extension (without the need to have to request the extension using the Form 5558) for calendar year plans, to provide additional time for multiple-employer plan sponsors to file the Form 5500 with participating employer information included.

Despite the Trump administration's clear support for multiple-employer plans, the guidance suggests some internal inconsistency about how regulatory agencies view them and how plans sponsored by PEOs may be treated.

Although this transition relief does not address the larger concerns of multiple-employer plan sponsors—including PEOs—that do not wish to disclose their proprietary client information, it does reduce the risk of costly penalties for historic failures for those sponsors that fully comply with the disclosure obligation going forward. Unfortunately, as of the writing of this article, the DOL has not agreed to waive or modify the requirement to include with the 5500 filing participant (i.e., PEO client) information.

Defined Contribution Multiple-Employer Plan (MEP) Final Regulation (published July 31, 2019)

Similar to the AHP final rule, the MEP final regulation set forth the conditions under which a bona fide group or association will be treated as an employer, as defined in Section 3(5) of ERISA, when establishing a defined-contribution retirement plan.

Although largely similar, the MEP final regulation deviated from the AHP final rule by establishing separate

PEO HEALTHCARE PLAN STATS

According to NAPEO's 2019 Financial Ratio & Operating Statistics (FROS) Survey results:

74.7%

of PEOs participating in the survey sponsored fully insured health plans;

4.0%

sponsored self-funded health plans;

9.3%

sponsored both fully insured and self-funded plans;

1.3%

sponsored some other type of plan; and

13.3%

did not sponsor a health plan.

criteria (in the form of a four-factor test) that a PEO must satisfy to be treated as sponsoring a defined-contribution retirement MEP "indirectly in the interest of an employer [member or client]" under ERISA.

The MEP final regulation acknowledged the disconnect with the AHP final rule, and rejected the idea that it (intended to apply only to defined-contribution retirement plans) should be relied upon by PEOs establishing group health plans for their client employers. However, by acknowledging the existence of PEO-sponsored group health plans and citing the different issues between health and retirement plans (including non-discrimination concerns), the DOL appeared to hint that future guidance may be forthcoming.

In connection with the MEP final regulation, the DOL also issued a request for information (RFI) seeking comments (by October 29, 2019) about whether it should permit open MEPs, the costs and benefits associated with permitting open MEPs, and the types of employers that would join open MEPs.

KEY TAKEAWAYS FOR PEO-SPONSORED PLANS

Health Plans

PEO-sponsored health plans should keep a close eye on the appeal in the *State of New York v. United States Department of Labor* case discussed above and look for supplemental guidance from the DOL addressing PEO-sponsored health plans.

Even if current AHP guidance is expanded to include PEO-sponsored group health plans, the AHP final rule confirmed that AHPs are treated as MEWAs and subject to all applicable compliance requirements (including Form M-1 filing obligations). Therefore, PEO-sponsored group health plans should continue to monitor these developments closely, including the impact any future guidance may have on determining whether a PEO-sponsored group health plan should be subject to MEWA compliance obligations.

Retirement Plans

Given the similarities between the AHP final rule and the MEP final regulation, a challenge similar to the *State of New York v. United States Department of Labor* case would not be surprising. Therefore, PEOs should continue to monitor for legal developments that may impact their ability to rely on the defined-contribution MEP final regulation.

In the meantime, PEO-sponsored defined-contribution retirement plans should ensure that they satisfy the four-factor test set forth in the MEP final regulation for establishing a single-employer plan, including the fact-specific test for determining whether the PEO performs "substantial employment functions" on behalf of its clients.

PEO-sponsored retirement plans should also ensure that they are satisfying the conditions set forth to avoid the application of the "one-bad-apple" rule to non-compliant employer clients participating in their plans. This is particularly important for a PEO due to the inability to monitor with any degree of certainty the client's activities as an adopting participant.

All Plans

According to the current rule, and unless there is a last-minute change of course, to be compliant, PEOs will need to file Forms 5500 for the 2018 plan year (and going forward), and include a complete and accurate list of participating employers. Although some industry groups (including PEOs) have discussed the ability to provide a "de-identified" client list (using client numbers, etc.), the DOL has informally indicated that this will not satisfy the reporting requirement. Therefore, if a PEO plans to include such limiting or "de-identifying" client lists, it should consult its legal counsel to understand fully the risks of such a strategy.

PEO-sponsored retirement plans should also ensure that they are satisfying the conditions set forth to avoid the application of the 'one-bad-apple' rule.

Be vigilant about developments impacting PEOs relating to AHPs. All rules and guidance in this area will likely have some impact on PEO health plans and their status under ERISA.

Be aware that plaintiff's attorneys may try to use recent DOL guidance and rules as a means to argue employer status for PEOs in non-benefits areas such as Title VII, the Fair Labor Standards Act (FLSA), the Affordable Care Act (ACA), and other employment laws. As always, news on one front of the "who is the employer" issue can impact other employer status questions, even if not intended. ■

1 The DOL has appealed the court's decision and oral arguments are scheduled for November 14, 2019.

ERIN M. O'NEAL, ESQ.
Associate, Tax
Akerman
West Palm Beach, Florida

BRIAN NUGENT, ESQ.
Partner, Labor and Employment
Akerman, LLP
Denver, Colorado