

*Workshop 51: BUSINESS OWNERS:
SHOULD YOU OFFER A MEP?*

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I. History Lesson

A. What is a MEP?

1. It's a Multiple Employer Plan
 - a. Not a multi-employer plan (the big union type plans).
2. PEOs (Professional Employer Organizations) is where this type of plan became most popular.
 - a. A MEP consisting of otherwise unrelated employers (often called an "Open MEP") participating in a "single plan"
3. Shared employee situations were also amenable to this type of plan.
 - a. Example: three separate doctor's practices in one office suite utilizing some employees on a shared basis.
 - (1) One plan covering all three employer entities.

B. Is it legal?

1. Absolutely! IRC Section 413(c) provides for the possibility of two or more unrelated employers jointly maintaining a single plan.
 - a. So, it clearly can be structured to be a qualified plan.
2. The concern: What is the status of an Open MEP under ERISA (as distinguished from the IRS qualification issues?)
 - a. Is it a single "employee pension benefit plan" under ERISA?
 - b. Is it a combination of separate plan?

C. The Controversy

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1. The Department of Labor (DOL) issued an Advisory Opinion 2012-04A that laid out their requirements for determining whether a MEP is an Open or a Closed MEP.
 - a. This is a determination UNDER ERISA, not the Internal Revenue Code.
 - b. As far as DOL is concerned:
 - (1) An Open MEP is NOT a single plan.
 - (2) A Closed MEP is a single plan.
 - c. As far as IRS is concerned, a MEP is a single plan (Open or Closed).
 - (1) However, some IRS rules apply across the plan and some apply to the individual employer adopters.
 - (a) Applied across the plan:
 - i) Eligibility, participation, benefit accrual
 - ii) Vesting
 - iii) IRC Section 415 limits
 - iv) Plan qualification generally
 - (b) Applied by employer
 - i) Nondiscrimination rules
 - ii) Coverage rules
 - iii) IRC Section 404 deductions
 - iv) DB funding requirements
 - v) Top-heavy rules
 - vi) EPCRS fillings
 - (2) A disqualifying failure caused by one employer taints the entire plan.
 - i) the "one bad apple" theory
2. What does it matter?

- a. Because, if NOT a single plan under ERISA, there are going to be requirements for SEPARATE audits, bonds, 5500 filings.
 - b. If a single plan, only a single audit, bond, and 5500.
3. DOL's concept of a "closed" MEP:
- a. Only open to employers who share common interests and/or organizational relationships BEYOND the provision of benefits. (See DOL Advisory Opinions 77-59A, 78-04A, 83-15A, and 85-02A.)
 - b. Or, plan must be established by an EMPLOYEE ORGANIZATION (ERISA Section 3(4)).
 - (1) DOL wants a commonality of interest with respect to employment relationships, or active representation of employees. (DOL Advisory Opinions 77-59A, 78-24A, 85-15A, and 85-02A.)
 - (2) Moreover, the employees MUST, at the least, have a voice in the control of the association. (See DOL Advisory Opinions 80-63A, 80-74A.)
 - (a) Example: A credit union primarily serving employees of SEVERAL employers was found NOT to be an employee organization. (DOL Advisory Opinion 85-22A).
4. Open MEPs can be open to any employer who wants to join.

II. What's all the interest about?

- A. There appears to be a belief in some quarters that small businesses don't provide enough opportunity for their employees to participate in retirement plans.
- B. There are those who suggest that an open MEP is the solution.
 1. The biggest selling point seems to be "economies of scale"
 2. Also suggested is minimal fiduciary liability.
 3. Bureau of Labor Statistics statistic:
 - a. Only 50% of those employed by firms with fewer than 100 workers have access to a workplace retirement plan.
- C. It should be noted that SEPS, SIMPLE's and payroll deduction IRAs have, in the past, been touted for solving the same problem.

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1. They haven't!
2. So maybe MEPs are the answer
3. Or maybe not
4. Anyone remember myRAs?

D. Reduction in fiduciary liability?

1. Supposedly some small employers shy away from offering a retirement plan because of the responsibilities and liabilities they might assume as ERISA fiduciaries.
2. In over 30 years, I haven't had one potential client suggest that was the reason they didn't set up a plan.
 - a. Cost of benefits for the employees was almost always number one reason.
 - b. Administrative costs was almost always a distant second.
 - c. Is this a solution to a non-existent problem?
3. The employer can never ELIMINATE fiduciary responsibility.
 - a. Want to eliminate fiduciary liability?
 - (1) Best to eliminate employee direction of investments (listen to heads explode in audience!)
 - (2) That's a discussion for another seminar.
4. DOL has suggested that expanding the "open" multiple employer plans would allow promoters of such plans to take advantage of small employers and their employees under the guise of offering a "low cost, no-liability plan"
 - a. In a letter from our good friend Phyllis Borzi to the chairman of the Senate HELP Committee.
5. Suggestions for modification of the law and regulations include eliminating fiduciary responsibility for plan sponsors in MEPS.
 - a. Suggestion is to limit the fiduciary responsibility (and liability) of the employer to just the prudent selection of the MEP sponsor.

(1) And if they pick one of those promoters who care more about taking advantage of employers than providing appropriate services, where is the limit of liability?

(a) GONE!

6. Another suggestion: provide a model MEP that

a. minimizes administrative complexities and costs

b. is not subject to complex tax qualification testing requirements

(1) QUERY: do you think such a model MEP will be more generous in eligibility and benefit options than would be required otherwise?

(2) Such a plan might be NO employer contributions required.

(3) Such a plan (it is suggested) would allow the maximum 401(k) deferral with no non-discrimination testing?

(a) Think Congress is going to allow "doctor" plans where all the docs can maximize their 401(k) deferrals and the employees put away and get NOTHING?

(b) How many of those employees would be deferring more than the IRA maximum?

i) Payroll deduction IRAs would probably work much better.

ii) Advocates tout automatic enrollment and escalation, but many employees would opt out.

a) Many employees in small businesses don't participate because they can't afford it.

E. "Outsourcing" Plan Administration Duties

1. More entities popping up that sell "outsourcing"

a. Isn't that what most of us are already doing for our clients?

2. There are certain functions that just can't be outsourced.

a. The employer has to provide the employee information; no one else can.

(1) Employee census data

(2) Employee deferral data

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- (3) Employer contribution data
 - (a) Would you trust the payroll firm to do it?
- b. Can't outsource the election of the service provider!
 - (1) That's a fiduciary duty.
- 3. Are the "economies of scale" really substantial?
 - a. Probably modest at best.
 - b. Each employer in the plan still needs all the administrative assistance that they would get if they had their own plan.
 - (1) What substantive cost items would be eliminated with a MEP?
 - (2) The individual employers have to generally have their plans run as if they were truly separate.
 - (a) Contribution calculations
 - (b) Testing
 - (c) Enrollment meetings (if done)
 - i) All need to be done as if it was just one plan
 - c. There are good service providers today who provide services to small plans at reasonable prices.
 - (1) I'm not talking about the admin factories that often do a less than credible job and that no one you talk to really understands what this is all about.
 - d. There are a number of entities suggesting they will take over the fiduciary responsibilities but when you look at the fine print, there are many responsibilities that are left with the employer.
 - (1) One critic has identified anywhere from 150 - 212 functions for proper plan administration.
 - (a) Many of these so called 3(16) administrators leave many of those functions to the employer.
 - (b) How much protection does that give you?

III. Are MEPS just a marketing gimmick?

A. From the 2012 US Government Accountability Office Report:

1. "MEPs are marketed as providing several advantages for employers over single-employer plans, but GAO found that these advantages may not always be unique to MEPs."

B. The idea that small employers cannot provide low-cost plans to their employees is a myth.

1. Perpetuated by vested interests in the financial services industry.
2. MEPS said to be a solution to a problem that does not exist

C. It is said that:

1. Streamlining plan design concerns and standardizing investment line-ups across many small business 401(k) plans allow small employers to pool resources and negotiate better deals with plan service providers.
 - a. just like the big boys do!
2. Maybe that was true many years ago when mutual funds had high loads and index funds didn't exist.
 - a. Today, low cost plans are available to almost all employers regardless of size.
 - (1) Vanguard S&P 500 Index Fund charges expenses of \$500 per year PER MILLION DOLLARS.
 - (a) I tell clients "that's pretty much free".
 - (b) Should the client pay 1% (\$10,000 a year) or even .5% (\$5,0000 a year) to an investment firm/broker for that product?

D. Why the big interest in open MEPs?

1. Lobbying from Wall Street.
 - a. Big fund companies see them as a cheap way to gather assets from small business 401(k) plans.
 - b. Actively managed mutual funds have lagged passive index funds for years.

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- c. Distribution model utilizing brokers and investment advisors for retail distribution is expensive.
- d. MEPS provide a direct sale channel to small business plans that can eliminate the cost of the broker-dealer middleman.

(1) The investment company sells direct.

IV. Do You Need To Offer Your Client's A MEP?

- A. A question only you can answer.
- B. In our firm, a MEP offers no advantages to the client in most of our situations.
 - 1. Most plans don't have participant direction.
 - 2. Most plans are invested in low cost investments
 - a. lost of index investments
 - b. and they typically do better than managed accounts (again, another subject for another day).
 - 3. Each plan would have to be administered separately when looking at our own systems.
 - a. The only "savings" would be in the master document.
 - b. But we don't charge separately for documents and our annual fee for document compliance is moderate and wouldn't be eliminated.
 - c. We don't want one employer's timeliness to affect other employer's results.
- C. Ask yourself if there is much push from the Service Provider side to have MEPS become more widely used.