

## LAW &amp; POLICY GROUP

**GRIST****RULES FOR DC MULTIPLE-EMPLOYER PLANS EASED AS DOL SEEKS INPUT ON OPEN MEPS**

*By Mercer's Margaret Berger and Brian Kearney  
July 31, 2019*

A final Department of Labor (DOL) [rule](#) makes it easier for employers to join 401(k) and other defined contribution (DC) multiple-employer plans (MEPs). Intended to expand access to retirement plans, the rule allows employers in the same industry or certain geographic areas to offer “association retirement plans.” MEPs can also be sponsored through professional employer organizations (PEOs) — companies that contractually assume certain employment-related functions for clients. The final rule is nearly identical to the proposal, with only a few changes to the PEO provisions. DOL has also published a [request for information](#) (RFI) seeking input on further rule changes to facilitate MEPs sponsored by unrelated employers (“open MEPs”). The final rule takes effect Sept. 30, and comments on the RFI are due Oct. 29.

**PUSH FOR EXPANDED USE OF MEPS**

The new rule is a response to a 2018 [executive order](#) requiring DOL and IRS to consider policies that would enhance retirement security — particularly by expanding the availability of MEPs to small employers. Although not limited to small employers, the rule helps them band together to reduce the costs of offering DC plans to their employees.

The final rule stops short of allowing the type of open MEPs found in several bills before Congress, including the House-passed Setting Every Community Up for Retirement Enhancement Act ([HR 1994](#)). That bill would also provide relief from the “one bad apple” rule, which says that a violation of the plan qualification rules by one participating employer can jeopardize the entire MEP’s tax qualified status. IRS recently [proposed](#) some relief from that rule, but the proposal is still in the comment phase.

**OVERVIEW OF RULE**

Under ERISA, an employee benefit plan can be sponsored by “any person acting directly as an employer, or indirectly in the interest of an employer ... [including] a group or association of employers acting for an employer in such capacity.” The statute doesn’t define a group or association of employers or what it means to act indirectly on behalf of an employer. However, DOL has addressed these points over the years in various pieces of regulatory and subregulatory guidance.

### Association MEPS

DOL has long allowed employers to join “closed MEPS,” sponsored by groups or associations of employers with “genuine economic or representational interests unrelated to the provision of benefits.” The rule confirms that groups of employers in the same trade, industry, line of business or profession can establish these association MEPS.

The rule now also permits unrelated employers in the same state or metropolitan area (even if spanning multiple states) to join an association MEP. Geography-based MEPS are allowed even if the primary purpose of the group or association is to provide MEP coverage, as long as the group shares another substantial business purpose unrelated to providing benefits.

Association MEPS must meet several other requirements — for example, a plan must be controlled (in both form and substance) by participating employers. This requirement (and other aspects of the group or association MEP rules) track some of the final DOL association health plan (AHP) [rules](#).

### PEO MEPS

A PEO can now sponsor MEPS if it performs substantial employment functions for the participating employers. The PEO must act as the MEP’s plan sponsor, plan administrator and named fiduciary and have substantial control over the MEP’s activities. Participation in the MEP must be limited to current and former employees of the PEO and its participating client-employers (and their beneficiaries).

The final rule’s provisions on PEO MEPS are nearly identical to the original proposal, except for the following minor changes:

- **PEO safe harbor.** The largest change from the proposed rule is the safe harbor for determining if a PEO performs substantial employment functions for its client-employers. The proposal included two safe harbors: one for certified PEOs (CPEOs) and another for non-CPEOs. In response to comments, the final rule provides a single streamlined safe harbor for all PEOs. But the final rule reiterates that a PEO performing substantial employment functions may satisfy that MEP requirement without meeting the safe harbor, depending on the facts and circumstances.
- **PEO obligations continue after employer terminates contract.** In response to comments, the final rule clarifies that the PEO’s fiduciary obligations toward plan participants continue even after a participating employer no longer contracts with the PEO.

### Other Key Provisions

**Excluded MEP sponsors.** Banks, trust and insurance companies, securities broker-dealers, recordkeepers, third-party administrators, and other commercial enterprises that provide retirement plan products and services can’t sponsor a MEP. In addition, the rule generally prohibits any entity owned or controlled by such organizations and any of their subsidiaries or affiliates from sponsoring a MEP.

**‘Working owners’ can participate.** Working owners — such as sole proprietors and “gig” or “contingent” workers — can join association MEPS under certain conditions (such as if they work on average at least 20

hours per week or 80 hours per month). But working owners with no common-law employees can't join PEO MEPS (on the theory that owners with no employees have no need for PEO services beyond providing benefits).

**MEPs as single ERISA plans.** An association or PEO MEP is considered a single ERISA plan, meaning ERISA's requirements — including those governing plan documents, reporting and disclosure, and selection and monitoring of plan investments — apply to the MEP instead of each participating employer. But participating employers still have ERISA fiduciary duties to prudently select and monitor the arrangement and timely deposit contributions to the MEP.

#### RELATIONSHIP TO ASSOCIATION HEALTH PLAN RULE

The final rule, like the proposal, deliberately tracks DOL's 2018 AHP rule, so employers that want to provide both AHPs and MEPS can do so under a uniform and consistent set of rules. But a federal court struck down portions of the AHP rule in March 2019 (*New York v. US Dep't of Labor*, No. 18-1747 (D.D.C. March 28, 2019)). The court found DOL had unreasonably expanded ERISA's definition of "employer" by including groups that share only the same geographic area (and no real commonality of interest) and working owners without employees. DOL is appealing that decision and, in the meantime, [says](#) it won't pursue enforcement against AHPs formed under the new rules before the court decision.

Despite the legal setback, DOL left these provisions in the final MEP rule. However, DOL added a "severability" provision (copied from the AHP rule) to the final MEP rule. Under that provision, if one part of the rule is found invalid or unenforceable, the remainder of the rule will stay in force. This could save the PEO MEP provisions if the expanded association retirement plan provisions are found to violate ERISA.

#### REQUEST FOR INFORMATION ON OPEN MEPS

Along with the final rule, DOL released a RFI on whether to amend its regulations to facilitate the sponsorship of open MEPS. The RFI comes partly in response to comments received on the proposed association and PEO MEP rule. Several of those comments raised concerns that convinced DOL to further consider the concept of open MEPS and gain a deeper understanding of the topic.

The RFI asks several broad questions, including whether DOL should allow financial service companies and other commercial entities (such as banks, trusts, broker-dealers and pension recordkeepers) to establish MEPS, and what kinds of conflicts might arise from such arrangements. The RFI also asks whether the rules should permit "corporate MEPS" for groups of organizations that have some common ownership but are not in the same controlled group.

#### RELATED RESOURCES

##### Non-Mercer Resources

- [Final Rule on Association Retirement Plans and Other Multiple-Employer Plans](#) (Federal Register, July 31, 2019)
- [Request for Information on Open MEPS and Other Issues](#) (Federal Register, July 31, 2019)

- [Fact Sheet: Final Rule on Association Retirement Plans \(ARPs\)](#) (DOL, July 29, 2019)
- [News Release on Final MEP Rule](#) (DOL, July 29, 2019)
- [Proposed Regulation on MEPs and the Unified Plan Rule](#) (Federal Register, July 3, 2019)
- [HR 1994](#), Setting Every Community Up for Retirement Enhancement (SECURE) Act (Congress, May 23, 2019)
- [Response to Decision in \*New York v. US Dep't of Labor\*](#) (DOL, April 29, 2019)
- [New York v. US Dep't of Labor](#), No. 18-1747 (D.D.C. March 28, 2019)
- [Executive Order 13847](#), Strengthening Retirement Security in America (White House, Aug. 31, 2018)
- [Final Rule on Association Health Plans](#) (Federal Register, June 21, 2018)

#### **Mercer Law & Policy Resources**

- [IRS Proposes Relief from 'One Bad Apple' Rule for DC Multiple-Employer Plans](#) (July 3, 2019)
- [Litigation, Legislation Leave AHP Guidance in Flux](#) (May 2, 2019)
- [Association Health Plans Offer New Opportunities for Employers Under Final DOL Rule](#) (Nov. 8, 2018)

*Note: Mercer is not engaged in the practice of law, accounting or medicine. Any commentary in this article does not constitute and is not a substitute for legal, tax or medical advice. Readers of this article should consult a legal, tax or medical expert for advice on those matters.*