



DOL Releases Guidance on Multiple Employer Plans

On May 25, 2012, the Department of Labor (DOL) released Advisory Opinion 2012-04A, finding that that *many of the multiple employer plans (MEP) marketed to unrelated employers do not, in fact, qualify as MEPs under ERISA.* This position provides an opportunity for those involved with such arrangements between unrelated employers to evaluate their situation in a new light.

The Advisory Opinion – available on the DOL’s website [here](#) - addressed a specific Open MEP structure, but its analysis is also instructive to associations, PEOs, and other organizations that sponsor or are considering sponsoring a MEP.

In practice, ‘Open’ MEPs are set up as a single retirement plan in which unaffiliated employers participate – that is, employers that are not part of an association or organization, are not related by ownership, and have no common connection other than the employee benefit plan.

The Unraveling.

Consistent with prior rulings, the DOL found that where several unrelated employers execute participation agreements or similar documents as a means to fund benefits, *in the absence of any genuine organization relationship among employers, there is no proper sponsoring organization as required by ERISA.*

“In effect, there is no MEP at all.”

The impact of this test is critical because adopting employers of an Open MEP with this problem now:

- *retain* fiduciary responsibility and liability

- *are responsible for* their organization’s plan document
- *must address* Form 5500 filing obligations
- *are responsible for* any required plan audits
- *must address* administrative responsibilities they had previously delegated to the purported MEPs sponsoring entity.

In effect, there is no MEP at all. Rather what exists are a series of individual employer plans covered under a common plan document. The potential impact to the adopting employers of an MEP that cannot meet the DOL’s requirements is significant, essentially removing all the benefits enjoyed by adopting an MEP in the first place. Under a MEP, adopting employers expect to have reduced plan administration expenses by sharing costs with other adopting employers for a single Form 5500, independent audit, plan document, and IRS determination letter filing. Further, many employers that adopt a MEP do so out of a desire to reduce their fiduciary liability by delegating investment and fiduciary duties to the MEP sponsor and/or investment professional. In the facts addressed by the DOL ruling, the above expense savings and fiduciary liability benefits are eliminated.

Law and Analysis. ERISA requires that employee benefit plans, including MEPs, be established or maintained by an employer or employee organization (such as a labor union). An “employer” under ERISA is an entity acting directly as an employer or indirectly, as in the case of an employer group or association.

Noted factors the DOL details in determining whether an entity is a **bona fide employer group or association** include:





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- how members are solicited,
- who is entitled to participate and
- who actually participates in the association,
- the process by which the association was formed,
- the purposes for which it was formed,
- the preexisting relationships of its members, *and*
- *who actually controls and directs the activities and operations of the benefits program.*

Control over a Group or Association Benefit Program. In the recent opinion and in prior opinions, the DOL's analysis of whether a "group or association" existed emphasized the last element regarding actual **control** of activities and operations of the benefits program. The DOL went on to state that, "employers that participate in a benefit program must . . . exercise control over the program . . . in order to act as a bona fide employer group or association with respect to the program."

Employers may demonstrate control over a benefit program by:

- establishment of the plan and trust,
- plan amendments,
- administration of the plan,
- having a right to terminate the plan,
- the formation of a MEP's Board of Trustees, and
- the Board's voting rights, and authority over the program.

Conclusion & Next Steps. In Advisory Opinion 2012-04A, the DOL reached the same conclusion it has in the past regarding ERISA's requirement that an employee benefit plan must be sponsored by a qualified employer or employer group or association. Importantly, the opinion provides insight into the DOL's views on groups or associations that sponsor a MEP. Organizations that currently sponsor or participate in, and those considering establishing or joining, a MEP should review the ruling with legal counsel to ensure that the structure, control, and management of the benefit program satisfy the requirements of ERISA.

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