Pools Employer Plan

Why PEP?

POOLED EMPLOYER PLAN (**PEP**) created in 2019 under the Setting Every Community Up for Retirement Enhancement Act of 2019 (**SECURE Act**) intends to:

- Extend retirement plan accessibility especially to small employers (according to the Federal Reserve Report on the Economic Well-Being of U.S. Household in 2018[1], "One-quarter of the nonretired indicate that they have no retirement savings or pension whatsoever. Of the non-retired age 60 and older, 13 percent have no retirement savings or pension.")
- By pooling assets and resources from many small employers reduces the cost to adopt, offer and administer an account-based, self-directed defined contribution retirement plan to employees
- Offer large plan and institutional practices.

From MEP to Open MEP or PEP

Historically, ERISA permits a **MULTIPLE EMPLOYER PLAN** (**MEP**) to be established or maintained by a bona fide group or association of employers that is controlled by the employer members and that acts in the interests of its employer members to provide benefits to their employees. This approach is based on the premise that the person or group that maintains the plan is tied to the employers and employees that participate in the plan by some common economic or representational interest or genuine organizational relationship (a nexus) unrelated to the provision of benefits.

The SECURE Act removed possible legal barriers (removed the nexus requirement) to the broader use of MEPs by authorizing a new type of ERISA-covered defined contribution plan—a **PEP** operated by a ''**POOLED PLAN PROVIDER**" (**PPP**). The SECURE Act amended section 3(2) of ERISA to authorize these pooled employer plans, which offer benefits to the employees of multiple unrelated employers without the need for any commonality among the participating employers or other genuine organizational relationship unrelated to participation in the plan, thus enabling a type of open MEP.

What is a PEP[2]?

A PEP allows most of the administrative and fiduciary responsibilities of sponsoring a retirement plan to be transferred to a PPP. Therefore, a PEP can offer employers, especially small employers, a workplace retirement savings option with reduced burdens and costs compared to sponsoring their own separate retirement plan. The effective date for these provisions allows PEP to begin operating on January 1, 2021.

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[1] https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf
[2] https://www.govinfo.gov/content/pkg/FR-2020-11-16/pdf/2020-25170.pdf

Under section 3(2) of ERISA, a PEP is treated for purposes of ERISA as a single plan that is a multiple employer plan. A PEP is generally defined in section 3(43) as a qualified retirement plan that is an individual account plan or a plan that consists of individual retirement accounts described in IRC § 408 that is established or maintained for the purpose of providing benefits to the employees of two or more employers, the terms of which meet certain requirements.

What are PEP Requirements

Specifically, the terms of the plan must:

- designate a PPP and provide that the PPP is a named fiduciary of the plan;
- designate one or more trustees (other than an employer in the plan) to be responsible for collecting contributions to, and holding the assets of, the plan, and require the trustees to implement written contribution collection procedures that are reasonable, diligent, and systematic;
- provide that each employer in the plan retains fiduciary responsibility for the selection and monitoring, in accordance with ERISA fiduciary requirements, of the person designated as the PPP and any other person who is designated as a named fiduciary of the plan, and the investment and management of the portion of the plan's assets attributable to the employees of that employer (or beneficiaries of such employees) in the plan;
- provide that employers in the plan, and participants and beneficiaries, are not subject to unreasonable restrictions, fees, or penalties with regard to ceasing participation, receipt of distributions, or otherwise transferring assets of the plan in accordance with applicable rules for plan mergers and transfers;
- require the PPP to provide to employers in the plan any disclosures or other information that the DOL may require, including any disclosures or other information to facilitate the selection or monitoring of the PPP by employers in the plan;
- require each employer in the plan to take any actions that the DOL or PPP determines are necessary to administer the plan or to allow for the plan to meet the ERISA and IRC requirements applicable to the plan, including providing any disclosures or other information that the DOL may require or which the PPP otherwise determines are necessary to administer the plan or to allow the plan to meet such ERISA and IRC requirements; and
- provide that any disclosure or other information required to be provided to participating employers may be provided in electronic form and will be designed to ensure only reasonable costs are imposed on PPPs and employers in the plan. The fidelity bonding requirements in ERISA §412 apply to fiduciaries and other persons handling the assets of a pooled employer plan, but the maximum bond amount for each such plan official is $1,000,000.

What is a PPP?

The SECURE Act does not limit the class of persons who can act as PPPs, but it is expected that many financial services companies (such as insurance companies, banks, trust companies, consulting firms, record keepers, and third-party administrators) will be PPPs. However, §3(44) does require as a condition of being a PPP that the person ''registers as a PPP with the DOL, and provides to the DOL such other information the Department may require, before beginning operations as a pooled plan provider.''

A PPP with respect to a PEP is defined in ERISA § 3(44) to mean a person that—

- is designated by the terms of the plan as a named fiduciary under ERISA, as
    - the plan administrator, and
    - the person responsible to perform all administrative duties (including conducting proper testing with respect to the plan and the employees of each employer in the plan) that are reasonably necessary to ensure that the plan meets the IRC requirements for tax-favored treatment and the requirements of ERISA and to ensure that each employer in the plan takes such actions as the DOL or the PPP determines necessary for the plan to meet Code and ERISA requirements;
- acknowledges in writing its status as a named fiduciary under ERISA and as the plan administrator;
- is responsible for ensuring that all persons who handle plan assets or are plan fiduciaries are bonded in accordance with ERISA requirements; and
- registers as a pooled plan provider.

PPP Registration[3]

The primary statutory purpose of the registration requirement is to provide the Department with sufficient information about persons acting as PPPs to engage in effective monitoring and oversight of this new type of ERISA-covered retirement plan.

Registration requirements can be divided into three sets of filing obligations corresponding to the timing of specific events.

1. There is an initial registration filing of basic identifying information about the PPP and additional information about pending legal or administrative proceedings.
2. There is a supplemental filing or filings requirement if there is a change in the information that was reported in the initial registration or if there is a significant new financial and/or operational event related to the pooled plan provider. A supplemental filing also is required when a PEP starts operations. The requirement for supplemental information is intended to provide the agencies, participating employers and employees, and the public information about noteworthy events occurring after the initial registration. And,
3. There is a final filing required once the last pooled employer plan has been terminated and ceased operations.

3 https://www.dol.gov/newsroom/releases/ebsa/ebsa20201112#:~:text=The%20final%20rule%20establishes%20a,30%20days%20before%20beginning%20operations.

Retirement Plans Startup Costs Tax Credit [4]

As provided under the SECURE Act, eligible employers may be able to claim a tax credit of up to $5,000, for 3 years, for the ordinary and necessary costs of starting a qualified plan (like a 401(k) plan.) A tax credit reduces the amount of taxes owed on a dollar-for-dollar basis. Credit for Small Employer Pension Plan Startup Costs - Form 8881 PDF (https://www.irs.gov/pub/irs-pdf/f8881.pdf).

Eligible employers are defined as:

- 100 or fewer employees who received at least $5,000 in compensation from the same employer for the preceding year;
- There is at least one plan participant who was a non-highly compensated employee (NHCE); and
- In the three tax years before the first year the employer is eligible for the credit, employees weren't substantially the same employees who received contributions or accrued benefits in another plan sponsored by the same employer or a member of a controlled group that includes the employer, or a predecessor of either.

An eligible employer that adds an auto-enrollment feature to their plan can claim a tax credit of $500 per year for a 3-year taxable period beginning with the first taxable year the employer includes the auto-enrollment feature.

Annual PEP Reporting and Auditing

- Only one Form 5500 needs to be filed for the entire PEP—individual employers are not required to file their own Form 5500s.
- Simplified reporting (i.e. no audit required) is available if (i) no single employer participating in the plan has 100 or more covered participants, and (ii) there are fewer than 1,000 participants in the plan overall.

[4] https://www.irs.gov/retirement-plans/retirement-plans-startup-costs-tax-credit#:~:text=Eligible%20employers%20may%20be%20able,dollar%2Dfor%2Ddollar%20basis