THE PEP ASSESSMENT TOOL

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PREPARED BY

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The following materials were prepared by Jeff Atwell, President of TRG Fiduciary Services, LLC, and Bruce Ashton, Esq., Senior Counsel of Faegre Drinker Biddle & Reath LLP, and are for informational purposes only. This Assessment Tool is designed to provide information to employers that may be interested in participating in a pooled employer plan and to their advisors. This document does not constitute legal or fiduciary advice, and readers should discuss any legal or fiduciary issues with their legal and financial advisors. These materials are current as of June 2021. There is no affiliation between TRG Fiduciary Services, LLC and Faegre Drinker Biddle & Reath LLP.

THE **PEP** ASSESSMENT TOOL

The 2019 SECURE Act created a new kind of retirement plan called a "pooled employer plan" or PEP.[1] PEPs may present significant advantages for many employers by reducing their administrative burdens, shifting most of their fiduciary responsibilities to professionals and lowering certain costs of the plan. This Assessment Tool is designed to assist employers and their advisors in determining whether a PEP is right for them.

First, we need to start with an overview. PEPs are an outgrowth of multiple employer plans, or MEPs, but with some significant differences discussed later. To understand the uniqueness of PEPs and why they aren't just another version of a MEP, we first need to review the MEP concept.

Multiple Employer Plans

There are a number of perceived advantages of MEPs:

- A reduction in costs by aggregating the assets and administration of many plans into a single trust;
- The shifting of administrative burdens from individual businesses to centralized professional service providers; and
- A shifting of fiduciary responsibility from the individual businesses to one or more entities that are willing to take on most (though not all) of the fiduciary responsibilities for running the plan.

So far, this sounds similar to the advantages we listed for PEPs. But there are important distinctions.

The Law Governing MEPs

Multiple employer plans are governed by section 413(c) of the Internal Revenue Code (the "Code"). Under this section, a MEP is a single plan maintained by more than one employer.[2] For these purposes, companies that constitute a controlled group or are a group of trades or businesses under common control (as defined in Code sections 414(b) and (c)) are considered to be "related" and are thus treated as one employer. So a MEP is a group of unrelated employers. Section 413(c) provides a number of special rules for a MEP in terms of participation, vesting, funding, deductions and treatment of the assets and liabilities of the plan.[3] The regulations under section 413 also provide what has become known as the "one bad apple" rule. The section states:

> *...the failure by one employer maintaining the plan (or by the plan itself) to satisfy a applicable qualification requirement will result in the disqualification of the section 413(c) plan for all employers maintaining the plan.*[4]

In other words, the actions or failure to act by one adopting employer can disqualify the entire plan, even though the other adopting employers are fulfilling the requirements. While the IRS offers correction programs that can be used to help avoid this result, it nonetheless has remained a concern that has discouraged employers from joining MEPs in some cases.

There is no similar concept under the Employee Retirement Income Security Act (ERISA). ERISA defines an "employer" as:

> *any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.*[5]

1. Setting Every Community Up for Retirement Enhancement Act of 2019 (referred to as the "SECURE Act"), Section 101, which added new §413(e) to the Internal Revenue Code, §§3(43) and (44) to the Employee Retirement Income Security Act and made other conforming amendments.
2. Treas. Reg. §1.413-2(a)(2).
3. Code §413(c)(1) through (7).
4. Treas. Reg. §1.413-2(a)(3)(iv).
5. ERISA §3(5).

For retirement plan purposes, the Department of Labor (DOL) has, until fairly recently, held that in order for a plan adopted by multiple unrelated employers to be treated as a single plan, there would need to be a "commonality of interest" or "nexus" among the employers that is unrelated to the provision of benefits.[6] The DOL stated:

> *It has been the Department's consistent view that where several unrelated employers merely execute identically worded trust agreements or similar documents as a means to fund or provide benefits, in the absence of any genuine organizational relationship between the employers, no employer group or association exists for purposes of ERISA section 3(5).*[7]

As a result, while a plan adopted by multiple unrelated employers under Code section 413(c) is treated as a single plan, such a plan would not be a single plan for ERISA purposes unless the required commonality of interest exists. This means that each adopting employer would be treated as having a separate plan that, among other things, must file a separate Form 5500 and have a separate financial audit if that employer's portion of the plan would otherwise be required to have a financial audit.

The MEP Market

The DOL's stance has not forestalled the creation of what are commonly referred to as "Open MEPs", that is, plans that are set up by a service entity for adoption by employers that have no commonality other than the adoption of the service entity's plan. These plans (and other structures that result in the aggregation of plan assets and the shifting of administrative and fiduciary obligations) offer many of the advantages discussed earlier, even though each adopting employer's plan must file its own Form 5500.

In 2019, the DOL modified its stance somewhat by adopting a regulation defining Association Retirement Plans or ARPs.[8] These plans must meet a number of requirements, including the requirement that the association is controlled by its employers and the plan is controlled by the participating employers.

However, the commonality of interest requirement has been greatly simplified. The regulation only requires that adopting employers be in the same trade, industry, line of business or profession or have a principal place of business in the same state or metropolitan area (even if the metropolitan area includes more than one state).[9] On the other hand, the regulation limits the type of entity that may serve as the sponsor of the plan, by excluding a bank, trust company, insurance company, broker-dealer or "similar financial services firm." [10]

ARPs have not gained much traction, possibly because service providers and employers were anticipating legislation that would further simplify the creations of a multiple employer plan. This anticipation was addressed with the creation of PEPs.

Pooled Employer Plans

In a sense, PEPs are like MEPs in that they are governed by many of the provisions of Code section 413(c). However, they are different because of the elimination of the nexus requirement and the "one bad apple" rule and the addition of new requirements for ERISA purposes. When the new requirements are met, a PEP will be treated as a single plan under ERISA as well as under the Code. And this should make PEPs more attractive in that they will be easier to establish and for participating employers to avail themselves of the advantages of the multiple employer plan type of structure.

PEP Requirements

The requirements that must be met are the following:[11]

- The PEP plan document must name a "pooled plan provider" or PPP that serves as a named fiduciary of the plan, responsible for the administrative functions of the plan and that must register with the DOL;
- The plan document must also name a trustee that is responsible for the collection of employer contributions and for holding the assets of the plan;

6. Advisory Opinion 2012-04A.
7. Id.
8. ERISA Regulation §2510.3-55, adopted in July 2019.
9. Id. at subsection (b)(2)(i).
10. Id. at subsection (b)(1)(vii).
11. See footnote 1.

- Adopting employers are responsible for the prudent selection and monitoring of the PPP and any other named fiduciaries of the plan; and
- Adopting employers are responsible for selecting and monitoring the assets of their portion of the plan unless the PPP appoints another entity to perform that function.
- The PEP is not subject to disqualification if an adopting employer fails to adhere to the terms of the plan or legal requirements, though the PPP is required to move the adopting employer's portion of the plan into a separate plan covering only that employer's employees.[12]

The SECURE Act mandates that the DOL and Treasury Department issue guidance to flesh out the statutory provisions, in large part because the new PEP structure leaves open a number of key issues. These include the permissible business structures for the provision of services to and the investments that may be included in a PEP and how to address prohibited transaction issues that are likely to arise. To date, no guidance has been issued.

The Role of the PPP

Employers need to understand the role of the PPP (the pooled plan provider), since its duties are likely different from the normal service provider role many employers may be used to. The SECURE Act says the PPP **(1)** is a named fiduciary of the PEP, **(2)** is the plan administrator of the PEP and **(3)** is the person responsible to perform all administrative duties to make sure the PEP meets the qualification requirements of the Code and that all participating employers fulfill their responsibilities (described in the next section). The fact that the Act lists each of these functions separately is significant.

ERISA provides that a named fiduciary has the "authority to control and manage the operation and administration of the plan" and is named in the plan document.[13] The role of a plan administrator (sometimes referred to as a "3(16) fiduciary") is not clearly defined, but its role is limited to specific administrative duties.[14] The plan administrator in most individual employer plans is the employer itself. By specifying that the PPP is a named fiduciary and is responsible for all administrative duties to ensure compliance with legal requirements, the Act is making clear that the PPP's obligations for plan management and oversight extends to all aspects of managing, administering and operating the plan.

The importance of the SECURE description of the PPP's role is to make it clear that the PPP has greater responsibility over the PEP and broader duties than those service providers (including some entities holding themselves out as fulfilling the PPP role) that say they are "3(16) fiduciaries" to a plan but limit their duties to only a few specified administrative functions, leaving everything else to the employer.

There is another important aspect of requiring that a PEP have a PPP with this full range of responsibilities; it has to do with the reason for the creation of PEPs in the first place. Since the adoption of ERISA in 1974, employers have had the ultimate responsibility for their plans. In essence, the duty to ensure compliance with the requirements of ERISA and the Code has fallen on the shoulders of the people trying to run a business and who have no particular training or expertise in running a retirement plan. What the SECURE Act does, in essence, is to turn this around, to shift the burdens of running the plan onto experts (the PPP), whose business it is to run plans, and out of the hands of those who are less qualified. Assuming the PPP has the expertise to fulfill all these duties, this shift is one of the greatest benefits of a PEP.

On-Going Employer Responsibilities

The list of responsibilities that normally must be met by an employer in properly establishing and administering a retirement plan for its employees is extensive. At the highest level, an employer must ensure that **(1)** the plan is properly established, **(2)** the document complies with legal requirements at all times, **(3)** the plan in operation complies with those requirements, **(4)** plan service providers are prudently selected and periodically monitored to make sure they are doing their job and their compensation remains "reasonable," **(5)** plan investments are prudently selected and monitored...and the list goes on. The details of how each of these functions is fulfilled is daunting.

As indicated in the prior section, while employers retain some responsibilities when they participate in a PEP, the list is very short. The limited on-going responsibilities of the adopting employers are reflected in the following chart.

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12. The Secretary of Labor may adopt regulations that provide a waiver of this requirement "in appropriate circumstances if the Secretary determines it is in the best interests of the employees of the [delinquent employer] to retain the assets in the [PEP]."
13. ERISA §402(a)(1) and (2).
14. ERISA §3(16).

PEP REQUIREMENTS AND EMPLOYER RESPONSIBILITIES

REQUIREMENT	PPP Responsibility	Participating Employer Responsibility
The PEP plan document must meet specific requirements plus tax qualification conditions	Yes	No
Pooled plan provider (PPP) serves as a named fiduciary of the plan	Yes	No
PPP undertakes responsibility for the administrative functions of the plan	Yes	No
PPP registers with the DOL	Yes	No
The PEP has a trustee that is responsible for the collection of employer contributions and for holding the assets of the plan	Yes	No
PEP assets are selected by an investment manager and not by participating employers	Yes (when appointed by the PPP)	No (*so long as* the PPP appoints an investment manager)
Removal of participating employers that fail to adhere to the terms of the plan or legal requirements, in order to maintain qualified status of the PEP	Yes	No
EMPLOYER RESPONSIBILITIES		
The prudent selection and monitoring of the PPP and any other named fiduciaries of the plan	No	Yes
Making contributions to the plan, including deposits of deferrals, on a timely basis.	No	Yes
Keeping the PPP informed of the current employee census and of any changes in the employer's business structure	No	Yes
Communicating with eligible employees about the availability of the PEP	No (but can assist the employers)	Yes

The following chart compares the role played by a PPP to a PEP, acting as both 402(A) named fiduciary and 3(16) plan administrator, to that played by many service providers that hold themselves out as providing "3(16) plan administrator fiduciary" services, but often leave much of the responsibility to employers. As the chart reflects, the named fiduciary assistance is much broader and the participating employers are relieved of all responsibility for the specified items.

FIDUCIARY AND ADMINISTRATIVE FUNCTIONS

FUNCTION	PPP-402(a) Named Fiduciary and 3(16) Plan Administrator	Responsibility Accepted by Typical 3(16) Provider	Employer Responsibility
Ensuring PEP document is up to date with current regulations	Yes		
Ensuring PEP operates in accordance with plan document terms, IRS, and ERISA Regulations	Yes		
Prudently selecting and monitoring service providers (recordkeeper, investment manager, auditor)	Yes		
Ensuring definition of compensation as provided in the plan document is being used	Yes		
Ensuring compliance with non-discrimination requirements	Yes		
Ensuring compliance with top-heavy requirements	Yes		
Monitoring trustee to ensure that contributions are made properly and timely	Yes		
Ensuring proper compliance with controlled group and affiliated service group requirements	Yes		
Maintaining proper fidelitybond	Yes		
Ensuring ADP requirements are being met	Yes		
Ensuring that matching contribution and non-elective contribution ACP requirements are being met	Yes		
Ensuring the PEP meets minimum participation requirements	Yes		
Ensuring contributions are within the Code §402(g), 415 and 401(a)(4) annual limits	Yes		
Ensuring that vesting is being properly calculated and applied	Yes		
Ensuring that participant loans receive approval by a responsible fiduciary	Yes		
Ensuring that the investment options are suitable and prudently selected for the participants and beneficiaries	Yes in most cases, through the ERISA §3(38) investment manager appointed by the PPP		No, unless the PPP has not appointed an ERISA §3(38) investment manager for the PEP
Ensuring that there are no transactions between the PEP and a party in interest and that the PEP does not otherwise engage in any non-exempt prohibited transactions	Yes		
Ensuring that all PEP service providers have provided adequate disclosure that meets the requirements of ERISA §408(b)(2)	Yes		

FUNCTION	PPP-402(a) Named Fiduciary and 3(16) Plan Administrator	Responsibility Accepted by Typical 3(16) Provider	Employer Responsibility
Ensuring that all service agreements are in writing and adequately and properly describe all services being provided and those not being provided	Yes		
Ensuring that all service providers are receiving no more than reasonable compensation	Yes		
Ensuring that all fees paid by the PEP are permissible, reasonable and properly accounted for	Yes		
Ensuring that any mutual fund revenue sharing or 12b-1 fees on PEP investments is being appropriately applied	Yes		
Ensuring that the PEP complies with all requirements of ERISA §404(c) where applicable	Yes		
Ensuring that PEP has a proper Qualified Default Investment Alternative (QDIA) and that proper notice is provided to participants	Yes		
Ensuring that the PEP recordkeeper properly accounts for participant and employer contributions	Yes		
Ensuring that the PEP's ERISA §3(38) investment manager meets ERISA fiduciary standards of care	Yes		
If desired, ensuring that participants receive adequate investment/financial education to help properly manage their accounts	Yes		
Ensuring that the PEP's investment alternatives allow participants to properly diversify their portfolios	Yes in most cases, through the ERISA §3(38) investment manager appointed by the PPP		No, unless the PPP has not appointed an ERISA §3(38) investment manager for the PEP
Preparing and timely filing of Form 5500	Yes	Yes	
Ensuring compliance with eligible employee enrollment and that all coverage requirements are being met	Yes	Yes	
Ensuring compliance with contribution limits	Yes	Yes	
Ensuring vesting is properly calculated and applied	Yes	Yes	
Ensuring plan loans issued and administered according to the loan policy	Yes	Yes	
Ensuring distributions made according to PEP provisions	Yes	Yes	
Ensuring Required Minimum Distributions are properly administered	Yes	Yes	
Ensuring direct rollover requirements are being met	Yes	Yes	
Ensuring that participant loans are being issued and administered according to loan policy provisions	Yes	Yes	
Ensuring that participant distributions are made according to plan provisions and receive proper participant (and where required, spouse) consent	Yes	Yes	

FUNCTION	PPP-402(a) Named Fiduciary and 3(16) Plan Administrator	Responsibility Accepted by Typical 3(16) Provider	Employer Responsibility
Ensuring that direct rollover requirements for distributions and roll-ins are being met	Yes	Yes	
Ensuring that all annual reporting, disclosure and participant notice requirements (including 404a-5 disclosures) are being met	Yes	Yes	
Ensuring that the PEP recordkeeper properly processes loans, withdrawals and distributions	Yes	Yes	

The PEP Advantage

The passage of ERISA in 1974 initiated the prudence standard of care for retirement plans. As noted earlier, employers – the parties with the least experience and least availability – were made largely responsible for ensuring that the plan and those providing services to the plan met this standard. PEPs are designed to change this around, to shift compliance with the prudence standard to those operating the PEP and leave the participating employers with the ability to manage their businesses and leave oversight and management of the plan to the professionals.

In essence, a key element of the new Pooled Employer Plan concept from the perspective of employers is that PEPs should make it easier and may make it less expensive to establish and maintain a plan for their employees. From a service provider's perspective, the PEP structure may open up new avenues for the offering of their products and services so long as they are willing and capable of taking on the fiduciary roles mandated by the law.

Properly structured and operated by knowledgeable, experienced professionals, a PEP can be highly beneficial to employers that want to provide a retirement plan for their employees.

PEPs enable the employer to have a plan without the burdens.