



AMERICAN BENEFITS
COUNCIL

September 30, 2019

The Honorable Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Dear Preston:

We very much appreciate the recent guidance on multiple employer plans (MEPs), and the accompanying request for information regarding open MEPs. Allowing employers to join together in a common plan and achieve greater economies of scale has long been a priority of the American Benefits Council (“the Council”).

Today, we write to highlight one aspect of the preamble to the final MEP regulations that raises concerns for us. We look forward to the opportunity to have further discussions on the issue, which is discussed below.

The American Benefits Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and families. Council members include over 220 of the world’s largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

EXCERPT FROM FINAL MEP REGULATIONS’ PREAMBLE

The MEP preamble stated in relevant part:

In the MEP context, although a participating employer would no longer have the day-to-day responsibilities of plan administration, the business owner would still need to

prudently select and monitor the MEP sponsor and get periodic reports on the fiduciaries' management and administration of the MEP, consistent with prior Department guidance on MEPs.

One commenter suggested that the Department should establish a "fiduciary checklist" to assist small employers in discharging their selection and monitoring duties. According to this commenter, the checklist could encourage or require employers to: (1) *consider at least three plans*; (2) *examine how long the plan has been in existence*; (3) *review how many other employers and employees are actively enrolled*; (4) *consider the investment options and all employer and participant fees*; and (5) *receive and review a report on plan operations and periodically assess employee satisfaction and complaints at least annually*. The Department recognizes that small employers often benefit from compliance guides of the type identified by the commenter. To assist business owners in carrying out their responsibilities under ERISA to prudently select and monitor plan service providers generally, the Department's EBSA, several years ago, published a compliance guide entitled "Tips for Selecting and Monitoring Service Providers for your Employee Benefit Plan." The Department's EBSA maintains this document on its website and updates it periodically. The Department agrees with this commenter that small businesses may benefit from a checklist or similar guidance on how to discharge their duties to prudently select and monitor the MEP sponsor. *Accordingly, the Department will review and possibly update the Tips document taking into consideration the five factors identified by the commenter.*¹ (emphasis added)

We recognize that the preamble simply indicates that the commenter's five factors will be taken into consideration. But in that spirit, we ask that the U.S. Department of Labor (DOL) and Employee Benefits Security Administration (EBSA) also consider the perspectives of our members who have extensive current experience with MEPs.

CONCERNS

Trade Association MEPs

We are concerned that the commenter's listed factors (1) do not reflect the way that MEPs work today, and (2) accordingly, describe the fiduciary process inaccurately.

The prototypical non-professional employer organization (non-PEO) MEP today is sponsored by a trade association made up of members that work together on numerous joint objectives and have joined together in a MEP as another means of working together to benefit the group. Typically, unrelated service providers will provide certain services to the MEP and the trade association, which is controlled by its members, will perform other services, including overseeing the unrelated service providers.

In this context, it does not make sense to consider other plans or reexamine the history and size of the plan. The employers control the trade association, and through the trade association, they control the plan. Why should employers that control a plan

¹ Federal Register, Vol. 84, No. 147, July 31, 2019, at pages 37522-37523.

have to consider another plan? Shouldn't they just use their control to ensure that the trade association adequately reviews whether plan services and fees are appropriate?

If the employers were required to consider other plans, what other plans could they consider? This is the trade association that they belong to. Generally, this is the only MEP that they could join.

This is not to say that there should not be oversight and review of the MEP. On the contrary, for example, unrelated service providers certainly should be reviewed, in the context of (1) setting fees, (2) negotiating regarding services, and (3) as appropriate, reviewing whether to change service providers.

PEO MEPs

PEO MEPs require special attention in the context of fiduciary considerations. The relationship between a PEO and its business clients goes far beyond a MEP. Any requirement for business clients to consider other MEPs likely means consideration of leaving the PEO, with effects throughout the employment relationship.

We are not suggesting in any way that services to PEO MEPs should not be subject to fiduciary review. We are simply saying that there should not be a formulaic requirement to consider other plans, since (1) the cost of such a review would be very material, (2) any such change would be costly and disruptive for participants and (3) there are other ways to ensure that PEO MEP services are adequately reviewed.

Overarching Comment

We believe that DOL's existing "Tips" document is very well done and helpful. One of the key virtues of the document is that it does not prescribe a formula for satisfying ERISA's fiduciary duties. Such duties are inherently determined based on all the facts and circumstances and do not lend themselves well to a formulaic approach.

The commenter's approach is more formulaic, with required consideration of "three" plans and "annual" considerations of specific reports, regardless of the costs and benefits of more or less frequent considerations of these or other reports. In our view, this is not the right answer. We urge DOL and EBSA to avoid such a formulaic approach, and provide any tips in a manner consistent with its existing Tips document.

We thank you for considering our views and look forward to the opportunity to discuss these issues with you further.

Sincerely,

A handwritten signature in cursive script that reads "Lynn D. Dudley". The signature is fluid and elegant, with the first letters of each word being capitalized and prominent.

Lynn D. Dudley

Senior Vice President, Global Retirement and Compensation Policy