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## New ERISA Regulation Expands Access to 401(k) Plans for Small Employers

*Legal Alert*

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In response to an Executive Order issued by the President last year directing regulatory action to expand access to workplace retirement plans, the U.S. Department of Labor (DOL) issued final regulations on the definition of the term “employer” that help expand multiple employer pension plan (MEP) availability for small employers. A MEP is a plan maintained by more than one unrelated employer. It should not be confused with a multiemployer plan, which is a plan maintained under a collective bargaining agreement. The regulation, which was effective on September 30, 2019, removes some of the regulatory burdens that prevent small businesses from participating in defined contribution plans, such as 401(k) plans. Many small employers do not offer 401(k) or other retirement plans to their employees because of the time and expense of sponsoring and managing such a plan. Small employers often lack the size and resources to negotiate favorable fees from retirement plan service providers to sponsor their own stand-alone retirement plans at an affordable cost.

The final regulation will permit small employers to join together to participate in a single MEP. Small employers will now be able to combine resources to negotiate more favorable fees from service providers, which makes offering a retirement plan to their employees a more realistic option. This facilitates employee participation and retirement savings because (1) small employers will be more willing to offer a plan to their employees and (2) fees associated with operating the plan (which are often passed through to the participants by reducing net earnings on investments) can be lower.

Additionally, small employers will benefit from the MEP being subject to plan-wide compliance requirements, such as conducting a single annual audit, maintaining one fidelity bond and filing one annual report on Form 5500. While participating employers still will be treated as separate employers for purposes of discrimination testing relating to contributions, benefits and coverage for their own employees who participate in the MEP, failure of any participating employer to comply with these rules could jeopardize the tax-qualification of the entire MEP. The IRS, with the consultation of the DOL, has issued proposed regulations that would protect the qualified status of the MEP despite any participating employer’s failure to comply with the applicable non-discrimination rules. Although the proposed regulation cannot be relied on until it has been adopted as a final regulation, existing IRS correction programs have established sanctions for non-compliance short of plan disqualification. Until adoption of the final regulation, the rationale behind the proposed rules and the IRS willingness to accept alternatives to disqualification may indicate that IRS would be inclined to treat a MEP with a non-compliant participating employer less harshly than current law allows.

Small employers participating in a MEP also would retain limited fiduciary responsibilities. For example, employer-members must continue to be prudent in the selection and monitoring of service providers and would also be responsible for the timely remittance of contributions to the plan.

The final regulation is applicable to MEPs sponsored by bona fide groups or associations of employers (Associations), and bona fide professional employer organizations (PEOs).

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## Bona Fide Employer Groups or Associations

Under the final regulation, a group or association of employers is considered "bona fide" if the following requirements are met:

1. The Association must have at least one substantial purpose unrelated to sponsoring a MEP, although, sponsorship of the MEP can be its primary purpose.
2. Each employer-member of an Association must be acting directly for at least one employee who is covered under the MEP.
3. The Association must have a formal organizational structure with a governing body and by-laws, or other similar indications of formality.
4. The Association and the MEP must be controlled by its employer-members.
5. The employer-members must have a "commonality of interest," which exists if the employer-members (i) are in the same industry, trade, line of business or profession, or (ii) have a principal place of business that does not exceed the boundaries of a single state or metropolitan area.
6. Only employees and former employees of the employer-members (and their beneficiaries) may participate in the MEP.
7. The Association cannot be a bank, trust company, insurance issuer, broker-dealer, or other similar financial services firm, nor can the Association be owned by or affiliated with such entities.

## Bona Fide PEOs

Under the final regulation, a PEO is considered "bona fide" if the following requirements are met:

1. The PEO performs "substantial employment functions," and maintains adequate records related to such functions, on behalf of its client employers that adopt the MEP. Whether "substantial employment functions" are performed by a PEO is based on the facts and circumstances of each situation.
2. The PEO has substantial control over the MEP's functions and activities, acts as the plan sponsor and the plan administrator and is a named fiduciary of the MEP.
3. Each employer that adopts the MEP must act directly as the employer of at least one employee who is covered by the MEP.
4. Only employees and former employees of the PEO (and their beneficiaries) and the PEO's client employers may participate in the MEP.

The final regulation does not address so-called "open" MEPs or "corporate" MEPs. An "open" MEP is a MEP that covers employees of employers with no relationship other than their joint participation in the MEP. A "corporate" MEP covers employees of employers related by some level of common ownership, but that are not in the same "controlled" or "affiliated" group of employers. Issues raised in connection with "open" and "corporate" MEPs will continued to be considered by the DOL.

*If you have any questions about this alert or questions about your compensation and/or employee benefits program, please feel free to contact Eric Loi, Allen P. Fineberg, or any member of Flaster Greenberg's Employee Benefits and Executive Compensation Group.*

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**ATTORNEYS MENTIONED**

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