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Multiple Employer Plans: An ERISA Enigma

By S. Derrin Watson

Although the basic concept has been with us for many years, multiple employer plans (MEPs) have been growing in public awareness. Formerly the domain of Professional Employer Organizations (PEOs) and shared employee situations, several plan administration and investment firms are promoting multiple employer retirement plans of otherwise unrelated employers (sometimes called "open MEPs") as a mechanism to reduce costs and fiduciary exposure while providing various benefits to employees.

Some are questioning the status of open MEPs under ERISA. At issue is whether a properly structured open MEP is a single "employee pension benefit plan" under ERISA, or whether it is a combination of separate plans. The distinction is critical. If the MEP is a single plan under ERISA, then it files a single Form 5500, which requires at most one independent audit. If it is a series of separate plans, then arguably each employer must file a separate Form 5500, each with its own separate audit requirement.

What is not at issue is the status of a MEP under the Internal Revenue Code. Code Section 413(c) clearly provides for the possibility of two or more unrelated employers jointly maintaining a single plan. This means these ERISA concerns do not adversely impact the status of a MEP as a qualified plan.

This article will explore the ERISA provisions that relate to the status of plans involving more than one employer. As a necessary part of that process, the article will examine the ERISA definitions of employer and employee, and contrast the ERISA rules to the corresponding Code rules. The reader will see throughout the years a consistent pattern of DOL rulings that MEPs without strong ties between the owners are not single ERISA plans, but rather are multiple plans.

S. Derrin Watson is an attorney and pension educator working with SunGard in their Relius Education Division.

Core ERISA Definitions

Under ERISA Section 3(2), an employee pension benefit plan is generally "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—(i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond."

The key portion of that definition as it relates to MEPs is the requirement that the plan be "established or maintained by an employer or by an employee organization, or by both." An identical requirement appears in ERISA Section 3(1) defining an "employee welfare benefit plan." An employee benefit plan under ERISA Section 3(3) is an employee pension benefit plan, an employee welfare benefit plan, or both.

This is important because many DOL advisory opinions, as this article discusses, interpret the "established or maintained by an employer" requirement as it applies to welfare plans. Under general legal rules of statutory construction, one phrase used in a statute in two different contexts should have the same meaning in both contexts unless there is some indication in the statute that a different interpretation is warranted. There is no reason that the welfare interpretation of that phrase would differ from the pension interpretation. Some have argued that, because there are different policy considerations that apply to retirement and welfare plans, the ERISA status of multiple employer retirement plans could or should be different from that of welfare plans in a similar situation. However appealing the policy argument may be, it finds no support in the statute, regulations, or DOL rulings. No welfare plan ruling cited herein turned on whether the arrangement was potentially "abusive." Rather, they all relied on the same definition of "employer" that ERISA uses for pension benefit plans.

ERISA Section 3(5) 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." DOL advisory opinions addressing MEPs frequently apply this provision to hold that a particular set of sponsors does not constitute an employer under this definition.

Even if a plan is not established or maintained by an employer, the plan is still an ERISA pension benefit plan if an employee organization has established or maintains the plan. Under ERISA Section 3(4), an employee organization is "any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan."

The DOL views the presence of an employee organization narrowly, requiring a commonality of interest with respect to employment relationships or active representation of employees. [*See, e.g.,* DOL Advisory Opinions 77-59A, 78-04A, 83-15A, and 85-02A.] Moreover, the employees must, at the least, have a voice in the control of the association. [*See* DOL Advisory Opinions 80-63A, 80-74A.] A credit union primarily serving employees of several related employers was found not to be an employee organization [DOL Advisory Opinion 85-22A].

Employees Under ERISA

The definition of "employee" is central to the definition of employer and employee pension benefit plan. An employer is a person or business which employs employees; the employer can establish a plan for those employees.

It is remarkable that the most fundamental term in pension law, "employee," has different definitions under tax law and labor law. But the definitions do differ, and they differ in ways that practitioners take for granted.

The key tax law definition of employee for retirement plans comes from the coverage regulations. Treas. Reg. Section 1.410(b)-9 tells us, "EMPLOYEE means an individual who performs services for the employer who is either a common law employee of the employer, a self-employed individual who is treated as an employee pursuant to section 401(c)(1), or a leased employee (not excluded under section 414(n)(5)) who is treated as an employee of the employer-recipient under section 414(n)(2) or 414(o)(2)."

Within that provision are three very different kinds of employees: (1) common-law employees, (2) self-employed individuals, and (3) leased employees. The last two categories are both problematic under ERISA. ERISA nowhere recognizes leased employees for purposes of retirement plans.

Code Section 401(c) defines sole proprietors and partners (or owners of entities taxed as partnerships, such as a typical LLC) who have earned income as "self-employed individuals." The Code treats the self-employed individual as an employee and the sole proprietorship or partnership as the employer. [*See* Code § 401(c)(1), (4).]

The ERISA treatment of self-employed individuals could not be more different than that under the Code. DOL Reg. Section 2510.3-3(c) states that, for purposes of determining whether a plan is an employee benefit plan (pension or welfare), partners, sole proprietors, and their spouses, are not deemed to be employees. Moreover, if an individual (or a married couple) owns 100 percent of the stock of a corporation, the owner and the owner's spouse are not employees. DOL Reg. Section 2510.3-3(b) states that a plan that does not cover employees (as so limited) is not an employee benefit plan.

This is why "owner-only" plans can file Form 5500-EZ and forego filing a full Form 5500. The plan does not cover anyone ERISA recognizes as an employee. Therefore, the plan is not an employee benefit plan, and the DOL has no jurisdiction over the plan.

Incidentally, the Supreme Court held that this definition of "employee" is limited to the definition of an employee benefit plan. As a result, a working owner can participate in an ERISA plan and is entitled to the benefits, including anti-alienation, which other participants receive [Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 124 S. Ct. 1330 (Mar. 2, 2004). *See also* DOL Advisory Opinion 99-04A.].

Related Employers Under the Code

Treas. Reg. Section 1.410(b)-9 includes the key retirement plan definition of employer for tax purposes:

> "Employer" means the employer maintaining the plan and those employers required to be aggregated with the

> employer under sections 414(b), (c), (m), or (o). An individual who owns the entire interest of an unincorporated trade or business is treated as an employer. Also, a partnership is treated as the employer of each partner and each employee of the partnership.

Accordingly, the Code concept of employer embraces the controlled group, common control, and affiliated service group rules, as well as the rules determining the employer of a self-employed individual. A plan maintained by two or more related employers is not a multiple employer plan [Treas. Reg. § 1.413-2(a)(2)]. (This regulation refers merely to controlled groups and common control but was written before Congress adopted the affiliated service group rules. There is no reason to suppose that the rules differ with regard to affiliated service groups, at least with regard to the employee benefit purposes enumerated in Code Section 414(m)(4).)

Single Plan/Risk-Pooling

Even though related employers may jointly adopt a plan, it is possible that the Code will regard it as multiple plans. Treas. Reg. Section 1.414(l)-1(b)(1) contains the basic tax definition of a plan: "A plan is a 'single plan' if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries." The regulation goes on to say that separate accounting, separate accounts, or separate adoption agreements do not necessarily create separate plans. If the funds are ultimately available to pay all participants, the plan is a single plan. [*See, e.g.,* Treas. Reg. §§ 1.410(b)-7(a), 1.401(k)-1(b)(4)(v)(B), and 1.413-1(a)(2).]

Rev. Rul. 81-137 applied this risk-pooling principle in the context of Form 5500. If a controlled group maintains a joint plan, but the assets contributed by a given employer are available only to provide benefits to the employees of that employer, there are separate plans, and each employer must file a separate Form 5500.

This risk-pooling concept is consistent with the Form 5500 instructions. The 2010 instructions state:

> A separate Form 5500, with line A (single-employer plan) checked, must be filed by each employer participating in a plan or program of benefits in which the funds attributable to each employer are available to pay benefits only for that employer's employees, even if the plan is maintained by a controlled group.
>
> A controlled group is generally considered one employer for Form 5500 reporting purposes. A "controlled group" is a controlled group of corporations under Code section 414(b), a group of trades or businesses under common control under Code section 414(c), or an affiliated service group under Code section 414(m).

Related Employers Under ERISA

While ERISA from time to time refers to the controlled group rules of the Code, it does not specifically incorporate those rules into the definition of employer or plan. The DOL has indicated that the related employer rules apply in defining a plan under ERISA, nonetheless, DOL Advisory Opinion 82-17A specifically applies the principles of Rev. Rul. 81-137, including risk-sharing, in defining ERISA filing, reporting, and disclosure requirements. [*See also* DOL Advisory Opinion 97-23A.]

DOL Advisory Opinion 89-06A makes the general statement that "The Department of Labor . . . would consider a member of a controlled group which establishes a benefit plan for its employees and/or the employees of other members of the controlled group to be an employer within the meaning of section 3(5) of ERISA." There is every reason to suppose that this ruling would apply with equal force to groups under common control and affiliated service groups.

More recently, DOL Advisory Opinion 2008-08A permits a controlled group to file a single registration statement for unfunded "top hat" plans maintained for the group, and sets forth procedures for that statement. The employer(s) filing such a statement need not file Form 5500 for the plan or plans in question [DOL Reg. § 2520.104-23]. In doing so, the DOL cited to DOL Advisory Opinion 84-35A, which used the risk-pooling concept of the 414(l) regulations as part of its analysis that separate plans had been created.

Multiple Employer Plans Under the Code

Neither the Code nor IRS Regulations limit to any extent the ability of unrelated employers to form a multiple employer plan. Code Section 413(c) governs the tax qualification of the plan. The regulations define a multiple employer plan as a single plan maintained by more than one unrelated employer [Treas. Reg. § 1.413-2(a)(2)]. There is no indication that there needs to be some existing relationship between the employers to adopt a single plan. The Section 414(l) risk-pooling concept applies here in defining a "single plan" [Treas. Reg. § 1.413-1(a)(2)].

This treatment is consistent with the existing Form 5500 instructions, which state:

> A multiple-employer plan is a plan that is maintained by more than one employer and is not one of the plans already described [controlled group, or multiemployer]. . . . Participating employers do not file individually for this type of plan. Do not check this box if the employers maintaining the plan are members of the same controlled group.

Multiple Employer Plans Under ERISA

ERISA does not directly address in its definition of employee benefit plan the concept of multiple employer plans. Neither do DOL regulations. However, there is a rich history of DOL advisory opinions applying ERISA Section 3(5) and its definition of employer to determine if a plan is an employee benefit plan. Under that definition, a retirement plan is an employee pension benefit plan if it is established and maintained by:

- Any person acting directly as an employer;
- Any person acting indirectly in the interest of an employer, in relation to an employee benefit plan; or
- A "bona fide" group or association of employers acting for an employer.

DOL Advisory Opinion 83-15A dealt with an IRA product the American Dental Association (ADA) offered to its members. Unmistakably, the ADA is a legitimate organization whose purposes go well beyond offering benefit programs. However, the ADA contended that it is not an employer or employee organization. ADA membership is open to any licensed dentist, which may include self-employed dentists without any employees and dentists who are common-law employees.

The DOL agreed, holding that the IRA product was not an employee pension benefit plan under ERISA. The ADA is not an employee organization because it does not exist for the purpose of dealing with employers on behalf of employees. It is also not an employee's beneficiary association, because there was no "commonality of interest" among members with respect to their employment relationship.

More important is the DOL's ruling that the ADA is not an employer. The discussion here is typical of that found in DOL opinions.

> It is also the Department's position that the ADA is not an "employer" within the meaning of ERISA section 3(5). . . . A group or association such as the ADA described in your application must be a bona fide group or association of employers in order to meet the definition in section 3(5) of ERISA. A determination of the existence of a bona fide employer group or association must be made on the basis of all relevant facts and circumstances. The following are among the factors which should be considered in making such a decision: the manner in which association members are solicited; identification of persons eligible to participate (and who actually participate) in the association; the presence of a pre-existing relationship among the members; the process by which and the purpose for which the organization was formed; the powers, rights, and privileges of employer members that exist by reason of their employer status; and the identification of the parties who actually control and direct the activities and operations of the association and its benefit program.
>
> From the information submitted with your inquiry, it appears that members of the ADA who are also employers enjoy no special powers, rights or privileges because of their employer status. It is the Department's position that where membership in a group or association is open to anyone engaged in a particular trade or profession regardless of employer status, and where control of such a group or association is not vested solely in employer members, such group or association is not a bona fide group or association of employers within the meaning of section 3(5) of the Act.

The last sentence is crucial. If control of an organization is vested, at least in part, in persons or entities which are not employers, the organization is not a "bona fide group or association of employers," no matter how bona fide the organization itself is. The opinion adds, "It should be noted that the mere presence of nonemployer members will not, in and of itself, vitiate the status of a group or association as an 'employer' if such other members have no voting rights in the association and no control over it." DOL Advisory Opinion 88-07A followed this reasoning in ruling that the Carolinas Section of the Professional Golfers Association had not established an employee pension benefit plan.

The fact that the ADA may not be an employer does not remove the arrangement from ERISA however. The opinion notes that if an ERISA 3(5) employer (such as a dentist with common-law employees) adopts the plan, "that employer may be considered to have established an employee pension benefit plan with regard to such employees." In other words, the arrangement itself is not a pension benefit plan, but individual employers who enter into the arrangement may have adopted separate plans, each subject to ERISA. [*See also* DOL Advisory Opinion 81-73A.]

Weeks after issuing the ADA ruling, in DOL Advisory Opinion 83-21A, the DOL addressed the ERISA status of a different multiple employer retirement plan. This opinion involved the plan ("EBP") of the United Way and affiliated agencies. The United Way did not control the operations of the agencies (or vice versa). Rather, the United Way and the other agencies made a common appeal for donations and coordinated operational activities. In finding that each employer had separate plans for ERISA purposes, the DOL stated:

> Since it appears that there is no formal group or association of employers involved in this matter, the Department of Labor . . . believes that the issue is whether United Way acts "indirectly in the interest of" each participating agency, for purposes of section 3(5), in relation to the EBP. With respect to this issue, the Department believes that a greater organizational nexus than is demonstrated by your submission must exist among the agencies (including United Way) in order that the EBP should be considered a single employee benefit plan for purposes of title I of ERISA.
>
> Therefore, it is the Department's position that the United Way and each of the affiliated agencies have established separate employee pension benefit plans for their employees.

This opinion was actually favorable to the sponsors. Because no sponsor had 100 participants, the ruling meant that none of the plans was subject to ERISA's independent audit requirement. If the DOL had ruled that the plan was a single ERISA plan, that plan would have had more than 100 participants and would have been subject to the audit requirement.

Note that, based on IRS regulations effective in 2009, it is possible that the EBP could be considered to be maintained by a group of trades or businesses under common control. [*See* Treas. Reg. § 1.414(c)-5(c)(1).] This could potentially alter the DOL's view of the arrangement.

Notice that the DOL required an "organizational nexus" between the adopting employers. The fact that this was a qualified plan subject to the requirements of Code Section 413(c) (such as counting the service of all adopting employers for purposes of eligibility) could not substitute for the lack of a bona fide group of employers.

In 1981, the DOL found that a YWCA was a bona fide employer group, and that its retirement plan constituted an ERISA pension benefit plan [DOL Advisory Opinion 81-44A]. In this case, the employers were individual YWCA chapters that were affiliated with the national organization. The DOL found the following factors to be persuasive in determining that the YWCA was an employer:

- The plan restricted participation to YWCA chapters and certain similar organizations.
- Plan participation was required as a condition of national association membership.
- Participating employers elected the board of trustees that managed the plan.
- Benefits were provided directly to employees rather than to the employers.

Multiple Employer Welfare Plan Opinions

Most DOL opinions concerning multiple employer plans deal with welfare plans rather than retirement plans. However, since the relevant requirements are the same, the same interpretation should apply to both. ERISA Sections 3(1) and 3(2) both require that the plan be "established or maintained by an employer or by an employee organization," and both use the same definition of employer. Nowhere in the opinions is there a suggestion that a "bona fide group or association of employers" means something different in the context of welfare plans than it does in the context of retirement plans. Many of those opinions provide either that a single plan does not exist, or the DOL cannot rule that one exists. The few opinions in which the DOL has ruled that a MEP was a single employee welfare benefit plan found very strong connections (apart from benefits) between the employers, as well as evidence that the plans were the result of action by the employers (rather than the result of sales by vendors).

DOL Advisory Opinion 79-49A was one of the earliest rulings on multiple employer welfare plans. It held that The Florida Osteopathic Medical Association Health Plan Trust was not an employee welfare benefit plan. Membership was open to all osteopaths licensed to practice in Florida and was not limited to employers. As a result, the association was not a bona fide employer group that could establish or maintain an ERISA employee benefit plan. Subsequent opinions have never wavered on this condition. [*See, e.g.,* DOL Advisory Opinions 2005-12A (missionary support), 95-01A (horse racing), 90-19A (alarm service and installation), 86-08A and 83-53A (home builders), 86-26A and 83-41A (CPAs), 82-59A (chiropractors), 82-50A (realtors), and 80-68A (insurance agents).] As with pension benefit plans, the DOL requires that an association establishing an employer welfare benefit plan be controlled by the participating employers. [*See, e.g.,* DOL Advisory Opinions 90-07A, 81-73A.]

The DOL found a multiple employer employee welfare benefit plan did exist in DOL Advisory Opinion 84-17A, concerning a plan jointly founded by certain unions and associations of employers involved in sprinklers and fire control. The unions and the employers jointly selected the trustees. Perhaps because of the union ("employee organization") involvement in the plan and trust, the fact that all the "employer" sponsors were clearly employers, and the level of control vested in all parties, the DOL did not raise concerns about the associations being a bona fide group of employers.

DOL Advisory Opinion 85-06A dealt with plans established for employees of various school districts. Although the schools involved were all in a certain state, they did not have any affiliation other than their cosponsorship of the plan. The conclusion that the plan is not a single ERISA welfare benefit plan is terse. "[T]he record does not indicate the existence of any . . . cognizable, bona fide employer group or association."

DOL Advisory Opinion 80-42A provided a detailed analysis of a plan established by a trust for entities affiliated with the Roman Catholic Church to provide health care benefits to employees of the entities. It is instructive because of the depth of the analysis of what is required to have a bona fide employer group. In this case, employers became the trustors (settlors) of the governing trust as they cosponsored the plan.

The DOL opines that there must be "some organizational relationship among employers in forming a group or association and establishing the plan." By contrast, "plans established and maintained by insurance entrepreneurs for the purpose of marketing insurance products to employers and employees at large are not ERISA plans." The opinion noted that the determination of a bona fide group is a facts and circumstances test, and listed essentially the same set of considerations as in Advisory Opinion 83-15A quoted above. In this case, factors which indicated a bona fide employer group existed included:

- Employer voting rights in governing the trust were in proportion to the number of employee participants each employer enrolled;
- Specific church affiliation was required (thus showing a "pre-existing relationship among the employer trustors before the establishment" of the trusts);
- The trust did not solicit employers to participate in it; and
- The plan administrator did not form the trust.

However, the DOL declined to rule on whether the trust was an ERISA employee benefit plan. Questions or issues demonstrating a lack of a bona fide group included:

- Uncertainty over whether the employers exercised "formal" control only or whether they controlled the trust "in substance" as well; and
- A statement from the trust to the DOL that the trust is "a self-funded multiple employer trust whose primary market is Roman Catholic Church related organizations in California and Nevada" indicated that the trust "might, in fact, be a vehicle for marketing insurance products and might, in fact, be controlled by the contract administrators, not the employers."

What is important about this decision is not the lack of a ruling on the trust involved, but the clear picture it paints that an "open MEP" established by a service provider for its clients could never meet the standards the DOL is setting forth. Such a relationship would clearly be controlled by the vendor, with no preexisting relationships. (Moreover, if it were controlled by the employers, that would take away many of the fiduciary benefits frequently claimed for the MEPs.)

The issue of substantive control is one that appears repeatedly in DOL Advisory Opinions. DOL Opinion Letter 91-42A states "It is the Department's view that the employers that participate in a benefit program must, either directly or indirectly, exercise control over the program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the program." Even where employer members appear to control an association, the DOL has often refused to rule on employer status if it is unclear that the employers control the association in substance. [*See* DOL Advisory Opinions 2001-04A, 90-01A, 89-17A, 84-11A, 83-48A, and 83-22A.]

More recently, the DOL declined to rule in DOL Advisory Opinion 2003-13A on whether the health plan of the Association of Independent Commercial Producers was an ERISA welfare benefit plan because of uncertainty over substantial control. The DOL noted that the plan association included nonemployers. However, the opinion added that association members who were employers were, at least in form, a bona fide group that could act as an employer under ERISA, because they:

- Were engaged in the same industry;
- Had a history of organized cooperation on employment-related matters;
- Had a genuine organizational relationship through their membership in the association unrelated to the provision of benefits; and
- Appeared to have control over the management of the plan.

The facts of DOL Advisory Opinion 2003-17A made an even stronger case for employee welfare benefit plan status. The opinion dealt with a consortium of employers all involved with a Department of Energy cleanup of a former plutonium production site. The employers' contracts with the DOE mandated that they provide similar employee benefits and had a common labor force with many individuals having been employed by more than one of the employers. The plan was jointly directed by the employers, with votes depending on the number of participating employees. The DOL ruled that the employers constituted, at least in form, a bona fide employer group, but declined to rule on the issue of substantial control. The situation is similar to many small shared employee plans or other arrangements entered into by many closely affiliated employers. The situation could not be more different from an open MEP.

DOL Advisory Opinions 2005-24A and 2005-25A similarly found an employer "in form," but the DOL again declined to rule because of the question of substantial control. The case involved associations of independent colleges and universities in a state which had a joint plan, managed by the colleges. The DOL noted the organization's limited membership and the history of cooperation between the employers to demonstrate commonality of interest and genuine organizational relationship beyond participation in the plan.

Although dealing with a welfare plan, the fact pattern involved in DOL Advisory Opinion 89-19A is very similar to that found in retirement plan open MEPs. The trustees of the Tacoma Industrial Trust established the trust to provide welfare benefits for employees of participating employers. The trustees determine their own successors. Participation was open to any employer that agreed in writing to participate. Based on these facts, the DOL ruled that the plan "was not established and is not maintained by a cognizable, bona fide group or association of employers. Rather, the Trust was formed solely by the trustees and the participating employers do not seem to have any control over the activities or operations of the Trust or the trustees. Moreover, the Trust appears to be open to any employer who wishes to participate without regard to the employer's trade or industry or the presence or lack of any preexisting relationships between the participating employers."

DOL Advisory Opinion 94-07A dealt with the health plans of the United Service Association for Health Care, a nonprofit trade association of roughly 130,000 small employers, including self-employed individuals. The DOL could not conclude that a bona fide group existed because:

- Membership included self-employed individuals who were not necessarily ERISA employers;
- The members did not control the association; and
- The association "may lack the commonality of interest that forms the basis for sponsorship of an employee welfare benefit plan."

The DOL discussed the commonality of interest requirement in some detail in a case involving the Bend (Oregon) Chamber of Commerce [DOL Advisory Opinion 2008-07A]. The chamber claimed that membership was limited to employers in a specific region, the chamber's activities included business and associational purposes outside of the plans, the chamber was a bona fide nonprofit organization under the Code, and the chamber was financially solvent. The DOL noted:

> The Bend Chamber's structure is not the type of connection between employer members that the Department requires for a group or association of employers to sponsor a single "multiple employer" plan. Rather, the Department would view the employers that use the Bend Chamber's arrangement as each having established separate employee benefit plans for their employees. Although we do not question the Bend Chamber's status as a genuine regional chamber of commerce with legitimate business and associational purposes, the primary economic nexus

> between the member employers is a commitment to private business development in a common geographic area. This would appear to open membership in the Bend Chamber, and in turn participation in the proposed health insurance arrangement, to virtually any employer in the region. The other factors the Bend Chamber cites do not directly relate to a connection between the member employers, the association, and the covered employees.

Case Law

Case law concurs with the DOL opinions in showing reluctance to view open multiple employer plans as plans under ERISA. One of the most delightfully worded opinions, using cartographic similes throughout, is MD Physicians & Associates Inc. v. Texas Board of Insurance, 957 F.2d 178 (5th Cir. 1992). A physician practice offered and marketed a health plan to which over 100 disparate employers in the area subscribed for their employees. The language of the ruling is helpful in that there are remarkable similarities in motivations between this case and a TPA or investment advisor or vendor setting open an open MEP for its clients. In ruling that the plan was not an ERISA employee welfare benefit plan, the court held:

> We hold that MDP did not act indirectly "for the [Subscribing Employers]" in relation to the MDP Plan. Rather, it acted for itself in relation to the MDP Plan. MDP advertised the MDP Plan as a "commercial product" to "employers at large" in the Texas panhandle. . . .The record indicates that MDP sometimes used insurance agents to sell the Plan to employers for a commission. MDP established, marketed, and maintained the MDP Plan to enable the physician practice association, MDP Physicians, to compete with other exclusive providers of medical and health services. . . . To allow an entrepreneurial venture to qualify as an "employer" by establishing and maintaining a multiple employer welfare arrangement without input by the employers who subscribe to the plan would twist the language of the statute and defeat the purposes of Congress.
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> Next, we consider the relationship between the provider of benefits, MDP, and the recipients of those benefits under the Plan, the Employees of Subscribing Employers. We agree with the Eighth Circuit, which reads the pertinent definitions as requiring "that the entity that maintains the plan and the individuals that benefit from the plan [be] tied by a common economic or representation interest, unrelated to the provision of benefits." The most common example is the economic relationship between employees and a person acting directly as their employer. The representational link between employees and an association of employers in the same industry who establish a trust for the benefit of those employees also supplies the requisite connection. This special relationship protects the employee, who can rely on the "person acting directly as an employer" or the person "acting indirectly in the interests of" that employer to represent the employee's interests relating to the provision of benefits.
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> Outside the provision of medical and health benefits under the MDP Plan, MDP had no relationship with the Employees of Subscribing Employers. DOL persuasively contends that the "relationship between the plan sponsor and the participants . . . distinguishes an employee welfare benefit arrangement from other health insurance arrangements." We agree: Absent the protective nexus between the entity providing the benefits and the individuals receiving the benefits, we cannot consider MDP a "group or association of employers" acting indirectly for the Subscribing Employers in relation to the MDP Plan. [Citations omitted.]

Numerous other cases have come to similar conclusions. [*See, for example,* Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982) (en banc); Matthew 25 Ministries, Inc. v. Corcoran, 771 F.2d 21 (2d Cir. 1985); Wayne Chemical, Inc. v. Columbus Agency Service, 567 F.2d 692 (7th Cir. 1977); Bell v. Employee Security Benefit Association, 437 F. Supp. 382 (D. Kan. 1977); Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co., 809 F.2d 617 (9th Cir. 1987).]

Staffing Firms

Staffing firms, sometimes called Professional Employer Organizations (PEOs), form a unique part of the multiple employer plan landscape. These organizations function as outsourced human resources departments, taking over payroll and other functions from client employers. A client moves some or all of the employees from its payroll to the PEO's, but the client generally retains many of the attributes associated with employer status.

Rev. Proc. 2002-21 essentially forbade PEOs from adopting or maintaining single employer plans which covered the worksite employees who were serving client organizations. Instead, the Rev. Proc. insisted the PEO that wanted to provide retirement benefits do so with a multiple employer plan, cosponsored by the client employer. Rev. Proc. 2003-86 held that for purposes of administering these multiple employer plans, the client was to be treated as the employer.

Several DOL advisory opinions address staffing firm welfare plans. The opinions almost universally hold that the plan is a multiple employer welfare arrangement (MEWA) under ERISA Section 3(40), and therefore subject to state insurance regulation. [*See* ERISA § 514(b)(6)(A).]

ERISA Section 3(40) defines a MEWA as "an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any [welfare] benefit . . . to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries." The definition continues with some exceptions, including an unusual application of the common control rules. Under that definition, a MEWA may or may not be an employee welfare benefit plan under ERISA.

The DOL seldom rules on whether a staffing firm plan is a single employee welfare benefit plan under ERISA. Instead, the opinions focus on the status of the arrangement as a MEWA.

For example, DOL Advisory Opinion 91-47A dealt with a staffing firm which provided a health plan for its worksite employees. Some of the employers engaged the firm specifically so that their employees could participate in the plan. The DOL ruled that the arrangement was a MEWA. Although not providing a definitive ruling, the opinion did discuss the employer status of a staffing firm, and examined the language in ERISA's employer definition, which indicated an employer could be one or more persons acting indirectly in the interest of an employer in relation to a plan.

> Therefore, merely because a person, group or association may be determined to be an "employer" within the meaning of ERISA section 3(5) does not mean that the individuals covered by the plan with respect to which the person, group or association is an "employer" are "employees" of that employer.
>
> The term "employee" is defined in ERISA section 3(6) to mean "any individual employed by an employer." . . . An individual is "employed" by an employer, for purposes of section 3(6), when an employer-employee relationship exists. For purposes of section 3(6), whether an employer-employee relationship exists will be determined by applying common-law principles and taking into account the remedial purposes of ERISA. In making such determinations, therefore, consideration must be given to whether the person for whom services are being performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which the result is to be accomplished; whether the person for whom services are being performed has the right to discharge the individual performing the services; and whether the individual performing the services is as a matter of economic reality dependent upon the business to which he or she renders services, among other considerations.
>
> While the FSA [the arrangement between the staffing firm and its clients] purports, with respect to the leased employees, to establish in CAP [the staffing firm] the authority and control associated with a common-law employer-employee relationship, your submission indicates that several client employers actually retained and exercised such authority and control.
>
> Although we conclude in this situation that some of the individuals participating as "employees" in the Program are "employees" of the client employers, the Department notes that CAP may also be considered an "employer" within the meaning of ERISA section 3(5).

The DOL made very similar rulings in DOL Advisory Opinions 92-04A and 92-07A. The latter opinion added this important comment: "In this regard, it should be noted that a contract purporting to create an employer-employee relationship will not control where common law factors (as applied to the facts and circumstances) establish that the relationship does not exist." This is generally consistent with applicable IRS ruling and court opinions. [*See generally* Watson, *Who's the Employer: A Guide to Employee and Aggregation Issues Affecting Qualified Plans,* 5th edition (2009), Chapter 5.] This means that the question of employee status in a staffing firm arrangement is inherently factual, which caused the DOL to decline to rule whether one staffing firm plan was a MEWA [DOL Advisory Opinion 95-22A].

The DOL disregarded a state law which provided that a staffing firm "shall be deemed to be the employer of its leased employees for the purposes of sponsoring and maintaining any benefit plans," inasmuch as MEWA status is determined under federal law [DOL Advisory Opinion 2007-05A].

The DOL found a staffing firm had validly established an ERISA employee welfare benefit plan in

DOL Advisory Opinion 95-29A. The opinion noted the DOL's inability to determine whether the worksite employees were common-law employees of the staffing firm or its clients. In the facts of that case, the DOL determined that the firm was acting directly or indirectly in the interest of an employer in establishing the plan. It is not clear from the opinion what led the DOL to that conclusion. However, the opinion concluded that the arrangement was a MEWA, unless the firm could show that all of the worksite employees were common-law employees of the firm.

Application to Typical Multiple Employer Retirement Plans

There are several situations which frequently give rise to multiple employer retirement plans. This section will consider those situations and apply the rules described above to them.

Shared employees: Frequently, several employers will share a suite or other common location and share expenses, including those relating to some or all of the employees. The employers may then establish a MEP to provide retirement benefits for the employees. Given the preexisting relationship between the employers, with significant consequences outside of providing benefits, this would likely qualify as an ERISA employee pension benefit plan.

"Kissing cousins": Sometimes, companies with overlapping ownership (but not enough to be a controlled group) will form a MEP, particularly if there is movement of employees between the firms. Again, this should be a single plan.

Broken controlled group: Sometimes, companies that are part of a controlled group (or are otherwise related) will experience a change in ownership, resulting in breakup of the group. If the group jointly maintained a retirement plan before the ownership change (which, as explained above, would be a single employer plan for both the Code and ERISA), there is no reason it should splinter into multiple ERISA plans when the ownership changes.

PEO plans: Staffing firm plans are a somewhat more difficult problem. DOL opinions have focused on the MEWA issues and have not closely considered the ERISA status issues. It is uncertain how the DOL would rule if the issue were squarely put today.

Association plans: Sometimes, MEPs will be formed by companies in a similar industry. As described above, the DOL views arrangements open to any member of a trade or business as not being a single ERISA plan, notwithstanding the business similarities of the employers involved. Issues of control and lack of a pre-existing relationship seem paramount here.

Open MEPs: If the DOL is so skeptical about the employee benefit plan status of association MEPs, how much less likely is it that the DOL would find an open MEP, which lacks even similarity of industry, as a single employee benefit plan?

Retirement plan issues: One blogger has suggested that retirement MEPs should be treated more favorably than welfare MEPs because of Code Section 413(c). Among other things, the Code requires that all MEP sponsors credit service with all other MEP sponsors for purposes of eligibility and vesting. [*See* Code § 413(c)(1), (3).] The blogger suggests that this inherently creates "commonality" between the employers. However, this suggestion misses the mark. As discussed above, he commonality the DOL is looking for is commonality of interest outside of employee benefits. The pre-existing relationships the DOL discusses in its rulings all describe business relationships, of which benefits issues are but a small part.

Consequences of ERISA Plan Status

Unmistakably, if a plan constitutes a single employee benefit plan under ERISA, that plan need file only one Form 5500. The status if more than one plan exists is somewhat less certain.

The DOL addressed this issue directly in DOL Advisory Opinion 81-47A. Iowa Bankers Insurance and Services, Inc. (IBIS) set up a welfare plan for use by member banks. The DOL declined to rule on whether IBIS was an ERISA employer, saying that the DOL lacked sufficient information to determine whether IBIS members controlled IBIS. However, the DOL did respond specifically to IBIS' request to know the 5500 filing status of the plan:

> If IBIS is not a bona fide group or association of employers, then each member bank that provides benefits for its employees through IBIS or IBBP maintains a separate employee welfare benefit plan, and each such plan must comply with the reporting and disclosure requirement of Part I of ERISA that are applicable to it. On the other hand, if one multiple employer plan can be recognized in this case, the designated administrator of the plan would be the proper person or entity to file that plan's annual report.

This strongly implies that if the IBIS plan is really a collection of separate employee benefit plans, each established by a member bank, then each bank must separately file Form 5500.

Similarly, DOL Advisory Opinion 83-21A (discussed above) stated that audit status was determined on the basis of the employer. This certainly suggests that, if multiple plans exist, each would require a separate audit. Additionally, it is likely that the DOL would find that ERISA's bonding requirements apply separately to each employer, thereby requiring higher bond amounts [ERISA § 402].

However, it must be stressed that the DOL is not actively pursuing these results. There have been reports of informal conversations with DOL officials who have indicated a belief that the DOL should apply the existing rulings to open MEPs. But informal, private conversations are not public opinions. Moreover, the opinions of one official, no matter how senior, are not necessarily agency positions.

If the DOL were to take action on MEPs, it is very likely that it would take political and policy considerations into account, as well as strict legal precedent. And there is always the possibility that any action the DOL takes may be prospective only, which would avoid refiling old returns or obtaining new audits.

ERISA MEP Service Rules

ERISA does include a provision that mirrors in part Code Section 413(c). ERISA Section 201 provides that, if more that one employer maintains a plan, the eligibility, vesting, and funding rules are applied as though all adopting employers were a single employer.

However, this provision offers little comfort to the proponents of open MEPs. It merely recognizes that there may be more than one employer adopting a given plan (compare with ERISA 3(5), which acknowledges that a "group or association of employers" can establish a plan), and describes how such a plan must credit service. It does not come close to suggesting that totally unrelated employers can sponsor a single plan under ERISA. No advisory opinion cited in this article references Section 210.

Congressional Action

Before concluding, we should note that there is a bill currently pending in Congress which would affect the ERISA status of MEPs. Representatives Kind and Reichert have introduced H.R. 1534, the "SAVE Act of 2011." The bill has been in committee since April, 2011. The bill sets up a SIMPLE QACA 401(k) for use by a multiple employer plan and requires the IRS to provide that a disqualifying portion of the plan (such as might exist if an employer failed to make the required employer contribution) could be severed without adversely affecting the remainder of the plan.

More importantly for this article, the bill proposes to amend the definition of ERISA employee pension benefit plan. It would specifically recognize a single multiple employer plan, notwithstanding the lack of any relationship between the cosponsors other than the plan itself. This provision would be limited to defined contribution plans. If enacted, such a provision would eliminate all the confusion relating to open retirement MEPs.

Unless and until Congress passes such a law, the status of MEPs in general, and open MEPs in particular, under ERISA will remain under a cloud unless the DOL decides, in light of the increased marketing of open MEPs, to take definitive action. ■