The Eventual Comeback Of MEPs

By Ary Rosenbaum, Esq.

Sometimes what is old is new again. Over the years, clothing styles, hairstyles, political styles, movie styles, and television program styles may come back after being out of fashion. People tell my fashion styles always come back in fashion, but I do notice as a kid from the 1970s that ruffled shirts and leisure suits haven't come back in style. Unlike ruffled shirts and leisure suits, it looks like multiple employer retirement plans (MEPs) may make a comeback. Many retirement plan providers have been touting MEPs recently and made plan sponsors think this is a new concept. MEPs have been around for years, but are only going back into style because of recent regulatory change and renewed interest. The comeback of MEPs is a positive development in the retirement plan business because it offers a choice to retirement plan sponsors on how to get a better plan at a better price while eliminating most of the liability that goes with being a plan sponsor and fiduciary. While MEPs aren't for everyone, they are a choice for many plans to consider whether being part of a MEP outweighs the risk of being a standalone plan.

The problem with plan costs

When it comes to fees for the administration and financial advisory work for retirement plans, size does matter. Larger plans have more choices for plan providers because economies of scale allow plan providers to charge less in fees (as a ratio percentage to plan assets). Smaller plans have fewer choices because unbundled providers have high minimum fees which plan sponsors find too cost prohibitive The MEPs are attractive, especially on the 401(k) front because it essentially adds a bunch of small plans together to create a larger plan which reduces fees and liability for employers that adopt them. The MEPs aren't a magic elixir because, for most of those plans, the cost savings isn't as large as expected.

What are MEPs?

The first thing that should be known about MEPs is that they are multiple employer plans. Can you say multiple employer plans? I am not trying to make fun of you, but for you to understand that multiple employer plans are different from multi-employer plans, which are reserved for collectively bargained (union) employees. Don't worry; it took me about two years as an ERISA attorney to remember the difference. MEPs are governed under Section 413(c) of the Internal Revenue Code. A MEP is one plan sponsored by two or more employers where at least two of the sponsoring employers are unrelated employers (meaning they are not members of the same controlled group or an affiliated service group of companies). Under MEPs, one company is the plan sponsor and the other companies adopting the plans are co-sponsors. There is one plan document and one Form 5500 filed for the Plan if there is a commonality between adopting employers, a Form 5500 issued for each adopting employer if there isn't. While it uses one plan document, for discrimination testing (for deferrals, coverage, matching contributions, top heavy, etc.), the plan is tested separately for each unrelated employer. Related employers are grouped together for discrimination testing purposes as one employer under the MEP (as they would be if they were on their own and not part of a MEP).

Which employers join MEPs?

Most MEPs are set up by businesses in a similar industry (such as law firms and medical practices) or associations (such as a medical association or a small business organization) or have some common ownership (but not qualifying as a controlled group) or are part of a national charitable organization. While some plan providers are pushing these association or industry-specific plans, there is no requirement that you have to be a member of a specific industry or organization to join a MEP. Just because you are an attorney doesn't mean you have to join the bar association plan nor do you have to spurn a MEP because your industry like comic book stores doesn't have a specific MEP. A MEP should be chosen based on the quality of the providers involved and that the expenses of joining the MEP are reasonable as compared to other MEPs. MEPs have become popular again because of two important issues that have been subjecting plan sponsors to a lot of lawsuits: fiduciary liability for plan costs and investments. Plan sponsors and the individual trustees of a retirement plan are plan fiduciaries. Fiduciaries have important responsibilities and are subject to standards of conduct because they act on behalf of participants in the retirement plan. One of a plan fiduciary's main duties is paying reasonable expenses. While many plan sponsors may think that joining a MEP is as costly as joining a country club, the economies of scale in the retirement plan industry allow small plan

sponsors to save on plan expenses as a co-sponsor of a MEP than as a sponsor of a standalone plan. A MEP is the Costco or Sam's Club of retirement plans because its size allows it to "buy" plan services such as administration and financial advice in bulk. Plan providers such as TPAs and financial advisors reduce their compensation as a percentage of plan assets when plan assets grow. Plan implementation and documents costs are also lower because the costs of setting up a MEP (which is one plan) are shared by the employers adopting the MEP. One of the plan sponsor's potential liability pitfalls involves the fiduciary process of selecting plan investments. Whether the retirement plan is participant directed or not, a plan sponsor and trustee have to manage the process of developing an investment policy statement and using it to select and review plan investments. If the plan is participant directed, then the plan sponsor still has to provide investment education to participants. This process is assisted by the plan's financial advisor, as long as the financial advisor is doing their job. Companies that adopt a MEP are delegating almost all of the fiduciary liability that goes with being a plan sponsor or trustee to the company that is the MEP sponsor. So these companies that join the MEP are transferring most of the headaches of being a plan sponsor to someone that is eager to accept that responsibility. I did say almost all of the fiduciary liability because I believe joining a MEP is a fiduciary function. So in English, that means a plan sponsor that joins a MEP needs to make sure costs are reasonable and that the providers are quality providers, unlike Matt Hutcheson who is serving 17 years for stealing over $3 million in MEP plan assets where he served as plan fiduciary for a handful of MEPs. Otherwise, they have breached their fiduciary duty even though they transferred most of it away to the MEP plan sponsor and other hired plan fiduciaries.

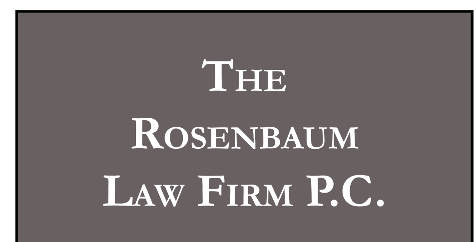
Why are they back in style?

There was tremendous interest around 2010-2012 concerning MEPs. At the time, there were two types of MEPs: closed and open. Closed MEPs were a MEP where all participating employers had commonality, for example, they were all members of an association that was sponsoring the plan. An Open MEP is where there was no commonality between adopting employers, these plans were often set up by plan providers. The attractiveness at the time for both Closed and Open MEPs was the filing of one Form 5500 for each MEP, so participating employers didn't have to bother with one as they did if they were still part of a single employer plan. One very large Open MEP in particular unwisely asked the Department of Labor (DOL) for an Advisory Opinion on whether their plan qualified as a single plan for ERISA purposes. Instead of approving the Open MEP as a single plan, the DOL had the opinion that if there was no commonality between participating employers, then the plan wouldn't be considered a single plan. In plain English,

that meant that Open MEPs would have to file separate Form 5500s for each adopting employer, which would defeat the purpose and cost savings of Open MEPs. After the issuance of the Advisory Opinion that was only specific to that Open MEP that sought it, it shriveled up interest in Open MEPs. While many Open MEPs went the route of what many called a MEAP (multiple employer aggregation program) where every participating employer has issued a Form 5500, many other Open MEPs shuttered operations. Many of us in the retirement plan industry expected the DOL to issue further guidance to flesh out their views in that Advisory Opinion because it was contrary to the Internal Revenue Service's view that it was still one plan, but that never happened until President Trump issued an executive order for the DOL to issue MEP regulations. Many people thought that the DOL would issue rules to allows Open MEPs, but they didn't. Their recently issued proposed rules further delineated the requirements for Closed MEPs and what defined commonality and did zero for Open MEPs. Actually, they did say that plan providers could not serve as a MEP sponsor, so that closed the door for them in sponsoring Open MEPs. The proposed rules which still can be amended came from the same viewpoint as the 2012 Advisory Opinion, the DOL punted the issues on Open MEPs for Congress to fix. There are multiple proposed bills from Congress that would treat Open MEPs as a single plan, but these bills have been stalled for years. Many people think that the DOL's proposed rules from Trump's executive order may act as a lightning rod for Congress to finally pass MEP legislation. Time will tell, but interest in MEPs have grown again.

A MEP isn't for everybody

As with anything in life, MEPs aren't for everyone. Larger plans already have the economies of scale to have an unbundled TPA and financial advisors with lower fees (as a ratio to plan assets), so they would be less interested in a MEP. Based on their size, a large plan can delegate fiduciary liability by hiring an ERISA §3(38) fiduciary to handle their plan at a price that is comparable to a MEP. Also based on the fact that a MEP is using one plan document, plan provisions and choice of plan investments may be somewhat limiting. Another concern that is sometimes overblown is that if one co-sponsor fails to satisfy an applicable qualification requirement under the Internal Revenue Code, application of the Code §413 regulations will result in disqualification of the MEP for all participating employers. As long as the plan providers of the MEP (especially the TPA) are competent in the administration of retirement plans and with some unique drafting of MEP agreements and documents, this liability pitfall can be minimized. This so-called "one bad apple" argument against MEPs is more exaggeration because there are enough opportunities to fix the problems of one adopting employer through voluntary compliance or terminating the adopting employer from the plan. While the new DOL proposed rules didn't address the "one bad apple", there is hope that the final rules or a new MEP law will eliminate it.



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