

Update on Pending Multiple Employer Plan (MEP) Legislation
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Background. Many employers use third leasing organizations to perform their HR functions, including providing a 401(k) plan to their employees. In these open multiple employer plans (MEPs), the employees of two or more unrelated employers participate in one 401(k) plan.

Currently, however, there are several barriers to open MEPs. Specifically, a DOL Advisory issued in 2012 requires a “common nexus or other genuine organizational relationship” between employers for them to fully benefit from the cost efficiencies of MEPs. As a result, MEPs lose much of their economies of scale, because each participating employer must file its own Form 5500 and conduct individual annual plan audits. Neither of these two requirements apply to standard MEPs, which generally are comprised of companies with unionized workforces in the same industry.

MEP proponents would like to expand access to open MEPs because they believe that a MEP is a cost-efficient way of providing retirement plans to employees of small employers.

Expected MEP Legislation. Back in 2013, Senator Orrin Hatch introduced the Secure Annuities for Employee Retirement (“SAFE”) Act of 2013 to promote the use of MEPs. Senator Hatch is now Chair of the Senate Finance Committee and is expected to reintroduce soon the SAFE Act bill in the current Congress.

The new bill’s provisions regarding MEPs are expected to be substantially similar to the 2013 SAFE Act. The provisions will probably include the following:

- Repeal of the common nexus requirement for 401(k) MEPs to be treated as a single plan if:

- The employer retains the fiduciary responsibility for selecting and monitoring the MEP’s designated provider, the named fiduciary if different from the MEP’s designated provider, and the investment and management of plan assets attributable to their employees if not delegated to another fiduciary.

- On termination of participation, the participating employer is not subject to unreasonable fees, penalties or restrictions

- Repeal of the “the one bad apple” rule on plan disqualification for MEPs that satisfy the common nexus requirement and other MEPs if:

- The MEP has “designated plan provider”;
- The “designated plan provider” registers with the IRS and consents to IRS audits; and
- The “designated plan provider” is designated under the plan as the person responsible to perform the necessary administrative duties (as determined by IRS regulations).

Employers who currently participate in an open MEP and other small employers who would like to offer a MEP 401(k) plan to their employees should monitor the SAFE legislation once it is re-introduced. The bill will be somewhat controversial, so it will be interesting to see whether it gains traction in the current Congress.