WRMarketplace
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The *WRMarketplace* is created exclusively for AALU members by the AALU staff and Greenberg Traurig, one of the nation's leading tax and wealth management law firms. The *WRMarketplace* provides deep insight into trends and events impacting the use of life insurance products, including key take-aways, for AALU members, clients and advisors.

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TOPIC: Proposed Legislation Could Expand Multiple Employer Plan Opportunities.

MARKET TREND: There is increasing concern that Americans are not saving enough for retirement. As discussed in *WRMarketplace* #16-35, a growing number of states are implementing retirement savings programs for private sector employees. Proposed federal legislation would also further the efforts to increase retirement savings opportunities for American workers.

SYNOPSIS: The Senate Finance Committee unanimously approved a bill that would allow unrelated employers to join "pooled employer plans," which are multiple employer plans ("MEPs") meeting certain requirements that are treated as single plans for ERISA purposes. The MEP proposal is included in a bill, known as the Retirement Enhancement and Savings Act of 2016, which also contains a variety of other retirement savings reforms. This proposed legislation would (1) dramatically increase the availability of MEPs with fewer administrative burdens and costs for employers and (2) create new opportunities for retirement plan service providers and advisors to offer MEP products and services. The proposed legislation eliminates the commonality requirement under current law, which requires the unrelated employers participating in a MEP to have a common economic tie for pooled employer plans and allows such plans to be treated as single plans for ERISA purposes.

The proposed legislation also provides relief from disqualification for a covered MEP if one or more of the participating employers fail to take actions that are required with respect to the plan.

TAKE AWAYS: Retirement plan providers and advisors should be aware of the new opportunities that may be available if the proposed MEP legislation is passed and enacted, so they can advise employer-clients on the new products and services that may become available if the legislation in enacted. They should also explore whether or not they should become pooled plan providers and sponsor pooled employer plans that their employer-clients can adopt as participating employers.

PRIOR REPORTS: 16-35.

MAJOR REFERENCES: Joint Committee on Taxation's Description of the Chairman's Modification of the Retirement Enhancement and Savings Act of 2016; DOL Advisory Opinion 2012-04; S. 3471- 114th Congress: Retirement Enhancement and Savings Act of 2016.

This fall, the Senate Finance Committee unanimously approved various retirement savings reforms in a bill entitled the "Retirement Enhancement and Savings Act of 2016" ("**RESA**"). RESA includes a proposal that would allow unrelated employers to join certain MEPs, known as "pooled employer plans", by eliminating the "commonality requirement" that currently applies to MEPs (the "**Proposed MEP Legislation**"). This commonality requirement provides that an unrelated party maintaining a plan must be tied to the employers and employees that participate in the plan by some common economic or representational interest or genuine organizational relationship unrelated to the provision of benefits. The elimination of the commonality requirement allows third party providers to sponsor retirement plans that can be adopted by employer-clients. The proposal also provides relief from the disqualification of the entire MEP merely because one or more participating employers fail to take actions required with respect to the plan.

If this Proposed MEP Legislation is enacted, small employers will have more options for offering workplace retirement plans by participating in pooled employer plans made available through a pooled plan provider. These plans will be especially attractive alternatives to small employers because the employer can outsource most of the fiduciary responsibilities making the approach far more cost effective. In addition, the Proposed MEP Legislation will present opportunities for third party administrators and advisors to start pooled employer plans that can be offered to their employer-clients.

The Proposed MEP Legislation did not become law this year, but there is a lot of potential for this proposed legislation to move forward when the new Congress convenes in 2017.

THE CURRENT RULES FOR MEPs.

A MEP is a plan maintained by two or more unrelated employers, but usually with some type of common economic tie. An open MEP is generally established and maintained by a third party provider and open for employers to join by executing a participation agreement if the employer meets the MEP's specified eligibility criteria.

With a MEP, employers can take advantage of economies of scale to lower administrative and other costs. However, under current law, the Department of Labor ("**DOL**") does not consider an open MEP arrangement to be a single ERISA plan because the MEP sponsor and participating employers do not meet the commonality requirement applicable to MEPs. Instead, each participating employer is treated as having created its own separate ERISA plan when it becomes a participating employer in the open MEP, because the open MEP provider is not considered the MEP sponsor. As a result, each participating employer must incur administrative burdens and expenses relative to its respective ERISA plan, such as filing Forms 5500 and complying with ERISA's disclosure requirements (i.e., providing a summary plan description).

Under the current Internal Revenue Code ("**Code**"), the tax-qualified status of the MEP as a whole is determined with respect to all employers maintaining the plan, and the failure by one employer (i.e., one bad apple) to satisfy an applicable qualification requirement or failure to take actions required with respect to the plan may cause the entire MEP to be disqualified with respect to all employers.

WHAT DOES THE PROPOSAL PROVIDE?

The proposed legislation would treat a qualified defined contribution plan that is established or maintained for the purpose of providing benefits to the employees of two or more employers as a single plan for purposes of ERISA if the plan meets the requirements for being a pooled employer plan, regardless of the current commonality requirement.

In addition, the proposal further amends the MEP rules in the Code to provide that certain defined contribution plans will not fail to meet the tax qualification requirements just because one or more of the participating employers fail to take actions required for the plan to remain a tax-qualified plan (the one bad apple problem).

Treatment as a Single Plan under ERISA.

Under the proposed legislation, a pooled employer plan will be treated for purposes of ERISA as a single plan that is a multiple employer plan. A "pooled employer plan" is defined under the proposal as a plan that:

1. Is a defined contribution plan established or maintained for the purpose of providing benefits to employees of two or more employers,
2. Is a qualified retirement plan or an individual retirement account (IRA) plan, and
3. Includes plan terms that meet the requirements described below.

For a plan to be a pooled employer plan, the terms of the plan must:

1. Designate a pooled plan provider (as defined below) and provide that the pooled plan provider is a named fiduciary of the plan,
2. Designate one or more trustees (other than a participating employer), that meet the Code requirements to be an IRA trustee (i.e., banks or IRS-approved nonbank trustees), to be responsible for collecting contributions to, and holding the assets of, the plan, and require the trustees to implement written contribution collection procedures that are reasonable, diligent, and systematic,
3. Provide that each participating employer retains fiduciary responsibility for the selection and monitoring, in accordance with ERISA fiduciary requirements, of the person designated as the pooled plan provider and any other person designated as a named fiduciary and, to the extent not otherwise designated to another fiduciary by the pooled plan provider (and subject to the ERISA rules regarding self-directed investments), the investment and management of the portion of the plan assets attributable to the participating employer's employees,
4. Provide that a participating employer, or participant or beneficiary, is not subject to unreasonable restrictions, fees, or penalties with regard to ceasing participation, receipt of distributions, or otherwise transferring assets of the plan in accordance with the applicable rules for plan mergers and transfers,
5. Require the pooled plan provider to submit to participating employers any disclosures or other information required by the Secretary of Labor ("**Labor Secretary**") and require each participating employer to take any actions that the Labor Secretary or the pooled plan provider determines are necessary to administer the plan or to meet the requirements of the Code and ERISA, and
6. Provide that any disclosure or other information required to be provided as described above may be provided in electronic form and will be designed to ensure only reasonable costs are imposed on pooled plan providers and participating employers.

The treatment of pooled employer plans as single plans for ERISA purposes will allow participating employers to join such plans and not be treated as having established its own separate retirement plan. These participating employers will save on some of the administrative costs associated with sponsoring and maintaining a retirement plan, such as costs for filing Forms 5500 (including the costs for obtaining the annual accountant's report, if applicable).

Relief from Plan Disqualification.

The proposed legislation provides relief from disqualification of the entire MEP merely because one or more of the participating employers fail to take actions required with respect to the plan. The relief from disqualification applies to multiple employer qualified defined contribution plans ("**covered MEPs**") that either:

- Are sponsored by employers that have both a common interest other than having adopted the plan and control the plan, or
- In the case of a plan not described in (1), have a pooled plan provider.

The relief applies if the terms of the MEP provide that, in the case of an employer failing to take required actions ("**Noncompliant Employer**"):

- The MEP assets attributable to the employees of the Noncompliant Employer will be transferred to a plan maintained only by that employer (or its successor), to a tax-favored retirement plan for each individual whose account is transferred, or to any other arrangement that the Secretary of the Treasury ("**Treasury Secretary**") determines is appropriate, and

- The Noncompliant Employer (and not the MEP with respect to which the failure occurred or any other participating employer) is, except to the extent provided by the Treasury Secretary, liable for any MEP liabilities attributable to employees of the Noncompliant Employer.

In addition, if the pool plan provider does not perform substantially all of the administrative duties required of the provider for any plan year, the Treasury Secretary, in his or her discretion, may provide that the determination as to whether the MEP meets the Code requirements for tax-favored treatment will be made in the same manner as would be made without regard to the relief under the proposal.

For purposes of the relief from plan disqualification, a "pooled plan provider" means a person that:

1. Is designated as a named fiduciary by the terms of the plan, as the plan administrator, and as the person responsible to perform all administrative duties that are reasonably necessary to ensure the plan meets the requirements of the Code and ERISA, and to ensure that participating employers take all actions deemed necessary by the pooled plan provider or the Treasury Secretary to meet the requirements of the Code and ERISA,

2. Registers with the Treasury Secretary as a pooled plan provider and submits any other information that the Treasury Secretary may require before beginning operations as a pooled plan provider,

3. Acknowledges its status in writing as a fiduciary under ERISA and as the plan administrator, and

4. Is responsible for ensuring that all persons who handle plan assets or are plan fiduciaries are covered by an ERISA bond.

This definition of a "pooled plan provider" generally applies for ERISA purposes as well. Under the ERISA definition, a person would have to register as a pooled plan provider with the Labor Secretary and provide any information required by the Labor Secretary before beginning operation as a pooled plan provider.

HOW WILL POOLED EMPLOYER PLANS WORK?

If the proposed legislation is enacted, the practical implication is that a third party provider can establish and sponsor a pooled employer plan that employer-clients can adopt. For example, ABC Retirement Consulting Group ("**ABC**") is a third party administration and investment consulting firm. ABC has registered as a pooled plan provider with the Treasury Secretary and the Labor Secretary. ABC establishes the ABC Open Defined Contribution Plan (the "**Plan**"). The written Plan document provides that ABC is the Plan's administrator and investment fiduciary. Fifty of ABC's employer-clients sign participation agreements, which provide that the employer-clients adopt the Plan as participating employers for their eligible employees and will make contributions, including salary deferral contributions, to the Plan (as indicated in the participation agreement).

The Plan is treated as a single plan under ERISA. ABC files a Form 5500 for the Plan as a whole and obtains the annual accountant's report for the Plan. ABC also prepares a summary plan description for the Plan, which the client-employers can distribute to their eligible participants. ABC performs all other functions required of a plan administrator and/or plan sponsor.

If a participating employer in the Plan fails to satisfy a qualification requirement of the Plan, the Plan is **not** disqualified merely because of the participating employer's failure to satisfy the Plan requirement. For example, Employer B withholds salary deferrals exceeding the annual dollar limit under Code §402(g) for Employee Smith and does not refund the excess deferrals (adjusted for earnings) to Employee Smith as required under the Code. Employer B's failure to refund the excess deferrals does not, by itself, cause the Plan to lose its qualification status.

TAKE AWAYS

Retirement plan providers and advisors should be aware of the new opportunities that may be available if the proposed MEP legislation is passed and enacted, so they can advise employer-clients on the new products and services that may become available if the legislation in enacted. They should also explore whether or not they should become pooled plan providers and sponsor pooled employer plans that their employer-clients can adopt as participating employers.

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