

General Description of AHP and MEP Proposed Regulations

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In an effort to extend access to both health and retirement plan benefits to more small businesses, the U.S. Department of Labor has issued two proposed regulations. These proposals were designed to shift the administrative requirements to the sponsoring association and to permit groups of small businesses to bind together in purchasing the plan administration services and obtain more cost effective benefits. These may both be of interest to certain associations of the smaller employers to assist their respective members in procuring employee health and retirement savings opportunities for the members' respective employees. Both regulations are proposed regulations and request comments in a number of areas.

The two proposed regulations vary in the requirements to some extent. The proposal for expanding the availability of more affordable retirement plans provides two options by which small employers can access a multiple employer defined contribution retirement plan. (It is important to note that there are also Internal Revenue Code (the "Code") requirements that impact the retirement plans and hopefully pending legislation will pass to also facilitate the proposed regulations. The Code does not prohibit this, but it has a provision that may prove problematic.) The proposal for health plans only includes one of the two options that are available under the proposed regulation for retirement plans.

This alert discusses highlights of both of the proposed regulations. Any association considering developing the infrastructure to offer either health or defined contribution retirement plan benefits to their members should carefully review all of the details of each of the proposed regulations and may want to consider commenting on certain aspects of the proposed regulations.

Health Insurance Expansion-Proposed Regulation on Association Health Plans

In order to be able to extend health insurance coverage to member organizations, the members would need to be members of an association in an industry or geographic area. The members need to be in control of this association and it would need to have an additional function beyond obtaining access to health benefits or retirement benefits. This would permit both members who have employees and members who operate as owner-employees to access health insurance and this proposed regulation became effective on September 1, 2018 with respect to fully insured health insurance offerings. (Since this was only issued on June 21, 2018 and it is not yet final, it is unclear whether the insurance industry has moved its policies to adapt to this new concept.)

Defined Contribution Retirement Plan Expansion

Retirement benefits could also be extended to an association's members via the multiple employer plan proposed regulations. This regulation is not yet effective and is still open for comments. The association could offer a defined contribution retirement plan to all the members that would permit the member's plans to obtain investment and services a combined basis to hopefully lower some of the administrative costs of maintaining a defined contribution retirement plan. This could be done if the employer members have a commonality of interest. The common interest could be they all work in the same industry and are associated with association.

The association based methodology for retirement plans could not be extended to members who are owner-employees or single individual members (self-employed individuals) without any other employees. Plus if neither of these regulations are changed the association could offer members operating both as a solo self-employer person or as a small business with one or more employees health insurance on a fully insured basis, but could only offer small businesses with one or more employees the option of obtaining retirement plan record keeping and better investment fund fees through the option of participating in the multiple employer retirement plans.

There is a second option for offering retirement plans to a group of small businesses; however would require establishing a professional employer organization or a Certified Professional Employer Organization ("CPEO") under Internal Revenue Code section 7705. If the Certified Professional Employer Organization route is selected, it is a safe harbor, instead of a facts and circumstances test. If a professional employer organization is used that is not a CPEO, it must satisfy five or

more of the following criteria in order for the employment bond to be established. The five or more criteria must come from the following ("organization" as used below refers to the professional employer organization):

1. The organization would be responsible for payment of wages to the employees without regard to whether they received adequate payment from the client employers.
2. The organization must be responsible for reporting, withholding and paying all applicable federal employment taxes for the client employers it up the plan and must do so even if they do not receive payment from client employers.
3. The organization must be responsible for recruiting, hiring and firing workers of a client employer in addition to the client employer's responsibility for recruiting hiring and firing workers.
4. The organization must be responsible for establishing employment policies, conditions of employment and supervising employees of its client employers that adopt the retirement plan in addition to the responsibilities such client employers have in this area.
5. The organization must be responsible for determining employee compensation, including method and amount of employees compensation, for all employees of the client employers that adopt the retirement plan in addition to the client employer's responsibilities in this area
6. The organization must be responsible for providing Worker's Compensation coverage to the employees of the client employers and it must do so even if they're not adequately paid for such insurance by the client employers.
7. The organization must be responsible for integral human-resource functions of the client employer such as preparing job descriptions, background screening, drug testing, employee handbook preparation, performance reviews, paid time off tracking, employee grievances, or exit interviews and this is in addition to the requirements that the client employer has with respect to these areas.
8. The organization must be responsible for regulatory compliance of his client employers participating in the retirement plan with respect to workplace discrimination, family and medical leave, citizenship or immigration status, workplace safety and health or program electronic review management labor certification in addition to the responsibility that the client employer has in this area.
9. The organization must continue to have employee benefit plan obligations to the multiple employer plan's participants in the plan maintained by the professional employer organization after the client employer no longer contracts with the organization.

If the professional employer option is selected then the working owners are treated both as employers and employees and this could be extended to both members that operate on a solo basis and members who have employees.

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