

FEATURE

An 'Open' Door



The Obama Administration Signals an Open Mind About Open MEPs

BY JUDY WARD

There's strength in numbers.

"Right now, small businesses with less than 100 employees are probably paying 1½ points in fees on average," says Jamie Kalamarides, senior vice president of institutional investment solutions at Prudential Retirement in Hartford, Conn. "If they got together with 1,000 other small businesses, they could be paying less than 50 basis points."

Open MEPs (multiple employer plans) can help accomplish that, and they previously saw a lot of growth. But then came U.S. Department of Labor (DOL) Advisory Opinion 2012-04A, which basically ended the momentum for open MEPs. "It is not that the DOL doesn't like them — they have said that you can't have them," says Bob Toth, a Fort Wayne, Ind.-based employee benefits attorney who had filed for the advisory opinion on behalf of a MEP provider. "The advisory opinion said that you can't have unrelated employers in a MEP unless there is a commonality among the employers, and the employers are exercising direct or indirect control over the MEP."

But some in the industry wonder if the Labor Department's late 2015 guidance on state-run retirement plans, which gave the okay for states to use the MEP approach, indicates that its opposition to private sector open MEPs could change. "I can only hope that the Department will loosen its rules, because it is willing to take these steps with the states," Toth says.

And then came President Obama's 2017 Budget, which, among other things, indicated support for Congress to develop a legislative solution that would open up multiple-employer defined contribution plans to any unrelated employer provided that the service provider promoting and administering the plan, the participating employers and the plan itself meet certain conditions — and make no mistake, the administration has a number of conditions in mind.

The DOL Outlook

Open MEPs still can speak to the concerns that many small employers have about sponsoring a retirement plan, says Bill Harmon, Denver-based senior vice president at Empower Retirement. "Small businesses are afraid of the liability associated with making decisions, the cost of the plan, and the complexity of it," he says. "But when you get into these packaged approaches, they get an investment lineup, they get buying power, and a lot of the decisions already have been made, in terms of plan design and especially investments."

In a November 2015 interpretive bulletin, the Labor Department discussed a state-sponsored MEP as one of several viable options for a state-run retirement plan. States can organize an individual marketplace for IRAs aimed at citizens who don't have access to an employer-based plan, the DOL has said. Otherwise, the Labor Department mentioned several allowable ways for a state to do an ERISA plan-based approach: develop and administer a prototype plan; organize an online marketplace to connect employers with private-sector plan providers; or put together a MEP.

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Some states already have issued RFPs (requests for proposal) to providers to bid on helping with administration of these new retirement offerings, Harmon says. "Most of what we've seen so far is the IRA approach," he says. But he thinks the DOL's openness to using MEPs for state-run plans will bring the MEPs issue to the forefront again, and get people talking about it.

In light of its opposition to private sector open MEPs, Toth found the DOL's reasoning in permitting state MEPs curious. "Think about this. Some states already have passed laws that allow MEPs. So now the DOL was stuck: We've got all these state laws that don't mesh with what the DOL has said," he says, referring in particular to the DOL's requirement that the employers have a commonality. "What the DOL said is that if a state sponsors a MEP, the state's special responsibility creates that 'commonality' because of the state's inherent interest in providing for the interests of its citizens." So the Labor Department now "has taken the MEP concept developed by the marketplace and banned the marketplace from doing it, but the DOL will allow states to do it," he says.

Sources say it's unlikely the Labor Department will reverse its 2012 advisory opinion, however. "I'm not sure that I see them going back and revisiting this," says David Certner, legislative counsel and director of legislative policy for government affairs at AARP in Washington. "For one thing, I don't think they have the time. They

are still working on bigger rules they need to get out,” he says, citing new fiduciary rules. “It is probably more likely at this point that you’d see legislation than have some regulatory change,” he adds.

A DOL reversal of the open MEPs advisory opinion seems relatively unrealistic, says Adam Pozek, a partner at St. Paul, Minn.-based DWC ERISA Consultants, LLC. “The DOL would have to take it upon itself to basically go back on an opinion that it issued only recently, in 2012,” he says.

“And that advisory opinion was pretty consistent with 30 years of previous advisory opinions,” Pozek continues, referring particularly to prior opinions on ERISA-based health and welfare plans. “What the DOL was really saying is that a lot of the reasoning it had used on health and welfare plans applies to retirement plans as well. If you dissect 30 years of advisory opinions and look at the underlying reasoning, and then you step back and say, ‘These are all ERISA plans,’ it is not surprising that they issued the advisory opinion on open MEPs. Based on the DOL’s reasoning, unless there is a law change from Congress, there is no reason for the DOL to take a different position.”

The Legislative Option

Which brings us back to the president’s budget, and its implied opening for Congress to act. For open MEPs to regain momentum, sources say Congress most needs to address these three issues:

Permit Open MEPs of Unrelated Employers

The 2012 advisory opinion focused on the one thing needed for MEPs to really thrive, says Kalamarides, who testified at an October 2015 Senate subcommittee hearing on retirement plan options for small businesses. “The DOL said you can’t have a MEP of unaffiliated employers without a commonality of interest,” he says. Pragmatically speaking, he explains, that means the employers must share a common employee base — which seriously limits the ability to form open MEPs. “That is the essence of what an open MEP is,” he says of pooling unrelated small employers. Open MEPs can’t work unless Congress essentially reverses the DOL’s stand on that issue.

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Clarify the Fiduciary Duties

Providers of MEPs and closely related “aggregation program” approaches have dealt with fiduciary responsibility in varying ways, Pozek says. “Some still put a lot of burden on plan sponsors. If Congress were to act, they should address: Who is responsible to make sure that everything is done in a compliant fashion?” he says. “It’s a complex-enough area that it is not always easy for a small employer to recognize what type of fiduciary support it is getting. That piece is very critical to flesh out in whatever ends up as the next generation.”

AARP thinks the potential legislation should require MEP providers to serve as fiduciaries, says Certner, who testified at the October hearing. “Most MEP providers don’t want to take on fiduciary responsibility. In most cases, fiduciary responsibility is then left on the employer,” he says. “But the whole idea is to take fiduciary responsibility off employers. So it has to be made clear: Who is the fiduciary for what?”

Lance Schoening, director-retirement services at Des Moines, Iowa-based Principal Financial Group, also testified at the October hearing. He has a suggestion on how to define employers’ fiduciary duties for open MEPs. “We would like to see the fiduciary responsibilities of adopting employers be limited to having a prudent process to select a MEP provider, submitting contributions in a timely fashion, as well as some ongoing monitoring,” he says. “That would give the adopting employers some ease of mind in terms of their ultimate responsibility.”

Change the “One Bad Apple” Rule

Under current regulations, the businesses in an open MEP have joint liability if one business does something wrong such as not submit contributions on time, Kalamarides says. “They need to remove the ‘one bad apple’ rule,” he says. “If one small-business owner in a MEP does something wrong, we don’t want it to contaminate all the small businesses in the MEP.” The other employers in a MEP should not pay a penalty for the misdeeds of one employer in the MEP, Schoening believes. “Today, if there’s a risk of a fiduciary penalty because of an unrelated employer that is part of the plan, that is a problem for employers,” he says.

This issue has a lot of bipartisan interest on Capitol Hill, Certner says, adding that MEPs provisions more likely would get attached to a larger bill than pass as stand-alone legislation. There was some talk last year about doing that, but it didn’t happen, and this election year provides less opportunity for progress. “It is a little trickier this year, because there is a lot less legislation moving overall,” he says. “But this is the kind of issue, with the right vehicle, that could end up moving.” If not this year, it could realistically happen in 2017, he says.

Indeed, the MEP concept has already enjoyed bipartisan support on Capitol Hill, and there have been a number of bills introduced that include it, notably Senate Finance Committee Chairman Sen. Orrin Hatch’s SAFE Retirement Act, the Small Businesses Add Value for Employees (SAVE) Act of 2014 (H.R. 5875) sponsored by Reps. Ron Kind (D-Wis.) and Dave Reichert (R-Wash.), and last year Sens. Susan Collins (R-Maine) and Bill Nelson (D-Fla.) introduced the Retirement Security Act of 2015 (S. 266), as did Reps. Vern Buchanan (R-Fla.) and Ron Kind (D-Wisc.) in the House of Representatives (H.R. 577).

“I think we will get something. The question is, when are we going to get it?” Pozek says. “We’re in an election year now, so the odds that it will happen this year seem unlikely. But after we get through the election, there is bipartisan support to expand coverage in retirement programs, and open MEPs are one way to accomplish that. I would be surprised if in the next 24 months something doesn’t get passed.”

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