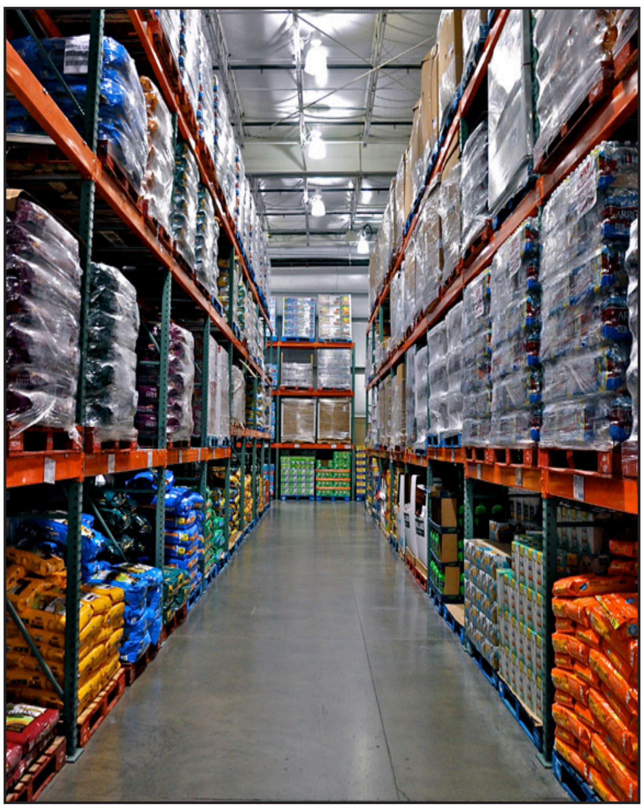
Multiple Employer Retirement Plans: The Truth, The Rumors, and Buying in Bulk

By Ary Rosenbaum, Esq.

In 1946, a bunch of grocers in New Jersey started a cooperative called Wakerfern Corporation so that they could get reasonable prices on wholesale goods by banding together for product purchasing. In 1951, these grocers decided to market their independently owned groceries under one name and that name was Shoprite. By uniting as a cooperative, these grocers (which have grown in number since then) are able to buy products in bulk and at a lower cost so that they can compete against other supermarkets which are chains and owned by large corporations.

I always see multiple employer plans (MEPs) as the ability of small plans to group together and buy in "bulk". In my mind, the MEP should act as the Costco or Sam's Club of retirement plans. By buying in "bulk" and grouping together with other unaffiliated employers, plan sponsors can get a better product at a better price. At least that's the way it should be. For me MEPs is the ability of smaller plans to have a greater choice in the choice of plan providers, allowing them to get services from unbundled providers that they probably could not afford as a standalone plan. The pricing of daily valued 401(k) plans is highly dependent on plan asset size because plan expenses shrink when expressed as a percentage of the plan's assets as assets grow. Taking advantage of the economies of scale of a MEP, participating employers can get a better plan at a better price. In addition, being a part of an MEP can help defray fiduciary liability.



MEPs are treated as one plan for purposes of Form 5500 and for plan audits and are treated as separate plans for discrimination testing, contribution allocations, and participating employer provision plan choices allowed by a participation agreement. So in a sense, these are treated as plans within one plan for most administrative functions, but as one plan for governmental reporting purposes.

MEPs are not a new phenomenon. They have been around for a long time and have come back in style like bellbottoms sometimes do because of issues dealing with plan expenses and fiduciary liability, which have been important discussion topics for plan sponsors for the last several years. MEPs come in two different varieties, the closed MEP and the open MEP. The closed MEP is often considered an association where a group of employers that are part of the same industry or part of a business group or trade association. A closed MEP may be for a bar association, or auto dealers, or a chamber of commerce. An open MEP is what it implies, where there is no commonality of business or association between them. Both open and closed MEPs are allowed under Internal Revenue Code Section 413(c).

MEPs have become very popular of late and have certainly become a burgeoning business for my practice. More plan sponsors, financial advisors, and third party administrators (TPAs) have asked me whether a MEP is a good fit for them. A client of mine, DCS Retirement Group has made a splash by announcing MEPs for 401(k) plans, as well as novel open MEPs using defined benefit plans, cash balance plans, and 403(b) plans.

As with any burgeoning business, it will bring in the entry of many new players in the market. The problem for the MEP area, it may bring in a lot of providers that have no background in MEPs or understand how they actually operate.

There has been discussion of late of the Department of Labor (DOL) looking at MEPs because someone asked someone from the DOL at some benefits conference about them. The person for the DOL said that the DOL would be taking a closer look at open MEPs because of concerns on how they operate and how they can be abused as just a gimmick of treating what is really a bunch of small plans as one MEP, avoiding the need for a Form 5500 for each participating employer.

Low and behold, a lot of people started to act as if the MEP sky was falling. You had advisors questioning of having their clients in MEPs and plan providers consider curtailing their interest in them. Calm yourselves, will you? The sky isn't about to fall just yet and there is no reason to panic. Having someone from the DOL say something at some Midwest benefits conference is hardly regulation. However, if you read between the lines, I think MEPs that really look like individual plans bundled together for the sole purpose of avoiding separate 5500s. What types of MEPs are these? I think MEPs where you have the third party administrator (TPA) or a registered investment advisor as the plan sponsor. If the plan sponsor is an association or a company that is unrelated to the TPA, I don't think you have anything to worry about. If I'm wrong and the DOL is going to act on open MEPs, they would offer some relief to wind them down and allow the participating employers to spin them off into plans of their own.

The job of the DOL (which they have taken quite of interest in doing in the last couple of years) is to monitor for abuses within retirement plans that can affect participant's rights under ERISA. So with a sudden rush in marketing MEPs, the DOL is simply doing their job to look at abuses within the marketplace. A review of the DOL of the MEP marketplace, especially the open MEPs, is not an indictment of them; it's just a way for them to detect those MEP providers that may be abusing this type of structure. Any major changes for MEPs will come from DOL regulations or an amendment to Section 413(c) of the Internal Revenue Code and not by some off the cuff comment at some benefits conference.

As with anything new and popular, you hear a lot of false marketing and innuendo. One piece of false marketing is that joining a MEP totally eliminates a participating employer's fiduciary responsibility. Not true. Joining a MEP is a fiduciary function, so the participating employer still has potential liability. The liability is reduced because the MEP sponsor assumes the bulk of it. So since a participating employer reduces some fiduciary responsibility, it is incumbent on them to join the right MEP.

One slightly false rumor is that if a retirement plan that already requires an audit and joins a MEP, the audit requirement is eliminated. The audit for the plan that merged into the MEP is eliminated, but the MEP itself would still need an audit. However, this would reduce audits costs as the cost of the audit would be spread among the participating employers under the MEP.

Another slightly false rumor out there is that if one participating employer is not in compliance, then the entire plan is out of compliance and susceptible to plan disqualification. While the malfeasance of a participating employer puts the entire MEP at risk according to the Internal Revenue Service (IRS), the issue is really a red herring. First off, the IRS allows

MEPs to self correct or voluntarily correct any plan errors. In addition, plan disqualification is an extreme penalty and is very doubtful that the IRS would disqualify a MEP for all participating employers for the malfeasance of one. In addition, a good MEP helped by a good ERISA attorney (cough, cough) would draft language in the participating employer/joinder agreements that would force the spinoff of participating employers who refused to abide with the compliance of the plan such as paying top heavy minimum contributions. I have never seen the IRS take such a drastic action against any MEP for the mistakes of a participating employer. The IRS has outlined a system in place that allows any plan sponsors to correct either voluntarily or on audit to avoid such a drastic penalty such as plan disqualification. The process is open for MEPs and non-MEPs, so the fear for MEPs is the same as the fear for single employer plans.

In addition, there are a lot of insurance company based MEPs. While I have not really looked into the issue on an expense level, I always believe that the beauty of a MEP was low plan expenses, so I would urge employers and their advisor to look into cost for these plans. Perhaps the economies of scale would allow these usually expensive providers to use one of their platforms that have less hidden charges. Only a full review of what the MEP provider is offering and the costs involved will give you a full flavor on whether joining a MEP is a value, when contemplating the costs it will save on administration and fiduciary liability.

MEPs do have their drawbacks such as limited plan provision choices or with some, a shorter menu of investment options. As with anything, a cooperative is no social utopia and you do have to give up some individual choices when you are joining a MEP. However for many plans, the drawbacks are clearly overwhelmed by the MEP's positive features.

A MEP isn't for anyone, but there is nothing that the retirement plan industry offers that is. A MEP can be a cost effective retirement plan solution for those plan sponsors that want a plan, but want to pay less in fees and have less fiduciary responsibility. It is a great opportunity for some employers to get a better plan at a better price, so don't let Chicken Little steer you wrong, the MEP sky isn't falling.

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