Multiple Employer Retirement Plans: A Bigger Bang For The Buck

By Ary Rosenbaum, Esq.

Sometimes what is old is new again. Over the years, clothing styles, hair styles, political styles, movie styles, and television program styles may come back after being out of fashion. For those that missed the initial breakthrough of the styles in question, it's new to them. The same can be said about multiple employer retirement plans (MEPs). Many retirement plan providers have been touting MEPs recently and made plan sponsors think this is a new concept. MEPs have been around for years, but are only going back into style because of changes and concerns in the retirement plan industry. The comeback of MEPs is a positive development in the retirement plan business because it offers a choice to retirement plan sponsors on how to get a better plan at a better price while eliminating most of the liability that goes with being a plan sponsor and fiduciary. While MEPs aren't for everyone, they are a choice for many plans to consider whether being part of a MEP outweighs the risk of being a standalone plan.

When it comes to fees for the administration and financial advisory work for retirement plans, size does matter. Larger plans have more choices for plan providers because economies of scale allow plan providers to charge less in fees (as a ratio percentage to plan assets). Smaller plans have fewer choices because unbundled providers have high minimum fees which plan sponsors find too cost prohibitive The MEPs are attractive, especially on the 401(k) front because it essentially adds a bunch of small plans together to create a larger plan which reduces fees and liability for employers that adopt them.

The first thing that should be known about MEPs is that they are multiple employer plans. Can you say multiple employer plans? I am not trying to make fun of you, but for you to understand that multiple employer plans are different from multi-employer plans, which are reserved for collectively bargained (union) employees. Don't worry; it took me about two years as an ERISA attorney to remember the difference.

MEPs are governed under Section 413(c) of the Internal Revenue Code. A MEP is one plan sponsored by two or more employers where at least two of the sponsoring employers are unrelated employers (meaning they are not members of the same controlled group or an affiliated service group of companies). Under MEPs, one company is the plan sponsor and the other companies adopting the plans are co-sponsors. There is one plan document and one Form 5500 filed for the Plan. While it is one plan, for discrimination testing (for deferrals, coverage, matching contributions, top heavy, etc.), the plan is tested separately for each unrelated employer. Related employers are grouped together for discrimination testing purposes as one employer under the MEP (as they would be if they were on their own and not part of a MEP).

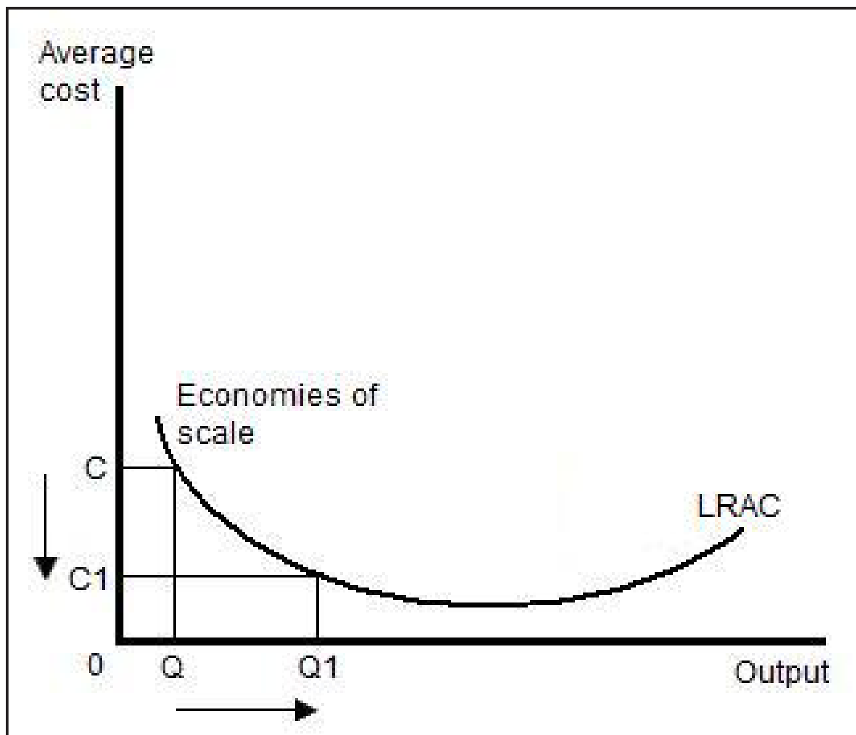
Most MEPs are set up by businesses in a similar industry (such as law firms and medical practices) or associations (such as a medical association or a small business organization) or have some common ownership (but not qualifying as a controlled group) or are part of a national charitable organization. While some plan providers are pushing these association or industry specific plans, there is no requirement that you have to be a member of a specific industry or organization to join a MEP. Just because you are an attorney doesn't mean you have to join the bar association plan nor do you have to spurn a MEP because your industry like

comic book stores doesn't have a specific MEP. A MEP should be chosen based on the quality of the providers involved and that the expenses of joining the MEP are reasonable as compared to other MEPs.

MEPs have become popular of late because of two important issues that have been subjecting plan sponsors to a lot of lawsuits: fiduciary liability for plan costs and investments. Plan sponsors and the individual trustees of a retirement plan are plan fiduciaries. Fiduciaries have important responsibilities and are subject to standards of conduct because they act on behalf of participants in the retirement plan.

One of a plan fiduciary's main duties is paying reasonable expenses. While many plan sponsors may think that joining a MEP is as costly as joining a country club, the economies of scale in the retirement plan industry allow small plan sponsors to save on plan expenses as a co-sponsor of a MEP than as a sponsor of a standalone plan. A MEP is the Costco or Sam's Club of retirement plans because its size allows it to "buy" plan services such as administration and financial advice in bulk. Plan providers such as TPAs and financial advisors reduce their compensation as a percentage of plan assets when plan assets grow. Plan implementation and documents costs are also lower because the costs of setting up a MEP (which is one plan) are shared by the employers adopting the MEP.

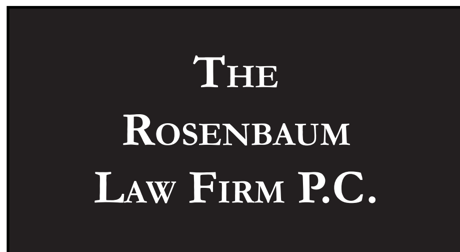
One of the plan sponsor's potential liability pitfalls involves the fiduciary process of selecting plan investments. Whether the retirement plan is participant directed or not, a plan sponsor and trustee have to manage the process of developing an investment policy statement and using it to select and review plan investments. If the plan is participant directed, then the plan sponsor still has to provide investment education to participants. This process is assisted by the plan's financial advisor, as long as the financial advisor is doing their job. Companies that adopt a MEP are delegating almost all of the fiduciary liability that goes with being a plan sponsor or trustee to the company that is the MEP sponsor. So these companies that join the MEP are transferring most of the headaches of being a plan sponsor to someone that is eager to accept that responsibility. I did say almost all of the fiduciary liability because there is a debate of ERISA attorneys whether joining a MEP is a fiduciary function in or not. So in English, while some ERISA attorneys say a MEP co-sponsor delegates all fiduciary liability to the MEP sponsor, some attorneys (such as yours truly) maintain that a company joining a MEP as a co-sponsor retains a residual amount of fiduciary liability. Depending on the quality of the MEP plan providers, that residual fiduciary liability (if any) is negligible.



As with anything in life, MEPs are not for everyone. Larger plans already have the economies of scale to have an unbundled TPA and financial advisors with lower fees (as a ratio to plan assets), so they would be less interested in a MEP. Based on their size, a large plan can delegate fiduciary liability by hiring an ERISA §3(38) fiduciary to handle their plan at a price that is comparable to a MEP. Also based on the fact that a MEP is considered one plan, plan provisions and choice of plan investments may be somewhat limiting.

Another concern that is sometimes overblown is that if one co-sponsor fails to satisfy an applicable qualification requirement under the Internal Revenue Code, application of the Code §413 regulations will result in disqualification of the MEP for all of the participating employers. As long as the plan providers of the MEP (especially the TPA) are competent in the administration of retirement plans and with some unique drafting of MEP agreements and documents, this liability pitfall can be minimized.

As the retirement plan industry heads towards major changes with full fee disclosure and a change in the definition of fiduciary, MEPs can be an attractive way for smaller employers to partake in a retirement plan by limiting their liability and reducing plan expenses than if they decided to go with a standalone retirement plan. As with any choice in retirement plan, retirement plan sponsors should always consultant with their financial advisor, ERISA attorney, or retirement plan consultant to determine if a MEP is for them.



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