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Multiple Employer Plans: The Platinum Standard

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In my last four columns, I described how the sponsor of a qualified retirement plan such as a 401(k) plan—the "sponsor" actually being real flesh-and-blood people who serve as trustees and other named and functional fiduciaries of the plan—can insulate itself from virtually all day-to-day fiduciary investment risk as well as operational/administrative risk to which the sponsor would otherwise be subject as a result of sponsoring the plan.

The U.S. Department of Labor (DOL) provides, in its DOL Advisory Opinion 2002-06A (issued July 3, 2002), that a plan sponsor (typically through the board of directors of the sponsor/employer) has the power, pursuant to ERISA section 402(b), to delegate limited-scope duties to a specialized fiduciary responsible for administration of the plan (an ERISA section 3(16) Plan Administrator); one responsible for selecting, monitoring, and (if necessary) replacing the investment options offered in the plan (an ERISA section 3(38) Investment Manager); or one responsible for trustee duties defined in the plan (an ERISA section 403(a) Plan Trustee).

A plan sponsor also has the power, pursuant to ERISA section 402(b), to delegate limited-scope duties to a specialized ERISA section 3(21) fiduciary responsible for a narrowly defined issue where discretion can be exercised, such as the determination of whether or not it's prudent to hold the company stock of a plan sponsor as an investment option in the company's plan.

Alternatively, a plan sponsor can radically simplify things for itself. Instead of continuing to bear the inherent responsibilities associated with sponsoring a retirement plan, bearing the liability for parceling out some (or all) such duties to specialized fiduciaries on its own—which takes substantial time, investigation, due diligence, monitoring, etc.—the plan sponsor can simply off-load liability for such duties by delegating them all to a full-scope, professional, independent ERISA section 3(21) named fiduciary.

The acceptance by a full-scope ERISA section 3(21) fiduciary of these duties with respect to a qualified retirement plan such as a 401(k) plan is the gold standard of delegation of fiduciary responsibility (and liability) by a plan sponsor because it encompasses all other fiduciary duties. The only liability retained by the sponsor in these circumstances would be a residual oversight monitoring duty.

The Platinum Standard of Delegation

But what if a plan sponsor could jettison even its residual oversight monitoring duty of the full-scope ERISA section 3(21) named fiduciary? That kind of power would represent the platinum standard of delegation of fiduciary responsibility (and liability) by a plan sponsor. In fact, ERISA allows a plan sponsor to do exactly that.

A plan sponsor can do so by joining a multiple employer plan (MEP) pursuant to section 413(c) of the Internal Revenue Code (IRC). A MEP is a qualified retirement plan such as a 401(k) plan maintained by two or more employers that are not required to be related as (1) controlled groups (IRC section 414(b)), (2) trades or businesses under common control (IRC section 414(c)), or (3) affiliated service groups (IRC section 414(m)). Employers that are subject to common control under IRC sections 414(b), 414(c), or 414(m) are treated as a single employer for the purpose of applying coverage under IRC section 410(b), while each unrelated employer is treated separately for various compliance demonstrations. Suffice it to say that unrelated employers retain their autonomy for tax deduction and compliance demonstration purposes.

By the way, a "multiple employer" plan, governed by IRC code section 413(c), should not be confused with a "multiemployer" plan, which is often referred to as a Taft-Hartley plan. A multiemployer plan, described in IRC Reg. 1.413-1(a), is a collectively bargained defined benefit pension plan maintained by more than one employer (usually within the same or related industries) whose employees are subject to collective bargaining agreements.

A MEP is set up by an entity—a principal plan sponsor—that bears all the responsibility (and therefore the liability) for running the retirement plan, even including the residual oversight duty to monitor a full-scope independent ERISA section 3(21) named fiduciary. The operations

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of the plan (i.e., administration) and the plan's assets (i.e., plan investment options) are transferred to an existing platform designed for the specific purpose of alleviating the burdens of fiduciary responsibility (and therefore fiduciary liability) from plan sponsors.

A plan sponsor that adopts a MEP—a plan cosponsor—has only one choice: to join or not to join the MEP. If an adopting plan cosponsor decides to join the MEP, that employer will not bear any fiduciary responsibility (or liability) at all. A MEP could allow, conceivably, even thousands of plan sponsor employers to join it and none of them would actually be a fiduciary and therefore would have no fiduciary responsibilities—or liabilities.

Some retirement plans such as larger 401(k) plans (i.e., those with many hundreds of employees or more) may want more "exclusivity" and have their own stand-alone plan. The same MEP-like scenario—without the MEP—can be created in a single employer plan through the use of specialized fiduciary methodologies employed by fiduciaries to protect employers from risk and improve outcomes for participants (and their beneficiaries).

The Costs of a Multiple Employer Plan are Reasonable

Some advisors to plan sponsors such as ERISA attorneys believe that many of their clients don't consider a MEP and the use of a fiduciary protocol such as a professional named fiduciary because they perceive it to be too costly and something that only larger retirement plans can afford. Uh, let's see: "too costly"—as compared with what? The kind of investment options—woefully underdiversified with hidden (and therefore high) costs—that populate and plague the 401(k) plans at even many Fortune 500 companies?

Many independent ERISA section 3(21) named fiduciaries don't depend on the existence of 12(b)-1 fees or other subsidy payments. Instead, they usually choose low-cost, passively managed funds such as index funds and asset class funds for a plan's investment options and eliminate unnecessary services that drive up costs. Retirement plans run by independent fiduciaries are priced differently, and even after the fiduciary's fees are taken into account, the total "all-in" cost is almost always lower.

Micro-sized retirement plans can enjoy the protections and other advantages of a MEP managed by an ERISA section 3(21) fiduciary and ERISA section 3(38) fiduciary team. That way, the smallest plans can take advantage of the pricing that some of the very largest retirement plans enjoy. Although it may seem counterintuitive, independent fiduciaries are the most affordable method for delivering results-based services to plan participants (and their beneficiaries), while reducing risk to employers more significantly than any other current method offered in the retirement plan marketplace. That's why a MEP or a single employer plan in a MEP-like scenario using an independent fiduciary not only makes practical sense, it also makes real economic sense.

The Concern Expressed by Some ERISA Attorneys

Some ERISA attorneys are not in favor of the MEP concept. Their concern centers on the fact that if one participating employer cosponsor (or the plan itself) fails to satisfy an applicable qualification requirement, application of the IRC section 413 regulations will result in disqualification of the multiple employer plan for all participating employers. For example, according to the IRS Web site, the failure of any participating employer cosponsor to satisfy the top-heavy rules disqualifies the entire multiple employer plan for all the employer cosponsors maintaining the plan. (See Reg. 1.416-1, Q&A G-2.)

When asked to clarify their concern, however, such attorneys are usually unable to elaborate any further. Plan sponsors interested in joining a MEP or establishing a stand-alone single employer plan in a MEP-like scenario may wish to ask their attorneys such questions as: (1) Have you ever established a fully functional, highly successful MEP? (2) Have you ever actually seen a MEP disqualified for a problem with a single cosponsor? (3) How do you explain the IRS' requirement that certain industries must adopt MEPs? (4) Wouldn't it make sense to get a determination letter for each individual cosponsor if you're really that concerned? (5) Isn't the Federal Thrift Savings plan essentially a MEP?

Most MEPs use identical eligibility, vesting, and other provisions so that each adopting employer cosponsor is subjected to the exact same rules. A MEP with three or four different provisions to satisfy almost any plan design desire pretty much resolves all the operational concerns that may arise. MEPs can be fully compliant and prudent by design; safe harbors and other safety provisions are easily included in the plan.

ERISA attorneys expressing concern about "what ifs" is one thing, but they and others should know that preventing the "what ifs" is much easier in the MEP environment than commonly assumed. A MEP is the best way to create maximum efficiency in retirement plans, especially smaller plans. That's why they have been used with great success for decades.

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