

Increasing Access to Open Multiple Employer Plans



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Introduction

Given recent gains in the stock market, some may be looking at their 401(k) balances with satisfaction. Others, however, may still be yearning for the opportunity to save for retirement in a 401(k).¹ According to data from the Investment Company Institute (ICI) and Employee Benefit Research Institute (EBRI), as of 2015, only about 54 million Americans were active 401(k) participants,² out of over 150 million employed Americans that same year³ – that’s about one third of working Americans. While some may have saved through other means, and others may be set to receive a traditional defined benefit (DB) pension, millions of workers have yet to begin saving for retirement.

Many workers who are not yet saving for retirement are employed by small businesses. Private sector employees who work for small businesses that do not offer a retirement plan are particularly at risk of not having sufficient savings to secure their retirement. Currently, it is estimated that one-third of private sector workers do not have access to an employer-sponsored retirement plan. Further, individuals who work for small firms are more than nine times less likely to have an employer-sponsored plan in comparison to workers at the largest firms.⁴

One way to encourage small employers to offer retirement plans is to make it easier for these firms to establish and maintain open multiple employer plans (open MEPs). In an open MEP, small businesses can join together and create a pooled retirement plan, delegating certain onerous administrative and other responsibilities to a plan sponsor, thereby reducing the burden on individual firms from offering a plan to their employees. In the past two years, there have been a number of legislative proposals that would enable small businesses to more easily establish open MEPs. We support efforts to facilitate greater adoption of open MEPs, and we urge Congress to enact legislation that would do this by eliminating two current requirements that discourage firms from creating open MEPs: (i) the commonality requirement that small employers share a common nexus in order to join together in creating an open MEP, and (ii) the “one bad apple” rule, which states that if any one of the participating employers violates some qualification requirements, it can disqualify the plan for all of the participating employers.

Key Observations and Recommendations

- Private sector employees who work for small businesses are particularly at risk of having limited access to retirement plans and insufficient retirement savings.
- Legislative changes that would encourage adoption of open MEPs would make it easier for small businesses to establish and maintain retirement plans.
- In the past two years, there have been multiple bills proposed in Congress that would eliminate key disincentives for small firms to establish open MEPs.

Current Landscape for Small Businesses to Establish Plans for Their Employees

Although a number of retirement plan options are available to small employers, including 401(k) plans, Simplified Employee Pension (SEP) IRAs, or Savings Investment Match for Employees (SIMPLE) IRAs, these alternatives are often not a good fit for small businesses. Many small employers are reluctant to offer plans to their employees because of concerns regarding potential fiduciary liability as well as administrative complexity, burdens, and costs. In addition, small employers often do not have the time to obtain the education and third party resources needed to establish a plan.⁵ While SEP and SIMPLE IRAs may present lower administrative burdens and costs than 401(k) plans, they both require employer contributions. When presented with the current options, many small employers opt not to offer any retirement plan at all.

One solution to address this problem is to encourage small businesses to join together in offering retirement savings plans (i.e., via MEPs), which can improve efficiency and bargaining power and reduce administrative burdens at the individual firm level. Unfortunately, current law, as interpreted by the US courts and the Department of Labor (DoL), discourages this in many circumstances. Unless there is a business relationship between firms meeting specific requirements, the law treats each employer as the creator of its own plan, which comes with attendant administrative and fiduciary responsibilities and significantly limits the benefits of a MEP. Given this interpretation, if businesses were to come together in offering a joint retirement plan, one employer could potentially suffer from the mistakes of another employer, as each company is responsible for the requirements relating to establishing and maintaining the plan. Without a mechanism to ease these duties for small businesses, such firms lack incentive to join together in offering retirement plans. To make it easier for more small businesses to offer plans, we encourage Congress to change the law to allow efficiencies that would ease the burden for small businesses to offer retirement plans for their employees.

Open Multiple Employer Plans

Open MEPs allow businesses to share administrative and other responsibilities associated with establishing and maintaining a retirement plan by outsourcing these duties to a MEP sponsor. The sponsor assumes overall fiduciary responsibility for the plan, files required reports, and handles many other administrative and recordkeeping tasks. While participating employers are responsible for managing employee contributions and distributions, they are relieved of many fiduciary responsibilities assumed by the sponsor and shoulder a significantly lower administrative burden. MEPs

significantly reduce and simplify the burdens on employers and offer a good solution for companies, particularly smaller companies that would like to offer a plan but are concerned about the associated time, complexity, and fiduciary risk of doing so.

Current judicial and regulatory rulings require that there be a “nexus” among the employers who participate in the MEP (e.g., multiple franchises of the same restaurant chain).⁶ Without this nexus, unrelated employers who band together to offer effectively the same retirement plan would each be viewed as plan sponsors offering their own retirement plan. As a result, the employers cannot obtain several key benefits of an open MEP. For example, under current rules, each firm would need to file a separate Form 5500 report and may bear responsibility for investment decisions and be required to hold insurance protection in the form of a fidelity bond.

Similarly, the Internal Revenue Code of 1986, as amended (the “Tax Code”) presents an impediment to the beneficial use of open MEPs. Section 413(c) of the Tax Code recognizes plans that are created for the employees of more than one unrelated employer. However, certain tax rules have been interpreted to mean that if one employer violates the rule it can disqualify the plan for all of the participating employers.⁷ This is often referred to as the “one bad apple” rule.

We believe the nexus requirement and the one bad apple rule should be eliminated in the defined contribution (DC) plan context. Given that the MEP sponsor would be required to acknowledge status as a plan fiduciary, we believe there is sufficient regulation in place to protect participant assets from abuse in an open MEP. This fiduciary status and the relatively simple structure of these types of plans (i.e., individual participant accounts) should avoid concerns regarding abuse. Forcing small employers to individually shoulder fiduciary responsibility in a manner similar to large employers serves to discourage small employers from taking on the retirement plan burden without providing meaningful additional protections to plan participants. We believe the benefits of open MEPs would clearly outweigh any risks of abuse given protections already in place.

Legislative Proposals to Facilitate Open MEPs

Over the past few years, there have been multiple legislative proposals that would eliminate the nexus requirement and one bad apple rule. In November 2016, Senator Orrin Hatch (R-UT) introduced the Retirement Enhancement and Savings Act of 2016, which included the elimination of both of these provisions, along with various changes to the Employee Retirement Income Security Act of 1974 (ERISA)

and the Tax Code.⁸ Shortly thereafter, Representatives Vern Buchanan (R-FL), Jim Renacci (R-OH), Ron Kind (D-WI), and Richard Neal (D-MA) introduced the Retirement Security for American Workers Act in the House, a standalone bill addressing the qualification requirements for open MEPs.⁹

In December 2017, two new bills were introduced in the House that would similarly eliminate the open MEPs nexus requirement and one bad apple rule. Representative Neal introduced the Automatic Retirement Plan Act of 2017, which would eliminate both of these requirements. We note that this bill would also implement a series of other retirement reforms, including mandating DC plans for all but the smallest employers and phasing in automatic enrollment and lifetime income requirements for new plans.¹⁰ Representative Kind introduced the SAVE Act of 2017, a narrower bill that would eliminate the nexus requirement and one bad apple rule, along with additional provisions related to automatic deferral IRAs, SIMPLE IRAs, and lifetime income.¹¹

Each of these four bills would address the one bad apple rule by allowing the plan assets of a non-compliant employer to be removed from the MEP, without penalizing the other employers in the plan. However, the bills take slightly different approaches on how to implement the elimination of the nexus requirements, varying from simple elimination of the nexus requirement to elimination of the nexus requirement only for open MEPs that designate “pooled plan providers” meeting certain requirements, including registration with the Internal Revenue Service (IRS). Some would also require open MEPs to designate an institutional trustee to be responsible for collecting contributions and

holding plan assets. While we believe the simplest proposal of outright elimination would be the least burdensome for small firms to implement, all of these approaches would achieve the ultimate goal of allowing small businesses to join together in an open MEP without a nexus requirement.

We support legislative provisions that would encourage open MEPs by allowing small businesses to share the administrative and other responsibilities associated with establishing and maintaining a retirement plan. Open MEPs can provide small companies with a way to take advantage of economies of scale and lower fees and expenses, as the open MEP sponsor can assume overall fiduciary responsibility, file required reports, and handle many other administrative and recordkeeping tasks. Participating employers or a designated trustee would be responsible for contributions and distributions, but would be relieved of fiduciary responsibilities assumed by the sponsor and would shoulder a significantly lower administrative burden.

Conclusion

As we have written in several previous *ViewPoints*,¹² Americans are living longer and increasingly must rely on their own savings to fund their retirement expenses. We urge Congress to work with the DoL and the IRS to address this important issue by implementing workable solutions that facilitate greater retirement savings. It is critical to ensure that retirement policy initiatives offer solutions that make it easier for employers, particularly small employers, to establish retirement savings programs for their employees without imposing undue regulatory burdens. Open MEPs meet these criteria and deserve serious consideration.

Related content

ViewPoint – [Expanding Access to Retirement Savings for Small Business](#) (Nov. 2015)

ViewPoint – [Multiemployer Pension Reform Act of 2014: A Catalyst for Broader Reform?](#) (Jan. 2015)

ViewPoint – [Addressing America’s Retirement Needs: Longevity Challenge Requires Action](#) (Sep. 2013)

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Endnotes

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2. Jack VanDerhei, Sarah Holden, Luis Alonso, and Steven Bass, "401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2015," EBRI Issue Brief, no. 426, and ICI Research Perspective, Vol. 23, no. 6 (Aug. 3, 2017), available at https://www.ebri.org/pdf/briefspdf/EBRI_IB_436_K-update.3Aug17.pdf. Using National Compensation Survey data and historical relationships and trends evident in the Form 5500 data, EBRI and ICI estimates are based on a combination of data from U.S. Department of Labor Bureau of Labor Statistics from 2012, 2013, 2014, 2015, and 2016.
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6. DoL Advisory Opinion 2012-03A (May 25, 2012), available at <https://www.dol.gov/sites/default/files/ebsa/employers-and-advisers/guidance/advisory-opinions/2012-03a.pdf>; DoL Advisory Opinion 2012-04A (May 25, 2012), available at <https://www.dol.gov/sites/default/files/ebsa/employers-and-advisers/guidance/advisory-opinions/2012-04a.pdf>; *MDPhysicians & Associates, Inc. v. State Bd. Ins.*, 957 F.2d 178, 185 (5th Cir.), cert. denied, 506 U.S. 861 (1992).
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8. S. 3471, 114th Cong. (2016).
9. H.R. 6396, 114th Cong. (2016).
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11. H.R. 4637, 115th Cong. (2017).
12. BlackRock, *ViewPoint*, Expanding Access to Retirement Savings for Small Business (Nov. 2015), available at <https://www.blackrock.com/corporate/en-us/literature/whitepaper/viewpoint-expanding-access-retirement-savings-november-2015.pdf>; BlackRock, *ViewPoint*, Multiemployer Pension Reform Act of 2014: A Catalyst for Broader Reform? (Jan. 2015), available at <https://www.blackrock.com/corporate/en-us/literature/whitepaper/viewpoint-multiemployer-pension-reform-january-2015.pdf>; BlackRock, *ViewPoint*, Addressing America's Retirement Needs: Longevity Challenge Requires Action (Sep. 2013), available at <https://www.blackrock.com/corporate/en-us/literature/whitepaper/viewpoint-retirement-needs-092013.pdf>.

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