

## **Multiple Employer Plans as a Fiduciary Risk Mitigation Tool**

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### **Introduction**

As more defined contribution plan sponsors come to grips with their fiduciary responsibilities, a solution rapidly gaining market traction is the use of Multiple Employer Plans (MEPs). Traditionally utilized as the plan structure for association plans and Professional Employer Organizations (PEOs), MEPs have expanded in recent years to include unrelated employers seeking a streamlined approach to plan oversight. It is these “independent” Multiple Employer Plans, open to virtually any employer, that have led the surge in MEP growth.

Employers adopting a sound Multiple Employer Plan eliminate their plan audit and Form 5500 filings, simplify plan operations and achieve a profound reduction in fiduciary risk exposure. This paper focuses on the most controversial claim – transfer of fiduciary risk.

### **Multiple Employer Plan Defined**

A Multiple Employer Plan is a retirement plan established by one plan sponsor which is then adopted by one or more participating employers. The adopting employers may have a common link, such as an industry association, or may have no shared connection at all beyond that of their participation in the same plan. Instead of being the plan sponsor themselves, adopting employers are joining a plan sponsored by another entity.

### **Legal Basis for Multiple Employer Plans**

Multiple Employer Plans are established under Section 413(c) of the Internal Revenue Code, defining a plan as a Section 413(c) plan if:

*(i) The plan is a single plan, within the meaning of section 413(a) and Sec. 1.413-1(a)(2), and*

*(ii) The plan is maintained by more than one employer.*

The surrounding text provides details on rules related to the handling of participation, vesting, funding and other issues, and differentiates between collectively bargained “multiemployer” (Taft Hartley) plans, controlled group plans and Section 413(c) Multiple Employer Plans.

Notably, there is no reference in the code to a requirement for a connection among adopting employers such as a trade association or Professional Employer Organization, although both of these are common structures.

### **Typical MEP Characteristics**

An MEP fund menu generally is the same for all adopters. Plan features, however, are a different story. While some MEPs limit adopters to Safe Harbor or automatic enrollment plan structures, many MEPs have written their plan document to accommodate a wide variety of provisions, resulting in little or no takeaways for employers merging into the plan. When the MEP is associated with a Professional Employer Organization (PEO), there is usually a

common payroll system that makes it easier for the MEP to handle consolidated reporting at the plan level. When the MEP is open to unrelated employers, the MEP must develop a means to aggregate data among diverse employers in order to prepare a single MEP-level Form 5500 and provide data for the annual plan audit.

### **Outsourcing the Key Fiduciary Roles**

A Multiple Employer Plan can offer significant mitigation of fiduciary responsibility to the adopting employer. The reason is a simple one: *The adopting employer ceases to perform certain key roles that incur fiduciary status.* When an employer merges their current single employer plan into a properly structured Multiple Employer Plan, they are no longer the sponsor of the plan. They should also cease to be a Trustee, Plan Administrator or any sort of named fiduciary. Those central roles move to the MEP, and the inherent fiduciary liability transfers with them.

Let's break down exactly how this works. As we do, bear in mind there are variations in structure among MEPs that can markedly affect roles and fiduciary responsibilities.

### **How Do Responsibilities Transfer from the Adopting Employer to the MEP?**

To explain the transfer of fiduciary responsibilities, it is necessary to understand the fiduciary roles normally inherent in being a plan sponsor.

In a single employer plan, the employer is generally the plan sponsor and they appoint certain "named fiduciaries" and/or serve in the fiduciary roles themselves.

ERISA Section 402(a)(2) says, "the term 'named fiduciary' means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary."

There are four primary kinds of "named" fiduciaries under ERISA, three of which should be named in the plan and a fourth which is often named in a separate contract, as follows:

- **ERISA 403(a) Trustee:** Plan trustees are named either in the plan document or trust agreement. They can be the same person or entity as the 3(21) Named Fiduciary or completely separate. Trustees manage and control assets of the plan but are often subject to the direction of a non-trustee ERISA 3(21)(a) fiduciary or 3(38) investment manager.
- **ERISA 3(16) Plan Administrator:** Not to be confused with a third party administrator, the plan administrator bears responsibility for many operational functions such as form 5500 filings and participant notices. The 3(16) Plan Administrator is named in the plan document and may be either a person or the plan sponsor itself.
- **ERISA 3(21) Named Fiduciary:** The plan document generally names one of the executives of the plan sponsor for this key role. While additional fiduciaries may be

appointed by the 3(21) Named Fiduciary, these are subordinate to the fiduciary named in the plan document.

Note also that other individuals may be considered 3(21) fiduciaries, either by design or unintentionally, if they “exercise any discretionary authority or discretionary control...” over management or administration of the plan, or render investment advice for compensation (ERISA 3(21)(a). These fiduciaries are defined by function and are not necessarily named in the plan instruments.

- **ERISA 3(38) Investment Manager:** This is an optional role which is generally established by contract rather than through the plan document. ERISA 402(c)(3) says that “a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of the plan.” That is, the plan sponsor may turn over all control of investment decisions and thereafter monitor the performance of the investment manager.

In a typical single employer plan, *most fiduciary functions reside with these three to four named fiduciaries*, along with anyone characterized as a functional fiduciary under ERISA 3(21)(a) due to either acting as a paid investment advisor or through exercising control over the plan’s management of assets or administration.

### Transfer of Roles in a Multiple Employer Plan

In an effectively structured Multiple Employer Plan, all named fiduciary roles transfer from the adopting employer to the Multiple Employer Plan and its designees as follows:

Typical Single Employer Plan			Typical Multiple Employer Plan
<b>Plan Sponsor</b>	Employer	➔	MEP plan sponsor
<b>3(21) Named Fiduciary</b>	Employer (or executive)	➔	MEP plan sponsor
<b>403(a) Trustee</b>	Employer or independent trustee	➔	MEP plan sponsor or third party trustee
<b>3(16) Plan Administrator</b>	Employer or named individual	➔	MEP plan sponsor or named individual
<b>3(38) Investment Manager (optional)</b>	Independent investment advisor (client is employer / sponsor)	➔	Independent investment advisor (client is MEP plan sponsor)

Translating this into functional terms, most MEPs or their appointees make the investment decisions, select the recordkeeper and maintain the plan document. The plan audit, Form 5500 and regulatory compliance also are handled at the MEP level and no longer by the adopting employer. What remains with the adopting employer primarily is various ministerial functions and the decision to join or withdraw from the Multiple Employer Plan.

When the adopting employer transfers the role of plan sponsor and plan trustee, they no longer bear the responsibility for the selection and monitoring of the fund menu. To the extent that one

of the adopting employers or their advisor continues to offer advice for a fee or exercise control over the investment menu offered to that employer's participants, they take back a fiduciary role related to their investment menu, defeating much of the fiduciary liability relief sought by adopting the Multiple Employer Plan.

### **Residual Fiduciary Liability for Adopting Employers**

The adopting employer is not entirely on the sidelines after joining a Multiple Employer Plan. They may still participate in important plan responsibilities, including:

- The decision to adopt or de-adopt the Multiple Employer Plan, including necessary due diligence and monitoring of the MEP.
- Plan design decisions, within the options offered in the MEP document.
- Timely and accurate submission of plan contributions.
- Fulfillment of non-elective contributions required by the plan.
- Distribution to participants of required notices and information, though this may at times be handled directly by the MEP plan sponsor.
- Communication and enrollment assistance for participants.
- Providing information required by the MEP.

How much fiduciary liability remains with the adopting employer due to these functions? The answer to that question is disputed. Some suggest the fiduciary relief may be total, on the basis that the responsibilities of the adopting employer are either settlor functions (adoption and plan design) or are non-fiduciary ministerial acts that do not involve discretion under ERISA 3(21)(a). (See the Scott Simon interview with Jeff Mamorsky, J.D., LL.M. in the November 4, 2010 Morningstar advisor).

Others believe that an employer retains residual fiduciary liability for the selection and monitoring of the MEP, or that actions by the adopting employer may cross over the line from being purely ministerial to the "discretionary authority or discretionary responsibility" that defines a fiduciary in ERISA 3(21)(a)(iii).

Our perspective is that marketing claims and, indeed, the debate itself, may be diverting attention from the main point. We suggest that properly structured Multiple Employer Plans offer the most significant mitigation of fiduciary risk available today for many employers. The question of whether that fiduciary risk reduction is 100% or 90% should not obscure the tremendous impact of this achievement. We advise our clients that the best practice is to operate on the assumption that they have liability for all acts performed for the benefit of participants, whether that liability arises under ERISA or elsewhere, and that, in any event, it is a sound business practice to evaluate and monitor any service provider. Whether or not this residual role of the adopter rises to the level of a fiduciary act under ERISA, those functions are still critical duties which the adopting employer should take seriously and for which the adopter bears responsibility.

### **Role of the Adopting Employer's Advisor**

With the exception of investment selection and monitoring, the adopting employer's advisor should continue in the same role they played in a single plan structure. Plan design assistance, participant counseling, communication strategies and fee analysis continue to be important to the adopting employer. More broadly, the advisor should serve as advocate for the adopting employer and guide them through the process of evaluating the Multiple Employer Plan approach, conducting the Request For Proposals with various MEP providers and benchmark the performance of the MEP in terms of its investment oversight, fiduciary practices and cost / benefit structure.

In summary, there are a number of strategies and tools available to plan sponsors seeking to manage fiduciary responsibilities and risks. Adoption of a Multiple Employer Plan is one effective solution to mitigate fiduciary risk and streamline plan oversight for employers that prefer to outsource key responsibilities.

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