

**MULTIPLE EMPLOYER
RETIREMENT PLANS: A
PETITE PRIMER**

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- I. **Terminology.** Let me start with some comments about terminology. In particular, let me explain what I mean in this outline when I use the term “multiple employer plan,” and also what I mean by the term “retirement plan.” By a “multiple employer plan” I mean a plan maintained by more than one employer that is not a multiemployer plan. In deciding whether a plan is maintained by more than one employer, I will think of employers aggregated under the controlled group, common control, or affiliated service group rules of Internal Revenue Code (“IRC”) Section 414(b), (c), or (m) as being a single employer.
- A. **Multiemployer Plans: An Aside.** I mentioned that I am not in this outline going to consider multiemployer plans to be multiple employer plans. Although multiemployer plans cover employees of multiple employers, the rules applicable to those plans, both under the Tax Code and ERISA, comprise their own world. By “multiemployer plan” I mean a plan that is a multiemployer plan within the meaning of either the Tax Code definition of that term, which is set out in IRC Section 414(f), or the ERISA definition of that term, which is set out in ERISA Section 3(37)(A). Those definitions are quite similar to one another, though not strictly identical (for example, ERISA alone has a special provision for a “qualified football coaches plan”). In general they treat a plan as a multiemployer plan if more than one employer is required to contribute, the plan is maintained pursuant to one or more collective bargaining agreements between a union (or other employee organization) and more than one employer, and any other requirements set by the Secretary of Labor are satisfied. As to those additional requirements, Department of Labor (“DOL”) regulations require that a plan not in existence prior to ERISA’s effective date have been established for a “substantial business purpose” in order to be a multiemployer plan. 29 C.F.R. § 2510.3-37(c). For a ruling in which the DOL concluded that establishing a multiemployer plan merely to obtain the statutory advantages of that status (apparently including advantages under both the Tax Code and Titles I and IV of ERISA) will not satisfy the substantial business purpose requirement, see DOL Advisory Opinion 2002-07A.

It can sometimes be unclear whether a plan is a multiemployer plan where the plan covers both bargaining unit employees and non-bargaining unit employees. Recall that the foundational requirements for being a multiemployer plan are that (a) more than one employer be required to contribute to the plan, (b) the plan be maintained pursuant to one or more collective bargaining agreements, and (c) the plan have been established for a substantial business purpose. What, then, if only a substantial minority of participants are covered under a collective bargaining agreement? Let’s say, for example, that 25 percent of participants are covered under a collective bargaining agreement. I think most employee benefits professionals would assume

that even if this plan covers employees of more than one employer, it is probably is not a multiemployer plan. But I'm not aware of any clear guidance explaining how predominant the bargaining unit employees must be as a percentage of plan participants for a plan covering employees of multiple employers to constitute a multiemployer plan. There is no numerical test set out in the Tax Code, ERISA, or related regulations. And the statutes do not require that there be joint union-employer trusteeship for an arrangement to be a multiemployer plan. Perhaps of interest, in a different context the Department of Labor has established a helpful 85 percent threshold for deciding when a plan has enough participants employed under bargaining agreements to be considered established or maintained under or pursuant to collective bargaining agreements, so as to avoid constituting a multiple employer welfare arrangement ("MEWA"). 29 C.F.R. § 2510.3-40(b)(2). But I am not aware of any similarly specific guidance that applies in the retirement plan context.

One notable difference between multiemployer plans and multiple employer plans is the application to multiemployer plans of the ERISA Title IV withdrawal liability rules. Also notable, PBGC premiums for multiemployer plans are significantly less than for single employer plans. For example, for plan years beginning in 2019, multiemployer plans pay a flat rate premium of \$29 per participant. Single employer plans, in sharp contrast, pay \$80 per participant as a flat rate premium, plus a variable rate premium that depends on the amount of the plan's unfunded vested benefits. (Remember, under Title IV of ERISA, multiple employer plans are considered "single-employer" plans.) Multiemployer plans pay no variable rate premium. The 2019 variable rate premium for single employer plans is \$43 per \$1,000 of unfunded vested benefits, up to a maximum of \$541 times the number of participants in the plan. Plans sponsored by small employers (generally, fewer than 25 employees) may be subject to a lower per participant cap.

Multiemployer plans are also subject to different funding rules than single employer or multiple employer (or CSEC) plans. The IRC Section 430 funding rules do not apply. Instead, the rules of IRC Section 431 (and perhaps Section 432) apply. IRC § 412(a)(2)(c). This is so even if the plan covers some noncollectively bargained employees (that is, employees not covered under a collective bargaining agreement), so long as it is a multiemployer plan.

Some Tax Code qualified plan rules, such as those relating to vesting and the IRC Section 415 limitations, apply differently to multiemployer plans. And multiemployer plans are subject to the additional qualification rules of IRC Section 413(a) and (b) that apply to all plans maintained pursuant to a collective bargaining agreement, whether or not multiemployer. Treas. Reg. § 1.413-1; IRM Section 7.11.6.1.1.4.

As with many plans maintained pursuant to one or more collective bargaining agreements, a good number of Tax Code section requirements will automatically be satisfied for collectively bargained participants in a multiemployer plan, including the following:

- IRC Section 401(a)(4) nondiscrimination rules
- IRC Section 401(a)(26) minimum participation requirement
- IRC Section 401(a)(35) diversification for assets requirements
- IRC Section 401(m) average contribution percentage tests
- IRC Section 410(b) coverage tests
- IRC Section 416 top-heavy rules
- IRC Section 436 funding based limits

A plan must, however, still satisfy these requirements for all noncollectively bargained participants. In particular, where a plan covers both collectively and noncollectively bargained employees, the plan must satisfy the requirements for the mandatorily disaggregated noncollectively bargained participant portion of the plan. See, generally, IRM Section 7.11.6.6.1, as well as Treasury Regulations Section 1.410(b)-2(b)(7); 1.401(a)(4)-1(c)(5); 1.401(a)(26)-1(b)(2)(i) and (ii); and 1.416-1 T-38.

In the discussion above, I have referred to “collectively bargained employees” and “noncollectively bargained employees,” terms which would surely drive a proper labor lawyer mad. These are, however, the terms used in the relevant Treasury regulations. A “collectively bargained employee” is, generally, an employee in a unit of employees covered by a collective bargaining agreement. And a “noncollectively bargained employee” is an employee who is not a collectively bargained employee. See, generally, Treas. Reg. §§ 1.410(b)-9 (definitions of “collectively bargained employee” and “noncollectively bargained employee”) and 1.410(b)-6(d)(2).

B. Plans Maintained Pursuant to a Collective Bargaining Agreement: A Further Aside. Special rules apply under IRC Section 413(b) to any plan maintained pursuant to a collective bargaining agreement. These rules apply whether the arrangement is a single employer plan, a multiple employer plan, or a multiemployer plan. For confirmation that IRC Section 413(b) applies to multiemployer plans, see IRM Section 7.11.6.1.1.4.

In applying a number of Tax Code requirements, all employees of each of the employers who are parties to the collective bargaining agreement and are subject to the same “benefit computation formula” are treated as if employed by a single employer. IRC Section 413(b); Treas. Reg. § 1.413-1. This is the case, for example, with respect to the IRC Section 410 participation rules, the IRC Section 401(a)(4) nondiscrimination rules, and the IRC Section 411(d)(3) rules on plan termination, partial termination, and the complete discontinuance of contributions. IRC § 413(b)(1) and (2).

For purposes of the IRC Section 411 vesting rules (other than subsection (d)(3)), all employers that are parties to the collective bargaining agreement are generally treated as a single employer, without regard to whether the participants are covered under the same benefit computation formula. IRC § 413(b)(4). And the minimum funding requirements of IRC Section 412, as well as the deduction limitations of

IRC Section 404(a), are determined as if all participants were employed by a single employer. IRC § 413(b)(5) and (7). That is true even if the plan was established after 1988 (see the discussion in Part II.F. below for special rules that otherwise apply to multiple employer plans established after 1988).

- C. **Affiliated Service Groups.** I noted above that I will not be calling a plan maintained by a single affiliated service group a multiple employer plan. I will instead think of it as a single employer plan. That is because when I think about whether a plan is a single employer plan or instead a multiple employer plan I focus to a large degree on how I must deal with the Tax Code's qualified plan participation, vesting, and, particularly, nondiscrimination rules. And for purposes of IRC Sections 410, 411, and 401(a)(4) and (26) (among other requirements), all employees of members of an affiliated service group are treated as employed by a single employer. IRC § 414(m)(4).

But one of the frustrations of the multiple employer plan rules under the Tax Code is their lack of clarity concerning the treatment of plans covering employees of affiliated service group members. For example, although affiliated service group status clearly causes qualified plan nondiscrimination testing to be handled as if all employees of the affiliated service group are employed by a single employer, the Tax Code's special rules for multiple employer plans, set out in IRC Section 413(c) and related Treasury regulations, do not expressly treat affiliated service group members as a single employer. They do treat employers that are members of the same controlled group or under common control as if they are a single employer. Treas. Reg. § 1.413-2(a)(2). But the relevant regulation does not aggregate affiliated service group members. Notably, that regulation was last amended in 1979, which is prior to the affiliated service group rules being added to the Tax Code. Although the listing of Tax Code provisions for which affiliated service group members are aggregated set out in IRC Section 414(m)(4) does not include Section 413, and although the (elderly) Section 413 regulations do not call for that aggregation, the Internal Revenue Manual says affiliated service group members are aggregated in determining whether a plan is a multiple employer plan. IRM Section 7.11.7.1.1.3 (this is a sensible result, whether or not there is adequate legal authority for it).

Adding to the confusion, ERISA's provisions do not seem consistent on the question whether to aggregate affiliated service group members so as to treat them as a single employer. For example, in determining whether a welfare arrangement covers the employees of more than one employer – so it is a “multiple employer welfare arrangement,” or “MEWA” – it appears affiliated service group members are not treated as a single employer. See DOL Information Letter to Nicholas W. Ferrigno dated May 24, 2004.

In contrast, there is aggregation of affiliated service group members under Title IV of ERISA. Somewhat strangely, by the way, under most of the operative provisions of Title IV of ERISA (concerning PBGC coverage, PBGC premiums, and the termination of defined benefit plans), there are only “single-employer plans” and

“multiemployer plans.” That is because, under PBGC regulations, multiple employer plans are treated as single-employer plans for purposes of Title IV. 29 C.F.R. § 4001.2 (definitions of “multiple employer plan,” “single-employer plan,” “multiemployer plan,” and “controlled group”). And PBGC regulations treat members of an affiliated service group as a single employer for this purpose. 29 C.F.R. § 4001.2 (definition of “controlled group”).

Although Title IV of ERISA characterizes multiple employer plans as “single-employer plans,” it does include special provisions that apply where a “substantial employer” withdraws from a multiple employer plan, and where a multiple employer plan terminates. Those rules are set out in ERISA Sections 4063 and 4064, respectively. These provisions, rather awkwardly, identify a plan affected by their rules as a “single-employer plan which has two or more contributing sponsors at least two of whom are not under common control.” This lengthy description of the affected plans is necessary because ERISA itself does not define the term “multiple employer plan,” though the PBGC regulations cited above do introduce the term. And although ERISA does not define the term, the term “multiple employer plan” did slip into ERISA Sections 103(g) and 204(g)(4)(B).

- D. Retirement Plans.** I am going to use the term “retirement plan” to mean a qualified retirement plan – that is, a plan that meets the requirements of IRC Section 401(a). So, when I refer to a “retirement plan” I mean a Section 401(k), defined benefit, money purchase pension, ESOP, and other stock bonus, plan that is qualified by meeting the requirements of IRC Section 401(a). And, of course, by “Section 401(k) plan” I mean a plan that includes a qualified cash or deferred arrangement satisfying the requirements of IRC Section 401(k).

Although most qualified plans would be “pension plans” within the meaning of ERISA (unless they are church or governmental plans), I’m nonetheless going to use the term “retirement plan,” since that seems to be the term used more frequently in common parlance by employee benefits professionals. When professionals use the term “pension plan” they often seem to mean specifically a qualified defined benefit pension plan or qualified money purchase pension plan (picking up on the Tax Code’s distinction between pension, profit sharing, and stock bonus plans, a distinction that appears, among other places, in the deduction rules of IRC Section 404 and Treasury Regulation Section 1.401-1(a)).

- E. One More Term: “Plan.”** At the risk of further alienating you, I’d better explain what I mean by one more term. If we are going to talk about multiple employer plans, I should say something about what I mean by a “plan,” as distinguished from an arrangement comprising multiple plans. I will use the well-developed definition of “plan” set out in Treasury Regulation Section 1.414(l)-1(b)(1). Well, actually, that regulation defines what it means for a plan to be a “single plan.” That is what I mean by a “Plan,” and here is what the regulation says:

(b) *Definitions.* For purposes of this section:

(1) *Single plan.* A plan is a “single plan” if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries. For purposes of the preceding sentence, all the assets of a plan will not fail to be available to provide all the benefits of a plan merely because the plan is funded in part or in whole with allocated insurance instruments. A plan will not fail to be a single plan merely because of the following:

- (i) The plan has several distinct benefit structures which apply either to the same or different participants,
- (ii) The plan has several plan documents,
- (iii) Several employers, whether or not affiliated, contribute to the plan,
- (iv) The assets of the plan are invested in several trusts or annuity contracts, or
- (v) Separate accounting is maintained for purposes of cost allocation but not for purposes of providing benefits under the plan.

However, more than one plan will exist if a portion of the plan assets is not available to pay some of the benefits. This will be so even if each plan has the same benefit structure or plan document, or if all or part of the assets are invested in one trust with separate accounting with respect to each plan.

So, the *sine qua non* for an arrangement constituting a single plan is that all plan assets are available to pay benefits to all individuals covered under the plan. I like that. It’s pretty simple. It comports with my notion of what a plan should be. Unfortunately, and very frustratingly, the Department of Labor’s view of what constitutes a single plan under ERISA is quite different. As a consequence, a plan that is a single multiple employer plan under the Tax Code may, in the view of the DOL, instead be under ERISA a conglomeration of many plans, each of which is maintained by an employer. More on that later.

II. Tax Code’s Multiple Employer Plan Rules. Well, that was a lot of talk about terminology. Now let’s get down to business. What does the Tax Code say about how to apply the Tax Code’s rules to a plan maintained by more than one employer? The answer is found in Tax Code Section 413(c) and Treasury Regulation Section 1.413-2. (See also ERISA Section 210(a) for rules relating to parallel participation, vesting, and funding provisions under ERISA.)

- A. Participation.** Under the IRC Section 413(c) rules, some Tax Code provisions apply as if all employees of each of the employers that maintain the plan are employed by a single employer. This has a certain logic to it, since we are talking about a single (albeit multiple employer) plan. For example, IRC Section 410(a), which concerns, among other things, the maximum permissible service requirement a plan may impose before an eligible employee is allowed to participate (typically, one “year of service”) is applied as if all employees of the employers maintaining the plan are employed by one single employer. Treas. Reg. § 1.413-2(b). This means that “hours of service” with any of the employers maintaining the plan generally must be counted in deciding whether an employee has met the plan’s service requirement (which may, for example, be a requirement that the employee have completed 1,000 hours of service in a particular 12-month period). Things get a bit more complicated, however, where the plan covers only certain job classifications or classes of employees. See 29 C.F.R. § 2530.210.
- B. Vesting.** In similar fashion, the vesting rules of Section 411 generally apply as if all employers that maintain the plan constitute a single employer. IRC § 413(c)(3). As a consequence, all hours an employee works for any of the employers maintaining the plan are aggregated in computing the employee’s hours of service for vesting purposes. Treas. Reg. § 1.413-2(d). As another consequence, all employers maintaining the plan are treated as a single employer in determining whether there has been a plan termination, partial termination, or complete cessation of contributions, each of which may require accelerated vesting. Treas. Reg. § 1.413-2(a)(3)(iii) and -2(d). So, for example, if one employer were to terminate participation or completely discontinue contributions, that would not seem to constitute a plan termination or complete discontinuance of contributions requiring accelerated vesting, assuming other employers continue to participate and contribute. In like fashion, the determination of whether enough participants have been lost in order for a partial termination to have occurred would seem to be made by looking at the participants of all employers, not just those of a single employer in isolation. So, if one employer were to close a facility and in doing so terminate 50 percent of its employees participating in the plan, that would not necessarily cause a partial termination if those terminated employees constitute only a small portion of all employees participating in the plan.
- C. Exclusive Benefit Rule.** The exclusive benefit rule of Section 401(a) is applied as if all participants are considered to be the employees of each employer. IRC § 413(b)(3). As a consequence, a contribution made by one employer may be applied to provide benefits, or pay expenses, relating to employees of other employers.
- D. Section 415 Limitations.** In applying the Section 415 limits on contributions and benefits, compensation, contributions and benefits contributed by all employers in a multiple employer plan are taken into account. Treas. Reg. § 1.415(a)-1(e).
- E. Employer-by-Employer Determinations (Especially Nondiscrimination Rules).** There are, however, important rules that apply on an employer-by-employer basis. For example, the minimum coverage requirements of IRC Section

410(b) are generally applied on an employer-by-employer basis. In making this employer-by-employer determination, members of a controlled group or those under common control are treated as a single employer. 29 C.F.R. § 1.413-2(a)(3)(ii). Although the Section 413(c) rules and regulations do not say so explicitly, members of an affiliated service group will presumably be treated as a single employer for this purpose too, either because that is intended to be the (unstated) rule under Section 413(c) (IRM Section 7.11.7.1.1.3 assumes this) or because IRC 414(m)(4)(B) says affiliated service group aggregation applies for Section 410 purposes anyway.

Other qualification requirements that are applied to each participating employer as if that employer maintained a separate plan are the IRC Section 401(a)(4) nondiscrimination rules (Treas. Reg. §§ 1.413-2(a)(3)(iii) and 1.401(a)(4)-1(c)(4)), the minimum participation requirements of IRC Section 401(a)(26) (Treas. Reg. § 1.401(a)(26)-2), the ADP and ACP tests under IRC Sections 401(k) and (m) (Treas. Reg. §§ 1.401(k)-2(a)(3)(ii)(A) and 1.401(k)-1(b)(4)), the top-heavy rules of IRC Section 416 (Treas. Reg. § 1.416-1, Q&A G-2 and T-8), and the determination of who constitutes a highly compensated employee (Treas. Reg. § 1.414(q)-1(t), Q&A 1.

For a nice summary of the application of the Tax Code's qualified plan requirements to multiple employer plans, see IRM Section 7.11.7, and in particular Exhibit 7.11.7-1.

- F. Disqualification of Entire Plan.** The failure of any employer to satisfy the minimum coverage requirements of IRC Section 410(b), or any other applicable qualification requirement, will result in disqualification of the entire plan for all employers maintaining the plan. Treas. Reg. § 1.413-2(a)(3)(iv).
- G. Funding and Deduction Rules.** The funding and deduction rules that apply depend on whether the plan was established prior to 1989. The applicable rules generally favor plans established before 1989. The different funding rules that apply to post-1988 plans are particularly important, and troublesome, for defined benefit plans. Those rules make it much less practical to establish a multiple employer defined benefit plan today than was the case prior to 1989. In particular, a multiple employer plan established after 1988 must be funded as if each participating employer is funding a separate plan. IRC § 413(c)(4)(A). So, the plan's assets must be allocated among the participating employers. In contrast, plans established before 1989 that did not elect to be treated as plans established after 1988 are funded as if all participating employers maintain one single employer plan. IRC § 413(c)(4)(B). In a Government Accountability Office Report from 2012 ("Federal Agencies Should Collect Data and Coordinate Oversight of Multiple Employer Plans," GAO-12-665), the GAO said actuarial experts told the GAO this makes it particularly difficult to establish a defined benefit multiple employer plan today. Those experts said:

[A]allocating assets across employers requires application of onerous, detailed allocation techniques that may result in certain employers receiving asset allocations that are disproportionate to their individual contributions. Disproportionate allocations may give certain participating employers the impression that the plan is inequitable – that is, for example, that certain employers are contributing to more to the funding of the plan than they would have were the plan not funded separately, while other participating employers may receive particularly favorably asset allocations.

According to this same GAO Report, as of the 2009 plan year roughly 37 percent of defined benefit multiple employer plans were subject to the more burdensome, post-1988 funding rules.

The deduction limits of IRC Section 404(a) also apply differently depending on whether a multiple employer plan was established before 1989. For plans established after 1988, each of the applicable limitations under IRC Section 404(a) is determined as if each employer were maintaining a separate plan. In contrast, for plans established before 1989, each limitation under IRC Section 404(a) is determined as if all participants were employed by a single employer (assuming the pre-1989 plan did not elect to be treated as established after 1988). IRC § 413(c)(6).

For plans established after 1988, both for funding purposes and for purposes of the Tax Code’s deduction rules, the assets and liabilities of each of the “separate plans” the employers are treated as maintaining are the assets and liabilities that would be allocated to a plan maintained by the employer if the employer withdrew from the multiple employer plan. IRC § 413(c)(7)(B). The legislative history to the Technical and Miscellaneous Revenue Act of 1988 (“TAMRA”), which created the distinctions between plans established before 1989 and those established later, indicates that the IRC Section 414(l) rules are used to make the determination of the assets and liabilities attributable to the “separate plans” employers in a multiple employer plan are considered to maintain for funding and deductibility rules purposes. Specifically, a Joint Committee Explanation of a Senate Consensus Amendment says:

The provision would provide that, for purposes of calculating the required or permissible contribution to a pension plan pursuant to the minimum funding rules and the full funding limitation, each employer participating in a multiple employer pension plan is deemed to be maintaining a separate plan. The assets and liabilities of each such plan are deemed to be those that would be transferred to a successor plan if the employer were to withdraw from the multiple employer plan, determined in accordance with section 414(l) and the terms governing the multiple employer plan.

Note three things about the above-quoted legislative history. First, the reference to the “terms governing the multiple employer plan” may be important in determining

to which employer's plan any overfunding of a defined benefit plan is to be allocated. Second, the reference to a "pension plan" may call into question whether the quoted legislative history applies to the deduction rules for profit sharing or stock bonus plans, though it would seem to make sense to apply the Section 414(l) rules even in that circumstance. Third, it is interesting that the legislative history refers to the IRC Section 414(l) rules, when, at least in the case of a defined benefit plan subject to Title IV of ERISA, one might otherwise have wondered whether the ERISA Section 4064 rules concerning liability on termination of a multiple employer plan, or the ERISA Section 4063 rules concerning liability of a "substantial employer" withdrawing from a multiple employer plan, might have had some relevance. Neither would have been a perfect fit because the former does not concern a withdrawal of an employer (but instead concerns termination of a plan), and the latter determines only a substantial employer's potential liability to a plan upon withdrawal.

The Conference Committee Report for TAMRA explains a special provision under which, in meeting the IRC Section 412 funding rules, a defined benefit (or money purchase pension) plan established after 1988 may be treated as a single plan (contrary to the general rule for post-1988 plans). That special rule applies if the plan's method for determining required contributions provides that any employer must contribute at least the amount it would if it maintained a separate plan. The rule is explained this way in the Conference Committee Report:

[T]he minimum funding standards is to be determined by treating each employer in a multiple employer plan as maintaining a separate plan, unless the plan's method for determining required contributions assures that each employer will contribute at least the amount that would be required if each employer were maintaining a separate plan. If the plan's method satisfies this requirement, then the multiple employer plan will file only a single Form 5500 and only a single Schedule B for the entire plan will be required to be prepared. Plans are required, however, to be able to demonstrate compliance with the employer-by-employer rule. It may be possible to demonstrate this compliance, for example, by using appropriate plan-wide assumptions for turnover, mortality, future growth in wages, and investment experience such that each employer contributed, at a minimum, the sum of normal cost plus required amortization of any unfunded liabilities, or net experience or other losses reduced by the amortization of any credits for experience or other gains and any contributions the deduction for which would be denied by the full funding limitation. Each employer's normal cost is required to reflect the actual salary and demographics of its employees. In addition, unfunded past service liabilities are to be amortized at least as rapidly as required by the minimum funding rules applicable to qualified plans. Under any acceptable method, no deficiencies arise and no prior year credit balances are permitted with respect to any employer.

Under the conference agreement, the assets and liabilities of each plan treated as a separate plan are the assets and liabilities that would be allocated to a plan maintained by the employer if the employer withdrew from the multiple employer plan, determined under a reasonable and consistent method. It is intended that the Secretary prescribe rules to prevent plan withdrawal mechanisms from being manipulated in order to avoid the deduction limits.

Note with respect to the legislative history quoted above that instead of referring to the IRC Section 414(l) rules for determining the assets and liabilities attributable to each employer, the Conference Committee Report refers to applying a “reasonable and consistent method” for making that determination, with the Secretary of the Treasury prescribing rules to prevent manipulation to avoid the deduction limits of IRC Section 404.

- G. IRC Section 413(b) Collectively Bargained Plan Rules Take Precedence.** An arrangement that would otherwise be subject to the multiple employer plan rules of IRC Section 413(c) will not be subject to those rules if IRC Section 413(b) applies. That is, where a plan is a collectively bargained plan described in Treasury Regulation Section 1.413-1(a), the multiple employer plan rules of IRC Section 413(c) and related Treasury Regulation Section 1.413-2 do not apply. Treas. Reg. § 1.413-2(a)(3)(i). Instead, the collectively bargained plan rules of IRC Section 413(b) and Treasury Regulation Section 1.413-1 apply.

- III. CSEC Plans.** There is a special set of funding rules for what are known as “CSEC Plans.” These “Cooperative and Small Employer Charity Plans” (that is, “CSEC Plans”) are typically multiple employer (though not multiemployer) defined benefit plans maintained by electric cooperatives, agricultural cooperatives, telephone cooperatives, or charities. IRC Section 414(y). (One single employer plan, apparently maintained by the Girl Scouts of America, is also treated as a CSEC.) In general, CSEC plans are not subject to the Pension Protection Act of 2006 (“PPA”) funding rules, under which plan liabilities are valued using interest rates determined under frequently-changing corporate bond yield curves. Instead, CSEC Plans may set a reasonable fixed interest rate to be used in valuing their liabilities. This contributes substantially to funding stability. See, generally, IRC § 412(a)(2)(D) and IRC § 433 (particularly subsection (c)(3)); contrast the rules at IRC § 412(a)(2)(A) and IRC § 430 (particularly subsection (h)(2)).

In addition, the PPA benefit restrictions for underfunded plans generally do not apply to CSEC Plans. IRC § 401(a)(29). Although most of the pre-PPA funding rules apply to CSEC plans, the “deficit reduction contributions” that could apply under pre-PPA law do not apply to CSEC plans.

Further, CSEC plans are treated for funding purposes as if all participants are employed by a single employer. IRC § 413(d)(1). The same is true in applying the deductibility limits of IRC Section 404(a), where, again, all participants are treated as if employed by a single employer. IRC § 413(d)(3). In these ways, CSEC plans are treated as a single plan for funding and deductibility purposes, even if they were established after 1988.

For both CSEC plans and pre-1989 multiple employer plans, not only are the Section 404(a) deduction limitations determined as if all participants are employed by a single employer, the amounts contributed by each employer maintaining the plan are considered not to exceed the applicable limitation if the anticipated employer contributions for the plan year of all employers do not exceed the limitation. IRC § 413(c)(6)(B)(ii) and (d)(3).

IV. DOL’s Different Understanding of What Constitutes a Single “Plan.” As I noted earlier, I have been treating an arrangement as a single plan if it is a “single plan” within the meaning of Treasury Regulation Section 1.414(l)-1(b)(1). Under that standard, a plan is a single plan if all the plan’s assets are available to pay benefits to all employees (and beneficiaries) covered by the plan. Unfortunately, the Department of Labor takes a different position in interpreting what constitutes a plan under ERISA. A multiple employer plan – that is, a multiple employer plan that is a “single plan” within the meaning of the Tax Code – may be considered by the Department of Labor not to constitute a single plan, but may instead be considered to comprise a collection of single employer plans. This is frustrating primarily because if the DOL is correct it means a Form 5500 must be filed for each of the single employer plans, rather than it being sufficient to file a single Form 5500 for what is a single plan for Tax Code purposes. Incidentally, in the case of a multiple employer plan that is able to file a single annual report, that report must include a list of participating employers and a good faith estimate of the percentage of total contributions made by the participating employers during the plan year. See ERISA § 103(g), and Form 5500 Instructions, Line-by-Line Instructions, Line A - Box for Multiple-Employer Plans.

The theoretical underpinning for the Department of Labor’s different understanding of what constitutes a “plan” is ERISA’s requirement that a plan be sponsored by an “employer” (or by a union or other employee organization). It is the question of what constitutes an “employer” that creates the issue. Notably, although ERISA requires that an arrangement be “established or maintained by an employer” (or employee organization), the term “employer” means “any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.” ERISA § 3(2) and (5). One might argue that in the context of a multiple employer retirement plan, the plan sponsor (which under ERISA Section 3(16)(b)(iii) can be an “association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan”) should, in the normal circumstance, be considered as acting indirectly in the interest of the employers.

The Department of Labor has, however, historically taken a narrow view of what it means to be an “employer” that establishes or maintains an arrangement, and therefore a narrow view of when an arrangement is a single plan. The Joint Committee on Taxation summarized the Department of Labor’s historical position in a description of legislation that was under consideration by the Senate Finance Committee in 2016. There, in JCX-87-16, the Joint Committee on Taxation summarized in this way:

Under ERISA, an employee benefit plan (whether a pension plan or a welfare plan) must be sponsored by an employer, by an employee organization, or by both.²⁹ The definition of employer is any person acting

directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan, and includes a group or association of employers acting for an employer in such capacity.³⁰

These definitional provisions of ERISA are interpreted as permitting a multiple-employer plan to be established or maintained by a cognizable, bona fide group or association of employers, acting in the interests of its employer members to provide benefits to their employees.³¹ This approach is based on the premise that the person or group that maintains the plan is tied to the employers and employees that participate in the plan by some common economic or representational interest or genuine organizational relationship unrelated to the provision of benefits. Based on the facts and circumstances, the employers that participate in the benefit program must, either directly or indirectly, exercise control over that program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the program. However, an employer association does not exist where several unrelated employers merely execute participation agreements or similar documents as a means to fund benefits, in the absence of any genuine organizational relationship between the employers. In that case, each participating employer establishes and maintains a separate employee benefit plan for the benefit of its own employees, rather than a multiple-employer plan.

²⁹ ERISA sec. 3(1) and (2).

³⁰ ERISA sec. 3(5).

³¹ See, for example, Department of Labor Advisory Opinions 2012-04A, 2003-17A, 2001-04A, and 1994-07A, and other authorities cited therein.

Prior to the addition to ERISA of the “multiple employer welfare arrangement,” or “MEWA,” rules in 1983 (by way of Public Law 97-473), it was entirely understandable that the Department of Labor wished to be restrictive in deciding what constitutes a single plan. That is because plans covered under ERISA enjoy very substantial protection from state regulation under ERISA’s preemption provisions set out in ERISA Section 514. And prior to the addition of the MEWA rules, there had been concern about whether states had the power (or understood they had the power) to regulate self-insured MEWAs. That was particularly worrisome because of the number of poorly funded, and in some cases simply fraudulent, MEWAs being marketed. So, prior to the addition of the ERISA MEWA rules, one could understand the DOL’s motivation to narrowly interpret the term “employer,” to prevent abusive MEWAs from arguing they were plans enjoying preemption protection. But that legal concern was largely resolved 35 years ago, with the addition of the MEWA rules. The MEWA rules make clear that states may vigorously regulate self-insured MEWAs, and may regulate insured MEWAs to a lesser degree, whether or not those MEWAs are a single plan or instead a collection of single employer plans.

At least with respect to qualified retirement plans, where the Tax Code establishes detailed rules that are protective of plan participants, I don’t see a contemporary justification for the Department of Labor’s recalcitrance in refusing to acknowledge that a single multiple

employer plan within the meaning of Treasury Regulation Section 1.414(l)-1(b)(1) should also constitute a single plan within the meaning of ERISA. The potential for fraud and abuse in the case of qualified retirement plans, where the IRS has substantial enforcement authority, is much less than with respect to MEWAs.

There is an irony in the DOL's position. Treating a multiple employer plan covering the employees of many small employers as a constellation of single employer plans, rather than as a single multiple employer plan, means no audit requirement applies to the arrangement (assuming none of the individual employers' "plans" has at least 100 participants). And, at least arguably, the requirement that plans with at least 100 participants include more detailed information on their annual reports (Forms 5500) than smaller plans might not apply, though the IRS could argue that because there is a single multiple employer plan for Tax Code purposes, IRC Section 6058(a) and Treasury Regulation Section 301.6058-1(a)(3) still require inclusion of the more detailed information to be reported by large plans.

- V. **Proposed DOL Regulation.** The Department of Labor, in response to Presidential Executive Order 13847, issued on August 31, 2018, has proposed a rule modestly relaxing the Department of Labor's interpretation of who is an "employer" for purposes of establishing a single multiple employer plan. The proposed regulation is found at 83 Fed. Reg. 53534 (Oct. 23, 2018). The proposed expansion of the circumstances in which a multiple employer plan can be treated as a single plan would apply only to defined contribution plans, though it would not appear to be limited to defined contributions plans that are "qualified" or otherwise hold special status under the Tax Code. In the preamble to its proposed regulation, the DOL described its historic position as to what constitutes a single multiple employer plan in this way:

The Department has long taken the position that, even in the absence of the involvement of an employee organization, a single "multiple employer plan" under ERISA may exist where a cognizable group or association of employers, acting in the interest of its employer members, establishes a benefit program for the employees of member employers. To satisfy these criteria, the group or association must exercise control over the amendment process, plan termination, and other similar functions of the plan on behalf of the participating-employer members with respect to the plan and any trust established under the program.¹⁹ DOL guidance generally refers to these entities – *i.e.*, entities that qualify as groups or association, within the meaning of section 3(5) – as "bona fide" employer groups or associations.²⁰ For each employer that adopts for its employees a program of pension or welfare benefits sponsored by an employer group or association that is not "bona fide," such employer establishes its own separate employee benefit plan covered by ERISA.²¹ Largely, but not exclusively, in the context of welfare-benefit plans, the Department has previously distinguished employer groups or associations that can act as an ERISA section 3(5) employer in sponsoring a multiple employer plan from those that cannot. To do so, the Department has asked whether the group or association has a sufficiently close economic or representational nexus

to the employers and employees that participate in the welfare plan that is unrelated to the provision of benefits.²²

DOL advisory opinions and court decisions have long applied a facts-and-circumstances approach to determine whether there is a sufficient common economic or representational interest or genuine organizational relationship for there to be a bona fide employer group or association capable of sponsoring an ERISA plan on behalf of its employer members. This analysis has focused on three broad sets of issues, in particular: (1) Whether the group or association is a bona fide organization with business/organizational purposes and functions unrelated to the provision of benefits; (2) whether the employers share some commonality and genuine organizational relationship unrelated to the provision of benefits; and (3) whether the employers that participate in a plan, either directly or indirectly, exercise control over the plan, both in form and substance. This approach has ensured that the Department's regulation of employee benefit plans is focused on employment-based arrangements, as contemplated by ERISA's text. This approach also helps distinguish the establishment by a group or association of an employee benefit plan from "commercial insurance," consonant with ERISA's structure.²³ The Department continues to believe that this approach provides for a sound reading of ERISA and that it represents a sound policy choice. Concerns for simplicity and uniformity in approach justify applying the same requirement to an entity acting as "a group or association" in the pension context.

¹⁹ See 83 FR at 28912, 28920.

²⁰ See, e.g., Advisory Opinions 2008-07A, 2003-17A, and 2001-04A.

²¹ See 83 FR 28912, 13 (citing Advisory Opinion 96-25A).

²² See 83 FR 28912; see also Advisory Opinions 2012-04A, 1983-21A, 1983-15A, and 1981-44A.

²³ 83 FR 28914, 28917.

In its proposal, the DOL notes that for the purpose of being able to establish and maintain a pension plan under ERISA, an "employer" includes any person acting in the interest of an employer in relation to the plan. The proposed regulation would deem a "bona fide group or association of employers" and a "bona fide professional employer organization" to be able to act in the interest of an employer within the meaning of ERISA, and therefore to be able to establish a single multiple employer plan. Again, the proposed expansion of the term "employer" would apply only in the context of sponsoring a multiple employer defined contribution pension plan ("pension plan" as that term is used in ERISA, which is not restricted to defined benefit or money purchase pension plans under the Tax Code).

A. Bona Fide Group or Association of Employers. Here is the proposed regulatory language with respect to a bona fide group or association of employers:

(b)(1) *Bona fide group or association of employers.* For purposes of title I of the Act and this chapter, a bona fide group or

association of employers capable of establishing a MEP shall include a group or association of employers that meets the following requirements:

(i) The primary purpose of the group or association may be to offer and provide MEP coverage to its employer members and their employees; however, the group or association also must have at least one substantial business purpose unrelated to offering and providing MEP coverage or other employee benefits to its employer members and their employees. For purposes of satisfying the standard of this paragraph (b)(1)(i), as a safe harbor, a substantial business purpose is considered to exist if the group or association would be a viable entity in the absence of sponsoring an employee benefit plan. For purposes of this paragraph (b)(1)(i), a business purpose includes promoting common business interests of its members or the common economic interests in a given trade or employer community and is not required to be a for-profit activity;

(ii) Each employer member of the group or association participating in the plan is a person acting directly as an employer of at least one employee who is a participant covered under the plan;

(iii) The group or association has a formal organizational structure with a governing body and has by-laws or other similar indications of formality;

(iv) The functions and activities of the group or association are controlled by its employer members, and the group's or association's employer members that participate in the plan control the plan. Control must be present both in form and in substance;

(v) The employer members have a commonality of interest as described in paragraph (b)(2) of this section;

(vi) The group or association does not make plan participation through the association available other than to employees and former employees of employer members, and their beneficiaries; and

(vii) The group or association is not a bank or trust company, insurance issuer, broker-dealer, or other similar financial services firm (including pension record keepers and third-party administrators), or owned or controlled by such an entity or any subsidiary or affiliate of such an entity, other than to the extent such an entity, subsidiary or affiliate participates in the group or association in its capacity as an employer member of the group or association.

(2) *Commonality of interest.*

(i) Employer members of a group or association will be treated as having a commonality of interest if either:

(A) The employers are in the same trade, industry, line of business or profession; or

(B) Each employer has a principal place of business in the same region that does not exceed the boundaries of a single State or a metropolitan area (even if the metropolitan area includes more than one State).

(ii) In the case of a group or association that is sponsoring a MEP under this section and that is itself an employer member of the group or association, the group or association will be deemed for purposes of paragraph (b)(2)(i)(A) of this section to be in the same trade, industry, line of business, or profession, as applicable, as the other employer members of the group or association.

B. Bona Fide Professional Employer Organization. The proposed regulation defines “bona fide professional employer organization” in the following fashion:

(c)(1) *Bona fide professional employer organization.* A professional employer organization (PEO) is a human-resource company that contractually assumes certain employer responsibilities of its client employers. For purposes of title I of the Act and this chapter, a bona fide PEO is capable of establishing a MEP. A bona fide PEO is an organization that meets the following requirements:

(i) The organization performs substantial employment functions, as described in paragraph (c)(2) of this section, on behalf of its client employers, and maintains adequate records relating to such functions;

(ii) The organization has substantial control over the functions and activities of the MEP, as the plan sponsor (within the meaning of section 3(16)(B) of the Act), the plan administrator (within the meaning of section 3(16)(A) of the Act), and a named fiduciary (within the meaning of section 402 of the Act);

(iii) The organization ensures that each client employer that adopts the MEP acts directly as an employer of at least one employee who is a participant covered under the defined contribution MEP; and

(iv) The organization ensures that participation in the MEP is available only to employees and former employees of the organization and client employers, and their beneficiaries.

(2) *Criteria for substantial employment functions.* The criteria in this paragraph (c)(2) are relevant to whether a PEO performs substantial employment functions on behalf of its client employers. Although a single criterion alone may, depending on the facts and circumstances of the particular situation and the particular criterion, be sufficient to satisfy paragraph (c)(1)(i) of this section, as a safe harbor, an organization shall be considered to perform substantial employment functions on behalf of its client employers if –

(i) The organization is a “certified professional employer organization” (CPEO) as defined in section 7705(a) of the Internal Revenue Code, and regulations thereunder, the CPEO has entered into a “service contract” within the meaning of section 7705(e)(2) of the Internal Revenue Code with respect to its client-employers that adopt the defined contribution MEP with respect to the client-employer employees participating in the MEP, pursuant to which it satisfies the criteria in paragraphs (c)(2)(ii)(A), (B), and (C) of this section, and the organization meets any two or more of the criteria set forth in paragraph (c)(2)(ii)(D) though (I) of this section; or

(ii) The organization meets any five or more of the following criteria with respect to client-employer employees participating in the plan:

(A) The organization is responsible for payment of wages to employees of its client-employers that adopt the plan without regard to the receipt or adequacy of payment from those client-employers;

(B) The organization is responsible for reporting, withholding, and paying any applicable federal employment taxes for its client employers that adopt the plan, without regard to the receipt or adequacy of payment from those client-employers;

(C) The organization is responsible for recruiting, hiring, and firing workers of its client-employers that adopt the plan in addition to the client-employer’s responsibility for recruiting, hiring, and firing workers;

(D) The organization is responsible for establishing employment policies, establishing conditions of employment, and supervising employees of its client-employers that adopt the plan in addition to the client-employer’s responsibility to perform these same functions;

(E) The organization is responsible for determining employee compensation, including method and amount, of employees of its client-employers that adopt the plan in addition to the client-employers' responsibility to determine employee compensation;

(F) The organization is responsible for providing workers' compensation coverage in satisfaction of applicable state law to employees of its client-employers that adopt the plan, without regard to the receipt or adequacy of payment from those client-employers;

(G) The organization is responsible for integral human-resource functions of its client-employers that adopt the plan, such as job-description development, background screening, drug testing, employee-handbook preparation, performance review, paid time-off tracking, employee grievances, or exit interviews, in addition to the client employer's responsibility to perform these same functions;

(H) The organization is responsible for regulatory compliance of its client-employers participating in the plan in the areas of workplace discrimination, family-and-medical leave, citizenship or immigration status, workplace safety and health, or Program Electronic Review Management labor certification, in addition to the client-employer's responsibility for regulatory compliance; or

(I) The organization continues to have employee-benefit-plan obligations to MEP participants after the client employer no longer contracts with the organization.

- C. **Working Owners.** The proposed regulation is intended not only to expand the coverage of common law employees under multiple employer plans, but also to facilitate the coverage under multiple employer plans of owners who are not common law employees. The proposal would do so under the following proposed regulatory language:

(d) *Dual treatment of working owners as employers and employees.* (1) A working owner of a trade or business without common law employees may qualify as both an employer and as an employee of the trade or business for purposes of the requirements in paragraph (b) of this section, including the requirement in paragraph (b)(1)(ii) of this section that each employer member of the group or association adopting the MEP must be a person acting directly as an employer of one or more employees who are participants covered under the MEP, and the requirement in paragraph (b)(1)(vi) of this section that the group or association does not make participation through the group or association available

other than to certain employees and former employees and their beneficiaries.

(2) The term “working owner” as used in this paragraph (d) means any person who a responsible plan fiduciary reasonably determines is an individual:

(i) Who has an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including a partner or other self-employed individual;

(ii) Who is earning wages or self-employment income from the trade or business for providing personal services to the trade or business; and

(iii) Who either:

(A) Works on average at least 20 hours per week or at least 80 hours per month providing personal services to the working owner’s trade or business, or

(B) In the case of a MEP described in paragraph (b) of this section, if applicable, has wages or self-employment income from such trade or business that at least equals the working owner’s cost of coverage for participation by the working owner and any covered beneficiaries in any group health plan sponsored by the group or association in which the individual is participating or is eligible to participate.

(3) The determination under this paragraph (d) must be made when the working owner first becomes eligible for participation in the defined contribution MEP and continued eligibility must be periodically confirmed pursuant to reasonable monitoring procedures.

VI. Would the DOL’s Proposed Rule Make a Difference? In admirable candor, the DOL confesses in its proposed rule that it is not sure its proposal would substantially increase the number of persons covered under retirement plans. The DOL’s proposal is aimed at, though not restricted to, expanding coverage for employees of smaller employers. The Department notes that small employers may be deterred from offering retirement benefits for reasons of both cost and fear of fiduciary or other liability or responsibility. As to the first point – cost – the hope is that larger multiple employer plans will have lower administrative and investment management expenses, measured on a per-participant basis, than most smaller plans.

The DOL does a nice job in its proposed rule acknowledging the various arguments concerning the regulation’s possible effect on plan costs. In doing so, it includes references to a number of helpful surveys and statistical compilations. But as the DOL observes, multiple employer plan costs may not always be lower than those under currently available offerings from bundled financial service providers. More generally, the DOL says the variety of small employer retirement plan options currently available under the Tax Code

“may better serve an employer’s needs than a [multiple employer plan] would in some circumstances.” Leaving aside administrative and investment costs, if an employer is to make a matching or other contribution, that would, of course, be another, perhaps more substantial, cost.

As to the concern smaller employers, or other employers not offering retirement plans, may have about the legal risks associated with offering a retirement plan, the DOL proposal does not seem to signal any relaxation of the applicable fiduciary standards. The DOL says a multiple employer plan structure may “effectively transfer substantial legal risks to professional fiduciaries responsible for the management of the plan,” but notes that “employers would [still] retain some fiduciary responsibility for choosing and monitoring the arrangement and forwarding required contributions to the [multiple employer plan].” This is really little, if any, different than the DOL’s general view of one’s responsibility in hiring and monitoring any vendor in connection with a retirement plan.

If the DOL’s current proposal becomes effective, only time will tell whether it will have the desired effect of increasing retirement plan coverage (or at least availability). The DOL proposal is fair and transparent in expressing its uncertainty about the effect it may have. My view is that with the remarkable reduction in mutual fund investment management fees over the past decade or so, and increasingly competitive pricing by recordkeepers, the hoped-for reduction in administrative and investment costs associated with multiple employer plans may not seem all that impressive to an employer that is already cost conscious.

The argument about relieving small employers of fiduciary responsibility is more interesting. If an employer’s primary fiduciary responsibility would be merely to select and monitor a multiple employer plan vendor, the question may become what that selection and monitoring requires. If, in choosing and monitoring a multiple employer plan vendor, ERISA’s fiduciary rules require the employer to compare offerings – in terms of service, administrative costs, and investment options – available from a variety of vendors, and require quarterly analysis of the investment options offered by the chosen vendor, this may prove a considerable burden for a small employer. This may particularly be true if the employer feels it must retain an investment, or other retirement plan, consultant to help it with its analysis. Retaining such an expert would, after all, be the norm for larger employers trying to meet their ERISA fiduciary obligation of prudence. My view is that if the DOL’s proposal, or some variant of it, is to have the desired effect of substantially expanding retirement coverage, the DOL may need to issue guidance clarifying, and probably relaxing, the fiduciary standards applicable to the choice and monitoring of multiple employer plan vendors.

In considering whether the DOL proposal would substantially change the marketplace, it is worth noting that there are already multiple employer plans available, including some very large ones. Consider, for example, that in the listing of the largest defined contribution multiple employer plans set out in an earlier GAO Report, the third largest such plan (based on 2009 Forms 5500) was the ADP Total Source Group, Inc. plan. At that time, the ADP plan had roughly 150,000 participants and over \$1 billion in assets. GAO-12-665,

Appendix I (September 2012). That plan is already available, and apparently has been available since 1988.

Also casting doubt on the effect the DOL proposal may have, remember that the primary practical value of the DOL proposal to a small employer is the ability to avoid the need to file a Form 5500. But with respect to multiple employer plans already in place, such as the ADP plan, if participating employers' understanding, rightly or wrongly, is that they are not obligated to file a Form 5500 (or the multiple employer plan prepares individual Forms 5500 to be filed by the individual participating employers), it is not clear to me the DOL's proposal would increase participation.

That said, it is possible that merely by focusing attention on multiple employer plans, whatever the DOL promulgates as a final rule will spur the adoption of retirement plans by small employers. The DOL's proposal might cause additional parties to sponsor multiple employer plans, and in marketing those plans to small employers the attention brought by the DOL regulation and the President's Executive Order could provide those sponsors with a way to grab employers' attention, and might perhaps (mistakenly) be spun as some type of governmental blessing of the type of plan being marketed.

Again, my hunch, is that it will not be cost savings that will be the primary driver of any success in increasing retirement plan participation. Instead, I suspect it is the convenience and comfort afforded a small employer that comes to believe it can simply "purchase" a turnkey retirement plan for its employees that might meaningfully increase retirement plan participation. Even if the DOL does not issue guidance relaxing, or at least clarifying, the fiduciary standards applicable to the choice and monitoring of multiple employer retirement plan vendors, many smaller employers may fail to rely on an attorney or other advisor who would know to warn the employer of its fiduciary risks. In that circumstance, the fiduciary risks themselves may be little or no impediment to increasing coverage.