

Pooled Employer Plans: DOL Issues New Interpretive Guidance and Tips for Employers

Executive Summary

On July 29, 2025, the Department of Labor (the “DOL”) published [limited interpretive guidance](#) regarding pooled employer plans, or “PEPs,” in the Federal Register (the “New Guidance”). Although PEPs are available to all sizes of employers, the New Guidance is specifically intended to help small employers evaluate and select “high-quality” and “low-cost” PEPs. The New Guidance also includes general questions intended to solicit information that may be used to help keep Congress informed about the PEP industry, and to help the DOL develop regulatory safe harbors to encourage the proliferation of these plans.

Background

PEPs are a special type of multiple employer plan, which was enabled under the Setting Every Community Up For Retirement Enhancement Act of 2019 (the “SECURE Act”).¹ Prior to the SECURE Act, multiple employer plans were generally required to limit participation to associations of employers or a bona fide professional employer organization. These requirements were largely eliminated for PEPs, opening up multiple employer plans to a much broader group of organizations.

Although membership in PEPs is broadly prescribed, there are still multiple rules that apply to these plans. For example, the PEP provider (the “Provider”) must be a named fiduciary of the plan. Providers must be registered with the DOL and the Department of the Treasury before beginning operations as a Provider. The PEP document must designate a named fiduciary (other than a participating employer) to be responsible for collecting plan contributions.

The PEP plan document must include a variety of other provisions, as well. For example, it must require that each participating employer retain fiduciary responsibility for selecting and monitoring the Provider and all other named plan fiduciaries, and that each participating employer generally remain responsible for investment and management of its own employees’ plan assets², provided that the Provider does not delegate this responsibility to another fiduciary.

¹ A plan established before December 20, 2019 (the date the SECURE Act was enacted) may be treated as a pooled employer plan provided the plan administrator makes such an election and the plan meets the ERISA requirements applicable to a pooled employer plan established on or after such date.

² This fiduciary responsibility does not override the rules under ERISA related to self-directed investments, which may mitigate some of the employers’ fiduciary responsibilities in this regard.

In addition, the PEP terms must generally require that employers, participants, and beneficiaries may not be subject to unreasonable fees, restrictions, and penalties when terminating participation in the plan and receiving plan distributions or transferring plan assets, that the Provider provide any required notices and disclosures, and that the participating employers take any action the Secretary of Labor or Provider deems necessary in order to administer the plan or meet applicable legal requirements.

The New Guidance

Interpretation of Investment Selection and Management Rules

As noted above, the PEP terms must require that the employer retain fiduciary responsibility for the investment and management of the portion of the plan's assets attributable to the employees (or beneficiaries) of the employer. The New Guidance highlights that this requirement indicates that the participating employers are clearly responsible for monitoring and selecting the PEP's investments. However, as also noted above, the plan terms may authorize the Provider to delegate the authority for investment and management functions to "another fiduciary." If the Provider chooses to do this, it must prudently select and monitor that other fiduciary.

The New Guidance notes that if the Provider engages an investment manager under ERISA Section 3(38)³ (a "3(38) Fiduciary"), that manager is responsible for the selection and management of the investments rather than the participating employers. Additionally, the employers and the Provider would generally not be liable for the acts and omissions of the 3(38) Fiduciary.⁴ The New Guidance indicates that the DOL believes that participating employers are better protected from fiduciary liability if the Provider is solely responsible for selecting and retaining the 3(38) Fiduciary, rather than requiring the participating employers to authorize or ratify the delegation (which could be effectuated by Providers through an adhesive participation agreement, a non-negotiable "take-it-or-leave-it" contract). The Provider's independent selection and retention of the 3(38) Fiduciary, without the ratification of the employers, can help minimize the participating employers' fiduciary liability, although the employers would remain responsible for prudent monitoring of the Provider (but not the 3(38) Fiduciary).

³ To satisfy the applicable definition under ERISA 3(38), fiduciaries must meet specific requirements, including having full discretionary authority to manage, acquire, and dispose of plan assets and acknowledging their fiduciary status in writing.

⁴ There may still be potential co-fiduciary liability under ERISA Section 405(a).

DOL Tips for Employers When Selecting and Joining a PEP

- Note and appreciate the benefits of a PEP, which include an efficient “turnkey” workplace retirement savings option, with economies of scale (which can result in lower investment costs for participants) and professional management with reduced administrative burden.
- Consider which type of PEP best meets their needs, because some PEPs offer customization and flexibility for individual employers and some do not. Consequently, employers should compare several PEPs before choosing a Provider.
- Review the experience and qualifications of the Provider. Topics for Provider questions may include the quality of services, customer satisfaction, lawsuits or government enforcement matters involving the Provider, and whether the Provider is registered with the DOL.
- Ensure all fees are disclosed and understood. Confirm how much the Provider gets paid and who sets that amount. Query whether the Provider is compensated by any third parties with respect to the PEP and whether it sells participant data.
- Understand the investment options available under the PEP. Determine the number of fund options, their performance versus benchmarks, and if they have different risk and return characteristics. Determine what the default investments are and if target date funds are offered. Remember that unless the Provider has properly delegated authority, the employer may have fiduciary responsibilities with respect to the investment options. It is important to conclusively determine whether such a delegation has been made, or if the fiduciary responsibility for investment options lies with the employer. This question may be asked directly to the Provider.
- Determine how the PEP is structured and whether the PEP assumes all administrative, management, and operational functions, and whether any of the fiduciary duties will remain with the participating employers.
- Once a PEP is chosen it must be prudently monitored by the participating employers on an ongoing basis. Monitoring should include, but is not limited to, checking for resolution of any complaints the employees had about the plan, confirming that the correct fees were charged, and reviewing investment performance.
- Before joining a PEP, review what is required to enable exiting participation in the PEP. A participating employer should understand what restrictions or fees may be imposed if the employer decides to switch to a different provider or type of retirement plan, as well as whether individual terminating employees

can roll or transfer their assets to a new employer's plan and if there are any limitations to that process.

DOL Questions to the Public

As part of the New Guidance, the DOL solicits a substantial amount of information from the public, apparently designed to help the DOL deliver its required report to Congress (with its findings from a study of the PEP industry), and craft future guidance and potential safe harbors in order to reduce barriers to adoption and increase utilization of PEPs. A sample of the questions includes:

- How are PEPs marketed and distributed and by whom?
- In the context of corporate transactions, are there specific challenges for the retirement plans of acquiring businesses to accept acquired businesses' assets from PEPs (e.g. through plan spin-offs/mergers or through direct rollovers)?
- Have professional employer organizations (PEOs) offered PEPs, or do they offer only traditional multiple-employer plans?
- What barriers, if any, prevent small employers from becoming aware of, understanding, or trusting PEPs?
- What existing prohibited transaction exemptions (statutory or administrative) do pooled plan providers rely on, if any?

Responses to these questions have been requested by the 29th of September, 2025.

Takeaways

The DOL is encouraging increased adoption of PEPs, particularly by smaller employers. If an employer is considering adopting a PEP, they should review the DOL's suggested tips, and document the steps taken to evaluate and choose the PEP and Provider they ultimately select and will monitor on an ongoing basis.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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