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Multiple Employer Plans:
Keys to Compliance and Operation

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Multiple Employer Plans: Keys to Compliance and Operation - *Outline*

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I. Introduction
Multiple Employer Plans in Theory

A Multiple Employer Plan ("MEP") is, in theory, a single employee benefit plan with a primary sponsor and multiple participating or adopting employers who have elected to join the plan as a way of providing benefits to their employees. A Multiple Employer Welfare Arrangement ("MEWA") is a particular type of MEP providing health or other welfare benefits. MEPs can be an attractive alternative to the traditional single employer plan structure. In a MEP, the employers may pay less in administrative costs than they would if they were the sponsor of the plan and the employers may be able to mitigate potential fiduciary liability.

Nevertheless, employers must understand that MEPs are subject to extensive regulation under the Internal Revenue Code (Code), the Employee Retirement Income Security Act (ERISA) and, potentially, state law in the case of some MEWAs. To understand what is required, employers must first understand what it is that they are agreeing to join. Despite the single plan structure, a MEP might not be treated as a single plan from a legal perspective. The MEP, in the view of the U.S. Department of Labor, might actually be a collection of single employer plans.

The most common types of MEPs in today's market include: (i) MEPs sponsored by a Professional Employer Organization ("PEO") for adoption by the PEO's clients, (ii) MEPs sponsored by an industry or trade group for adoption by the group's members, (iii) MEPs sponsored by associations with members that are related by industry or trade, (iv) accidental MEPs and (v) open MEPs. An accidental MEP occurs when employers with common ownership participate in what was thought to be a single employer plan, but the common ownership was insufficient to treat the employers as a single employer under the Code (i.e., employers do not meet the requirements to be a "controlled group" or "affiliated service group" under the Code). Open MEPs are those that are typically sponsored by consulting firms for multiple employers who have no connection or relation to each other.

II. Tax Code Definitions and Requirements

A. Single Employer Plans - Control Group Rules

Employers that are related by sufficient common ownership do not need to adopt MEPs in order to have related employers participate in a qualified plan. Employees of all corporations that are members of a controlled group of corporations are treated as if they were employed by a single employer for most retirement plan rules. Code Section 414(b) provides that this rule applies for purposes of Code Sections 401 (tax qualification rules including the exclusive benefit rule), 410 (minimum participation rules), 411 (vesting rules), 415 (limitations on benefits) and 416 (top heavy rules).

The term "controlled group of corporations" is defined to include parent-subsidiary controlled groups, brother-sister controlled groups, and combined groups.[1] A parent subsidiary

[1] *See* I.R.C. §§ 414(b) & 1563(a).

controlled group includes all corporations connected through stock ownership with a common parent if (1) eighty percent or more of the total combined voting power of all classes of stock entitled to vote (or eighty percent or more of the value of all shares of all classes of stock) of each of the corporations, except the common parent, is owned, directly or indirectly, by one or more of the other corporations, and (2) the common parent corporation owns, directly or indirectly, eighty percent or more of the total combined voting power of all classes of stock entitled to vote (or eighty percent of the value) of at least one of the other corporations.[2]

A brother-sister controlled group, on the other hand, is a group where five or fewer individuals, estates, or trusts own, directly or indirectly, stock possessing: (1) eighty percent or more of the total combined voting power of all classes of stock entitled to vote (or eighty percent of the value) of each corporation, and (2) more than fifty percent of the total combined voting power of all classes of stock entitled to vote (or fifty percent of the value) of each corporation, taking into account the stock ownership of each owner only to the extent that the level of ownership interest is identical with respect to each such corporation.[3] A controlled group may also be a combined group where there are overlapping parent-subsidiary and brother-sister controlled groups.[4] Additionally, Code Sections 406 and 407 contain special rules that allow a domestic corporation to treat an individual employed by certain foreign affiliates as its employee for purposes of applying qualified plan rules, thus enabling such person to be covered by the domestic company's qualified plan, even though the foreign company and the domestic company are not part of the same controlled group under Code Section 414.

B. Multiple Employer Plans - Code Section 413(c)

In contrast, a MEP is defined under Code Section 413(c) as a single qualified plan that is maintained by two or more employers who are not related under Code Section 414(b), (c), (m) or (o).[5] However, qualified plans with multiple participating employers pursuant to one or more collective bargaining agreements are not MEPs subject to Code Section 413(c), but are instead considered multiemployer or Taft-Hartley Plans.[6] Additionally, the mere fact that a qualified plan, or qualified plans, utilizes a common trust fund (otherwise known as a group trust) or otherwise pools plan assets for investment purposes does not, by itself, result in a particular plan being treated as a MEP under Code Section 413(c).

Once it is determined that Code Section 413(c) applies, employers and MEP plan sponsors should carefully consult the rules set forth in Code Section 413(c), which, despite the treatment of a MEP as a single plan, provide that the employers participating in the qualified plan are treated as one employer for some, but not <u>all</u>, purposes.

[2] *See* I.R.C. §§ 414(b) & 1563(a)(1).
[3] *See* I.R.C. §§ 414(b) & 1563(a)(2)
[4] *See* I.R.C. §§ 414(b) & 1563(a)(3).
[5] Treas. Reg. § 1.413-2(a).
[6] Treas. Reg. § 1.413-2(a)(3). *See also* I.R.C. § 413(b) & Treas. Reg. § 1.413-2(a)(3).

1. Treated as One Employer

Employers participating in a MEP are treated as one employer for the following purposes:[7]

Eligibility. Code Section 413(c)(1) provides that a MEP must apply the minimum service requirements (i.e., one year of service) under Code Section 410(a) as if the participating employers are a single employer. For example, service with all participating employers is counted in determining an employee's eligibility to participate in the plan.

Exclusive Benefit Rule. Code Section 413(c)(2) provides that the exclusive benefit rule is applied as if the employers are a single employer. This permits the allocation of contributions and forfeitures across company lines without violating the rule that an employer's contributions must be made for the benefit of its employees and former employees. According to the Service, "the employment relationship between workers and the employer maintaining the plan is fundamental to whether a plan is qualified under Section 401(a) of the Internal Revenue Code."[8] "If a retirement plan provides benefits for individuals who are not employees of the employer maintaining the plan, the plan does not satisfy the exclusive benefit rule contained in Section 401(a)(2), and therefore could be disqualified."[9] However, a MEP allows the participating employers to be treated as a single employer for purposes of this requirement, even though the employers are not related under Code Section 414(b), (c), (m) or (o).

Vesting. Code Section 413(c)(3) treats the employers as a single employer for vesting purposes. Thus, service with all participating employers is counted in determining an employee's vested percentage under the MEP. Further, the discontinuance of contributions and partial termination rules of Code Section 411 also apply to MEPs as if all employers participating in the MEP were one single employer.[10] Full plan terminations occur upon a complete discontinuance of contributions or benefit accruals under the plan.[11] Additionally, a partial plan termination can occur if a plan amendment or a reduction in force causes a twenty percent or more turnover in the number of employees receiving benefits under the plan or benefit accruals under the plan are greatly reduced.[12] Because MEPs are treated as being sponsored by one employer for purposes of Code Section 411, there would only be a complete discontinuance of contributions to a MEP, and therefore a full termination of the MEP, if every employer participating in the MEP ceased contributions to the MEP. Similarly, partial terminations due to a reduction in force would occur less frequently under a MEP than under individual plans because the turnover rate would include all participating employees in the MEP, rather than just the

[7] The term "employers" for purposes of this section means all employers and all members of its controlled group. *See supra* fn 1-4 and accompanying text.
[8] Rev. Proc. 2002-21.
[9] *Id.*
[10] I.R.C. § 413(c)(3). *See also* Treas. Reg. § 1.413-2(a)(iii).
[11] Treas. Reg. § 1.411(d)-2(a).
[12] Treas. Reg. § 1.411(d)-2(b). Whether a partial plan termination has occurred depends on the facts and circumstances of the case; however, there is a presumption that a partial plan termination has occurred if the turnover rate is at least twenty percent. *See* Rev. Rul. 2007-43.