

Key Considerations for Navigating the Pooled Employer Plans Landscape

Risk management and mitigation are at the forefront of many business decisions. Reducing potential exposure to the persistent threat of class-action litigation that has targeted 401(k) retirement plans and their sponsors in recent years is no different. Pooled employer plans (PEPs) can offer a way for employers to manage this potential risk.

Employers involved in these ERISA class-action lawsuits have at times incurred unforeseen costs to resolve or settle the plaintiffs' claims. Due to the relevance of 401(k) plan class-action litigation, employers should assess their current retirement plan governance and stay up to date on ways to mitigate their exposure to such claims, which could include consideration of a PEP. PEPs were first introduced in 2021, and their use has become increasingly more pervasive among private equity portfolio companies and other types of businesses that are looking to:

- outsource many of the ERISA fiduciary responsibilities and risks that come with sponsoring a retirement plan; and
- take advantage of the lower service provider fees and costs associated with day-to-day plan administration.

What Is a PEP?

A PEP is a multiple-employer defined contribution retirement plan sponsored by a third party that allows unrelated employers to participate under the same retirement plan. By participating in a PEP, employers are able to outsource to the PEP sponsor (the pooled plan provider) many of the administrative and fiduciary duties that come with sponsoring their own plans.

Breakdown of Duties				
	Single Employer Plan	Pooled Employer Plan		
	Employer	Employer	Investment Fiduciary	Pooled Plan Provider
Select & Monitor Plan Service Providers	✓	✓		
Select & Monitor Investment Options	✓		✓	
Manage Plan Documents	✓			✓
Distribute Required Notices	✓			✓
Annual Compliance and Audits	✓			✓
Approve Withdrawals, Loans, Rollovers, etc.	✓			✓
Submit Payroll Contributions	✓	✓		

Why Private Equity Firms and Portfolio Companies May Want to Consider PEPs

- **Participant Fees** – Economies of scale lead to lower fees.
- **Risk Management** – The pooled plan provider takes on the fiduciary risk.
- **Reduce Administration & Vendor Relations** – Participating employers' involvement in plan operation is reduced as the pooled plan provider is responsible for plan administration and the maintenance of vendor relationships.
- **Faster/Simpler Implementation Processes** – Certain PEPs can implement a new plan or transition within 60 days, far quicker than a typical single employer retirement plan implementation, which could take between three to four months on average to implement.
- **Carve-Out Transactions** – Retirement benefits are generally not included in transition services agreements (TSA), so in a carve-out situation, the PEP offers the private equity sponsor and its portfolio company a solution that can be implemented quickly at competitive costs with limited administrative hassle and fiduciary liability.
- **Portability** – Sale of a portfolio company may be simplified by not having to terminate or merge a retirement plan, and instead the seller can:
 - assign a portion or all of the plan/plan assets in the PEP attributable to the target's employees to the buyer;
 - cease participation in the PEP and transfer the assets; or
 - allow the buyer to continue to participate in the PEP.

Navigating the PEP Landscape

With over 350 PEPs and 164 unique pooled plan providers registered with the DOL as of December 2023, considering a PEP may feel overwhelming.

We have reviewed/evaluated a number of PEPs and pooled plan providers to create a database suitable to finding a PEP that fits the needs of a variety of private equity sponsors and their portfolio companies.

- **Factors for consideration:**
 - **Size** – Number of participants and expected growth of the company
 - **Plan Design** – Flexibility, ability to mirror parent company provisions for carve-outs

- **Investments** – Number of investment options, active vs. passive funds, brokerage window needs and limitations
- **Implementation Needs** – Timing, rollovers, loans
- **Fees** – Participant fees vs. employer fees
- **Experience** – Number of participating employers and participating employer demographics
- **Participant Experience** – Participant portal, education, investment assistance programs

Based on specific needs with respect to these factors, a list of what might be hundreds of PEPs can be narrowed down to a handful for consideration.

Selecting the Right PEP

Given the rapid growth in the PEP market, there is a variety of different PEPs available that may be suitable for employers to choose from. Nonetheless, this selection should not be made indiscriminately. An employer or private equity sponsor must ensure that it is carrying out its fiduciary duties under ERISA, which include a well-documented process and making choices that are in the best interest of the plan participants.

When it comes to choosing a PEP, it is critical that an employer or private equity sponsor undertake a robust and diligent search/review process of PEP services and fees. By doing so, it will have taken proactive steps to shield itself from potential litigation down the road by demonstrating how it engaged in a prudent and thorough analysis in choosing either a single-employer plan or PEP approach for their retirement plan coverage.

Finally, this vetting process should be fully documented. As we have seen repeatedly in recent years in the 401(k) fee litigation space, whenever it comes to hiring retirement plan service providers, a court will closely scrutinize the sponsor's evaluation process.

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