



# PENSION ANALYST COMPLIANCE BULLETIN



## DOL issues guidance on “open” MEPs

The Department of Labor (DOL) recently issued [Advisory Opinion 2012-04A](#), concluding that “open” multiple employer plans (MEPs) are not considered single retirement plans for purposes of ERISA. Instead, “open” MEPs are arrangements under which each adopting employer has established a separate ERISA plan.

### Background

A multiple employer plan (MEP), a plan to which more than one employer contributes, may provide participating employers a way to lower the cost associated with administering a plan. The employers who participate in a MEP may do so because there is some relationship or common ownership between the employers, but not enough to satisfy the related employer definitions. An “open” MEP is a plan where participating unrelated employers have no commonality except for providing retirement benefits to their employees.

Advisory Opinion 2012-04A was issued in response to a request for guidance regarding whether an “open” MEP arrangement, where multiple unrelated employers adopt a single plan to provide retirement benefits to their employees, is a single plan under ERISA.

### Bona fide employer group or association

In this Advisory Opinion, the DOL concluded that unless the MEP is sponsored by a bona fide group or association, each employer participating in the MEP is sponsoring a separate ERISA plan for their covered employees. The factors involved in determining whether a plan sponsor is a bona fide group or association of employers include:

- How members are solicited;
- Who is entitled to participate and who actually participates in the association;
- The process by which the association was formed, the purposes for which it was formed, and what if any, were the preexisting relationships of its members;
- The powers, rights, and privileges of employer members that exist by reason of their status as employer; and
- Who actually controls and directs the activities and operation of the benefit program.

Additionally, the employers that participate in a benefit program must, either directly or indirectly, exercise control over the program, both in form and in substance, to act as a bona fide employer group or association.

### Impact of Advisory Opinion 2012-04A

While the Advisory Opinion does not specifically address compliance with ERISA’s reporting requirements, the DOL’s conclusion that an “open” MEP is a collection of individual ERISA plans maintained by each employer subjects each plan to separate Form 5500 filings, and, if applicable, the annual audit requirement. The ruling also means that “open” MEPs will need to either separately meet ERISA’s bonding requirements, or the MEP’s plan administrator will need to obtain a bond equal to the total amount required for all plans participating in the “open” MEP. Additionally, unless the IRS provides relief, the DOL’s conclusion requires each plan to file a separate Form 8955-SSA with the IRS.

In the Advisory Opinion, the DOL did not express any opinion on the tax qualified status of “open” MEPs under the Internal Revenue Code.

## **Fiduciary responsibilities**

The Advisory Opinion states that persons who operate an “open” MEP are subject to the ERISA’s fiduciary provisions if they control plan assets or have discretionary control over the administration or management of the participating employers’ separate plans. They may also be subject to ERISA’s prohibited transaction provisions.

In addition, each employer sponsor that participates in the arrangement is subject to ERISA’s fiduciary provisions. As a result, the employer retains responsibility for prudently reviewing the performance of the administrator and appointed trustee of the plan.

## **Future guidance needed**

Prudential Retirement continues to believe that multiple employer plans, like “open” MEPs, could present an important vehicle for closing the retirement coverage gap, particularly for employees of small employers seeking to reduce the cost and administrative burden associated with traditional 401(k) plans.

It appears clear from the DOL’s recent advisory opinion that legislation or regulations are needed to promote and facilitate the formation of MEPs as single employer plans for purposes of ERISA’s reporting, disclosure and fiduciary responsibility requirements. Prudential will continue to engage with industry groups working to determine how best to broaden MEP sponsorship and participation as a means of improving retirement security.

## **Applicability to other MEPs**

Although Advisory Opinion 2012-04A specifically addressed “open” MEPs, the principles of this ruling and other DOL Opinions also appear to affect “single plan” status for other types of multiple employer plans. Professional employer organizations (PEOs), trade association plans, and state run MEPs should review the “bona fide group or association” factors with their attorney to determine whether they should also consider separate compliance with ERISA reporting and disclosure requirements.

## **Next steps**

Although only the individuals or entities receiving the advisory opinion may formally rely on the ruling, advisory opinions provide insight into the DOL’s thought processes and current views. As a result, employers participating in MEPs should carefully review Advisory Opinion 2012-04A when evaluating their compliance with ERISA’s reporting and disclosure requirements. Plan sponsors that use Prudential Retirement’s Form 5500 Preparation services should inform their Prudential representative of any filing status changes.

### **Compliance Bulletin by Prudential Retirement**

The Pension Analyst is published by Prudential Retirement, a Prudential Financial business, to provide clients with information on current legislation and regulatory developments affecting qualified retirement plans. This publication is distributed with the understanding that Prudential Retirement is not rendering legal advice. Plan sponsors should consult their attorneys about the application of any law to their retirement plans.

©2012 Prudential Financial, Inc. and its related entities.

Prudential, the Prudential logo, the Rock symbol and Bring Your Challenges are service marks of Prudential Financial, Inc., and its related entities, registered in many jurisdictions worldwide.

RSMH078