



NEW YORK
CITY BAR

By Electronic Submission
RIN 1210-AB88

December 20, 2018

The Honorable R. Alexander Acosta, Secretary of Labor
Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington D.C. 20210
Via Federal eRulemaking Portal: <https://www.regulations.gov>

**Re: DOL Docket No. EBSA 2018-0007, RIN 1210-AB88; Comment on Proposed Rule:
Definition of "Employer" Under Section 3(5) Of ERISA—Association Retirement Plans
and Other Multiple-Employer Plans**

Dear Mr. Secretary:

The Association of the Bar of the City of New York (the "Association")¹, on behalf of its Small Law Firm Committee and Labor and Employment Committee, respectfully submits the following comments and recommendations with respect to the above-referenced Proposed Rule that was announced by the Department of Labor (the "DOL") on October 22, 2018, and published in the Federal Register on October 23, 2018.²

The Association is a New York not-for-profit corporation, and is exempt from Federal income tax pursuant to Section 501(c)(6) of the Internal Revenue Code. Founded in 1870 as a professional membership organization, the Association's mission is to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice. The Association has approximately 24,000 members, all of whom are law students or individual lawyers who may be admitted to practice law in New York, and who also may be admitted to practice in other jurisdictions, including the contiguous states of Connecticut, New Jersey and Pennsylvania. Among its membership, sole practitioners³ and members of small law firms⁴ constitute one of the

¹ The Association currently conducts its operations using the name "The New York City Bar Association". However, the Association is registered with the New York Department of State, the Charities Bureau of the Office of the New York Attorney General and the Internal Revenue Service under the name "The Association of the Bar of the City of New York".

² 83 Fed. Reg. at 53534.

³ "Sole practitioner" or "solo practitioner" is the corollary term for "sole proprietor" typically used in the legal profession.

largest membership segments of the Association.

Consequently, the Association has a substantial interest in the Proposed Rule and the amendment to the ERISA regulations contemplated by the DOL. Inasmuch as the DOL is now acting to amend the regulations under ERISA to expand access to cost-effective retirement plans by allowing more employers to participate in Association Retirement Plans ("ARPs"), the Association submits that the proposed Rule should be revised, among other things, to ensure that the Final Rule will permit such association retirement plans to be offered by organizations such as the Association. Specifically, the Association respectfully recommends that the DOL revise the Proposed Rule to:

1. Revisit its earlier determination in order to allow associations, such as the Association, composed of individuals rather than employer organizations to qualify to offer a retirement plan to their members;
2. Clarify or broaden the test for a *bona fide* group or association to ensure organizations, such as the Association, may establish a Multiple Employer Plan ("MEP"); and
3. Address the effect of the consequences of a "unified plan rule" (or "one bad apple" rule) disqualifying a MEP.

With one exception, we do not propose to revisit the issues we addressed in our comment letter to the DOL dated March 6, 2018 in connection with Association Health Plans. We also do not propose to address "corporate MEPs" or "pooled employer plans" (or "open MEPs"), and do not propose to address the impact of pending legislation, including H.R. 6757, the Family Savings Act of 2018, or S. 2526, the Retirement Enhancement and Savings Act of 2018. We recognize that enactment of either bill may address elements of the Proposed Rule, especially with respect to pooled employer plans/open MEPs. We also recognize that either bill may have amendments before enactment that may address other issues, including the unified plan/one bad apple rule. We believe it is premature to address those issues at this time prior to enactment of any pending legislation. However, given the possibility that enactment of either bill could occur before the DOL's issuance of a Final Rule with respect to this matter, we respectfully suggest that, if legislation were enacted prior to issuance of a Final Rule, the DOL may want to consider reopening the Comment Period with respect to the Proposed Rule to allow further public comment and efficient integration of the Final Rule with any new law.

I. REVISIT ITS EARLIER DETERMINATION TO ALLOW ASSOCIATIONS, SUCH AS THE ASSOCIATION, COMPOSED OF INDIVIDUALS RATHER THAN EMPLOYER ORGANIZATIONS TO QUALIFY TO OFFER AN ASSOCIATION RETIREMENT PLAN TO THEIR MEMBERS

The Association respectfully submits that the DOL has the authority to amend the definition of "employer" by expanding the definition of "working owner" to include such owner/employee arrangements so that partners of law firms, who are typically both employers and employees of their firm, are treated analogously to "working owners", and their membership in an organization, such as the Association, should constitute the nexus necessary to enable them to participate in a MEP organized

⁴ The Association defines a "small law firm" as a law firm with no more than twenty-five lawyers. It defines a "large law firm" as one having more than twenty-five lawyers.

by such an organization. Alternatively, the DOL should consider amending the definition of "employer" to include any partner of a law firm or other professional entity as a person "acting indirectly in the interest of an employer".

The President's August 31, 2018 Executive Order 13847 (the "Executive Order") stated that the policy of the Federal Government shall be to expand access to workplace retirement plans for American workers. This policy statement was expressed, because "Enhancing workplace retirement plan coverage is critical to ensuring that American workers will be financially prepared to retire."⁵ The Executive Order indicated four principal areas of concern: (a) reduce costly obligations because of regulatory burdens and complexity; (b) expand MEPs to reduce administrative costs; (c) reduce the number and complexity of employee benefit plan notices and disclosures; and (d) revise, reduce or eliminate outdated distribution mandates.⁶ Toward those ends, the Executive Order directed the DOL to (1) clarify and expand when employers, especially **small and mid-size businesses** (ostensibly those with fewer than 100 employees), may sponsor or adopt a MEP; and (2) increase access to workplace retirement plans, especially MEPs, for part-time workers, sole proprietors, working owners and other entrepreneurial workers in non-traditional employer-employee relationships.

The Executive Order also directed the DOL within enumerated timeframes to consider issuing proposed rules or guidance to (a) clarify when a group or association of employers or *other appropriate business or organization* can be an "employer" within the meaning of Section 3(5) of ERISA,⁷ (b) coordinate with the Treasury Department and consider proposing amendments to regulations or other guidance to address the circumstances under which such expanded MEPs qualify for beneficial tax treatment under the Tax Code, and (c) coordinate with the Treasury Department to complete a review of actions necessary under ERISA and the Tax Code to make disclosures "more understandable and useful" and to reduce the expenses of producing and distributing such disclosures that may include broader use of electronic delivery for such disclosures.

While not directly relevant to the Association, the Executive Order also directs Treasury to consider revisions to the mandatory requirements for a retiree to begin withdrawing savings from a 401(k) plan, which currently is when the retiree reaches the age of 70.5 years.⁸

The Association, like most other organizations of lawyers, is a membership organization composed exclusively of individual members.⁹ The individual members of the Association may work

⁵ Executive Order § 1.

⁶ *Id.*

⁷ Ostensibly, this could include the Association.

⁸ Executive Order § 2.

⁹ Although we are unable, without inquiry, to express an opinion outside the practice of law, we believe it is reasonable to speculate that there are other professions, such as in the medical field, in which the admissions criteria for membership into their related organizations are also principally, if not exclusively, based on individual membership rather than corporate or organizational membership. Accordingly, the effect of the proposed amended definition of employer under Section 3(5) of ERISA is likely to exclude professionals in many fields who own and operate their own practices, but are not sole

as sole practitioners, as partners (i.e., owners, employers and employees) or employees in small law firms or large law firms¹⁰, in corporate organizations or in government, not-for-profit organizations or academia. As with the Final Rule with respect to AHPs, the Proposed Rule contemplates that an "employer" for purposes of Section 3(5) of ERISA includes "any person acting directly as an employer, or *any person acting indirectly in the interest of an employer* in relation to an employee benefit plan."¹¹

The Proposed Rule is clear that individuals who have an ownership interest in their firms, such as a sole practitioner who is a "working owner," qualify for participation in an ARP consistent with the Final Rule adopted with respect to Association Health Plans ("AHPs"). As mentioned above, we do not propose to reargue the points made in our earlier comment letter addressing the Proposed Rule with respect to AHPs. However, we believe it is appropriate to revisit whether partners of law firms, who are typically both employers and employees of their firm, should be treated analogously to "working owners", and their membership in an organization, such as the Association, should constitute the nexus necessary to enable them to participate in a MEP organized by such an organization. We also respectfully submit that the DOL has the authority to expand the definition of working owner to include such owner/employee arrangements under its general authority to amend the definition of "employer" as contemplated under the Proposed Rule.

Alternatively, we respectfully submit that the DOL revisit and consider amending the definition to include any partner of a law firm pursuant to its authority to amend the definition of an "employer" to allow persons "acting indirectly in the interest of an employer" provision. Such persons may under state law, such as in New York, remain personally liable for salaries of their employees.¹² Further, they are not able to shield themselves from personal liability for their own negligence even if they conduct their practice through a professional corporation, limited liability company or other partnership or corporate organizational structure.¹³ Accordingly, we respectfully submit that the DOL should address, by regulation or otherwise, the treatment of partners of partnerships as "employers" within the meaning of Section 3(5) of ERISA for purposes of sponsoring a MEP or participating in an organization, such as the Association, that offers a MEP to its membership.

practitioners, and their related membership organizations. That is, such professionals with one or more employees may as a legal and practical matter be personally responsible for the obligations incurred by their professional corporations or limited liability companies or partnerships under state or federal law to the same extent as if they were sole practitioners or proprietors, but are not considered "working owners" for purposes of the definition of "employer" as amended by the Proposed Rule.

¹⁰ The Association's definition of "large firm" differs from the Public Health Service Act ("PSA")'s definition of "large employer". As previously noted, the Association defines a large firm as having more than twenty-five lawyers. However, if such law firm has fewer than fifty employees, it would not currently qualify as a large employer under the PSA.

¹¹ Sec. 2510.3-55 (emphasis added).

¹² NY BCL § 630

¹³ E.g., NY Limited Liability Company Law § 1205(a).

II. CLARIFY OR BROADEN THE TEST FOR A BONA FIDE GROUP OR ASSOCIATION TO ENSURE ORGANIZATIONS, SUCH AS THE ASSOCIATION, MAY ESTABLISH A MEP

We respectfully submit that membership organizations composed of professionals, such as the Association, are ideally suited to fulfill the purpose of the Executive Order. For example, as previously stated, the individual members of the Association may work as sole practitioners, as partners (i.e., employers) or employees in small law firms or large law firms¹⁴, in corporate organizations or in government, not-for-profit organizations or academia. Such members or their employers may not have the administrative or financial resources to establish or administer a defined contribution plan on their own but would benefit greatly from a pooled plan.

Although we believe the Association satisfies the proposed requirements for recognition as a *bona fide* group or association of employers, we also believe one element of the proposed criteria should be clarified or broadened.

Section 2510.3-55 states in relevant part:

"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" Sec. 2510.3-55(b)(1)(iv) (Emphasis added).

This requirement may be too restrictive and may prohibit or prevent an association, such as the Association, from establishing a retirement plan. The affairs of the Association are managed by an Executive Committee. The Association conducts an annual election for its Executive Committee, and any member is eligible for election. Eligibility to serve on the Executive Committee is not dependent upon the employer/employment status of the nominee. Consequently, the possibility exists that a majority of the Board could be composed of individuals employed in government, not-for-profit organizations or academia, and as such would not constitute "employers". If such an event were to occur, would an association, such as the Association, become disqualified as a *bona fide* organization? And if the Association were to have a pre-existing MEP, would the MEP then become disqualified? It is not possible to guarantee that only employer members will be in control of the Association's governance, functions or activities. Arguably, the Association would then fail to meet the criteria for a *bona fide* group or association of employers.

Rather than establish criteria where legal professionals' membership organizations could be prohibited or discouraged from offering a MEP to its members, Sec. 2510.3-55(b)(1)(iv) should be broadened. For example, as long as employers are part of the organization, have the ability to control the governing body, and only the employer members control the MEP, an organization, such as the Association, should be allowed to establish a MEP.

¹⁴ The Association's definition of "large firm" differs from the Public Health Service Act ("PSA")'s definition of "large employer" (which is the applicable definition under ERISA). As previously noted, the Association defines a large firm as having more than twenty-five lawyers. However, if such law firm has fewer than fifty employees, it would not currently qualify as a large employer under the PSA and ERISA.

III. ADDRESS THE EFFECT OF THE CONSEQUENCES OF A "UNIFIED PLAN RULE" (OR "ONE BAD APPLE" RULE) DISQUALIFYING A MULTIPLE EMPLOYER PLAN.

The Association respectfully recommends that the DOL coordinate with the Internal Revenue Service to ensure that a tax-qualified retirement plan is not disqualified when a single employer of a MEP fails to fulfill its funding obligations to an ERISA-qualified plan.

The Association supports the efforts of the DOL to expand workplace retirement plans, especially for small businesses, by establishing more flexible standards and criteria for sponsorship of open MEPs under Title 1 of ERISA than currently articulated in prior guidance. However, we respectfully submit that the success of this effort may depend in large part on resolution by the DOL of the Unified Plan/One Bad Apple Rule. We recognize the DOL has the authority, and upon adoption of the Proposed Rule as a Final Rule, may supersede its guidance provided in Advisory Opinion 2012-04A. However, we believe that the effort to expand workplace retirement plans of any Final Rule may also depend upon coordination with the Internal Revenue Service and amendment of IRC §413(c) that disqualifies a tax-qualified retirement plan in which an employer, or a single employer of a MEP, fails to fulfill its funding obligations to an ERISA-qualified plan. We respectfully recommend that the DOL coordinate with the Internal Revenue Service to ensure that any Final Rule regarding the amendment to Section 3(5) of ERISA may effectively achieve the goals outlined in the Executive Order and provides a meaningful structure to enable well-established organizations, such as the Association, to offer a meaningful workplace retirement plan.

Thank you for the opportunity to comment on the Proposed Rule. We commend the DOL for its efforts. For the foregoing reasons, the Association recommends the above changes to the Proposed Rule, and supports the Proposed Rule with the recommended changes.

Respectfully submitted,



Bret I. Parker
Executive Director, New York City Bar Association



Gary M. Kaufman
Chair, Small Law Firm Committee



Katherine Greenberg
Chair, Labor and Employment Committee