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Working for America's Retirement

September 29, 2025

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Attn: Pooled Employer Plans: Big Plans for Small Businesses
Regulation RIN 1210-AC10

SUBMITTED VIA REGULATIONS.GOV

Re: Pooled Employer Plans Regulation (RIN 1210-AC10)

Dear Madam or Sir:

The American Retirement Association ("ARA") writes in response to the request for information regarding pooled employer plans (the "RFI").[1] ARA thanks the Department of Labor (the "Department") for the opportunity to provide input on these matters.

ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-Deferred Savings Association ("NTSA"), the American Society of Enrolled Actuaries ("ASEA"), and the Plan Sponsor Council of America ("PSCA"). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA has over 39,000 individual members who provide consulting and administrative services to sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

Summary

ARA commends the Department for its efforts to expand retirement plan coverage and offers the following recommendations to enhance the effectiveness of Pooled Employer Plans ("PEPs") for small businesses:

- **Reduce Practical Barriers for Small Employers**: The Department should focus regulatory improvements on lowering cost and administrative complexity, which remain the most significant obstacles preventing small businesses from adopting PEPs.
- **Maintain a Balanced Regulatory Approach**: Future guidance should not favor PEPs over other retirement savings solutions (such as single-employer plans) or suggest that the

[1] Pooled Employer Plans: Big Plans for Small Businesses, 90 Fed. Reg. 35646 (July 29, 2025).

Department believes they are better or safer than other arrangements. All plan types play an important role in expanding retirement coverage, and a durable regulatory framework should support continued innovation and success across all models.

- **Recognize the Diversity of PEP Structures**: The Department should maintain flexibility in the PEP framework to allow participation from a wide range of service providers and employers, ensuring that plan options can be tailored to meet different business needs.

Specifically, ARA recommends that the Department:

- Issue a model disclosure or rubric that an employer could use to compare diverse plan solutions.
- Consider a prohibited transaction exemption (PTE) that would allow PPPs to hire closely affiliated partners and related 3(38) investment managers, provided certain safeguards are in place.
- Apply any safe harbor developed regarding the selection and monitoring of a service provider not just to PEPs, or the selection of a PPP, but to all retirement plan service providers.
- Provide guidance to facilitate growth and innovation of PEP in the areas of sponsorship eligibility, the standard for selection of PEP service providers, liability for the correction of plan errors (including a potential safe harbor), responsibility and authority for unresponsive employers, and bonding of employers.
- Work with Congress and other agencies on certain issues beyond the Department's jurisdiction.

Background

While many small employers do sponsor retirement plans, a considerable segment of small business owners and their employees continue to lack access to the ability to save for retirement at work. This gap stems largely from the hurdles small businesses encounter in both establishing and maintaining retirement plans, including administrative complexity, regulatory requirements, and costs. PEPs, introduced in the Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE Act"), were intended to be a plan solution that would encourage small business adoption of retirement plans and close this retirement coverage gap.

PEPs were intended to lower these barriers and encourage broader adoption of retirement plans by allowing multiple, unrelated employers to participate in a single plan administered by a pooled plan provider ("PPP"). By pooling plan assets and assigning administrative responsibilities to a professional service provider, PEPs were expected to help streamline administration and potentially reduce costs through economies of scale. However, as noted in the RFI, recent statistics show that the uptake of PEPs has been modest, with large employers deriving the most benefit from PEP participation thus far. Small employers, in contrast, continue to face challenges that deter them from joining these plans.

The principal obstacles for small employers are not rooted in concerns over fiduciary liability in the selection of a retirement plan provider, as is sometimes assumed. Rather, cost and complexity remain the most significant factors.[2] Thus, as the Department considers guidance and other improvements to the PEP framework, close attention should be paid to reducing these practical impediments in order to make PEPs a more accessible, effective option for small businesses.

In addition, it is essential to recognize that all retirement savings solutions—including PEPs, single-employer plans, SIMPLE plans, and IRA-based plans—play a valuable role in expanding retirement coverage for American workers. Each solution offers unique features and benefits that may be best suited for a particular employer. Therefore, we respectfully urge the Department to ensure that any future guidance does not favor PEPs, or encourage their adoption, over other available solutions. Ensuring a balanced regulatory approach will provide a durable and lasting framework that supports the continued success and innovation of all retirement plan models.

Structures of Pooled Employer Plans

In its RFI, the Department asked various questions regarding the main roles, responsibilities, and business models of entities acting as pooled plan providers, including how they manage plan administration and investment decisions.

Many ARA members sponsor or provide services to PEPs in diverse roles, including as PPP, recordkeeper, investment manager, independent auditor, outside counsel, and special consultant. Our members report that a diverse array of organizations currently serve as PPPs. While recordkeepers and third-party administrators (TPAs) are among the most common entities serving as PPPs, the broader landscape includes financial institutions, consulting firms, PEOs, and other service providers.

Equally varied are the business models adopted by PPPs. Some PPPs or their affiliates offer comprehensive services, managing both plan administration and investment functions internally. Others engage third parties for all administrative and investment services. In some arrangements, the PPP appoints a third party as a 3(38) investment manager, while in other cases, employers themselves may select a third-party 3(38) advisor, with either a limited menu of investment lineups or full flexibility to choose among available advisors.

In addition, even within those broad business models, how a PEP sponsor divides duties and obligations with the PPP and adopting employers are varied. As examples, some sponsors assign all settlor duties to the PPP while others do not, and some association-sponsors act on behalf of their member-employers to retain and monitor the PPP, while others leave that to the adopting employers. Each model provides certain benefits and costs that the PEP sponsor must balance to

[2] Pew Charitable Trusts, *Reports Highlight Challenges Small Businesses Face in Offering Retirement Benefits*, available at: https://www.pew.org/en/research-and-analysis/articles/2024/07/25/reports-highlight-challenges-small-businesses-face-in-offering-retirement-benefits?utm_source=chatgpt.com

meet the needs of its own business and those of the potential adopting employers. This diversity reflects the flexible nature of the PEP framework, enabling participation from entities of varying sizes and specialties, which helps to ensure that employers have access to a wide range of options suited to their particular needs.

ARA recommends the Department of Labor maintain a neutral stance and not favor any particular PPP model or solution over others. Each structure involves a different balance of flexibility, costs, and fiduciary considerations for adopting employers. Regulatory guidance and other statements from the Department should avoid suggesting that any single model, such as those featuring PPP-appointed 3(38) advisors, inherently reduces fiduciary risk for employers more than other PPP models. Instead, focus should be placed on robust conflict mitigation and clear disclosures to ensure that employers are empowered to make informed decisions and that all parties understand their responsibilities and liabilities.

A balanced regulatory approach that recognizes the diversity of PPP types and business models will support innovation and safeguard the interests of both employers and plan participants. Promoting transparency and encouraging effective conflict mitigation strategies will better serve the retirement system as a whole, without inadvertently privileging any one business model or structure.

Conflicts of Interest and Fee Structures

The Department also asked various questions regarding how PPPs address conflicts of interest, design investment menus, use proprietary or affiliated investments, and create fee structures within PEPs.

PPPs manage conflicts of interest, investment menu design—including the use of proprietary products—and fee structures using processes that are generally consistent with those used in other retirement plan arrangements. While management of conflicts is not particularly unique, the role of the PPP is more likely to involve assignment of the right to hire and fire service providers. However, as noted above, the actual fiduciary structure of various PEPs can vary significantly, which has the potential to create confusion for plan sponsors and make it more difficult for them to compare PEPs to each other and to the other retirement plan solutions available.

To assist plan sponsors, ARA recommends that Department consider issuing a model disclosure or rubric that a sponsor could use to compare diverse plan solutions. This disclosure/rubric could list out the services that a plan typically needs, such as recordkeeping, investment advice or management, Form 5500 filings, fidelity bonding, delivery of participant notices, etc. and then, in addition to detailing information that would typically be provided in the 408(b)(2) notice (including potential conflicts), include a space to indicate who is providing the service and which party is responsible for hiring and monitoring that service provider. While the Department might decide not to *require* an employer to use this form, it could empower employers and their service providers to request that PPPs and other service providers provide information in

the model format. This would highlight the scope of services required, assist employers in understanding which services they remain responsible for providing, and help adopting employers distinguish the roles and fiduciary responsibilities among the various PEPs and other retirement plan solutions.

The Department also specifically inquired whether guidance or relief was needed for prohibited transactions involving PEPs. PPPs act as fiduciaries and therefore must comply with ERISA Section 406. While the exemption provided under Section 408(b)(2) covers reasonable compensation, it does not provide any relief from self-dealing under Section 406(b). As a result, PPPs are generally prohibited from hiring affiliated entities or adjusting their compensation, which can create inefficiencies in oversight and limit flexibility in plan management. There also is the potential for conflict between PPPs and service providers when they are unrelated, for example, if a significant portion of the PEP's adoption is driven by a party who is providing services (such as investment management services) to the PEP.

In response to this restriction, PPPs often require adopting employers to retain fiduciary authority to select the 3(38) investment manager to avoid the conflict. However, in practice, the PEP may be a bundled package of fiduciaries so that an employer's option for a particular PEP may be limited to the selection of the affiliated/related 3(38) investment manager or selecting a different retirement plan solution altogether. This delegation of duties is permitted but may create inefficiencies in the supervision and monitoring of service providers and confusion for adopting employers.

To address these challenges and promote more efficient oversight, ARA recommends the DOL consider a prohibited transaction exemption (PTE) that would allow PPPs to hire closely affiliated partners and related 3(38) investment managers, provided certain safeguards are in place. Any such exemption should be carefully tailored to protect plan participants, with requirements for clear disclosure of affiliations and compensation arrangements. This approach would encourage the retention of fiduciary obligations by PPPs, help ensure transparency, empower employers to make informed decisions, and maintain robust protections against conflicts of interest within the PEP framework.

Safeguards, Disclosures, and Regulatory Safe Harbors

The RFI posed various questions regarding what safeguards, disclosures, and regulatory safe harbors are needed to protect employers and participants and encourage the growth of high-quality PEPs.

To foster the development of high-quality PEPs and ensure robust protections for both employers and participants, it is essential that the Department implement safeguards, disclosures, and regulatory safe harbors that are neutral and equitable across all retirement plan solutions. The goal should be to maintain a level playing field, avoiding preferential treatment for any particular retirement plan solution (e.g., PEPs, multiple employer plans (MEPs), single employer plans, etc.) or particular PEP structure.

ARA strongly recommends that any safe harbor developed by the Department regarding the selection of a service provider should apply broadly, not just to PEPs or the selection of a PPP, but to all retirement plan service provider selections. Employers adopting a PEP do not need fiduciary protections that are greater than employers who are adopting single employer plans, nor are the fiduciary considerations materially different enough to warrant different treatment of those arrangements. As we have seen throughout the history of ERISA, a "safe harbor" provided by the Department is often viewed by employers as the only safe way to proceed. Therefore, any creation of a safe harbor only for PEPs will imply (even if not done intentionally) that the Department believes PEPs are more appropriate for employers and is likely to inappropriately provide an incentive for employers to choose a PEP over other plan structures that might be a better fit for their circumstances.

Rather than explicitly or implicitly favoring any particular retirement plan structure—whether PEPs, MEPs, or single employer plans—any safe harbor should be designed to ensure that the same standards, protections, and processes are applied equitably across all plan types. By maintaining a level playing field, employers, plan sponsors, and fiduciaries can make informed decisions based on the merits of various service providers and solutions, rather than being influenced by regulatory preferences or perceived advantages tied to a specific plan format. This approach encourages healthy competition, fosters innovation, and helps ensure that employers and participants benefit from high-quality, cost-effective, and professionally managed retirement solutions, regardless of the underlying plan structure.

If the Department elects to proceed with providing a safe harbor for the selection of service providers, including non-PEP providers, such a safe harbor could deem fiduciaries to have satisfied their prudence obligation when they follow a structured process that includes all of the following:

- Obtaining or preparing a model disclosure, as recommended above, that details all services under consideration, identifies the party responsible for the selection and monitoring of each service, whether the employer can select a different provider (while still using the solution), and the fees for each service (or group of services) that may be contracted for separately. At the time of plan adoption, the safe harbor should require the preparation of a comprehensive overview of all necessary services—such as document preparation, accounting, trustee/custodial duties, recordkeeping, and investment management or advice—to ensure the employer has a complete view of the proposed plan structure.
- Comparing at least two different service solutions, ensuring each prospective provider (or group of providers) receives substantially the same and complete information about the plan's needs.
- Reviewing information on each provider's experience with employee benefit plans, their fees and expenses, service quality, and any available customer satisfaction metrics.
- Confirming that any provider handling plan assets maintains a fidelity bond, and whether the employer is required to maintain such a bond.

- Verifying that licensed professionals (such as attorneys, accountants, investment managers/advisors) possess current licenses and disclosing any pending complaints.
- Outlining the proposed contract terms, including provisions for early termination and plan transfer.

Importantly, any safe harbor should be clear that fiduciaries may select any option considered, not necessarily the least expensive, provided the decision is based on the fiduciaries determination that it is in the best interests of participants and beneficiaries. The guidance should provide examples of non-cost factors that may be considered in reaching a decision to choose a more expensive provider, such as quality; professional management; perceived cultural fit with the participants; quality of technology interfaces; and services provided at the employer level, such as fiduciary education and systems integration.

While a selection safe harbor can help guide the initial satisfaction of fiduciary responsibilities, the Department will need to take care that it does not obscure the ongoing obligation to monitor those service providers. A safe harbor runs the risk of giving unsophisticated employers the impression that they have followed the guidance and now are "safe" forever. Therefore, if a safe harbor is developed for the selection of providers, ARA believes that a complementary safe harbor for monitoring providers should also be created, and, again, should apply to monitoring of providers in all plan arrangements—not just in PEPs. This would allow clear communication that an employer is only "safe" if both processes are followed. Such a safe harbor for monitoring providers could include the following:

- Mandating annual reviews of provider performance to ensure compliance with service agreements and fee arrangements.
- Reviewing participant feedback and complaints as necessary.
- Comparing service fees to at least two alternative solutions, using reasonable benchmarking techniques (which may include comparison of fees to representative data of similarly situated employers, requests for information on fees, or a competitive bid process) at least every five years and before renewing any contract that commits the employer to a three-year term or longer.
- Confirming the provider's continued compliance with licensing and other pre-hire criteria at least every five years and before renewing any contract that commits the employer to a three-year term or longer.

Any regulatory safe harbor should avoid specifying permissible fee ranges, as this could lead to artificial pricing, limit fee reductions, stifle innovation, and incentivize providers to offer only minimal services. It should also refrain from mandating particular investment lineups or applying exclusively to PEPs or specific PEP structures, as doing so would unfairly advantage certain retirement solutions.

Regardless of the adoption of a safe harbor, ARA recommends that the Department update its guidance on the selection of service providers to include information specific to PEPs. The Department may also consider publishing a tip sheet specific to PPP selection and monitoring to emphasize certain unique characteristics of PEPs. However, any specific discussion of PEPs should be carefully drafted to ensure that it is balanced and does not suggest that PEPs are inherently safer, require less fiduciary consideration, or otherwise lead employers to believe the Department views them as a better solution than other retirement plan arrangements. Such a resource could help employers make informed choices and effectively oversee their PEPs, further enhancing transparency and participant protection.

Regulatory and Fiduciary Issues for Innovation

The RFI also requests information on specific regulatory issues that could be addressed to foster innovation and integrity in the PEP market.

ARA recommends the Department consider the following key issues to facilitate growth, efficiency, and participant protection while minimizing administrative burdens and uncertainties:

- **Clarify PEP Sponsorship Eligibility**: Current regulations require that a PEP sponsor must qualify as an "employer" under ERISA Section 3(5). Associations and Professional Employer Organizations may be considered employers under 29 CFR 2510.3-55 (the "Association Retirement Plan (ARP) Regulation"), but this can necessitate dividing their base into employers who can participate under that regulation and those who cannot. Those employer-clients who do not qualify must be referred to a retail PEP, creating inefficiencies with limited additional benefits. To streamline operations and support broader access, the Department should clarify that those organizations will continue to meet the definition of an "employer" for PEP sponsorship, provided the primary purpose of the PEP continues to be serving those employers described in the ARP Regulation.
- **Clarify Standards for Provider Selection**: The Department should clarify that the fiduciary requirements required of a PPP that is selecting service providers are consistent with requirements applicable in all other retirement plan arrangements. There should be no higher standard imposed uniquely on PPPs, ensuring equitable treatment and reducing unnecessary regulatory complexity.
- **Consider a PPP Fiduciary Safe Harbor**: PPPs are plan fiduciaries, and therefore are subject to liability for breaches, including potentially for operational errors they uncover (as a co-fiduciary). PPPs generally are motivated to collaborate with adopting employers to resolve any such issues, but sometimes corrections may take a significant amount of time or the corrections required may be disputed, and a PPP may be hesitant to engage in extended discussions if this increases their fiduciary exposure. As a result, the PPP may be motivated to terminate services or push an employer to spinoff its plan to mitigate liability,

even though both parties would be willing to continue working in good faith to find a solution. To encourage good faith efforts and responsible oversight, the Department should consider a fiduciary safe harbor for PPPs. The Department should clarify that PPPs are not exposed to fiduciary liability while acting in good faith and following a reasonable process with respect to breaches of other fiduciaries (specifically including operational errors not caused by the PPP). In addition, a PPP should be deemed to have met its fiduciary obligations if certain correction steps are followed, including permitting the PPP to rely on the advice of an adopting employer's counsel with regard to the permissibility of a proposed correction under applicable guidance.

- **Define PPP Authority and Obligations for Unresponsive Employers**: A significant issue for PPPs is their authority and responsibility attendant to employers who are unresponsive or uncooperative. The Department should clarify the PPP's authority and fiduciary obligations when dealing with unresponsive employers to provide guidance to the PPPs, clarity for employers, and protection to participants. The Department should clearly specify when employer unresponsiveness *requires* the PPP to take independent action and what authority the PPP has to spinoff the assets of an unresponsive employer (and any attendant fiduciary obligations related to such a spinoff). The Department also should permit the PPP to handle assets of unresponsive employers in other ways, such as by retaining the assets (with appropriate participant protections) or transferring assets to a Qualified Termination Administrator ("QTA") or similar provider. This flexibility will allow the PEP to operate efficiently into the future but also ensure the accumulated assets of unresponsive employers are protected and efficiently managed and disbursed to participants.
- **SEC Registration for PPPs Hiring a 3(38) Fiduciary**: To remove uncertainty, the Department should ask the Securities and Exchange Commission ("SEC") to clarify whether a PPP that hires and fires an investment manager acting as a 3(38) fiduciary is required to be SEC registered. This guidance would help PPPs manage compliance and risk while ensuring effective oversight of plan investments.
- **Bonding of Adopting Employers:** The Department should permit the plan or a PPP to purchase a plan-level bond that covers all adopting employers, even when an adopting employer has late contributions or loan repayments. Because late contributions are not predictable, the current approach generally requires every adopting employer to acquire a separate bond, which increases the burden on employers.

By addressing these regulatory issues, the Department can foster a more efficient, innovative, and secure PEP marketplace. Clear guidelines will facilitate responsible growth, reduce inefficiencies, and enhance the integrity of retirement plan administration, ultimately benefiting both employers and participants.

Challenges in Plan Transitions and Corporate Transactions

Finally, the Department inquired about challenges, including leakage, related to plan transitions, mergers, and corporate transactions involving PEPs.

Plan transitions, mergers, and corporate transactions present several challenges for PEPs, which mirror the longstanding issues that other MEPs have faced over time. While the regulatory landscape has evolved, certain operational and compliance hurdles remain particularly pronounced during such events.

- Service Crediting Rules: One major challenge involves the rule requiring service crediting for any entity participating in the MEP at the same time as the employer. When an employer exits a MEP, it becomes nearly impossible to accurately administer service crediting, especially if the employer participated alongside a large number of other, unrelated entities. This administrative risk and complexity may lead employers to terminate the plan entirely, which, in turn, can result in increased plan "leakage" as assets are distributed rather than preserved for retirement.
- Plan Termination and Spinoff Requirements: Plans are regularly terminated during corporate transactions, such as mergers or acquisitions. Existing rules prevent a MEP from directly terminating the portion of the plan attributable to an adopting employer. Instead, these rules require a spinoff to a new plan prior to termination. The spinoff requires many steps, which include the creation of a new plan document, establishment of a new trust, transfer of plan assets, administration of blackout periods, identification of new fiduciaries, etc. All of these steps create additional complexity and costs for both employers and plan participants, which could be avoided by permitting the termination of an adopting employer's portion of a MEP.

Overall, these challenges increase leakage. However, these challenges are primarily created by the tax code and associated regulations, not by ERISA. Therefore, **ARA recommends the Department work with stakeholders in Congress and the Department of the Treasury to address these issues in order to reduce plan leakage, minimize administrative burdens, and better protect the interests of both employers and participants.**

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ARA appreciates the opportunity to work with the Department on these issues of great importance to our diverse membership of retirement marketplace participants. We would welcome the opportunity to discuss these comments further with you. Please contact Kelsey Mayo, ARA's Chief

of Retirement Policy & Regulatory Affairs, at KMayo@USARetirement.org regarding any questions on the matters discussed herein. Thank you for your time and consideration.

Sincerely,

/s/

Brian H. Graff, Esq., APM
Executive Director/CEO
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/s/

Kelsey Mayo
Chief, Retirement Policy & Regulatory Affairs
American Retirement Association