FRANKLIN TEMPLETON

Aggregated employer plans: Reduced effort, liability and cost

Prepared by the Law Offices of Geoffrey M. Strunk, LLC | White Paper

Sponsoring a retirement plan is a great way for a company to reduce its overall tax burden while also providing means for owners and employees to save for their retirement. However, just like most valuable things in life, the benefits of retirement plan sponsorship come at a price. While many plan sponsors entering this arena expect to incur certain direct costs, what may come as a surprise are the substantial indirect costs associated with the time and effort spent managing the plan... and let's not forget about the anxiety inspired by the significant potential personal liability connected to retirement plan sponsorship either.

These indirect costs of retirement plan sponsorship often inspire companies to ask, "Isn't there a better way?" The answer to that question may very well be "yes." The rest of this white paper considers that question as it reviews certain retirement plan products that seek to reduce a plan sponsor's time, effort, anxiety and cost. In this case, that peace of mind may be accomplished by delegating much of a retirement plan's administrative and fiduciary responsibility to third parties and leveraging the power of retirement plan assets by "pooling" them with other retirement plan sponsors' assets. These steps can allow a plan sponsor to spend more time focused on its business and less time focused on its retirement plan.

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IMPORTANT NOTE: The Law Offices of Geoffrey M. Strunk, LLC have prepared this white paper on behalf of Franklin Templeton. This paper includes suggested practices that plan sponsors, and the financial professionals who work with plan sponsors, may wish to consider in connection with the management of the plan and its investments.

It is important to note that the suggested practices are not the exclusive means of managing plan investments, monitoring the fees of service providers, or fulfilling administrative obligations. Other combinations of practices also may be effective. Plan sponsors and other fiduciaries should consult with their own legal counsel concerning their responsibilities under ERISA in the administration and management of their respective plans.

Future legislative or regulatory developments may significantly impact these suggested practices and the related matters discussed in this paper. Please be sure to consult with your own legal counsel concerning the application of ERISA to the selection of plan investments and your other fiduciary obligations under ERISA.

This white paper is intended for general informational purposes only, and it does not constitute legal, tax or investment advice on the part of The Law Offices of Geoffrey M. Strunk, LLC or Franklin Resources, Inc. and its affiliates. Plan sponsors and other fiduciaries should consult with their own legal counsel to understand the nature and scope of their responsibilities under ERISA and other applicable law.

The content of this white paper was updated in July 2023 and is subject to change.

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Delegation of administrative responsibilities

The primary source for the legal roles and responsibilities of a retirement plan sponsor is the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Under ERISA, any individual with discretionary authority or control over the operation of a retirement plan or its investments is a "fiduciary".[2] This is important because, when discharging his or her duties, an ERISA fiduciary generally must act in the same manner as a careful expert would and any failure to do so can result in personal liability for the decision maker.[2] Thus, what we have under ERISA is a very high standard of care with the potential for an extremely harsh result. Consequently, what we consider below is the broad delegation of ERISA fiduciary responsibilities to third parties in order to reduce the impact of these obligations.

ERISA named fiduciary

ERISA's fiduciary concept applies with respect to many different tasks that are required of a retirement plan sponsor.[3] In fact, the exercise of discretion resulting in fiduciary responsibility occurs in relation to most actions taken in order to operate and maintain a retirement plan. In order to ensure that some individual or entity is formally obligated to fulfill these fiduciary duties, ERISA requires that a "named fiduciary" be specifically identified within the plan document of a retirement plan ("Named Fiduciary") and, as one might suspect, the Named Fiduciary is deemed to have the requisite discretion and control over the plan to achieve fiduciary status.[4]

With such a broad grant of authority under ERISA, the Named Fiduciary is a kind of an "umbrella" fiduciary entity that is responsible for almost everything retirement plan related from ensuring that a 401(k) participant's deferrals are handled properly to selecting and monitoring other plan fiduciaries and service providers to establishing and monitoring a plan's investments (which we will discuss in greater detail later).[5] Typically, the plan sponsor of a retirement plan is identified as the Named Fiduciary within the official plan document. In fact, most retirement plan documents specifically state that, if no other entity is identified as the Named Fiduciary, the Named Fiduciary is the company that sponsors the plan.

It is clear from above that serving as a Named Fiduciary of a retirement plan carries with it many responsibilities, each of which imposes varying levels of potential fiduciary liability. However, many plan sponsors are unaware that it is possible to delegate most of these obligations to an independent third party.[6] By doing so, a plan sponsor can greatly reduce both the time and effort spent managing its retirement plan as well as the associated fiduciary liability.

Delegating both the administrative responsibilities imposed upon a Named Fiduciary as well as the associated fiduciary liability must be done carefully. This is because, while there are different third-party service providers willing to serve as a Named Fiduciary, each has its own specific services that it is willing to provide in that capacity. Any responsibilities that are not specifically delegated by the plan sponsor to the service provider presumably would remain with the plan sponsor. This can be even more complicated if some administrative responsibilities are being delegated in a fiduciary capacity and others are not. Consequently, it is very important to understand exactly what services are being delegated and in what capacity as it greatly impacts the efforts and care that a plan sponsor must undertake on an ongoing basis in connection with its retirement plan.

Effective delegation of Named Fiduciary responsibilities may be further impacted by the language of the retirement plan document that is employed. More specifically, a Named Fiduciary is defined within each retirement plan document. Thus, if a third party is to serve as Named Fiduciary, it must be willing to fulfill the specific obligations assigned to it under the definition of Named Fiduciary within the terms of such plan document.

Notwithstanding, those words of caution, effective delegation of Named Fiduciary responsibilities to a qualified entity can be extremely valuable. This is because such delegation allows the retirement plan sponsor to focus on the things that it presumably already is an expert at, the operation of its own business, while dramatically reducing the effort and potential uncertainty of attempting to satisfy tedious, detailed and exacting ERISA retirement plan fiduciary duties.

ERISA 3(16) plan administrator

While the Named Fiduciary is defined very broadly to essentially encompass all retirement plan fiduciary responsibilities, ERISA further refines this broad assignment of responsibility by identifying several other types of fiduciaries with more defined roles. One such fiduciary is the "plan administrator" as defined under section 3(16) of ERISA ("Plan Administrator"). By no surprise, the Plan Administrator is defined to focus more exclusively on administrative (as opposed to investment related) responsibilities.[7]

Like the Named Fiduciary, the Plan Administrator is required to be specifically identified within the retirement plan document.[8] However, section 3(16) of ERISA goes further to state that, if no Plan Administrator is named within the plan document, the plan sponsor is the Plan Administrator by default.[9] It also is important to note that the Plan Administrator is different than a "third-party retirement plan administrator" commonly referred to as a "TPA." A TPA is a service provider that performs certain administrative tasks on behalf of the plan sponsor and retirement plan but those tasks are

1. ERISA § 3(21).
2. ERISA § 404(a)(1)(B).
3. See ERISA §§ 404(a), 406.
4. ERISA §§ 402(a)(2).
5. Id.
6. See ERISA §§ 402(a)(2), (c)(2).
7. ERISA §§ 402(a)(2).
8. ERISA § 3(16)(A)(i).
9. ERISA § 3(16)(A)(iii).

traditionally performed on a non-fiduciary basis. This is because such services are performed at the direction of the ERISA Plan Administrator and do not require the exercise of discretion by the TPA.

A plan sponsor must understand that it, the plan sponsor, is the default ERISA Plan Administrator and that a TPA does not act in a fiduciary capacity in order to fully comprehend the level of responsibility and duty of care it has in connection with Plan Administrator related duties. Plan Administrator duties specifically assigned under ERISA and the related Labor regulations include, but are not limited to, the annual filing of Form 5500, Annual Return/Report of Employee Benefit Plan ("Form 5500"); preparation of mandatory disclosures such as "summary plan descriptions" ("SPDs"), "summary annual reports" ("SARs"), and participant fee and investment disclosures; processing and approving plan distributions; and determining plan eligibility.

While many of the tasks described above have a high cost as far as the effort necessary to accomplish them, the timely filing of the Form 5500 in particular also has the potential for a high economic cost. More specifically, both the Department of Labor ("DOL") and the Internal Revenue Service ("IRS") can assess penalties in relation to a late-filed Form 5500 and the penalties that can be assessed by the IRS in relation to a late-filed Form 5500 recently increased. The IRS can assess penalties of $250 per day up to $150,000 per return and the DOL can assess penalties of up to $2,333/day with no maximum per return.[10] These penalties can quickly add up to a very significant amount.

Upon fully understanding the duties of a Plan Administrator, most plan sponsors would certainly prefer to avoid both the administrative efforts associated with the tasks themselves as well as the potential liability if such tasks are not performed pristinely. Fortunately, once again, these duties can be delegated to an independent third party thereby allowing a plan sponsor to avoid having to acquire and maintain an expert's level of knowledge to satisfy its ERISA Plan Administrator responsibilities. However, as with the potential delegation of Named Fiduciary duties, it is critical to carefully examine and understand exactly which Plan Administrator duties are being delegated to the third party, which Plan Administrator duties will remain with the plan sponsor and ensuring that the delegation of Plan Administrator responsibilities occurs in a fiduciary capacity.

Recordkeeping

Recordkeeping involves participant and trust level accounting services such as tracking plan participants' investments, processing participant distributions, and issuing participant as well as plan level account reporting. For those who have an intimate understanding of recordkeeping services, it may seem disingenuous to include a discussion of a plan sponsor's delegation of recordkeeping services here. This is because essentially every retirement plan already delegates these services to a third party and does so from plan inception. In addition, a recordkeeper, like a TPA, provides services on a non-fiduciary basis.[11] Regardless, there is a reason to separately consider the delegation of administrative recordkeeping services within this discussion.

Despite the fact that recordkeeping services aren't provided on a fiduciary basis, it is a fiduciary act to select a service provider, such as a recordkeeper or TPA, even if the service delivery is done on a non-fiduciary basis. The ERISA Plan Administrator generally is responsible for selecting and monitoring such third-party providers.[12] If a provider isn't satisfactory with regard to the specific services being delivered or the cost of such services as compared to what a similar provider would charge for the same services, it is incumbent upon the Plan Administrator to replace such service provider.[13] Failure to do so is a fiduciary breach.

The idea of selecting, monitoring and, when necessary, replacing a service provider may sound routine and it can be… but only for a person or entity who is already intimately familiar with the industry, the service options available from different providers as well as their relative value. Unfortunately, this level of expertise is not possessed by the vast majority of plan sponsors. Thus, in order to adequately perform this service from an ERISA fiduciary perspective, a plan sponsor should engage in a thorough and, unfortunately, time-consuming benchmarking process every few years that includes "request for proposals" ("RFP(s)") from competing providers in order to compare services and costs. In addition, due to a lack of familiarity with the industry and what may be available, an ERISA fiduciary likely should engage an outside consultant familiar with these issues to assist with the process.

On the other hand, if ERISA fiduciary Plan Administrator duties are effectively delegated to a third party and that delegation includes the selection and monitoring of other third-party service providers, the plan sponsor can avoid this tedious task. To be clear, the plan sponsor would retain the duty to monitor the efforts and cost of the third-party ERISA Plan Administrator to whom it has directly delegated fiduciary duties. However, the plan sponsor might avoid direct involvement with the delegated ERISA Plan Administrator's process of selecting and monitoring other third-party retirement plan service providers. Also, although the focus here is on recordkeeping services, the same reasoning applies in the context of selecting and monitoring other administrative service providers such as a TPA.

This again demonstrates a scenario where, through the effective delegation of ERISA fiduciary responsibility, a plan sponsor can reduce the time it spends operating and administering its retirement plan as well as most of the associated fiduciary liability that accompanies it.

10. ERISA §§ 402(a)(2).
11. ERISA § 402(b)(2).
12. See id.
13. Id.

Delegation of investment responsibilities—ERISA 3(38) investment manager

So far we have focused on the delegation of ERISA fiduciary administrative duties to a third party. However, as anyone who carefully reads news headlines can tell you, most ERISA fiduciary litigation does not directly relate to administrative shortcomings. Instead, ERISA fiduciary breach claims in the retirement plan industry typically relate to plan investments and their associated fees and costs. Thus, while the delegation of ERISA fiduciary level administrative tasks may save a plan sponsor the most time and effort on a day-to-day basis, delegation of ERISA fiduciary investment responsibilities are more likely to save a plan sponsor from the potential economic cost associated with the shocking damage awards that we frequently read about in today's news headlines.

In connection with retirement plan investments, there actually are different types of ERISA fiduciaries each of which can provide varying levels of service and fiduciary protection. However, since the goal of this discussion is to advise on dramatically reducing plan sponsors' ERISA fiduciary duties and potential liability, we are going to focus exclusively on the type of ERISA investment fiduciary that provides the highest level of investment related services and the greatest degree of insulation from potential liability. This type of ERISA fiduciary is known as an "investment manager" and is defined under section 3(38) of ERISA ("Investment Manager").

An Investment Manager has the independent authority to manage, acquire or dispose of plan assets.[14] As a result, when an Investment Manager is hired, the plan sponsor no longer exercises any discretion with regard to the selection of specific plan investments.[15] Instead, the Investment Manager independently performs this task and the plan sponsor only remains responsible for selecting, monitoring and reviewing the efforts and cost of the entity to whom it has delegated its fiduciary duties.[16]

An Investment Manager is, by definition, an experienced investment professional willing to serve in an ERISA fiduciary capacity while it performs its duties. This understanding indirectly acknowledges the primary reason that most plan sponsor should hire a third-party ERISA fiduciary investment professional. That is the likelihood that the plan sponsor is unable to be able to meet the ERISA fiduciary standard of care in connection with investment related tasks.

As previously indicated, an ERISA fiduciary must discharge his or her duties in the same manner that a careful expert would and any failure to do so can result in the personal liability of such decision maker.[17] Beyond their investment expertise, most professional retirement plan investment professionals have at their disposal sophisticated tools that are specifically designed to support a skillfully crafted, well-informed and documented investment oversight process. Thus, even where an executive or business owner has ample investment knowledge, they likely still lack the infrastructure and resources necessary to perform these tasks in a manner comparable to a qualified investment professional. Consequently, most plan sponsors could not independently satisfy the ERISA fiduciary investment qualification standard and, as a result, should delegate these duties to a qualified ERISA fiduciary investment professional such as an Investment Manager.

Pooled assets can expand investment and service opportunities at a lower cost

A retirement plan's asset value can directly impact the costs and fees it incurs. To be more specific, the larger the asset value of a retirement plan, the more likely it is that such plan can leverage the value of its assets in order to lower the cost of available investment options as well as to reduce the fees assessed by certain types of service providers such as recordkeepers.

The lack of plan assets necessary to accomplish this goal is most evident either when a plan is initially established (often referred to as a "start-up" plan) or if the plan is sponsored by a small employer and, as a result, overall plan asset growth is slow. Why is this important? Well, one easy example relates to the mutual fund share classes that may be available to a plan for purposes of establishing a list of available investments for a participant to select from.

Mutual funds generally are offered in different share classes each of which has its own unique fee structure. Typically, "retail" share classes have higher expense ratios than "institutional" share classes. However, institutional share classes generally impose a substantial minimum investment requirement. Consequently, a start-up plan or a plan without significant assets may not qualify for investment in an institutional share class. In those situations, only a more expensive retail share class may be available to the plan. Thus, participants would be forced to pay higher investment fees until the point that the plan qualifies for the less expensive institutional shares.

As a side note, "improper" share class selection is one of the most common claims in litigation alleging a breach of ERISA investment fiduciary obligations. For a plan without substantial assets, a less expensive share class may not even be available to the plan. Regardless, share class selection is always an important consideration and is often also questioned in the context of regulatory inquiries and enforcement actions. As a result, ERISA investment fiduciaries generally should always pursue the share class with the lowest net cost unless it is possible to substantiate that a different investment alternative is clearly in the best interests of the retirement plan's participants and beneficiaries… or no cheaper alternative is available to the plan.

Regardless of a specific plan's asset value, certain service providers facilitate the pooling of assets of multiple retirement plans in order to gain certain advantages with respect to both the availability of less expansive investment options and the procurement of certain plan services at a lower cost. Thus, by engaging a service provider who offers this type of asset pooling service, even a plan without a large asset value can gain some of the same economic advantages as a large plan.

14. ERISA § 3(38).
15. See id.
16. Id.
17. ERISA § 409(a).

Potential advantages of aggregated employer plans over MEP/PEP

The savings in cost and effort considered within this white paper all relate to what is known as a "single employer plan," that is, a single employer sponsoring a single retirement plan. This is the case regardless of whether assets are pooled as discussed immediately above because each plan sponsor of a plan considered here has its own separate reporting and documentation requirements, among other things. This means that each such plan has its own formal written plan document and its own Form 5500 filing requirement, as applicable. Notwithstanding, our discussion wouldn't be complete without also exploring the opportunities offered through "pooled employer plans" ("PEP(s)") which were initially created under the Setting Every Community Up for Retirement Enhancement ("SECURE") Act.

MEP/PEP defined

Unlike the single employer plans that we have considered thus far, a PEP is a form of "multiple employer plan" ("MEP(s)"). In general, a MEP allows multiple, unrelated employers to participate in a single plan which can then use a single formal written plan document for all participating employers and, if structured properly, file a single Form 5500.[18] This can allow MEPs to recognize certain economies of scale with regard to plan document and Form 5500 preparation costs. Through the pooling of assets, a MEP also stands to recognize the leveraging of plan assets that we considered above in connection with the pooled assets of multiple, but separate, retirement plans.

A PEP is essentially a MEP, so a single plan with multiple unrelated participating employers, offered by a "pooled plan provider" ("PPP").[19] A PPP is an approved entity who serves as the ERISA Named Fiduciary and the ERISA Plan Administrator in connection with such plan.[20] Thus, as we can see, there are many similarities between a PEP and the delegation of ERISA fiduciary responsibilities we have considered to this point. For the sake of discerning between what we have discussed thus far (a single employer plan with a sponsor that delegates broad ERISA fiduciary responsibilities to third parties and pools its assets) and a PEP, the rest of this discussion shall refer to our initial concept as an "aggregated employer plan."

Plan design flexibility

As indicated above, both types of service offerings require the use of a formal written plan document. However, a PEP, in order to take advantage of a potential savings opportunity, will usually employ one plan document that all participating entities have to adopt. This means that a PEP is likely to offer only limited flexibility regarding plan design choices. This is in contrast to a single employer plan engaging in an aggregated employer plan design that would use a single employer plan document of its own selection. Presumably, an aggregated employer plan design would allow the plan sponsor to select a plan document that could accommodate a wider array of plan design features.

The difference here is that, with a PEP, it is anticipated that the PPP will take advantage of its unilateral control of the plan document in order to reduce the plan design options available to an adopting employer. In this manner, fewer potential plan designs would be offered to those employers adopting a PEP thereby easing the PPP's administrative burden which could then reduce the expenses associated with the PEP's administration efforts.

This would likely be different than a single employer under an aggregated employer design that would adopt its own plan document which is designed exclusively to its unique needs or desires. In this scenario, it is likely that the single employer could be more selective in its adoption of a plan document with greater flexibility that can accommodate more unique and/or sophisticated plan design features.

There are many different plan document options in the market today for plan sponsors to select from. This includes IRS "pre-approved" plan documents as well as individually designed custom plan documents drafted by an ERISA attorney. With all of these options, it is important for plan sponsors to ensure that it's plan document both accommodates and actually reflects the intended operation of its retirement plan. A failure to follow the terms of the plan's document is an ERISA fiduciary breach.[21] Thus, when it comes to plan document design and operation, plan document selection and flexibility are important considerations.

Avoid shared ERISA audit costs

As you may know, in general, if a plan has 100 or more eligible employees, it must include the report of a qualified public accountant each year with its annual filing of the Form 5500 ("ERISA Audit").[22] The cost of the ERISA Audit can be significant. For a single employer plan with 100 eligible employees, the cost of an ERISA Audit usually starts at approximately $15,000.

The ERISA Audit requirements for aggregated employer plans and PEPs have received significant legislative and regulatory attention in the last few years. With respect to the aggregated employer plans concept, Section 202 of the SECURE Act generally authorized multiple defined contribution plans with the same trustee, fiduciaries, ERISA Plan Administrator and plan year to be eligible to file a "consolidated" Form 5500. When promulgated, it was uncertain exactly what that meant. However, since that time, Congress provided further clarification via the SECURE 2.0 Act of 2022 (part of the 2023 Consolidated Appropriations Act) ("SECURE 2.0"). The IRS, DOL and Pension Benefit Guaranty Corporation then provided even more clarification via the creation of additional rules and regulations associated with the preparation and filing of Form 5500.[23]

In the context of aggregated employer plans where common trustees, fiduciaries, ERISA Plan Administrators and plan years are employed; the impact of this additional guidance is that a single Form 5500 can be filed for the entire aggregated employer group

18. IRC § 413(c).
19. IRC § 413(e).
20. Id.
21. ERISA §§ 404(a)(1)(D))
22. ERISA § 103(a)(3)(A).

with only an additional schedule to be attached to such filing for each component member.[24] However, even though a single Form 5500 can be filed on behalf of the entire aggregated employer group, the ERISA Audit requirement is not applied to the aggregated employer group as a whole. Instead, only those component members of the aggregated employer group with 100 or more eligible employees are independently subject to the ERISA Audit requirement.[25]

This means that, for an aggregated employer group, only those component members that are independently obligated to obtain an ERISA Audit must do so. Component members with fewer than 100 eligible employees are not required to obtain an ERISA Audit. Also, the aggregated employer group is not required to separately obtain an ERISA Audit in connection with the entire aggregated employer group population represented on the 5500.[26] Further, the Form 5500 filing obligation is simplified so that the filing requirements associated with each component member are limited to only a single specific attached schedule as opposed to an independent full Form 5500.

In contrast to certain Form 5500 and ERISA Audit exceptions now available to the aggregated employer group concept, regulators have not granted any exceptions to the ERISA Audit requirements for PEPs. More specifically, while the SECURE Act granted the DOL with the discretion to limit the application of the ERISA Audit requirement to PEPs, the DOL affirmatively chose not to do so.[27] As a result, every PEP that has at least 100 eligible employees is subject to the ERISA Audit requirement. Consequently, since PEP providers presumably aspire to supply retirement plan benefits to more than 100 eligible employees, it seems likely that every PEP will need to annually satisfy the ERISA Audit requirement. Further, in the context of a PEP where numerous unrelated employers are participating in a single plan and thousands of eligible employees likely exist, one would reasonably expect the cost of the ERISA Audit to increase dramatically.

The point here is that a single employer with fewer than 100 eligible employees could benefit from the aggregated employer design because it would not be subject to the ERISA Audit requirement. However, if that same employer adopted a PEP, it would be forced to indirectly share the expense of the ERISA Audit with other adopters of the PEP. Presumably this shared expense would be reflected in the fees paid to the PEP provider.

This ERISA Audit avoidance strategy may result in real cost savings to a plan sponsor with fewer than 100 eligible employees that uses an aggregated employer service model. However, the opposite may be true for a single employer with 100 or more eligible employees ("Large Employer"). In that case, it may actually generate a cost savings for the Large Employer to adopt the PEP in order to share the ERISA Audit cost with other adopters of the PEP rather than shouldering the entire audit cost on its own. Thus, we see here where the size of the employer might directly influence the analysis about which type of plan service model works best.

Duty to monitor delegated service providers

Much of the discussion above has focused upon the delegation of ERISA retirement plan fiduciary responsibilities, as well as their corresponding potential liabilities, to an independent third party[27] However, it is important to understand that it is not possible to completely delegate away all potential ERISA fiduciary liability. This is because a duty to monitor the performance of the delegated third-party fiduciary will always remain.[28]

It also is important to recognize that different service providers may have vastly different service offerings. Sometimes those service offerings are made on a fiduciary basis and sometimes they are not. In addition, some providers may perform certain tasks in a fiduciary capacity but other responsibilities may be performed in a non-fiduciary capacity. Thus, a plan sponsor must clearly understand the specific services to be provided by a delegated third party as well as which of those services will be performed in an ERISA fiduciary capacity.

Conclusion

Retirement plan sponsorship can be a time-consuming burden that carries a high level of potential liability. However, there are methods of trying to control and reduce both the effort and the risk associated with ERISA retirement plans. One such way is to effectively delegate as much ERISA fiduciary responsibility as possible to qualified third-party professionals who specialize in retirement plan investments and administration.

In addition, pooling the retirement plan assets of numerous separate retirement plans can leverage the combined value of those assets. This can result in cost savings with regard to both available investment options and certain service providers' fees.

Combining both of these tactics, delegation of ERISA responsibilities and pooling of plan assets, can generate valuable savings for a retirement plan sponsor in the form of reduced time and effort spent on retirement plan administration, reduced potential liability and reduced cost. As a result, the aggregated employer plan service model should be considered as a potential solution to many of the most difficult aspects of retirement plan sponsorship.

23. See Annual Return / Informational Reports, 80 Fed. Reg. 11984 (Feb. 24, 2023).

24. Id.

25. Section 345 of SECURE 2.0.

26. Id.

27. Section 101 of the SECURE Act granted the DOL with the discretion to provide simplified reporting options for MEPs (including PEPs) with fewer than 1,000 participants in total so long as each participating employer has fewer than 100 participants. However, in the context of rulemaking associated with the content of Form 5500, the DOL indicated that it would not amend the current reporting rules to establish a simplified report for such plans under such grant of authority. See Annual Return / Informational Reports, 80 Fed. Reg. 11989, fn. 24 (Feb. 24, 2023). The DOL did request specific comments from interested stakeholders on this issue. Id. However, the lack of any change to this rule as a result of such request for comment presumably indicates that the DOL was not persuaded to change its position by the responses it received. See id. Notwithstanding, since the reporting rules applicable to aggregated employer plans and PEPs have recently changed multiple times due to both legislation and regulatory rulemaking, it remains to be seen if further changes to these rules occur.

28. See ERISA §§ 402(a)(2), (c)(3); 405(c).

Exhibit A

The following is intended to provide plan sponsors with a way to easily evaluate whether an aggregated employer plan design may be advantageous to their business.

Aggregated employer plan suitability checklist

#	Question	Yes	No	Unsure
1	Do you prefer focusing on the operation and maintenance of your retirement plan rather than your business?	☐	☐	
2	Are you an expert on retirement plan administration?	☐	☐	☐
3	Are you an investment professional?	☐	☐	
4	Do you want to regularly spend time learning about ERISA and the fiduciary duties it imposes on retirement plan sponsors?	☐	☐	
5	Is your company's retirement plan being operated in accordance with all applicable ERISA requirements?	☐	☐	☐
6	Do the investments offered within your retirement plan meet or exceed their peers in most if not all measurable statistical categories?	☐	☐	☐
7	Does your retirement plan require an annual audit to accompany its Form 5500?	☐	☐	☐
8	Do you currently delegate your ERISA retirement plan fiduciary administrative responsibilities to a third-party ERISA 3(16) Plan Administrator?	☐	☐	☐
9	Do you currently delegate your ERISA retirement plan fiduciary investment responsibilities to a third-party ERISA 3(38) Investment Manager?	☐	☐	☐
10	Do you have an adequate support network consisting of qualified retirement plan professionals who are readily able to address and resolve any questions and concerns that you may have in connection with your company's retirement plan?	☐	☐	☐

If you answered "No" or "Unsure" to any of the questions posed above, an aggregated employer plan service model may be advisable for your company. If so, you should consult with your qualified retirement plan professionals in order to further investigate whether this process can help your company to reduce its administrative burdens as well as the fiduciary liability imposed under ERISA.

About Geoffrey M. Strunk

Geoffrey M. Strunk, Esquire, is the principal of the Law Offices of Geoffrey M. Strunk, LLC, a “boutique” ERISA law firm located in Glen Mills, Pennsylvania. Since 1998, Mr. Strunk has continuously maintained a private legal practice focused exclusively on the field of employee benefits. In that role, he routinely handles contested and procedural employee benefit matters, including the direct representation of plan administrators and fiduciaries before the IRS and the DOL. These responsibilities extend to the provision of compliance services involving government submissions and negotiations. In addition, he designs, drafts and consults on all forms of employee benefit pension plans with specialties in tax-qualified defined contribution plans and all forms of non-qualified plans.

Mr. Strunk also fulfills a compliance consulting role for certain recordkeepers and third-party retirement plan administration companies. In this context, he serves as a legal resource for marketing/sales staff and retirement plan administrators in order to help ensure the compliant design, maintenance and operation of their client’s retirement plans. Immediately prior to establishing his own law firm, Mr. Strunk served as Senior Vice President and General Counsel of ExpertPlan Consulting Services. In that role, his responsibilities included, among others, the management of the consulting services division within ExpertPlan, Inc., as well as the direct provision of consulting services to clients. Mr. Strunk received his Juris Doctor from Villanova University School of Law and his undergraduate degree from the Pennsylvania State University. He is licensed to practice law in the states of New Jersey and Pennsylvania.

Mr. Strunk was recognized in the legal community as a New Jersey Super Lawyer-Rising Star for five consecutive years. In addition, Mr. Strunk frequently writes and presents on numerous topical employee benefit matters.

All investments involve risk, including loss of principal.

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