



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

December 18, 2018

Definition of "Employer" under Section 3(5) of ERISA – Association Retirement Plans and Other Multiple-Employer Plans

RIN 1210-AB88

The Employers Association of New Jersey (EANJ) submits the following comments to the Proposed Regulation entitled: Definition of "Employer" Under Section 3(5) of ERISA – Association Retirement Plans and Other Multiple-Employer Plans.

In 2015, EANJ formed a multiple employer retirement plan (the "EANJ MEP"). Established in 1916, EANJ is a nonprofit trade association organized and operated under section 501 (c) 6 of the Internal Revenue Code. EANJ acts in the interest of its employer-members, primarily in the areas of labor relations and human resource practices. It maintains strong governance standards and members exercise rights and privileges under published bylaws. While the proposed rule would not necessarily change the character or status of the EANJ MEP, EANJ submits these comments to propose raising the threshold for an Association Retirement Plan (ARP) audit from the current 100 to 300 participants.

As the Proposed Regulation points out, small businesses are less likely to offer retirement benefits to workers, as only 53 percent of private-sector employers do so. Both regulatory complexity and cost discourage employers – especially small employers – from offering retirement benefits plans.

EANJ formed its MEP believing that it had the potential to broaden the availability of workplace retirement plans, although the Proposed Regulation acknowledges that higher participation, particularly by smaller employers, is uncertain.

Currently 168 employees from 12 small employers participate in the EANJ MEP. Of the participating employers, 6 had never offered a retirement savings plan to their employees.

As noted, all are members of EANJ and the MEP currently manages approximately \$6 million in collective assets. Participating employers manage their own plans that are governed by a Master Plan Document but are not directly responsible for the MEP's overall compliance with ERISA's reporting and disclosure obligations. Investment advice is provided by the investment manager. Significantly, employee participation is 90 percent, well over the 70 percent national average.

As the Proposed Rule observes, hiring an auditor is costly. However, a small employer will never be required to audit its retirement plan because it would be highly unlikely it would reach the 100-participant threshold. In contrast, the EANJ MEP which reached 100 employee participants in its third year was required to conduct an audit that cost \$24,000. EANJ, the sponsor, chose to absorb that cost because charging the participating small employers would eliminate the primary incentive to participate in the MEP in the first place.

EANJ has learned that the promise of ARPs – high value plans with low fees for small employers that would not otherwise offer a retirement savings plan – cannot be readily achieved without relief from the current 100-participant audit threshold. As will be explained, this can be accomplished without compromising fiduciary obligations.

The Proposed Rule rightly observes that *bona fide* associations are well-suited to sponsor an ARP because of well-established governance structures and meaningful relationships with members. As EANJ, a longstanding employers' association, has embarked on helping to solve the retirement saving crisis for its members, its fiduciary governance structure and representational membership model has served to guide the formation and management of the EANJ MEP.

For example, EANJ, the sponsor, has designated board members to serve as ERISA 403(a) trustees. The trustees, who meet regularly under the guidance of counsel and the president of EANJ, has appointed an ERISA 3(16) administrator-custodian and an ERISA 3(38) investment manager. Among fiduciary responsibilities of the trustees are the oversight of administrative and investment activities and the monitoring of the investment policy. Minutes of meetings are recorded and reported to the EANJ board. EANJ ensures that fidelity bonds and liability insurance are retained and that competent legal counsel and a plan auditor is retained. All agreements and arrangements were negotiated at arm's length. As such, EANJ believes that it has best-in-class governance structures that can be a model for other ARPs.

However, as EANJ has learned, the economies of scale still do not work for small employers who must pay their proportionate share of an audit once the ARP reaches 100 participants. The Proposed Rule recognizes this inherent barrier to increasing small employer participation by suggesting that small employers should locate and enroll in "large" plans

that already exist, such as those plans sponsored by Professional Employer Organizations (PEOs). But that choice would not only skew the market in favor of PEOs, it would undermine the very purpose of the Proposed Rule, which is to empower *bona fide* associations to leverage their relationships with members and expand participation among the small employers who do not offer retirement plans.

Clearly, a small employer could enroll in a PEO now, without any change to the ERISA definition of “employer.” The vast majority of small employers do not use PEOs because the services that are provided, including the multiple employer benefits’ arrangements, are irrelevant, not useful or too expensive. In other words, to the extent that large multi-employer plans already exist through PEOs, they do not present viable alternatives for small employers. Thus, the promise of the Proposed Rule can be best achieved through the empowerment of *bona fide* associations, like EANJ, whose members are small employers.

EANJ believes that raising the threshold for an audit to 300 participants for a fiduciary-managed ARP strikes the proper balance between ensuring the integrity of the ARPs financial statements and encouraging small employer participation in the first place. EANJ finds no meaningful purpose in maintaining the 100-threshold audit rule for a fiduciary-managed ARP when raising it to 300 would maximize the purpose of the Proposed Rule, which is to empower *bona fide* associations to form ARPs to increase small employer participation. Generally speaking, EANJ MEP funds are selected to provide retirement security to beneficiaries and to provide benefits at normal retirement age. Fund selection is subject to a fiduciary standard. Funds include Vanguard, T. Rowe Price, Fidelity and Franklin Templeton and many more. Fund purchases are commission-free and the MEP is managed for the sole benefit of beneficiaries.

Raising the audit threshold is an action not unrelated to changing the Unified Plan Rule (“one bad apple”) but is not dependent upon it. The ARP would still need to ensure the compliance of its participating employers on an ongoing basis. Again, the ongoing trusted relationship between the participating employers and the *bona fide* association to which they belong remains the foundation of fiduciary management. Participating employers’ involvement in day-to-day operations and administration of the EANJ MEP is generally limited to enrolling employees and forwarding voluntary employee and employer contributions to the plan. However, the EANJ MEP, as well as U.S. Department of Labor regulations, requires participating employers to remit participant contributions on the earliest date on which they can be reasonably segregated from general company assets. Elective deferrals must be deposited in the same manner as payroll tax payments. In short, the EANJ MEP proactively monitors all the “apples” in the plan to ensure proper compliance regardless of the audit threshold.

Therefore, raising the threshold for an audit for an ARP from the current 100 to 300 participants would not compromise fulfilling fiduciary obligations as long as the ARP had strong governance structures, as the EANJ MEP has. In fact, those governance structures offer much greater protection to a participating small employer than it would otherwise have as a sole sponsor. Moreover, as noted, a small employer would hardly ever pay for the costs of an audit since it would never exceed the 100-threshold. Thus, imposing that burden on a fiduciary-managed ARP merely poses a serious financial disincentive to a small employer, undermining the very purpose of the Proposed Rule, which is to increase participation among small employers.

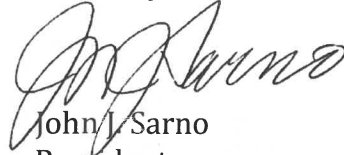
On August 31, 2018, President Trump directed the Departments of Labor and Treasury to consider issuing regulations and guidance that would make it easier for small businesses to offer retirement plans. Specifically, he directed the departments to consider changes to make it easier for businesses to join together to offer ARPs.

EANJ anticipated the Proposed Rule by three years and believes that it is now a model for other associations. It formed its MEP in 2015 knowing that it could not initially allocate the costs of administering the plan onto the likely small employers who would participate in the MEP because the objectives were to 1) provide a solution for small employers who wanted to provide retirement security for their employees but who did not have a viable way to do so, and 2) to provide a value-added benefit to the membership, which is comprised primarily of small employers. These objectives are essentially the same as the objectives of Proposed Rule, in that EANJ is providing a solution for small employers who would not otherwise sponsor a plan, meaning that workers in the MEP are participating in an employer-sponsored plan for the first time. Like the Proposed Rule, EANJ's primary goal is not to enroll employers with existing plans who are seeking merely to lower their administration costs. Rather, EANJ is seeking to play a role in solving an important socio-economic problem by expanding the pool of participating employers and therefore providing an opportunity for more workers to achieve retirement security. ⁱ

Raising the audit threshold to 300-participants will allow the ARPs formed by associations of small employers to reach the scale sufficient to allocate audit costs over a larger pool of participating small employers, creating the opportunity for the small employer who would not otherwise sponsor a retirement plan to participate. Not taking this action not only undermines the objectives of the Proposed Rule, which is to empower *bona fide* associations, but as the Rule is currently drafted, it clearly favors existing large plans, thus suppressing the competition and other value-added innovations which are needed to help solve the nation's retirement savings crisis.

It is for aforementioned reasons, therefore, that EANJ respectfully requests that the Proposed Rule include raising the threshold for an audit to 300 participants for a fiduciary-managed ARP.

Sincerely,

A handwritten signature in black ink, appearing to read "John J. Sarno".

John J. Sarno
President

¹ EANJ also sponsors a multiple employer welfare arrangement (MEWA). Formed and capitalized in 2010, the MEWA currently funds health coverage for 45,000 members.