

**For a pooled-employer plan,
what are an employer's fiduciary responsibilities?**

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for

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Are you ready for pooled-employer plans?

The “SECURE” Act ¹ establishes a new kind of multiple-employer plan—a pooled-employer plan with a pooled-plan provider.

Pooled-employer plans now are available in the retirement-services marketplace. ² Whether the interest in this new format comes from employers, is driven by advisers or brokers, or is about defending against competitors, practitioners want to understand which fiduciary responsibilities an employer might undo or share by joining a pooled-employer plan, and which responsibilities would remain with the employer.

This paper focuses on ERISA ³ fiduciary responsibility ⁴, mostly from the perspective of an employer that would choose whether to join a pooled-employer plan. (Fiduciary responsibility regarding a governmental plan ⁵, or a church plan that has not elected to be ERISA-governed, is beyond this paper's scope.)

What is a pooled-employer plan?

A pooled-employer plan is an individual-account retirement plan designed to facilitate use by many *unrelated* employers, with administration by a registered ⁶ fiduciary, a pooled-plan provider.

The Employee Retirement Income Security Act of 1974 (“ERISA”) has two new definitions:

- ERISA § 3(43) for a *pooled employer plan*, and
- ERISA § 3(44) for a *pooled plan provider*.

Those definitions specify some requirements and other conditions. ⁷

¹ The “Setting Every Community Up for Retirement Enhancement Act of 2019” is division O of the Further Consolidated Appropriations Act, 2020, Public Law No. 116-94 (Dec. 20, 2019), 133 Statutes at Large 2534 (2019).

² My search of EBSA's website listing of “Pooled Plan Provider Registrations” filed by February 12, 2021 retrieved 79 such registrations.

³ Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406 (Sept. 2, 1974), 88 Stat. 829-1035 (1974), as amended.

⁴ As the statute does, I use the heading “fiduciary responsibility” to refer to part 4 of subtitle B of title I of the Employee Retirement Income Security Act of 1974 [“ERISA”]. Part 4 is ERISA §§ 401 to 414 (unofficially compiled as 29 U.S.C. §§ 1101 to 1114).

⁵ For an explanation of State-law fiduciary responsibility to a governmental retirement plan, see Peter Gulia, *Fiduciary Responsibility to a Governmental Deferred Compensation Plan* [ch. 18], in 457 ANSWER BOOK (Gary S. Lesser, David W. Powell & Peter Gulia, editors, Wolters Kluwer 8th ed. & updated June 22, 2020). (I recently submitted my 2021 update.)

⁶ A pooled-plan provider must register with the Secretary of Labor and furnish the information the Secretary requires “before beginning operations as a pooled plan provider[.]” ERISA § 3(44)(A)(ii), 29 U.S.C. § 1002(44)(A)(ii).

⁷ ERISA § 3(43)-(44), 29 U.S.C. § 1002(43)-(44).

How is a pooled-employer plan a new kind of retirement plan?

Until 2021, ERISA had allowed only an employer or a labor union (or a combination of them) to sponsor an employee-benefit plan. Most retirement plans are a single-employer plan for one employer. (Several businesses might be treated as one employer if they are commonly controlled, affiliated in providing services, or in some other way sufficiently related.) A multiple-employer plan is a plan with more than one employer. But until 2021, ERISA did not treat a multiple-employer plan as one plan unless the employers have a common interest beyond using the retirement plan.⁸ For a pooled-employer plan, participating employers need not have a common interest.

For those who like the logic concept of sets and subsets, a pooled-employer plan is a subset of the set of multiple-employer plans—that is, a pooled-employer plan is one kind, but not the only kind, of multiple-employer plan.⁹ And if you know the expressions “closed” and “open” multiple-employer plans, a pooled-employer plan is one kind, but again not the only kind, of “open” multiple-employer plan.

How does a pooled-employer plan structurally differ from most retirement plans?

A pooled-employer plan reverses some roles between an employer and a retirement-services provider. For a typical single-employer individual-account retirement plan, an employer is the plan's administrator, and often the only discretionary fiduciary. The employer/administrator engages the recordkeeper. The recordkeeper is a service provider, lacks discretion, and works under the instructions of the employer/administrator. (This describes the norm without what the trade calls § 3(16) services for a service provider to perform, as a fiduciary, some allocated

⁸ See, for example, Dep't of Labor Employee Benefits Security Administration, ERISA Advisory Op. 2012-04A (May 25, 2012) (“[T]he Plan [“operated by 401(k) Advantage LLC”] does not constitute a single ‘multiple employer’ plan for purposes of ERISA, but rather is an arrangement under which each participating employer establishes and maintains a separate employee benefit plan for the benefit of its own employees.”).

⁹ That ERISA allows a pooled-employer plan does not preclude other kinds of multiple-employer plans. Those might include:

- a “closed” multiple-employer plan, about which the plan's sponsor acts in the interest of the employers for a purpose beyond providing employee benefits, and does so without relying on the Association Retirement Plans rule (see next point);
- an “ARP” multiple-employer plan established and maintained by a group of employers that have enough common interest under the Association Retirement Plans rule;
- an “open” multiple-employer plan that for ERISA's title I is an aggregation of the employers' separate plans.

Whether the Association Retirement Plans rule might be invalid as not a permissible interpretation of ERISA is beyond this paper's scope.

functions that otherwise would be the responsibility of the plan's administrator.) Even if inexperienced, unknowledgeable, and otherwise poorly prepared, the employer is in charge.

For a pooled-employer plan, the pooled-plan provider is *a* sponsor and *the* administrator of its pooled-employer plan. The provider bears some nondelegable fiduciary responsibilities.¹⁰ Among these, the provider must administer the plan.

But, some fiduciary responsibilities might be organized, allocated, and delegated.¹¹ Most important, an employer's fiduciary responsibility to select service providers, including the pooled-plan provider, and investment alternatives often persists.

Is a pooled-plan provider a fiduciary?

Yes. A pooled-plan provider is the administrator of its pooled-employer plan, and bears some nondelegable fiduciary responsibilities.

If a pooled-plan provider appoints a trustee, investment manager, investment adviser, claims administrator, disclosure administrator, or other fiduciary, the appointer bears fiduciary responsibility for each appointment.¹²

Is a participating employer a fiduciary?

Yes. A pooled-employer plan's terms must "provide that each employer in the plan retains fiduciary responsibility for the selection and monitoring [according to ERISA's fiduciary duties] of the person designated as the pooled plan provider and any other person who, in addition to the pooled plan provider, is designated as a named fiduciary of the plan[.]"¹³ With a pooled-employer plan, a participating employer must have at least that much fiduciary responsibility.

¹⁰ ERISA § 3(44)(A), 29 U.S.C. § 1002(44)(A).

¹¹ ERISA §§ 402-405, 29 U.S.C. §§ 1102-1105.

¹² Peter Gulia, *ERISA's Fiduciary-Responsibility Provisions* [ch. 6], at § 6.08[D][4], in *ERISA: A COMPREHENSIVE GUIDE* (Ilene H. Ferenczy & Alison J. Cohen, editors, Wolters Kluwer 6th ed. & updated Nov. 10, 2020).

¹³ ERISA § 3(43)(B)(iii)(I), 29 U.S.C. § 1002(43)(B)(iii)(I).

Further, an employer is a fiduciary for “the investment and management of the portion of the plan’s assets attributable to the employees of the employer” except to the extent a responsibility is allocated or delegated to another fiduciary.¹⁴

Must an employer prudently select and monitor the pooled-plan provider?

Yes. Under a pooled-employer plan’s required provisions, each employer has fiduciary responsibility to prudently select and monitor the pooled-plan provider, the trustee, and each other named fiduciary of the pooled-employer plan.

How about approving fees?

A pooled-employer plan’s documents might require a participating employer to serve as the responsible plan fiduciary that approves, independently, the other fiduciaries’ compensation, and perhaps non-fiduciary service providers’ compensation.

Why? The Labor department and courts have interpreted ERISA’s § 408(b)(2) exemption for reasonable service arrangements to apply only to a § 406(a) prohibited transaction, and not to any § 406(b) self-dealing. A fiduciary must not use any authority, control, or responsibility that makes the person a fiduciary to cause a plan to compensate the fiduciary.¹⁵ Likewise, a fiduciary must not use its power or control to cause a plan to compensate a person in which the fiduciary has an interest that could affect the fiduciary’s best judgment as a fiduciary. For example, a fiduciary might be unable to make a conflict-free decision about whether to engage the fiduciary’s subsidiary, parent, or other affiliate. Even if a service provider is not a fiduciary’s affiliate, a pooled-plan provider might be unable to approve a service contract or arrangement if there is a business or financial relationship that would call into question whether the pooled-plan provider is free from compromising influences.

For these and other reasons, many pooled-employer plans’ documents require a participating employer to serve as the independent plan fiduciary responsible to approve the pooled-plan

¹⁴ ERISA § 3(43)(B)(iii)(II), 29 U.S.C. § 1002(43)(B)(iii)(II).

¹⁵ 29 C.F.R. § 2550.408b-2(e)(1).

provider's, its affiliates', other fiduciaries', and even non-fiduciary service providers' compensation.

What about responsibility for selecting investment alternatives?

Responsibility for selecting investment alternatives turns on what the pooled-employer plan provides about which fiduciary must or may select investment alternatives.

Under a pooled-employer plan's required provisions, an employer retains fiduciary responsibility for "the investment and management of the portion of the plan's assets attributable to the employees of the employer (or beneficiaries of such employees)" unless the pooled-plan provider delegates this to another fiduciary.¹⁶

For some pooled-employer plans, a plan-wide fiduciary selects the plan's investment alternatives. But other plans might permit, or even require, a participating employer to select investment alternatives for that employer's portion of the plan. And some pooled-employer plans might require, as a condition of joining the plan, that an employer approve the menu of investment alternatives the plan specifies.

If a plan-wide fiduciary selects the investment alternatives, a participating employer's fiduciary responsibility is to act loyally and prudently, according to ERISA's required standard of care, in evaluating its appointment of that fiduciary implied by joining the pooled-employer plan.¹⁷ Likewise, the employer must monitor whether that implied appointment remains prudent. If it becomes imprudent, the employer must use its right to exit the plan.

If a participating employer separately selects the investment alternatives for its portion of the plan, the employer's responsibility practically is about the same as it would be for selecting investment alternatives for a single-employer plan for which the employer is the fiduciary.

How does an employer *disapprove* an appointment or service arrangement?

Before it becomes a participating employer, an employer may disapprove an appointment, a service arrangement, or an investment alternative, by not joining the pooled-employer plan.

¹⁶ ERISA § 3(43)(B)(iii)(II), 29 U.S.C. § 1002(43)(B)(iii)(II).

¹⁷ ERISA § 3(43)(B)(iii)(I), 29 U.S.C. § 1002(43)(B)(iii)(I); Peter Gulia, *ERISA's Fiduciary-Responsibility Provisions* [ch. 6], at § 6.08[D][4], in *ERISA: A COMPREHENSIVE GUIDE* (Ilene H. Ferenczy & Alison J. Cohen, editors, Wolters Kluwer 6th ed. & updated Nov. 10, 2020).

After joining a plan, an employer's fiduciary control is its power to exit the plan. To help make that power practical, a pooled-employer plan must "provide that employers in the plan, and participants and beneficiaries, are not subject to unreasonable restrictions, fees, or penalties with regard to ceasing participation [or] receipt of distributions[.]"¹⁸

An employer that serves as the responsible plan fiduciary for a single-employer plan must monitor, and sometimes must replace, a service provider. An employer that serves as a responsible plan fiduciary for its portion of a pooled-employer plan must monitor that plan's fiduciaries and service providers. If the way to replace or remove them is to exit the plan, that is the fiduciary's control.

Must a trustee collect contributions?

Yes. A pooled-employer plan's terms must name a trustee responsible to collect contributions. That trustee must be a bank, a trust company, an insured credit union, or (if none of those) a financial institution the Internal Revenue Service approved to act as a custodian for Individual Retirement Accounts. Besides banking, insurance, and securities law (which are not preempted¹⁹), ERISA requires a pooled-employer plan's trustee "to implement written contribution collection procedures that are reasonable, diligent, and systematic[.]"²⁰

Is an employer excused from responsibility for collecting contributions?

No. Although a pooled-employer plan must name an "institutional" trustee with responsibility to collect contributions, nothing in that ERISA provision precludes a plan from *also* imposing responsibility on a participating employer as another fiduciary.

Must an employer be covered by fidelity-bond insurance?

Yes. Every fiduciary of an ERISA-governed employee-benefit plan, and every other person who handles such a plan's money or other property, must be bonded. Because a participating

¹⁸ ERISA § 3(43)(B)(iv), 29 U.S.C. § 1002(43)(B)(iv).

¹⁹ ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A).

²⁰ ERISA § 3(43)(B)(ii), 29 U.S.C. § 1002(43)(B)(ii).

employer is a fiduciary, it must be bonded. (That is so even in the unlikely situation in which an employer never handles any plan asset.)²¹

Beyond co-fiduciary responsibility, ERISA makes a pooled-plan provider “responsible for ensuring that *all* persons who handle assets of, or who are fiduciaries of, the pooled employer plan are bonded in accordance with section 412.”²²

Does an employer have co-fiduciary responsibilities?

Yes. Once a person is an ERISA-governed plan's fiduciary—no matter how narrow the responsibility, the fiduciary bears ERISA's co-fiduciary responsibilities.²³ That includes personal liability if the employer has knowledge of another fiduciary's breach, unless the employer as an observing fiduciary makes prudent efforts to remedy the breach.

Why must an employer (or its lawyer) read all the documents?

Except for a few constraints ERISA specifies, a pooled-employer plan's organizer may use a combination of plan, trust, participation agreement, and other documents to allocate and delegate fiduciary responsibilities. If you advise an employer, anticipate that smart businesspeople and creative lawyers working for a plan's organizer might have narrowed the other named fiduciaries' responsibilities, and might have set unexpected responsibilities for a participating employer. Evaluate the differences, because not all pooled-employer plans have the same provisions and arrangements. And even if you lack bargaining power, read the terms anyhow so a participating employer can know what responsibilities, including those imposed by contract, the employer would accept.

²¹ Peter Gulia, *ERISA's Fiduciary-Responsibility Provisions* [ch. 6], at § 6.15, in *ERISA: A Comprehensive Guide* (Ilene H. Ferenczy & Alison J. Cohen, editors, Wolters Kluwer 6th ed. & updated Nov. 10, 2020).

²² ERISA § 3(44)(A)(iv), 29 U.S.C. § 1002(44)(A)(iv).

²³ Peter Gulia, *ERISA's Fiduciary-Responsibility Provisions* [ch. 6], at § 6.10[G], in *ERISA: A COMPREHENSIVE GUIDE* (Ilene H. Ferenczy & Alison J. Cohen, editors, Wolters Kluwer 6th ed. & updated Nov. 10, 2020). *See also* Peter Gulia, *Am I responsible for what someone else does wrong?* 401(k) ADVISOR, Mar. 2014.

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