8/10/16 Draft
Revision marks show changes to existing 2004 ERISA Handbook.
*Note that footnote numbering will adjust in finalized document.

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Multiple Employer Welfare Arrangements

Characteristics of MEWAs

ERISA defines a multiple employer welfare arrangement (MEWA) as: "[A]n employee welfare benefit plan, or any other arrangement…which is established or maintained for the purpose of offering or providing any benefit described in paragraph 1[1] to the employees of two or more employers (including one or more self employed individuals), or to their beneficiaries."[2]

While such an arrangement may be an ERISA-covered plan, most MEWAs are not ERISA-covered plans since they are usually not established or maintained by an employer or employee organization. Significantly, states may regulate MEWAs whether or not they are employee welfare benefit plans or covered by ERISA.

In practice, MEWAs are commonly formed by several types of entities. Associations of employers in a common trade, industry or profession (e.g., bankers, retail grocers) often make health plans available to employer members and their employees, as do associations that have no employment-related commonality. Professional employer organizations (PEOs) describe their business as co-employing a client workforce. Employee leasing firms describe their business as leasing employees to a variety of unrelated businesses. PEOs or employee leasing firms may also sponsor health plans for these employees. An employee leasing or PEO arrangement can relieve smaller employers from the administrative costs of personnel and payroll record keeping, and the PEO's or leasing organization's benefit plans can make pricing economies of scale available to an employer that would otherwise be only a very small group purchaser.[3] In the few PEO or employee leasing health plans the DOL has reviewed, the DOL has consistently determined such health plans to be MEWAs.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) created a filing requirement for MEWAs. The Form M-1 filing requirement is designed to keep the DOL informed about MEWAs' compliance with the requirements of Part 7 of ERISA (including the provisions of HIPAA, the Mental Health Parity Act, the Newborns' and Mothers' Health Protection Act, and the Women's Health and Cancer Rights Act). A sample Form M-1 form is contained in Appendix B. The one-page Form M-1 is filed with DOL once a year, usually on March 1. The MEWA M-1 forms that have been filed with DOL are accessible online at www.dol.gov/ebsa.

* * * *

[1] The benefits may include, inter alia, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services.

[2] 29 U.S.C. § 40(A) (2004)

[3] See discussion below regarding self-funded PEO plans' status as MEWAs notwithstanding their claim to be single-employer plans.

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Comment [FF1]: This selection should not be under "Characteristics of MEWAs, as PEOs are not characteristics but rather a business model. If this selection were to be included in the handbook, it should be relocated. An ideal place would be as a footnote to the heading "**Issues Related to Professional Employer Organizations (PEOs) and Employee Leasing Companies"**.

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ERISA PLAN CHARACTERISTICS AND RELATIONSHIP
TO STATE REGULATION

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Conclusion

As the discussion above indicates, evaluating whether an arrangement meets each of these elements is an imprecise and complex process. Regulators will want to be familiar with ERISA statutory and regulatory provisions, DOL advisory opinions, and the relevant case law applicable to their state. Of particular import in the analysis is determining who is the plan sponsor and whether the plan is providing benefits to the employer's employees or the employee organization's members. If the arrangement does not meet the requirements of the statutory definition or falls within a statutory exception, then the state must evaluate the appropriate application of state laws. Determining that an arrangement is an ERISA plan, however, does not end the analysis.

The form of the organization that sponsors the plan will also have a significant impact upon the applicability of state law. The remainder of this section will include a description of each of the three types of health-related employee welfare benefit arrangements: single-employer plans, "multiemployer plans," and multiple employer welfare arrangements (MEWAs), and will highlight ERISA's relationship to Taft-Hartley trusts.

* * * * *

Multiemployer Plans

Collectively Bargained "Multiemployer" Plans

Characteristics of a Multiemployer Plan

As used in ERISA, the term "multiemployer plan" does not simply mean a plan maintained by more than one employer. It refers more narrowly to a plan which is maintained pursuant to a collective bargaining agreement between one or more employee organizations and which has more than one contributing employer.[4] As a practical matter, multiemployer plans are plans jointly established by employers and labor organizations. These are commonly referred to as "union plans." Whether the agreement is a bona fide collective bargaining agreement is a fact-specific inquiry based on such factors as the terms of the agreement, the status of the parties, and the nature of the bargaining process.[5] As discussed above, plans operated by businesses under common control are considered single employer plans, not multiemployer plans, even if contributions are made pursuant to a collective bargaining agreement. Multiemployer plans

[4] 29 U.S.C. § 1002(37)(A) (Supp. 2016).

[5] See discussion of plans maintained pursuant to collective bargaining agreements—MEWAs Multiple Employer Welfare Arrangements under the Employee Retirement Income Security Act (ERISA): A Guide to Federal and State Regulation, FR Doc. 2013-04863, www.dol.gov/ebsa/pdf/mwguide.pdf, p24.

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receive contributions from unrelated employers who make the contributions for participants. These plans are usually administered by a board that consists of employer and union trustees.

Multiemployer Plans and State Regulation

As with single employer plans, the ability of states to regulate multiemployer plans is very limited. States do not have the authority to regulate a multiemployer plan directly, although they retain the authority to regulate organizations that contract with multiemployer plans to provide benefits, including the authority to regulate the underlying insurance contracts if a multiemployer plan is fully insured or protected by stop-loss insurance. As will be discussed below in the section on multiple employer welfare arrangements,[6] not all arrangements that ostensibly involve collective bargaining agreements are covered by ERISA or are exempted from the application of state law. They may, in fact, be multiple employer welfare arrangements and consequently, subject to state insurance law.

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Conclusion

Multiemployer plans are exempted from state laws as a result of ERISA preemption. However, not all arrangements that involve collective bargaining arrangements are subject to ERISA coverage or ERISA preemption. Arrangements that do not involve bona fide collective bargaining agreements are MEWAs and are subject to state law.

Multiple Employer Welfare Arrangements[7]

Characteristics of MEWAs

However, most benefit plans involving more than one employer fall into a third category. They are classified by ERISA as "multiple employer welfare arrangements" (MEWAs). ERISA defines a MEWA as: "[A]n employee welfare benefit plan, or any other arrangement…which is established or maintained for the purpose of offering or providing any benefit described in paragraph 1[8] to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries," unless a specific statutory exception applies.[9]

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That definition is broad. It includes both ERISA plans and "any other arrangement," and it includes both fully insured MEWAs (such as association group insurance and multiple-employer

[6] See discussion of the DOL Final Rules Regarding Section 3(40) of ERISA.

[7] Regulators are encouraged to read the MEWAs Multiple Employer Welfare Arrangements under the Employee Retirement Income Security Act (ERISA): A Guide to Federal and State Regulation, FR Doc. 2013-04863, www.dol.gov/ebsa/pdf/mwguide.pdf for a more detailed discussion of MEWAs and state regulation.

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[8] The benefits may include, *inter alia,* medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services.

[9] 29 U.S.C. § 1002(40)(A) (2014). The only exceptions are collectively bargained plans that qualify as "multiemployer plans," plans that are deemed to be single-employer plans because the participating employers are under common ownership and control, and plans established or maintained by a rural electric cooperative or by a rural telephone cooperative association. *Id.* §§ 1002(40)(A)(i) through (iii) & (40)(B).

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trust group insurance) and self-funded MEWAs. It should be noted, however, that "self-funded MEWAs" are typically funded by their participating employers. If the premiums collected from employers are insufficient, the entity responsible for payment varies according to the structure of the MEWA. It might be a third party, but often, the employers themselves are jointly and severally responsible for any shortfall. And in the worst-case scenario, participating employers and employees, and their health care providers, discover only after a MEWA collapses that nobody has assumed responsibility for the unpaid claims.

Comment [FF2]: It is not necessary to single out PEOs here, as any number of parties could fall into this category.

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Self-Funded Multiple Employer Arrangements Claiming "Single Employer" Plan Status—Issues Related to Professional Employer Organizations (PEOs) and Employee Leasing Companies

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Whether a self-funded benefit arrangement sponsored by an employee leasing company (or professional employer organization (PEO) is exempt from state regulation because of ERISA preemption depends upon whether the arrangement is an ERISA-covered single-employer plan or a MEWA. Under ERISA, the first inquiry of the state regarding an employee leasing company or PEO arrangement should be whether the arrangement is fully-insured or whether it is self-funded.

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Many PEOs across the country provide fully insured health benefit arrangements with authorized carriers. Notably, at least ten states statutorily recognize that these fully-insured health plans are not MEWAs. These are less likely to raise regulatory concerns, but the carrier must be licensed in every state where it does business. It is not sufficient to be licensed in the state where the PEO is based if licensure is required by the laws of one or more states where the PEO has clients. Rating is another issue regulators need to consider. Before the ACA, rating was controlled by state law, and states took different approaches.[10] Now, community rating is required in the small group market on a uniform, nationwide basis, and if federal and state definitions of "small employer" conflict, the federal definition controls for all federal-law purposes. Regardless of MEWA status (which depends on the underlying factual circumstances respective to the given arrangement), in accordance with ERISA itself, and as acknowledged by the Department of Health and Human Services ("HHS"), where an entity (such as a PEO) is working directly as an employer or indirectly in the interest of an employer (both within the meaning of ERISA), the group health plan sponsored by that entity will be considered to be a single group health plan, and the total number of employees covered under that plan will be considered in determining whether or not the coverage is subject to the ACA's small group market or large group market rules.[11]

Comment [FF3]: This sentence is misleading. In fact, at least fourteen states have statutes that expressly represent that the sale of PEO services is not considered the sale of insurance.

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[10] For example, New York law recognizes a PEO as a single employer for purposes of offering fully-insured health coverage on a large group basis, 31 N.Y. Labor Code § 922(5), while Maine law requires each client with 50 or fewer employees to be separately rated as a small employer. 24-A Me. Rev. Stat. § 2808-B(1)(H). Notably, the New York law withstood an Affordable Care Act conformity challenge, and the section of the New York Labor Code remains in force.

[11] *See* CMS Insurance Standards Bulletin ("Application of Individual and Group Market Requirements under Title XXVII of the Public Health Service Act When Insurance Coverage Is Sold to, or through, Associations"), at page 3 (September 1, 2011). *See also* 42 U.S.C. § 18024(a)(3) ("The terms 'large group market' and 'small group market'

The DOL has examined a limited number of PEO or employee leasing benefit plans to date and based on the facts and circumstances of those few examinations determined those arrangements to be MEWAs. If the benefit arrangement is fully insured, the state has authority to regulate the carrier and to establish certain standards for the MEWA itself. The state has far greater authority in the situation where the MEWA is not fully-insured. Regardless of the employer status of the PEO or the employee leasing company, the DOL has indicated in these decisions that if one or more of the client companies is also deemed to be an employer under common law standards, the arrangement is a MEWA and the self-funded plan is subject to state regulation.

States may allow PEOs to self-fund, but they may not dictate how ERISA treats such plans. This is true despite a contract purporting to designate the PEO as the employer, even if the PEO is designated as the sole employer. Both state and federal law look to common law factors, including day to day control of the employees, in determining whether the clients' businesses are in fact acting as employers.

Some operators of PEO's occasionally cite the ERISA provision treating employers "under common control" as single employers. However, that provision does not apply even if the PEO can be said to manage its clients' businesses, because client businesses are not all under common ownership, which is the basis of the statutory test for single-employer status.[12]
The DOL has consistently said that a PEO or employee leasing company plan cannot qualify as a single-employer plan under ERISA unless the PEO is actually the *sole* common law employer of all of the individuals under the arrangement. The question of whether or not a common law employer-employee relationship exists depends upon the specific circumstances of the case. In *Nationwide Mutual Ins. Co. v. Darden,*[13] the Supreme Court held that federal common law principles of employment govern the definition of employee contained in ERISA. Whether the PEO is a "co-employer"[14] is irrelevant. If the client businesses employ the participating employees, the PEO self-funded plan arrangement is a MEWA. The Court noted the following factors should be applied to determine the existence of an employer-employee relationship. Each factor must be separately weighed and none is decisive. Moreover, the actual practices, rather than the contractual terms, are determinative:

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mean the health insurance market under which individuals obtain health insurance coverage (directly or through an arrangement) on behalf of themselves (and their dependents) through a group health plan maintained by a large employer . . . or by a small employer"). For applicable DOL guidance, see DOL Advisory Opinions 2012-03A (May 25, 2012), 2012-04A (May 25, 2012), and 95-29A (December 7, 1995), and Department of Labor information letter to G. Chanos (May 8, 2006), citing DOL Advisory Opinion 95-29A.

[12] *See* 29 U.S.C. § 1002(40)(B)(2004). This assumes that the plan is sponsored by a commercial PEO, not a captive staffing entity that is genuinely under common ownership and control with all its "clients." Such an entity could serve as the vehicle for a *bona fide* single-employer plan for a group of affiliated employers, and is outside the scope of this discussion.

[13] 503 U.S. 318 (1992).

[14] The DOL opinions finding PEO benefit plans to be MEWAs do not adopt the dual employment doctrine, but they do not reject it either. The key to the analysis is that the client is an employer. Depending on the circumstances of the particular PEO-client relationship, the PEO might also be entitled to claim an employer-employee relationship with its leased employees, but that does not alter the plan's status as a MEWA. An employee may have more than one employer. *See Vizcaino v. U.S. District Court,* 173 F. 3d 713, 723 (9th Cir. 1999).

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1. the hiring party’s right to control the manner and means by which the product is accomplished;
2. the skill required;
3. the source of the instrumentalities and tools;
4. the duration of the relationship between the parties;
5. the location of the work;
6. the right of the hiring party to assign additional projects to the hired party;
7. the extent of the hired party’s discretion over when and how long to work;
8. the method of payment;
9. the hired party’s role in hiring and paying assistants;
10. whether the work is part of the regular business of the hiring party;
11. whether the hiring party is in business;
12. the provision of employee benefits; and
13. the tax treatment of the hired party.[15]

The DOL opinions on this topic have generally concluded that, since the client businesses in these arrangements are the common law employer of the employees, the arrangement is a MEWA. (The arrangement includes employees of multiple employers.) In an opinion letter to the Virginia Department of Insurance, the DOL evaluated whether the health benefit program offered by the employee leasing company, Employers Resource Management Company, Inc. (ERM), constituted a single employer plan or a MEWA. The DOL concluded that the arrangement was a MEWA under the facts as presented. The Department noted several non-exclusive factors which it considers when making a determination of whether the participants are employees of the client business, including who has the right to control and direct the individual who performs the services, the result to be accomplished, the means by which it is accomplished, and the right to discharge the individual performing the services. The Department also stated that the payment of wages, taxes, and provision of benefits do not, in and of themselves, establish an employer-employee relationship.[16]

A PEO-operated or employee leasing company “self-funded” health benefit plan covering co-employees or “leased” employees is highly likely, under the criteria outlined above, to constitute a MEWA under ERISA. In those cases, state insurance law is not preempted and the PEO or employee leasing self-funded arrangement would be an unauthorized insurer unless it is operating solely in states that have a specific PEO regulatory scheme and it is in compliance with those regulations.[17]

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[15] *Id.* at 323–324.

[16] USDOL Advisory Opinion 93-29A re: *Employers Resource Management Company, Inc.* (October 22, 1993).

[17] In Maine, for example, a plan that is not fully insured may not be offered unless it is licensed as a MEWA. 32 Me. Rev. Stat. § 14055(1)(A); 24-A Me. Rev. Stat. § 6603-A. Other states, such as New York, recognize a PEO as a single employer “for purposes of sponsoring welfare benefit plans for its worksite employees,” 31 N.Y. Labor Code § 922(5), and some states, such as Oklahoma, exempt PEO welfare benefit plans from licensing requirements. 40 Okla. Stat. § 600.7.F.2.

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While the states have the authority to define employer status for purposes of state law,[18] the status of PEOs as MEWAs under ERISA is a matter of federal law for pre-emption purposes, and contrary state laws are preempted. In *Payroll Solutions Group Ltd. v. Nevada,*[19] a federal court struck down a Nevada law providing that an employee leasing company "[s]hall be deemed to be the employer of its leased employees for the purposes of sponsoring and maintaining any benefit plans, [i]ncluding, without limitation, for the purposes of the Employee Retirement Income Security Act of 1974."[20] The court held that the Nevada law "impermissibly declares that benefit plans offered by employee leasing companies, such as defendants', that are in all respects Multiple Employer Welfare Arrangements ('MEWAs') under state and federal law shall nevertheless be legally deemed single employer plans, ('SEPs') for purposes of ERISA,"[21] because "[o]nly federal law may determine what is a SEP or a MEWA under ERISA."[22]

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APPENDIX 3

Unlicensed Professional Employer Organization ("PEO") Health Plans

Your company will not issue or purchase a stop loss policy or undertake to administer an unlicensed "self-funded" health plan for a professional employer organization or employee leasing company based in this state or offering coverage to client employers in this state. These firms commonly refer to their clients' employees as "co-employed" or as "leased" employees of the PEO. These self-funded health plans are Multiple Employer Welfare Arrangements under ERISA rather than single employer plans. Regardless of the employee's status under state law, a business is an employer under ERISA only if the employer actually controls and directs the individual's work, or where the PEO is acting indirectly in the interest of an employer in offering a single group health plan under ERISA. As indicated above, self-funded MEWAs are subject to state regulation as insurers, and state insurance laws applying to PEOs are not preempted by ERISA. Your company should exercise care that it does not assist a "self-funded" benefit plan of a PEO or employee leasing company that is an unlicensed insurer under the laws of this state.

Note: Some states have statutes allowing PEOs or employee leasing firms to self-fund health benefits or obtain a license allowing them to self-fund health benefits. Other state have laws expressly recognizing PEOs' "co-employer" status but explicitly prohibiting self-funding. If applicable, insurance departments should modify this paragraph to incorporate a description of the specific requirements of your state law.

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[18] *See, e.g.*, 31 N.Y. Labor Code § 922(5), *supra*, which provides that "[a] fully insured welfare benefit plan or plans offered by a registered professional employer organization to its employees and/or worksite employees shall not be considered for purposes of state law a multiple employer welfare arrangement." *(emphasis added)*

[19] 2010 U.S. Dist. LEXIS 80838 (D. Nev. Aug. 6, 2010), *granting partial summary judgment as to preemption; final judgment granted* Dec. 2, 2010, 2010 U.S. Dist. LEXIS 127487.

[20] Nev. Rev. Stat. § 616B.691(2) (2010).

[21] *Payroll Solutions,* 2010 U.S. Dist. LEXIS 80838, slip op. at 2–3.

[22] *Id.* at 5.