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Paul M. Secunda
Marquette University Law School

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THE EMERGING LAW OF PORTABLE RETIREMENT BENEFITS

PAUL M. SECUNDA*

INTRODUCTION

Alt-labor[1] and the sharing economy[2] have recently come to dominate the writings of labor and employment law scholars.[3] Misclassification,[4] union organizing,[5] and wage and hour issues,[6] have all been scrutinized as

* Professor of Law, Marquette University Law School. Georgetown University Law Center, J.D.; Harvard College, A.B. This paper was presented as part of the Chicago-Kent Law Review Symposium on *Alt-Labor Law: The State of the New Labor Movement* on November 14, 2019. Thanks to Professors Cesar Rosado and Michael Oswalt for soliciting this contribution to the Symposium.

1. According to Professor Oswalt:

The term alt-labor tends to refer to organizing efforts aimed at improving working conditions primarily through avenues other than collective bargaining. Because unions support and even fund many alt-groups and alt-campaigns, marking where "traditional" labor ends and alt-labor begins can be debatable. Michael M. Oswalt, *Alt-Bargaining*, 82 LAW & CONTEMP. PROBS. 89, 96 (2019); *see also* Josh Eidelson, *Alt-Labor*, AM. PROSPECT (Jan. 29, 2013), http://prospect.org/article/alt-labor [https://perma.cc/TXX5-W4SR] (coining the term "alt-labor").

2. The sharing economy refers to "the most prominent example of a new model of production and consumption of goods and services often referred to as 'sharing,' 'collaborative consumption,' or 'peer-to-peer consumption.'" *See* Shu-Yi Oei & Diane M. Ring, *The Tax Lives of Uber Drivers: Evidence from Internet Discussion Forums*, 8 COLUM. J. TAX L. 57, 58 (2017). Other terms for "sharing economy" include "'the disaggregated economy,' 'the peer-to-peer economy' (P-2-P), 'the human-to-human economy' (H-2-H), 'the community marketplace,' 'the on-demand economy,' 'the App economy,' 'the access economy,' 'the mesh economy,' 'the gig economy,' and also, 'the Uberization of everything.'" *See* Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 89 (2016).

3. *See, e.g.*, Lobel, *supra* note 2; Oswalt, *supra* note 1; Heather M. Whitney, *Rethinking the Ban on Employer-Labor Organization Cooperation*, 37 CARDOZO L. REV. 1455, 1480-94 (2016); Dayne Lee, *Bundling "Alt-Labor": How Policy Reform Can Facilitate Political Organization in Emerging Worker Movements*, 51 HARV. C.R.-C.L. L. REV. 509, 529-35 (2016).

4. *See, e.g.*, Veena Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 65, 67 (2017); Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1513-14 (2016); Brishen Rogers, *Redefining Employment for the Modern Economy*, AMER. CONST. SOC'Y (Oct. 2016), https://www.acslaw.org/sites/default/files/Redefining_Employment_for_the_Modern_Economy.pdf [https://perma.cc/HKS5-ZHY8] (observing that misclassification, subcontracting and franchising all "tend to deprive workers of their rights under employment laws, which generally do not protect independent contractors and do not effectively protect many subcontracted workers or workers for franchisees").

5. *See, e.g.*, Oswalt, *supra* note 1; Hiba Hafiz, *Picketing in the New Economy*, 39 CARDOZO L. REV. 1845 (2018); Jeffrey M. Hirsch & Joseph A. Seiner, *A Modern Union for the Modern Economy*, 86 FORDHAM L. REV. 1727 (2018); Michael C. Duff, *Alt-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATH. U. L. REV. 837, 843-49 (2014); Michael M. Oswalt, *Improvisational Unionism*, 104 CAL. L. REV. 597, 609-10 (2016); Brishen Rogers, *Libertarian Corporatism Is Not an Oxymoron*, 94 TEX. L. REV. 1623, 1631-35 (2016).

emerging issues for those who engage in alt-labor activities. In all this scholarship, the authors have mostly concerned themselves with workers who have precarious, less-than-full-time jobs in the new global economy of the early 21st century, and all of whom are seeking ways to improve their work conditions through organizing and other collective action outside the formalized collective bargaining process.[7]

One of the less discussed, but equally important, alt-labor topics concerns the provision of retirement work benefits for the self-employed, workers at small businesses, as well as those in the precarious[8] and gig-oriented American workforce.[9] Indeed, an increasing number of these workers will lack adequate retirement savings in the decades to come. This state of affairs exists in part because being labeled "independent contractors" or some other form of non-employee status is of utmost importance in the American workplace. Such classifications largely determine whether workers are covered by U.S. employment laws, as such laws center on the

6. *See, e.g.*, Jennifer J. Lee & Annie Smith, *Regulating Wage Theft*, 94 WASH. L. REV. 579 (2019); Nicole Hallett, *The Problem of Wage Theft*, 37 YALE L. & POL'Y REV. 93, 118-19 (2018); Daniel J. Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 PERSP. ON POL. 324, 339-42 (2016).

7. Members of the so-called "contingent" workforce or "precariat" (part-time, leased, temporary, and per diem workers) do not normally receive retirement benefits as part of their employment, in the same manner as core full-time workers. *See* Dubal, *supra* note 4, at 3. *See also* Hafiz, *supra* note 5, at 1851 ("The increasing fragmentation of work arrangements—replacing vertically integrated firms with the transactional economies of subcontracting, outsourcing, franchising, and supply chain disintegration—accompanied by the rise of contingent work and growing evidence of employer purchasing power, has fundamentally decentralized employment.").

8. In the United States, as of March 2019, "retirement benefits were available to 31 percent of workers in the lowest 10th percent wage category." *See Employee Benefits in the United States – March 2019*, U.S. DEP'T LAB. (Sept. 19, 2019), http://www.bls.gov/news.release/pdf/ebs2.pdf [https://perma.cc/WE3G-R92M]. Consequently, come old age, they are left to depend on mostly inadequate Social Security payments (averaging 45% income replacement) and little or non-existent personal savings. *See* Mark Miller, *How to Improve Your Retirement Income if You Haven't Saved*, N.Y. TIMES (Oct. 7, 2016), http://www.nytimes.com/2016/10/08/your-money/retirement-savings-income-social-security.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0 [https://perma.cc/S8VN-EQMY] (discussing Social Security income replacement rate); Matthew Frankel, *Here's the Average American's Savings Rate*, MOTLEY FOOL (Oct. 3, 2016), http://www.fool.com/investing/2016/10/03/heres-the-average-americans-savings-rate.aspx [https://perma.cc/2WLB-A5NZ] ("According to the latest data from the U.S. Bureau of Economic Analysis, the personal saving rate in the United States is 5.7% . . . . This is far too low to adequately prepare most people for retirement and unexpected expenses. . . . Most experts recommend saving at least 10% to 15% of your income."). One last point: not all whom lack access to retirement benefits are precarious workers. For example, the difference in compensation between free-lance writers and day-laborers is huge, but both tend to lack occupational retirement benefits. I would like to thank Professor Catherine Fisk for bringing this important observation to my attention.

9. Yet independent contractors, which are how many alt-labor companies classify their workers, are approximately two-thirds less likely than standard employees to have access to an employer-provided retirement plan. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS 6 (Apr. 20, 2015), http://www.gao.gov/assets/670/669766.pdf [https://perma.cc/T4HE-A35R].

existence of an employer-employment relationship.[10] Because American employers are increasingly seeking to define many workers as "independent contractors" or non-employees, these workers have little to no access to retirement plans.[11] In turn, this is critical because, according to AARP, Americans workers are fifteen times more likely to save for retirement when they are covered by a workplace retirement plan.[12]

A number of proposals have emerged in recent years to provide these uncovered employees with portable occupational retirement benefits.[13] Yet, so far, these proposals have not adequately come to grips with the problem of trying to provide self-employed, small business workers, or precarious workers with portable retirement security.[14]

Consequently, as I have argued previously,[15] and continue to maintain in this article, it is essential that most of these workers be considered common law "employees" under the applicable *Darden* test for purposes of the Employee Retirement Income Security Act of 1974 (ERISA).[16] Perhaps even more importantly for the emerging law of portable retirement benefits, the statutory structure of ERISA is crucial because it provides for the multiple employer pension (MEP), a well-suited benefit plan arrangement that

10. *See* Means & Seiner, *supra* note 4, at 1513-14 ("Employees cost more than independent contractors because businesses are responsible for . . . payroll taxes, workers' compensation insurance, health care, minimum wage, overtime, and the reimbursement of business-related expenses.").

11. Also, because they do not have discretionary income, these workers are not known to save for retirement on their own. *See* WILLIAM G. GALE, SARAH E. HOLMES & DAVID C. JOHN, BROOKINGS INSTITUTION, RETIREMENT PLANS FOR CONTINGENT WORKERS: ISSUES AND OPTIONS 7-8 (Sept. 23, 2016), https://www.brookings.edu/wp-content/uploads/2016/08/rsp923paper1.pdf [https://perma.cc/W374-VSED] ("[R]ecent survey indicated that 31 percent of the users of a specific software product said that their main concern as an independent worker was a lack of employer-sponsored benefits."); *id.* at 7 ("Based on the limited data available, it appears that contingent workers are generally unprepared for retirement.").

12. *See* Catherine Harvey, *Access to Workplace Retirement Plans By Race and Ethnicity*, AARP FACT SHEET (Feb. 2017), https://www.aarp.org/content/dam/aarp/ppi/2017-01/Retirement%20Access%20Race%20Ethnicity.pdf [https://perma.cc/VA5D-93ZL].

13. *See, e.g.*, Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"* 2 (Hamilton Project, Discussion Paper 15-10, 2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf [https://perma.cc/WR3T-XBZJ].

14. *See* Natalie Foster, Greg Nelson & Libby Reder, *Portable Benefits Resource Guide* 7, THE ASPEN INST.: FUTURE OF WORK INITIATIVE (2016).

15. *See* Paul M. Secunda, *Uber Retirement*, 2017 UNIV. CHI. LEG. F. 435, 439 (2018) [hereinafter Secunda, *Uber Retirement*].

16. Pub. L. No. 93-406, 88 Stat. 832 (codified as amended at 29 U.S.C. §§ 1001-1461 (2018); *see* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (common law "control test" applies to ERISA employee definition); Rogers, *supra* note 4, at 1 (listing advantages of being considered common law employee under ERISA, including fiduciary, disclosure, vesting, and other important ERISA-specific protections).

matches the peripatetic, irregular, and non-exclusive nature of the work of many of these workers.[17]

A MEP is a single employer retirement benefit plan, not under a collective bargaining agreement, that covers employees of more than one *unrelated* company.[18] More specifically, one variety of these plans, open multiple employee pensions ("Open MEPs"), allow *unaffiliated* employers to pool their resources and offer retirement plans to their employees under the statutory protections of ERISA.[19] Industries and companies, country-wide, that employ alt-labor workers potentially could constitute unaffiliated employers for MEP purposes under the right circumstances as will be discussed in more detail below and thus, this type of retirement plan could provide meaningful access to occupational retirement benefits to the group of workers who currently lack access to such benefits.

Moreover, by designating a professional service organization (PEO) to administer an Open MEP, companies can largely limit their fiduciary liability, as their only fiduciary action would be the selection and subsequent monitoring of the Open MEP plan sponsor.[20] Making Open MEPS an alternative for securing retirement benefits for alt-labor workers is now a realistic possibility. Already as recently as July 2019, the U.S. Department of Labor had outlined a number of new types of MEPs, including Association MEPs, PEO MEPs, and corporate MEPs, to attempt to fill the void in this part of the retirement plan marketplace.[21] Unfortunately, these current varieties fall short in meeting the promise of a truly Open MEP.[22] Given that currently very few self-employed, small business, and precarious workers have access to such workplace retirement plans,[23] and not all who do have

17. *See* Secunda, *Uber Retirement*, *supra* note 15, at 437 n.19.

18. *See* DWC, *Meet the MEPs: Corporate MEPs*, DWC THE 401(K) EXPERTS (Aug. 28, 2019), https://www.dwc401k.com/blog/meet-the-meps-corporate-meps [https://perma.cc/LW97-X7VC].

19. *See generally* ERISA Advisory Council, *Outsourcing Employee Benefit Plan Services*, U.S. DEP'T LAB. 18-22 (2014), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2014-outsourcing-employee-benefit-plan-services.pdf [https://perma.cc/X5JQ-SAW4].

20. *Id.* at 19 ("Effectively, the participating employer has outsourced the provision of retirement benefits.").

21. *See* Definition of "Employer" Under Section 3(5) of ERISA-Association Retirement Plans and Other Multiple-Employer Plans, 84 Fed. Reg. 37508, 37508 (July 31, 2019) (to be codified at 29 C.F.R. § 2510), https://www.federalregister.gov/documents/2019/07/31/2019-16074/definition-of-employer-under-section-35-of-erisa-association-retirement-plans-and-other [https://perma.cc/DP5Z-HSS5] [hereinafter DOL MEP Regulations].

22. *Accord RIN 1210-AB92 "Open MEPs" and Other Issues Under Section 3(5) of ERISA*, AM. BENEFITS COUNCIL (Oct. 29, 2019), https://www.americanbenefitscouncil.org/pub/?ID=2CE1E192-1866-DAAC-99FB-AD309F9D252E [https://perma.cc/959Z-7S8B].

23. Depending on whether alt-labor workers are considered independent contractors, the approximately 38 million, or 23% of, private-sector employees in the United States that do not have access to a retirement plan through their employers might not even include alt-labor workers. *See* U.S. Bureau Lab.

access participate in them in any event, it is imperative to promulgate a legal framework that is simultaneously inexpensive to set up for employers, and that provides these workers the wherewithal to easily participate in plans in an affordable, easy-to-understand manner.[24]

The thesis of this article is two-fold. First, self-employed, small business, and precarious workers must be considered common law employees under employee benefits law so that they can receive the consumer protections and the appropriate template of an approved retirement plan structure provided by ERISA. Second, under ERISA, these workers will most-likely receive meaningful access to retirement plans through the use of Open MEPs operated by PEOs. As this paper goes to press, Open MEPs run by PEOs have become a reality with the passage of the Setting Every Community up for Retirement Enhancement Act of 2019 (SECURE Act of 2019).[25] It will be important to educate, and give incentive to, employers who currently do not provide employment-based retirement benefits to consider joining one of these new employee benefit plan structures.

This article sets out the Open MEP model for providing retirement benefits to workers without access currently to retirement benefits in four parts. Part II provides a brief overview of ERISA and the protections and structure it provides for workers looking to find their way to retirement security. Part III discusses recent MEP regulations issued by the Department of Labor and the recent passage of the Secure Act of 2019. Part IV concludes by suggesting that this new Open MEP legislation could act as an eventual pathway to portable retirement benefits being unmoored from traditional conceptions of employment, so that terms like "independent contractor" and "employee" cease to have the definitive weight they now carry. In this manner, all workers would have access to, and then be able to meaningfully participate in, employer-provided tax-deferred retirement planning.

Stats., *Nat'l Compensation Survey: Emp. Benefits in the U.S.*, U.S. DEP'T LAB. (MARCH 2018), https://www.bls.gov/ncs/ebs/benefits/2018/employee-benefits-in-the-united-states-march-2018.pdf [https://perma.cc/GH7X-5M39]. According to the final DOL MEP regulations in the Federal Register: "The percentage of private-sector workers without access to a workplace retirement plan increases to 32 percent when part-time workers are included."

24. *See* Eric Drobylen, *How MEPs Signal a Broken 401(k) Industry*, EMP. FIDUCIARY (Oct. 30, 2019), https://www.employeefiduciary.com/blog/how-meps-signal-a-broken-401k-industry [https://perma.cc/H4PW-3RSQ] ("A straightforward and transparent 401(k) plan has three features - flat administration fees, passively-managed index funds, and basic administrative tasks for the employer to complete. Such plans offer diversified and cost-efficient market returns for participants and low liability and time commitment for business owners.").

25. Setting Every Community Up for Retirement Enhancement Act of 2019, Pub. L. No. 116-94, 133 Stat. 2534 (2019). The Secure Act was passed as part of the Further Consolidated Appropriations Act of 2020.

I. BRIEF OVERVIEW OF ERISA DEFINITIONS, PROTECTIONS & PLAN STRUCTURES

ERISA is a comprehensive federal law that regulates the provision of employer-provided pension and welfare benefit plans.[26] Although provision of employee benefits by employers is voluntary, once such plans are adopted, ERISA provides the applicable legal framework.[27]

ERISA is divided into four Titles, with Title I containing the lion's share of applicable employee benefit provisions.[28] Importantly, Title I, Subtitle A concerns general provisions regarding coverage and exemptions from coverage (Section 1003) and this limits DOL's authority over employee benefit plans more generally. ERISA applies only to an "employee benefit plan" sponsored "by any employer."[29]

Section 1003(a)(1) more specifically provides, in pertinent part, that ERISA "shall apply to any employee benefit plan if it is established or maintained by any employer engaged in commerce or in any industry or activity affecting commerce . . . ."[30] In turn, ERISA defines "employee pension benefit plan" to include "any plan, fund, or program . . . established or maintained by an employer . . . to the extent that by its express terms or as a result of surrounding circumstances," it provides retirement income to employees or the deferral of income at the termination of employment or beyond.[31] As the DOL recently stated in its final MEP regulations, "the term 'employer' is essential to a benefit arrangement's status as an 'employee pension benefit plan' within the meaning of ERISA. "A prerequisite for ERISA coverage is that the retirement plan must be established or maintained by an 'employer.'"[32]

ERISA defines an "employer" under Section 1002(5) as "any person acting directly as an employer, or indirectly in the interest of an employer,

26. *See* Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004) ("ERISA's 'comprehensive legislative scheme' includes 'an integrated system of procedures for enforcement.'").

27. *See* Paul M. Secunda & Brendan S. Maher, *Pension De-Risking*, 93 WASH. U. L. REV. 733, 754 (2016) ("ERISA does not require that employers offer retirement benefits; it merely regulates retirement benefit promises that are made.").

28. Title II of ERISA amended the IRC to make it consistent with the new ERISA provisions, and Title III establishes the authority of the Departments of Labor and Treasury to enforce various provisions of Title I and Title II. Title IV provides provisions for a federal insurer, the Pension Benefit Guaranty Corporation (PBGC), of one type of retirement plan, the defined benefit plan. *See* PAUL M. SECUNDA ET AL., UNDERSTANDING EMPLOYMENT LAW 184 (2019). None of these Titles are relevant for purposes of this article.

29. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 4(a)(1), 88 Stat. 829, 839 (codified as amended at 29 U.S.C. § 1003(a)(1) (2018)).

30. *Id.*

31. 29 U.S.C. § 1002(2)(A).

32. *See* DOL MEP Regulations, 84 Fed. Reg. at 37,511.

in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity."[33] ERISA is silent on what it means to act "directly as an employer" or "indirectly in the interest of an employer, in relation to an employee benefit plan" or what is meant by a "group or association of employers."[34] Because of this ambiguity, and as discussed in more detail below in Part II.A, the DOL took the opportunity to further define the meaning of the word "employer" in its final MEP regulations in 2019, and more specifically defined the meaning of both (i) a "bona fide" employer group or association and (ii) a "bona fide" professional employer organization (PEO).[35]

But that is not the end of the statutory puzzle. ERISA applies only to covered employee benefit "plans."[36] Courts apply the *Dillingham* factors and the *Fort Halifax* test to determine whether a "plan, fund, or program" is "established or maintained" by an employer and thus, qualifies for coverage under ERISA. Under *Donovan v. Dillingham*,[37] there are four elements that must be present for a "plan" to exist under ERISA: (1) intended benefits; (2) intended beneficiaries; (3) a source of financing; and (4) a procedure to apply for and collect benefits.[38] In *Fort Halifax Packing Co. v. Coyne*,[39] the Supreme Court supplied a fifth factor when it required that there also be "ongoing plan administration."[40]

Once it is turned you have an "employer" sponsoring a "benefit plan," ERISA divides the universe of covered employee benefit plans into employee pension benefit plans and employee welfare benefit plans. Employee pension benefit plans are established and maintained by employers for the purpose of providing retirement income to employees through deferral of employee income until at least termination of employment.[41] Employee welfare benefit plans, on the other hand, are established and maintained by employers to provide benefit programs that include health, disability, and life insurance; training programs; reimbursement for day-care centers; scholarship funds; and prepaid legal services.[42]

33. 29 U.S.C. § 1002(5).

34. *See* Meredith v. Time Ins. Co., 980 F.2d 352, 356 (5th Cir. 1993) ("[P]roblem lies, obviously enough, in determining what is meant by these oblique definitions of employer.").

35. *See* DOL MEP Regulations, 84 Fed. Reg. at 37,511.

36. 29 U.S.C. § 1002(3).

37. 688 F.2d 1367 (11th Cir. 1982).

38. *Id.* at 1372.

39. 482 U.S. 1 (1987).

40. *Id.* at 18.

41. 29 U.S.C. § 1002(2)(A).

42. *Id.* § 1002(1).

Although ERISA plans can also be categorized by the type and number of employers providing covered benefits, this article focuses solely on multiple employer plans (MEPs) run by unrelated employers outside of a collective bargaining agreement.[43] Different provisions apply to different benefit plan arrangements under ERISA, but only the MEP regulation, which is the focus of this article, will be discussed in detail in the next Part.[44]

ERISA specifically prescribes how employee benefit plans must be established and what basic provisions they must contain. For instance, an ERISA plan must be contained in a written instrument that provides for one or more named plan fiduciaries who are responsible for the administration and management of the plan. ERISA plans must hold their assets in trust by one or more trustees.[45] Such trustees come in two flavors: discretionary trustees and directed trustees.[46] Discretionary trustees have exclusive authority to manage and administer the plan, while directed trustees are subject to the directions of discretionary trustees.[47]

Employee pension benefit plans come in two distinct types: defined benefit plans (DBPs) and defined contribution plans (DCPs).[48] Because employers are responsible for providing a defined benefit amount to employees at retirement under DBP arrangements, there is more regulation of these plans so that the promised benefits are available upon retirement and plans do not default on their pension promises.[49] For instance, ERISA provides minimum vesting, benefit accrual, and funding standards for DBPs and sets up an insurance scheme, operated by the Pension Benefit Guaranty Corporation (PBGC), in case of employer defaults.[50] On the other hand, employers are only responsible to contribute money to employees' individual plan accounts under the DCP model and that is where their responsibility ends.[51]

43. Multiemployer plans are sponsored by more than one employer under provisions of a collective bargaining agreement for the benefit of union members, while single employer plans, the most numerous are sponsored by individual employers. *See* Secunda & Maher, *supra* note 27, at 185.

44. *See* DOL MEP Regulations, 84 Fed. Reg. at 37,508.

45. 29 U.S.C. § 1103(a).

46. *Id.*

47. *Id.* § 1103(a)(1); U.S. DEP'T LAB., FIELD ASSISTANCE BULLETIN 2004-03 (Dec. 17, 2004), https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2004-03 [https://perma.cc/X8T4-HNTP].

48. *See* SECUNDA ET AL., *supra* note 28, at 187-89.

49. *See* Secunda & Maher, *supra* note 27, at 738 (describing heavily regulation of DBPs).

50. *See id.*

51. *See* SECUNDA ET AL., *supra* note 28, at 188-89.

Although DBPs historically were the retirement plan of choice, there has been a significant shift to DCPs in recent years because DCPs generally cost less to operate, place fewer obligations on the employer, and provide portability for employees who move from one employer to the next.[52] The DOL MEP regulations solely focus on DCPs, which make sense given the mobile nature of alt-labor workers and the need to portable benefits.[53]

Defined contribution plans (sometimes referred to as individual account plans) only require the employer to a pay a defined amount into an employee's individual account. At that point, it is up to the employee to invest the pension funds in various financial instruments so that he or she will have sufficient funds available to last through retirement. In other words, DCPs place the risk of longevity and risk of investment loss on employees and there is no guarantee that a participant will receive any specified amount of benefit at retirement.[54]

The 401(k) salary deferral plan is the most popular form of defined contribution plan, in which the employee directs the employer to divert a specified percentage of her salary into her retirement account rather than receiving it as cash compensation.[55] Such contributions, like other retirement plan contributions, provide the advantage of tax deferral for the employee, and tax is not paid on this income until such funds are distributed from the account.[56]

One of the chief advantages of the DCP is that it is portable from employer to employer.[57] If an employee moves to another employer, which happens all the time in alt-labor, the employee can choose to directly rollover his or her individual accounts either into his or her new employer's retirement plan or into an Individual Retirement Account (IRA), where the

52. *See* COLLEEN E. MEDILL, ENRON AND THE PENSION SYSTEM, IN ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS (2004) ("[F]rom 1979 to 2001, the number of DBPs went from 139,489 to 51,000, while the number of DCPs went from 331,432 to 707,000.").

53. *See* DOL MEP Regulations, 84 Fed. Reg. at 37,512; *see also* James Earle, *Expanding Retirement Plan Coverage Through Association Retirement Plans*, TROUTMAN SANDERS (Oct. 23, 2019), https://www.troutman.com/insights/expanding-retirement-plan-coverage-through-association-retirement-plans.html#_ftn1 [https://perma.cc/T5K3-AWR2].

54. *See* Paul M. Secunda, *401 K Follies: A Proposal to Reinvigorate the United States Annuity Market*, ABA SEC. TAX'N NEWS Q. 13–15 (Fall 2010) (highlighting the problems surrounding 401(k) plans because of lack of life income annuity options).

55. *See* SECUNDA ET AL., *supra* note 28, at 189.

56. *See id.*

57. *See* COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 125-26 (4th ed. 2015) ("From the perspective of the employee, one key advantage of a defined contribution plan is the *portability* of the individual's account. If a participant changes jobs, the participant can always transfer . . . the nonforfeitable balance of the participant's account to an IRA." (emphasis added)).

retirement monies will continue to grow tax-free.[58] Employees tend to receive lump sums from their 401(k) plans upon retirement, and such funds may also be rolled over into an IRA.[59]

The Pension Protection Act of 2006 provides an additional mechanism for encouraging employees to save for retirement by permitting qualified automatic enrollment features, under which "each employee eligible to participate in the arrangement is treated as having elected to have the employer make elective contributions in an amount equal to a qualified percentage of compensation."[60] Under such arrangements, employees are required to be given notice of their ability to opt-out before salary deferrals begin.[61]

ERISA places fiduciary duties on those who use their discretion to administer and manage employee benefit plans.[62] The purpose of the fiduciary provisions is to ensure that persons with control over plan assets work in the sole interest of plan participants and beneficiaries and do not permit other considerations to sway their judgment concerning the operation of the employee benefit plan.[63] ERISA fiduciaries are subject to strict fiduciary and co-fiduciary duties and must avoid certain prohibited transactions involving plan assets.[64]

II. RECENTLY ENACTED DOL MEP REGULATIONS

Having set forth the applicable ERISA legal framework for statutory employees, and assuming for the sake of argument that many self-employed, small business, and precarious workers will qualify as statutory employees for ERISA purposes, the next question that remains is how best to get these workers access to employer-sponsored retirement plans. Most of these employees do not work for a single employer that voluntarily provides an employee benefit pension plan.[65] And most of these employees do not belong to a union under which a collective bargaining agreement that provides retirement benefits in the form of a multiemployer or Taft-Hartley

58. *Id.*

59. *Id.*

60. *See* Pension Protection Act of 2006 (PPA), Pub. L. No. 109-280, § 902, 120 Stat. 780 (2006).

61. *See id.*

62. *See* Secunda, *Uber Retirement*, *supra* note 15, at 453 (describing in detail fiduciary protections under ERISA).

63. *Id.*

64. *See generally* SECUNDA ET AL., *supra* note 28, at 201-06.

65. *See supra* note 9 and accompanying text.

plan.[66] That leaves the multiple employer pension (MEP) arrangement the remaining and best option for providing retirement benefits to self-employed, small business, and precarious workers.

The general idea under the Definition of "Employer" Under Section 3(5) of ERISA-Association Retirement Plans and Other Multiple-Employer Plan Regulation ("DOL MEP Regulation")[67] is to clarify the meaning of "employer" under ERISA to include both (i) a "bona fide" employer group or association and (ii) a "bona fide" professional employer organization (PEO).[68] More specifically, the Regulation explains that a bona fide Association or PEO is treated as a single plan under ERISA, even though multiple contributing employers participate in it.[69] The hope is that such "single plan" treatment under ERISA allows "simplified compliance and administration of the MEP, presumably at reduced cost and risk to the contributing employers, while also allowing a larger asset base for negotiating better economic terms with plan vendors and lower expense ratios for plan investment funds."[70]

Subsection A of this Part turns to an in-depth exploration of the different forms of MEPs permitted by the new DOL regulations. Thereafter, Subsection B considers the disadvantages of these new MEP forms for providing self-employed, small business, and precarious workers with retirement benefits. Finally, Subsection C updates a recent legislative amendment, the Secure Act, which allows for the first time true Open MEPs run by PEOs without the constraints of the commonality or other restrictive requirements.

A. The Different Types of MEP Models Available Under New DOL Regulations

In a past article, I argued that gig companies in particular should adopt some form of open multiple employee pension (Open MEP) model for its employees using a 401(k) DCP.[71] Essentially, the Open MEP model allows

66. Indeed, it is because traditional unionism has not worked for them, that they are engaged in alternative organizing techniques. *See* Oswalt, *supra* note 1, at 96.

67. *See* DOL MEP Regulations, 84 Fed. Reg. at 37,508.

68. *See* discussion *infra* Part III.A on different types of MEPs permitted by the new MEP regulation.

69. *See* Earle, *supra* note 53.

70. *See id.*

71. *See* Secunda, *Uber Retirement*, *supra* note 15, at 454-58; *see also* 29 U.S.C.A. § 1060(a) (Westlaw through Pub. L. No. 116-73) (provisions on multiple employer plans and other special rules). Open MEPs, including their advantages and disadvantages, are discussed in comprehensive detail in Advisory Opinion 2012-04A. *See* EMPLOYEE BENEFITS SECURITY ADMINISTRATION (EBSA), ADVISORY OPINION LETTER 2012-04A, at 1 (May 25, 2012), https://dol.gov/agencies/ebsa/employers-

separate, independent, companies to combine to provide retirement benefits to their employees.

Under new DOL MEP regulations that went into effect on September 30, 2019,[72] three types of MEPs are now recognized by DOL: Corporate MEPs, Association Retirement Plans (ARPs), and Association MEPs.[73] The DOL issued the final July 31, 2019 MEP regulations to "clarify[ ] that employer groups or associations and PEOs can, when satisfying certain criteria, constitute 'employers' within the meaning of ERISA for purposes of establishing or maintaining an individual account 'employee pension benefit plan' within the meaning of ERISA."[74] However, none of these recently-sanctioned MEPs are Open MEPs and each of these types of MEPs, and their shortcomings, will be discussed in turn.

1. Corporate MEPs

As far as corporate MEPs, historically it has taken overlapping ownership of at least 80% for companies to be part of a legally cognize controlled group for retirement plan purposes.[75] Convention wisdom has held, however, that overlapping ownership of any "meaningful" amount would suffice to meet the so-called commonality requirement required by MEP regulations.[76] So, for instance, DOL has permitted unrelated companies in different industries in different parts of the country that have 60% common ownership to run corporate MEPs as long as they were part of a "bona fide ownership group."[77]

This type of MEP seems to have limited utility in the self-employed, small business, and precarious worker world, as many employers who use such workers do not seem meet these overlapping ownership requirements.

2. Association Retirement Plans (ARPs)

To be considered an Association Retirement Plan or Association MEP, organizations have to be part of a "bona fide group or association,"

and-advisers/guidance/advisory-opinions/2012-04a [hereinafter EBSA ADVISORY OPINION LETTER] [https://perma.cc/VW4B-DUCX]. Until the recent regulatory interpretations, the Employee Benefit Security Administration (EBSA) of the DOL had found that the Open MEP arrangement was not an "employee pension plan" because no "employer" maintained or established the plan as required under Section 3(5) of ERISA. *Id.*

72. *See* DOL MEP Regulations, 84 Fed. Reg. at 37,508.

73. *See id.* at 37,508, 37,525-26.

74. *Id.* at 37,508.

75. DWC, *supra* note 18; *see also* DOL MEP Regulations, 84 Fed. Reg. at 37,525-26.

76. *See* DOL MEP Regulations, 84 Fed. Reg. at 37,525.

77. *Id.*

which is defined by four criteria. First, there must be a formal organizational structure.[78] There must be "indications of formality," like by-laws or a governing body.[79] The purpose of this prong is to make sure that both the organization is real and has the ability to act on behalf of participating employers.[80] In this manner, this factor also protects against fraud and insolvency concerns.[81]

Second, the group or association must have a substantial business purpose.[82] There only has to be one substantial business purpose unrelated to the provision of retirement benefits.[83] In this way, a commercial enterprise that has its primary purpose of providing benefits can be distinguished from a group or association that provides access to retirement benefits.[84] That being said, the MEP regulations do make it acceptable for the provision of retirement benefits to be the primary purpose as long as there is at least one other significant purpose.[85] Such a determination is made by the Department of Labor on a case-by-case, fact-specific basis. Importantly, an association or group can be bona fide even if it does not sponsor the benefit plan itself.[86]

Third, the association or group providing the retirement benefits cannot be a financial service firm.[87] The MEP regulations are clear here what qualifies as a financial service firm: "The group or association is not a bank or trust company, insurance issuer, broker-dealer, or other similar financial services firm (including pension recordkeeper or third-party administrator),

78. *See id.* at 37,515; *see also* Emp. Benefits Sec. Admin. (EBSA), *Fact Sheet: Final Rule on Association Retirement Plans (ARPs)*, U.S. DEP'T LAB. (July 29, 2019), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/final-rule-on-association-retirement-plans [https://perma.cc/8NW9-XHMP].

79. *See* DOL MEP Regulations, 84 Fed. Reg. at 37,515.

80. *Id.*

81. *Id.*

82. *Id.* at 37,514.

83. *Id.* at 37,513.

84. *See id.*

85. *See id.* at 37,514.

86. *Id.* ("[A] purpose other than MEP sponsorship does not have to be the lifeline of the organization in order to be 'substantial.' It must, however, be of considerable importance to the existence of the organization – not merely 'important,' but of 'considerable' importance."

87. *See id.* at 37,513. This is a bone of contention with those who represent financial service firms and would like to MEP sponsors. *See* AM. BENEFITS COUNCIL, *supra* note 22, at 2 ("The Council strongly encourages the DOL to expressly permit financial institutions or other persons to maintain defined contribution open MEPs by amending its regulations."); The Spark Institute, Inc., *RIN 1210-AB92, "Open MEPs" and Other Issues under Section 3(5) of ERISA* 1 (Oct. 29, 2019), https://www.sparkinstitute.org/wp-content/uploads/2019/10/SPARK-Comments-on-Open-MEP-RFI-Final-10.29.19-00310873.pdf [https://perma.cc/S8NX-69XE] ("**[T]he SPARK Institute continues to urge the Department to use its regulatory authority to permit truly open MEPs that can be sponsored by financial services firms.**").

or owned or controlled by such entity or any subsidiary or affiliate of such an entity . . . ."[88] The premise of this requirement is that without it, MEPs would not be "established or maintained" by employers, which would take it outside the scope of ERISA.[89]

Fourth and finally, there has to be employer member control of the organization to be a bona fide group or association.[90] This requirement requires employment control of form and substance, though group day-to-day management is not necessarily required.[91] Important sub-factors to this requirement include:

- Whether the employer members regularly nominate and elect those that comprise the governing body of the association, and
- Whether they have the authority to remove any such people either with or without cause.[92]

If all four of the above requirements are met, the Association MEP is permitted to provide retirement plans to their members. Such plans also must meet three further plan requirements under DOL regulations. These include: (1) plan must be limited to employer members; (2) participating employer control; and (3) commonality.[93]

With regard to limitation to plan members, this plan requirement is fairly straightforward. Because ERISA's focus is on employment-based benefits, DOL has no authority to expand benefit provision to where there is no employment link.[94] As far as participating employer control of plan, this is also easily understood. It simply means that the plan itself must be controlled by participating employers and "whether employer members that participate in the plan have the authority and opportunity to approve or veto decisions or activities which relate to the formation, design, amendment, and termination of the plan, for example, material amendments to the plan, including changes in coverage, benefits, and vesting."[95]

The third plan requirement, commonality, proves to be the most slippery. Similar to the commonality requirement with corporate MEPs, the

88. DOL MEP Regulations, 84 Fed. Reg. at 37517-18.

89. *See id* at 37,518.

90. *See id.* at 37,515.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 37,513 ("ERISA section 3(5) and ERISA title I's overall structure contemplate *employment*-based benefit arrangements. The Department's authority to define 'employer' and 'group or association of employers' under ERISA section 3(5) does not broadly extend to arrangements established to provide benefits outside the employment context and without regard to the members' status as employers.").

95. *See id.* at 37,515.

new DOL MEP regulations make some significant changes that are subject to some interpretation. Past regulations had required that all participating employers had to share some kind of organizational bond that rose to the level of having an interest in one another's success.[96] Indeed, there are a number of DOL Advisory Opinions that go through complicated scenarios when this commonality requirement was met and not met.[97] Under the old rules, geographical proximity was not enough; there needed to be a "representational nexus."[98] Now, under the new rules, similar geography and being part of the same industry *can* satisfy the commonality requirement.[99]

With regard to geography, commonality can now be satisfied by mere proximity, whether in the same state or not (though if not in the same state, it would have to be a metropolitan area like Philadelphia, as far as New Jersey and Delaware).[100] In this regard, the DOL MEP Regulation notes that, "employers in the same geography share common interests concerning employee's education and workforce development, taxation, transportation and commuting networks, the legal and regulatory environment . . . ."[101] However, geographical commonality does not include regional commonality that extends beyond most state or metro areas.[102]

As far as industry, the MEP regulations now state that employers meet the commonality requirement by being in the same "trade, industry, line of business, or profession."[103] This definition is as broad as it sounds and there is a specific note that DOL will not "challenge the inclusion of 'support' or 'allied' businesses as members of the group or association if they share a genuine economic or representational interest with the other members."[104]

96. *See* Secunda, *Uber Retirement*, *supra* note 15, at 457 n.149.

97. *See* EBSA ADVISORY OPINION LETTER, *supra* note 71.

98. *See* Definition of "Employer," 83 Fed. Reg. 28912 (June 21, 2018) [hereinafter DOL AHP Regulation].

99. *See* DOL MEP Regulations, 84 Fed. Reg. at 37,515.

100. *See id.* at 37,516.

101. *Id.* at 37,517.

102. *See id.* at 37,516.

103. *See id.*

104. *See id.* To be clear, it is still possible that groups will challenge the scope of the DOL's geographical requirement. In March 2019, the expansion of the commonality requirement to include geography was rejected by being beyond the scope of the DOL's authority by the D.C. District Court in *New York v. U.S. Department of Labor*, 363 F. Supp. 3d 109 (D.D.C. 2019). In this vein, the Court stated, "that the geography standard under the Final Rule fails to account in any way for employers' commonality of interest. This standard effectively eviscerates the genuine commonality of interest required under ERISA, thereby expanding the scope of the statute beyond what ERISA intended." *Id.* at 134. That case involved a final rule by DOL instituting Associated Health Plans (AHPs) and the Affordable Care Act (ACA), but it would appear that the same reasoning used by the Court in that case could strike down the expanded definition of "bona fide associations" now utilized by the DOL in its MEP regulations. *See id.* at 130 ("The Final Rule's bona fide associations provision is not reasonable because it

The issue with ARP is essentially the commonality requirement, even with the expanded geographic and industry definition. It would still be difficult for employers from different parts of the country, in different industry, to allow self-employed, small business, and precarious workers to join in one DCP MEP. Nevertheless, the DOL defends the commonality requirement saying that they want to keep uniformity with the AHP rule, simplicity and uniformity in administration, and maintain consistency with other rules which work in tandem with the commonality rule.[105] The DOL does say that it will continue to loosen the current restrictions with regard to the commonality requirement when it considers its RFI on Open MEP in a possible subsequent rule-making.[106]

3. PEO MEPs

There is also multiple employer pension where the function of running the MEP is outsourced to a professional employer organization (PEO).[107] PEOs were not invented to serve MEPs. Indeed, PEOs have existed for decades to provide sophisticated, professional financial services to employers who wish to provide single employer retirement plans for their employees, usually in the form of salary-deferral 401(k) plan.[108] With the exception of the fiduciary duty to select an appropriate PEO, employers enjoy the advantage of outsourcing to the PEOs, thereby making the provision of retirement plans more affordable by outsourcing their potential fiduciary liability to the PEO.[109]

In 2002, the Internal Revenue Service (IRS) issued a Revenue Procedure, which provided that only PEOs could offer their services through an MEP.[110] The idea was that the beneficiaries of such plans were the employees of the serviced employer and not the PEO itself.[111] On the other hand, DOL guidance has never been fully consistent with this IRS approach. As discussed above with regard to the commonality requirement with ARPs,

unlawfully expands ERISA's scope."). The AHP case is now pending on appeal in front of the D.C. Circuit.

105. *See* DOL MEP Regulations, 84 Fed. Reg. at 37,517.

106. *Id.* Although with the passage of the Secure Act of 2019, this RFI might now be moot since the new legislation permits at least one form of Open MEP.

107. *See id.* at 37,518.

108. *See id.* at 37,511 (According to the IRS, the term "PEO" generally refers to an organization that "enters into an agreement with a client to perform some or all of the federal employment tax withholding, reporting, and payment functions related to workers performing services for the client.") (citing Certified Professional Employer Organizations, 81 Fed. Reg. 27,315 (May 6, 2016)).

109. *See* Secunda, *Uber Retirement*, *supra* note 15, at 454.

110. *See* Rev. Proc. 2002-21, 2002-1 C.B. 911.

111. *Id.*

the DOL said most of these companies did not have the necessary commonality to offer an MEP consistent with ERISA definitions.[112]

The new MEP regulations, with its expanded definition of commonality, helps to reconcile the approaches taken by the IRS and DOL. There are four requirements, with the various sub-requirements, that must be met.[113] To be "bona fide PEOs" that "act indirectly in the interest of [its client] employers," PEOs must:

- Control the MEP as the plan sponsor, the ERISA § 3(16) plan administrator, and as a named fiduciary.
- Limit participation in the plan to current and former employees of its employer clients.
- Make certain that each employer client participating in the plan has at least one employee (other than the owner) covered by the plan; and
- Perform substantial employment functions on behalf of its employer clients.[114]

Unpacking these requirements, some are more straightforward than others.

First, with regard to PEO control of the MEP, what DOL is most concerned about is that the fiduciary responsibilities of loyalty and care will be so dispersed among the various participating employers that essentially no one will be in charge of the MEP.[115] To keep potential fraud from occurring and the loss of plan assets, DOL squarely places all the fiduciary responsibilities on the selected PEO.[116] Indeed, even after the PEO no longer contracts with the employer, the fiduciary duty to the participating employee continues beyond that contractual relationship between employer and PEO.[117] Only when retirement funds are distributed to employee participating does that duty end.[118]

Second, and this one of the straightforward factors, participation in the PEO arrangement is limited to current and former employees of the em-

112. *See infra* Part III.A.2 and accompanying text.

113. *See* DOL MEP Regulations, 84 Fed. Reg. at 37,518.

114. *See id.*

115. *See id.* at 37,519.

116. *See id.* ("Paragraph (c)(1)(ii) of the final rule requires the PEO to have substantial control over the functions and activities of the MEP, as the plan sponsor (within the meaning of section 3(16)(B) of ERISA), the plan administrator (within the meaning of section 3(16)(A) of ERISA), and a named fiduciary (within the meaning of section 402 of ERISA).").

117. *See id.*

118. See id.

ployers that the PEO services.[119] Under general ERISA principles, this means the PEO would also have obligations to the employee's beneficiaries and any alternate payees (like a former spouse under a qualified domestic relations order (QDRO)).[120]

Third, PEOs are only available to employers that have at least one employee, so working owners need not apply.[121] This is because PEOs are responsible to the day-to-day administration and management of benefit plans, and such would not be needed without an employer-employee relationship.[122]

Fourth, and finally, PEO MEPs must engage in substantial employment functions.[123] According to the DOL, this requirement is essential because, "[r]equiring the PEO to stand in the shoes of the participating client employers – by assuming and performing substantial employment functions that the client-employers otherwise would fulfill with respect to their employees – is what distinguishes bona fide PEOs under the final rule from service providers or other entrepreneurial ventures that in substance merely market or offer client-employers access to retirement plan services and products."[124] In other words, the PEO must undertake as a co-employer the crucial fiduciary obligations without which employees and their beneficiaries would not have the consumer protections for their retirement benefits provided by ERISA.[125]

In order to meet a safe harbor to show the PEO engages in substantial employment functions, it must meet an additional four sub-factors: (1) the PEO must pay wages to the employees regardless of whether the PEO receives payment for these purposes from the employer; (2) the PEO must take care of payroll taxes, including withholding taxes for employers; (3) the PEO must provide benefits to, and exercise control over any benefit plans for, the employees for which the employer has contracted for its employees; and (4) the PEO must play a "definite and contractually specified role" for recruiting, hiring, and firing employees, even though the employer is not cut out of any of these processes and various responsibilities can be allocated between the PEO and employer.[126]

119. See id. at 37,518.
120. See id.
121. See id.
122. Id.
123. See id.
124. See id.
125. See id.
126. See id. at 37,519-20.

Needless to say, under these new MEP regulations, it is quite cumbersome to be a bona fide PEO eligible to sponsor a MEP.[127] Indeed, one wonders whether PEOs not only taking over the fiduciary responsibility of providing retirement, but also having to engage in temporary agency functions like hiring and firing, might dissuade many of the otherwise interested parties from going this route.[128]

Keep in mind also that the selection of the PEO by the employer continues to be a fiduciary decision by the employer, which cannot be undertaken lightly.[129] Employers not living up to these exacting standards could be sued by the U.S. Department of Labor, other plan fiduciaries, or participants or beneficiaries of the plan, just like any other breaching fiduciary under ERISA.[130] Yet, this aspect of the PEO MEP is perhaps the most crucial advantage of providing companies that utilize self-employed, small business, and precarious workers the ability to provide retirement benefits through the financial intermediation of a MEP trustee to lessen the financial and regulatory burden of providing such benefits.[131]

B. Disadvantages of Current MEP Regulations

It goes without saying that the current types of MEPs available to employers as of September 30, 2019, are far from ideal.[132] The corporate MEP does not apply to most employers in this sector of economy as far as controlled groups and overlapping ownership.[133] It is not clear that the new expanded definition of commonality for Associated Retirement Plans (ARPs) is consistent with existing ERISA requirements, and if the recent invalidation of AHPs is upheld by the appeals court, ARPs might be short-

127. Accord AM. BENEFITS COUNCIL, supra note 22, at 2; Spark Institute, Inc., supra note 87, at 1-2 (As further explained below, the SPARK Institute believes that the Department should further eliminate barriers to MEP participation by permitting financial services firms to sponsor MEPs, removing the “limiting principles” that currently restrict greater MEP participation, and working with other regulators to reduce any MEP barriers that are beyond the Department’s jurisdiction.”).

128. See Spark Institute, Inc., supra note 87, at 10.

129. See DOL MEP Regulations, 84 Fed. Reg. at 37,522 (“Although participating employers would retain fiduciary responsibility for choosing and monitoring the arrangement and forwarding required contributions to the MEP, a participating employer could keep more of its day-to-day focus on managing its business, rather than on its plan.”).

130. See 29 U.S.C. § 1132(a)(2)-(3) (2018) (setting up breach of fiduciary duty enforcement actions).

131. See DOL MEP Regulations, 84 Fed. Reg. at 37,522.

132. Accord AM. BENEFITS COUNCIL, supra note 22, at 2; Spark Institute, Inc., supra note 87, at 1-2.

133. See supra Part III.A.1 and accompanying text.

lived as well.[134] Finally, the PEO MEPs, which at the outset seems perhaps to have the most promise, suffer from additional requirements with regard to substantial employment functions which might dissuade traditional PEOs to want to assume this role and its attendant liabilities.[135]

In short, none of the regulatory options are truly Open MEPs which permit companies to provide an effective vehicle for workers to be able to pool their retirement savings and receive inexpensive plans run by sophisticated investment professionals.[136] Rather, the answer appears now to lie in recently-enacted legislation which alters the terms of ERISA.

C. The Secure Act of 2019

Although current regulatory reforms are neither sufficient nor adequate to provide portable retirement benefits, there are a number of advantages that a true Open MEP model would supply for self-employed, small business, and precarious employees. From an employee perspective, perhaps one of the biggest problems is that these employees lack access to retirement benefits.[137] If one's employer does not offer employee benefits (which they are legally able to do because employee benefit sponsorship in the United States is voluntary as discussed above),[138] then employees may be able to take advantage of one of the new state-based automatic IRA programs[139] or seek to save themselves through private IRAs.[140] Either way, such employees have historically been shown either to save very little or nothing at all for retirement.[141]

The solution for self-employed, small business, and precarious workers is to be deemed "employees" and then have their employers establish

134. See supra note 104 and accompanying text.

135. See supra note 132.

136. See AM. BENEFITS COUNCIL, supra note 22, at 10 ("That being said, we do not believe that the concerns that have been raised over the potential cost and complexity of nationwide open MEPs are warranted or outsized in comparison to analogous plans.").

137. See supra note 11 and accompanying text.

138. See Conkright v. Frommert, 559 U.S. 506, 517 (2010) (quoting Aetna Health, Inc. v. Davila, 542 U.S. 200, 215 (2004)) (ERISA only encourages the voluntary creation of plans, but does not mandate them).

139. See Andrew Remo, DOL's Proposed Safe Harbor for State Savings Programs: A Closer Look, NAPA.NET (Nov. 18, 2015), http://www.napa-net.org/news/technical-competence/state-auto-ira-plans/dols-proposed-safe-harbor-for-state-savings-programs-a-closer-look/ [https://perma.cc/LB2S-RDEK]; see also Secunda, Uber Retirement, supra note 15, at 443-44 (discussing the advantages and disadvantages of such programs for specifically gig workers).

140. Statistics suggest that very few workers not covered by workplace retirement plans save on their own through IRAs or other methods. See DOL MEP Regulations, 84 Fed. Reg. at 37508 ("Among workers who do not have access to a workplace retirement plan, only about 13 percent regularly contribute to individual retirement accounts, commonly called IRAs.").

141. See Frankel, supra note 8.

DCP Open MEPs. This model allows both employers and employees to pool their retirement contributions, and get the best investment options at the lowest prices.[142] The advantages for employers is the tax deduction that comes with such retirement contributions,[143] the competitive advantage in obtaining better workers by offering a better benefit package, and the ability to off-load most of their fiduciary liability in co-sponsoring such a plan to PEOs.[144]

The advantage to employees is the ability to not even have to think about retirement savings and automatically let it happen. By setting up an open MEP with automatic enrollment and automatic escalation features with a wide variety of employers participating, these employees would be able to take advantage of tax-exempt retirement savings through basic behavioral economic devices.[145] These employees would also be enrolled and have a portion of their salary contributed to their individual MEP account without becoming bogged down in complex retirement decisions and procrastinating over various and complex investment options.[146] Because of their significant purchasing power and economies of scale, these Open MEPs would have access to the lowest-price wholesale mutual funds and other investments so that workers would default into a highly-diversified, low-fee retirement account.[147] If some workers wanted more control or had more financial savvy, they could easily opt-out and place their retirement money in whatever proportions in whatever funds the Open MEP offers as investment options.[148]

As I reported in a previous article in 2016,[149] Open MEP legislative proposals showed promise. Former Senator Orrin Hatch initially introduced the Retirement Enhancement and Savings Act of 2016 (RESA),[150] which

142. See GALE, supra note 11, at 12 ("MEPs have lower administrative costs and a simpler regulatory structure than a 401(k), and could be offered to independent workers as well as traditional employees if Congress and regulators approve.").

143. See id. at 15 ("Research that focuses on low-income households, however, generally finds larger impacts of [tax] saving incentives on net saving.").

144. See DOL MEP Regulations, 84 Fed. Reg. at 37522.

145. See Paul M. Secunda, The Behavioral Economic Case for Paternalistic Workplace Pensions, 91 IND. L. REV. 505, 529-30 (2016) [hereinafter Secunda, The Behavioral Economic Case).

146. See id. at 524-25 (discussing procrastination and inertia associated with many individuals when it comes to complex financial decisions involving retirement saving).

147. See Drobylen, supra note 24 ("Such plans offer diversified and cost-efficient market returns for participants and low liability and time commitment for business owners.").

148. See Secunda, The Behavioral Economic Case, supra note 145, at 527.

149. See Secunda, Uber Retirement, supra note 15, at 439.

150. See STAFF OF THE JOINT COMMITTEE ON TAXATION, 114TH CONG., 2D SESS., DESCRIPTION OF THE CHAIRMAN'S MODIFICATION OF THE "RETIREMENT ENHANCEMENT AND SAVINGS ACT OF 2016" 3-14 (Sept. 21, 2016), https://www.jct.gov/publications.html?func=startdown&id=4959 [https://perma.cc/65HD-7U7S].

would have permitted Open MEPs for private sector employees and allow multiple employers to pool retirement funds into a single 401(k) retirement plan starting in 2020.[151] In addition to doing away with the commonality requirement discussed with regard to the new DOL MEP regulations, another difficulty, the so-called "one-bad-apple rule," would be eliminated and no longer would entire MEPs be disqualified from favorable tax treatment if one employer did not meet the applicable tax rules.[152]

In 2019, the same basic RESA bill passed the House of Representatives with broad bipartisan support. Indeed, since the beginning of the 116th Congress in 2018, no less than seven bills dealing with Open MEPs have been introduced, including H.R. 1994, the "Setting Every Community Up for Retirement and Enhancement Act of 2019," commonly known as the "SECURE Act."[153] The House overwhelmingly passed the SECURE Act on May 23, 2019 by a vote of 417-3.[154]

Simultaneously, legislation has been introduced on the Senate side. Indeed, the SECURE Act contains the MEP provisions found in RESA, reintroduced by Senate Finance Committee Chair Charles Grassley (R-IA) and Ranking Member Sen. Ron Wyden (D-OR) on April 1, 2019.[155] RESA has language to the effect that, "two or more unrelated private employers [would be allowed] to adopt a defined contribution pooled employer plan (PEP) as long as the PEP has a pooled plan provider (PPP) as the named fiduciary to the plan."[156] Pensions & Investments explains succinctly what happened from there leading to its enactment:

> The Setting Every Community up for Retirement Enhancement Act of 2019, referred to as the SECURE Act, was attached Dec. 16, [2019] to a fiscal year 2020 appropriations bill that had a Dec. 20 deadline. With a deal worked out the previous weekend, lawmakers moved quickly to pass a $1.4 trillion spending package — the House approved it Dec. 17, the Senate Dec. 19, and the president, at press time, was expected to sign it into law.[157]

151. See Secunda, Uber Retirement, supra note 15, at 456.

152. See Special Rules for Plans Maintained By More Than One Employer, 26 C.F.R. § 1.413-2(a)(3)(iv) (2019); Questions and Answers on Top-Heavy Plans, 26 C.F.R. § 1.416-1 (G-2) (2019).

153. Pub. L. No. 116-94, 133 Stat. 2534 (2019).

154. See DOL MEP Regulations, 84 Fed. Reg. at 37509.

155. Id. at 37509 n.10.

156. See Andrew Remo, MEPs Resurface as 'PEPs' as Senate Finance Approves New Retirement Bill, NAPA.NET (Sep. 22, 2016), http://www.napa-net.org/news/technical-competence/legislation/meps-resurface-as-peps-as-senate-finance-approves-new-retirement-bill/ [https://perma.cc/5SD9-LW85] [hereinafter Remo, MEPs Resurface].

157. The bill was in fact signed into law on December 20, and as far as the Open MEP provisions, went into effect for plan years starting in January 2021. See Brian Croce, Secure Act moves to reality from long shot, PENSIONS & INVESTMENTS (Dec. 23, 2019),

Under new IRC §413(e), Open MEPs will not fail to be qualified for favored tax treatment due to the errors of an employer (the old bad apple rule) if the DC plan is "[m]aintained by employers that have a common interest other than maintaining the plan" or has a pooled plan provider ("PPP")."[158] The IRS is expected to issue a model open MEP plan (now to be called "Pooled Employer Plans" or "PEPs") and guidance for PPPs in 2020.[159]

Back in 2015, Senator Elizabeth Warren perceptively recognized during hearings on Hatch's bill, this new Open MEP approach is well-suited for self-employed, small business, precarious employees because of the mobile and sometime part-time nature of their work.[160] The Secure Act allows companies to pool their contributions into a common 401(k) retirement plan, with all the advantages that come with belonging to a large fund.[161] Most importantly, such funds have the advantages of providing participating employees diversification, low costs, reporting and disclosure requirements, and fiduciary protections based on the trust-based status of such 401(k) plans.[162] It is the ability to pool resources to purchase low-cost pension benefits which is now a reality for workers in the United States as of late 2019.

III. WHITHER OPEN MEPS AND THE PROSPECTS FOR PORTABLE BENEFITS FOR WORKERS?

https://www.pionline.com/legislation/secure-act-moves-reality-long-shot?utm_source=p-i-issue-alert&utm_medium=email&utm_campaign=20191220&utm_content=hero-image&CSAuthResp=1578252887381%3A0%3A199615%3A385%3A24%3Asuccess%3A90F6C5F7A6FFCA2D7561A4BA3FA20289 [https://perma.cc/S7XF-GKHJ]. The bill also has other important retirement provisions. See id. ("The SECURE Act features wide-ranging provisions, including ones that make it easier for smaller employers to join multiple employer plans, ease non-discrimination rules for frozen defined benefit plans, increase the automatic-enrollment safe harbor cap to 15% from 10%, and allow long-term part-time workers to participate in 401(k) plans.").

158. IRC § 413(e).

159. See Marta Ward, Flashpoint: New Pension Legislation Passes! Feeling More Secure?, FERENCZY BENEFITS L. CTR. (Dec. 24, 2019), https://ferenczylaw.com/flashpoint-new-pension-legislation-passes-feeling-more-secure/ [https://perma.cc/VQ6X-28HX].

160. See Secunda, Uber Retirement, supra note 15, at 458.

161. See Spark Institute, Inc., supra note 87, at 5 ("Not only would such an action create a new channel for small employers that do not engage with an employer association or PEO, it would also create greater competition and choice for all small employers; and as a market force, that competition and choice would increase efficiencies and lower costs for participating employers and employees.").

162. See Drobylen, supra note 24. See also Croce, supra note 157 ("[T]he open MEP provision will provide more opportunities to small employers who do not have the bandwidth and benefits knowledge needed to offer a retirement plan of their own.").

The purpose of this last Part, now that the Secure Act is a reality, is to argue for employers who currently do not provide retirement benefits to their workers to provide a portable retirement plan that would have the best chance to provide accessible and adequate retirement plans to self-employed, small business, and precarious workers. Given that such workers normally work for many employers at one time and/or over the course of their careers in various locations and industries, the argument is that these Open MEP workers will one portable individual retirement accounts throughout their careers that can be part of a larger Open MEP DCP 401(k) plan.[163]

Under such a system, none of the employers would have to be related, nor does there have to be any longer a substantial employment requirement like there is for bona fide PEOs under the DOL regulations.[164] Indeed, under the PEO model now possible under the Secure Act, the hope is that employees will be able to use their same individual account plan under the sponsorship of a PEO which already has their basic employment information, while at the same time providing a competitive menu of investment selections for these workers' retirement portfolios.

The challenge now is to give employers incentive to adopt these Open MEPs sponsored by PEOs and to make sure employees do not opt out of these plans. Although tax incentives will certainly provide some incentive to employers, clearly such incentives has proven thus far insufficient given the number of private employees not covered by workplace retirement plans. This is where the alt-labor movement can play a very important role by organizing to pressure employers to adopt such Open MEP PEO plans for their small business and precarious employees. Such alt-labor strategies would also educate less sophisticate workers of the advantage of joining such retirement plans and pressure them not to opt-out once auto-enrolled.

Finally, although this development would not represent that complete disconnection of retirement benefits from employers that I generally espouse, it will be a welcome step in that direction. Currently, employers are doing everything in their power to unload their old defined benefit plans[165] or to outsource their fiduciary responsibility when it comes to DCP plans.[166] Employees need a fool-proof way to invest in passive indexed retirement products and annuities, in an appropriate mix, so that they will have sufficient income to retire upon and then not outlive their retirement

163. Accord AM. BENEFITS COUNCIL, supra note 22, at 9-10.
164. See supra Parts III.A.2 & III.A.3.
165. See Secunda & Maher, supra note 27, at 735-36.
166. See ERISA ADVISORY COUNCIL, supra note 19, at 18-22.

savings no matter how long they live.[167] There is no magic formula in this regard, except that the ability to participate in an occupational retirement program from the beginning of one's career is certainly key. Also key is to have behavioral finance mechanisms in place that automatically enroll unsophisticated workers and auto-escalation provisions that allow them to invest more money in retirement as the workers progress in their careers and make more money.[168]

In the future, it might not matter whether one is classified as an "employee" or "independent contractor," as all workers will have access to portable occupational retirement benefits, unconnected from whomever they work. Although this concept may seem foreign to workers in the United States, such systems already exist in many countries throughout the industrial world.[169] As the world increasingly produces non-traditional employees and precarious working conditions, it will be increasingly important to have an Open MEP model available to pool retirement funds in plans run by investment professionals.

There are also a number of additional advantages to this PEO Open MEP model. First, it outsources the myriad of fiduciaries' duties to the PEO.[170] These onerous fiduciary requirements include: qualifying the plan for tax-favored status under the Internal Revenue Code's non-discrimination rules, operating and managing the plan on a day-to-day basis, and engaging in investment selection (perhaps through retention of a third-party investment advisor).[171] The only fiduciary duty that employer members of an Open MEP would retain would be to prudently select, and then monitor, the PEO, thus limiting their exposure to potential fiduciary liability.[172] Additionally, the price tag of permitting the formation of these organizations is relatively low according to at least one source: $3.2 billion over 10 years from the loss of tax revenue from the additional tax deduction for employers and tax-exempt status for employee contributions.[173]

This is not to say everyone is a fan. Some have argued that Open MEPs "make it easier for 401(k) providers to obfuscate fees and conflicts

167. Drobylen, supra note 24.

168. See generally Secunda, The Behavioral Economic Case, supra note 145.

169. Australia is an example of a mandatory defined contribution system run by professional "superannuation" funds, mostly disconnected from the employer. See id. at 534-40.

170. See DOL MEP Regulations, 84 Fed. Reg. at 37522.

171. See Remo, MEPs Resurface, supra note 156.

172. See DOL MEP Regulations, 84 Fed. Reg. at 37522; cf. Tibble v. Edison Int'l, 135 S. Ct. 1823, 1828-29 (2015) (holding that plan sponsors of 401(k) plan still have a fiduciary duty in selecting and monitoring participant investment options).

173. See Remo, MEPs Resurface, supra note 156.

of interest."[174] Indeed, one commentator maintains that he thinks "the push for MEPs signals a broken 401(k) industry that prioritizes profit ahead of the interests of retirement savers."[175] Be that as it may, when it comes to the plight of self-employed, small business, and precarious workers and their general inability to have access to workplace retirement plans, the DCP Open MEP model provides the best prospect for these workers to have a chance to have the same benefits as their more traditional unionized and non-unionized employee counterparts.

CONCLUSION

The rise of alt-labor with its itinerant, precarious workers, in conjunction with the large number of self-employed and small business workers, means there is a wide swath of American workers that do not have access to workplace retirement plans. Although the current DOL MEP regulations do not provide the necessary flexibility to permit many of these workers the wherewithal to gain these benefits through Association or PEO MEPs, the new Secure Act legislation certainly provides tremendous promise.

As long as such workers can fulfill the definition of "employee" for ERISA purposes, the Secure Act amendments to ERISA permit the development of Open MEPs, or retirement plans for employees who work for unrelated employers. Done properly, and using PEOs to outsource most of the fiduciary liability and provide cheaper funds that come with large pools of assets and diverse investment opportunities, more workers now finally have a fighting chance to be part of a system where they are able to stash away money on a low-fee, easily accessible basis so that they more likely can have a retirement and live comfortably during their golden years.

By no means is this the end of the portable retirement benefit story. Future proposals, for instance, will need to consider how such workers should spend-down such retirement assets through various forms of partial annuitization. For now, however, it suffices for purposes of this article to provide a viable mechanism for self-employed, small business, and precarious workers to accumulate retirement wealth. Now that the Secure Act allows for Open MEPs run by PEOs, the need exists to provide the incentive for employers to provide these retirement saving vehicles to their employers and education to these currently uncovered employees as to why joining such retirement plans is essential to their future retirement security. The alt-labor movement is perfectly situated to pressure employers to adopt

174. Drobylen, supra note 24.
175. See id.

such plans to educate workers regarding the need to invest early and often in their retirement security.