Spring 2020

Are Two Employers Better Than One? An Empirical Assessment of Multiple-Employer Retirement Plans

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At least 50% of Americans have not saved enough for retirement. This is in part due to a lack of access to employer-sponsored retirement plans. Nearly a third of the U.S. workforce is employed by businesses that choose not to sponsor workplace retirement plans for their employees. Moreover, plans set up by smaller employers tend to be plagued by high fees that eat away at retirement savings. To increase worker participation in low-cost retirement plans, lawmakers across the political spectrum have coalesced around reforms to allow more small employers to pool their assets and to centralize plan administration through multiple-employer plans. The efforts culminated in 2019 with the passage of the SECURE Act, which dramatically expanded access to multiple-employer plans.

This Article shows that the bipartisan enthusiasm for expanding multiple-employer arrangements rests on shaky theoretical and empirical considerations. Drawing on newly hand-collected data for multiple-employer plans in effect prior to 2019, it argues that overlooked agency costs, market opacity, and the limits of the fiduciary governance regime have undermined the gains from asset pooling and centralized plan administration in existing multiple-employer plans. Furthermore, while larger single-employer plans typically leverage economies of scale and greater bargaining power to reduce plan fees, the benefits of plan size have not mapped directly onto existing multiple-employer plans. Instead, the Article reveals that total plan fees for existing multiple-employer plans are significantly higher than the fees for single-employer plans of comparable size. As policymakers and regulators implement expanded access to employer-pooling arrangements, this Article proposes governance measures to realize the full potential of aggregation for retirement savings programs in the United States.

* David and Pamela Donohue Assistant Professor, Boston College Law School. I would like to thank Jordan Barry, Phyllis Borzi, Quinn Curtis, Heather M. Field, Edward Janger, Patricia McCoy, Shu-yi Oei, Menesh Patel, Diane Ring, Roberta Romano, Jacob Hale Russell, Norman P. Stein, and Peter Wiedenbeck, as well as the participants of the Law and Entrepreneurship Association Retreat, the National Employee Benefits and Social Insurance Conference, the AALS New Voices in Tax Policy and Public Finance Panel, the Law and Society Program on Wealth Formation and Financial Security for Working Families, the Fiduciary Law Workshop, and the faculty workshops at Boston College Law School and U.C. Davis School of Law for helpful comments on earlier drafts. The Boston College Institute on Aging Research Incentive Grant provided generous support for this project. All errors are my own.

I. INTRODUCTION

Half of the working-age households in America currently face the prospect of not being able to maintain their standards of living in retirement.[1] Fewer and fewer workers have access to traditional pensions, and Social Security alone is insufficient for most individuals to maintain their pre-retirement living standards.[2] Individual U.S. workers now bear the risk and responsibility of saving enough for retirement, most commonly through

1. Alicia Munnell et al., *National Retirement Risk Index Shows Modest Improvement in 2016*, B.C. CTR. FOR RETIREMENT RES. 1, 1 (Jan. 2018), https://crr.bc.edu/briefs/national-retirement-risk-index-shows-modest-improvement-in-2016/ [https://perma.cc/2T63-B5C5]; *see also* Heather Gillers et al., *A Generation of Americans is Entering Old Age the Least Prepared in Decades*, WALL ST. J. (June 22, 2018), https://www.wsj.com/articles/a-generation-of-americans-is-entering-old-age-the-least-prepared-in-decades-1529676033 [https://perma.cc/T253-YHBW] (suggesting that "Americans are reaching retirement age in worse financial shape than the prior generation, for the first time since Harry Truman was president" and noting that median 401(k) balances for working households nearing retirement are only enough to provide $600 per month in retirement).

2. Alicia Munnell et al., *An Analysis of Retirement Models to Improve Portability and Coverage* (B.C. Ctr. for Retirement Res. ed., 2018), https://crr.bc.edu/special-projects/special-reports/an-analysis-of-retirement-models-to-improve-portability-and-coverage/ [https://perma.cc/N7AB-DX6V] (noting that "[s]ince Social Security alone is insufficient for most workers to maintain their pre-retirement living standard," such workers will be increasingly reliant on employer-sponsored retirement plans to supplement their income in retirement).

tax-advantaged, employer-sponsored 401(k) plans.[3]

At present, however, only two-thirds of workers have access to such employer-sponsored plans.[4] U.S. employers are not required to offer any retirement savings plans, and many employers—particularly smaller employers—do not offer such plans to their employees.[5] Smaller employers commonly cite the lack of administrative resources and the expenses associated with retirement plans as factors that discourage plan formation.[6]

Employer size affects not only access to retirement plans, but also the *quality* of the plans available to employees. It is well documented that smaller employers lack the expertise and market power to provide the retirement benefits commonly available to employees of larger employers.[7]

To increase worker participation in low-cost retirement plans, lawmakers at all levels of government and across the political spectrum have coalesced recently around reforms that would allow more small employers to pool their assets and to centralize plan administration through so-called "multiple-employer plans," or "MEPs."[8] The premise of

3. *See* INV. CO. INST., THE BRIGHTSCOPE/ICI DEFINED CONTRIBUTION PLAN PROFILE: A CLOSE LOOK AT 401(K) PLANS 2015 11 (2018), https://www.ici.org/pdf/ppr_18_dcplan_profile_401k.pdf [https://perma.cc/7W3A-EK4L] (stating that "with $5.3 trillion in assets at the end of the third quarter of 2017, 401(k) plans have become one of the largest components of U.S. retirement assets, accounting for nearly one-fifth of all retirement assets") [hereinafter BRIGHTSCOPE/ICI REPORT]. Notably, the U.S. retirement system is deeply intertwined with the U.S. income tax system. The tax system subsidizes employee benefit plans by providing employers and employees with incentives to sponsor and participate in employer-based retirement plans. Expenditures for qualified retirement plans are among the largest tax expenditures in the federal budget. The 2018 tax expenditure for defined contribution retirement plans is estimated at $115.3 billion. JOINT COMM. ON TAX'N, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2016-2020 38–39 (2017).

4. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-111SP, THE NATION'S RETIREMENT SYSTEM: A COMPREHENSIVE RE-EVALUATION IS NEEDED TO BETTER PROMOTE FUTURE RETIREMENT SECURITY 1–2 (2017) [hereinafter GAO REPORT].

5. This remains true despite the availability of various "simplified" and safe-harbor arrangements—such as the SIMPLE 401(k)—designed specifically for small businesses. Such plans offer relatively easier implementation and administration, but limit the flexibility of small businesses to design and adjust benefits. *See, e.g.*, *Choosing a Retirement Plan: SIMPLE 401(k) Plan*, INTERNAL REVENUE SERV., https://www.irs.gov/retirement-plans/choosing-a-retirement-plan-simple-401k-plan [https://perma.cc/9YVM-NQR3] (last visited Feb. 21, 2018) (explaining the features of SIMPLE 401(k) plans).

6. PEW CHARITABLE TRS., EMPLOYER BARRIERS TO AND MOTIVATIONS FOR OFFERING RETIREMENT BENEFITS 9 (2017) (finding that "[m]ost commonly, employers without plans said that starting a retirement plan is too expensive to set up" while another 22% pointed to a lack of "administrative resources" for plan formation and maintenance).

7. *See, e.g.*, GAO REPORT, *supra* note 4, at 23 (noting that workers employed by "smaller firms and in certain industries are less likely to have access" to retirement savings programs); *see also* Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans*, 124 YALE L.J. 1476, 1501 (2015) ("The problem of fees is especially acute in small plans, where there is less competition and fewer resources are likely to be devoted by the plan sponsor to administering the plan."); *Impact of Plan Size on Workers' Retirement Income Adequacy*, EMP. BENEFIT RES. INST. (Apr. 6, 2018), https://ebriorg.wordpress.com/2018/04/06/impact-of-plan-size-on-workers-retirement-income-adequacy/ [https://perma.cc/Z6JQ-JSH5] (reporting that "participants can experience significantly greater increases [in retirement income adequacy] by simply benefiting from the economies of scale of large versus small plans"); Barry L. Salkin, *Who's the Boss? New York Defines Roles in the Professional Employer Organization Act*, N.Y. ST. B. ASS'N J. 34 (July/August 2005) ("Small businesses face compliance with a bewildering range of state and federal employment laws. These same businesses often find it administratively or financially impossible to offer group health insurance, 401(k) retirement plans, and other employee benefits.").

8. State and local governments, for example, have set up publicly-sponsored multiple-employer retirement

such legislative reform efforts has been that by joining a MEP, participating employers can spread plan administrative costs over more participants and thereby lower fees.[9]

In 2019, following numerous stalled efforts[10] and sustained pressure from industry,[11] both Congress and the Department of Labor dramatically expanded access to multiple-employer plans. On May 23rd, 2019, the House of Representatives voted 417-3 in favor of the Setting Every Community Up for Retirement Enhancement Act (the SECURE Act),[12]

plans for private-sector employers. Vermont and Massachusetts, for instance, have established multiple-employer plans, while New Jersey, Philadelphia, and New York City have considered various proposals. *See* DAVID E. MORSE & ANGELA M. ANTONELLI, MULTIPLE EMPLOYER PLANS (MEPS): AN OVERVIEW OF LEGAL, REGULATORY AND PLAN DESIGN CONSIDERATIONS FOR STATES 24–26 (Geo Ctr. for Retirement Initiatives ed., 2017), https://cri.georgetown.edu/wp-content/uploads/2017/08/CRI_MEP_PolicyReport17-2.pdf [https://perma.cc/7N3G-4CRP]; *see also* Jane Lindholm & Matthew F. Smith, *Retirement Plan for Vermont's Small Businesses to Launch by Next Year*, VT. PUB. RADIO (Jan. 22, 2018), https://www.vpr.org/post/retirement-plan-vermonts-small-businesses-launch-next-year#stream/0 [https://perma.cc/9FUB-VQ5U] (describing the Green Mountain Secure Retirement Plan, which will be open to employers with fewer than 50 employees); Alicia H. Munnell, *Can A State-Sponsored 401(K) Plan Expand Access to Retirement Savings*?, MARKETWATCH (May 30, 2018), https://www.marketwatch.com/story/can-a-state-sponsored-401k-plan-expand-access-to-retirement-savings-2018-05-30 [https://perma.cc/WD4E-E8C4] (noting that in 2017, Massachusetts "launched a multiple-employer 401(k) plan open to nonprofits with 20 employees or fewer"); Robert Steyer, *NYC Comptroller Unveils 3-Pronged Retirement Program for Private-Sector Employees*, PENSIONS & INV. (Oct. 7, 2016), https://www.pionline.com/article/20161007/ONLINE/161009887/nyc-comptroller-unveils-3-pronged-retirement-program-for-private-sector-employees (discussing New York City's multiple employer plan).

9. *See, e.g.*, Anne Tergesen & Richard Rubin, *House Republicans Unveil Tax Plan Focused on Savings, Retirement*, WALL ST. J. (July 24, 2018), https://www.wsj.com/articles/hose-republicans-unveil-tax-plan-focused-on-savings-retirement-1532463209 [https://perma.cc/VU4Z-XL44] (noting that the bill would lead to "spreading plan administrative costs over more participants and lowering fees").

10. In the 115th Congress alone, eight bills were introduced to expand access to pooling arrangements. *See, e.g.*, Richard Rubin & Anne Tergesen, *Retirement Bills in Congress Could Alter 401(k) Plans*, WALL ST. J. (July 17, 2018), https://www.wsj.com/articles/retirement-bills-in-congress-could-alter-401-k-plans-1531825200 [https://perma.cc/LQF4-UJSN] (describing bipartisan interest in a provision that would "allow small employers to band together to offer 401(k)-type plans"); Karishma Shah Page et al., *Taking on the Retirement Gap: Bipartisan Interest Grows in Open MEPs*, K&L GATES (July 22, 2016), http://www.klgates.com/taking-on-the-retirement-gap-bipartisan-interest-grows-in-open-meps-07-22-2016/ [https://perma.cc/BVG8-446V] ("Bipartisan bills have been introduced in both chambers of Congress to increase access to MEPs."); Hazel Bradford, *Multiple Employer Plans Grabbing More Attention*, PENSIONS & INV. (Mar. 17, 2014), https://www.pionline.com/article/20140317/PRINT/303179983/multiple-employer-plans-grabbing-more-attention (noting that "[a] concerted effort in Washington to get more employers to offer retirement plans has raised the profile of multiple employer plans, a largely untapped market for institutional money managers and other service providers"). Of the various bills introduced over the years, the bipartisan Retirement Enhancement and Savings Act (RESA), for example, would have allowed "small employers to band together to offer 401(k)-type plans." Tergesen & Rubin, *supra* note 9. The Retirement Security Act, introduced in 2017, would have enabled "businesses to link with multiple employer plans (MEPs) and provide enhanced retirement programs." Amanda Umpierrez, *Bipartisan Bill Seeks Middle-Ground Retirement Solutions*, PLANSPONSOR (June 21, 2017), https://www.plansponsor.com/bipartisan-bill-seeks-middle-ground-retirement-solutions/ [https://perma.cc/8SJS-W2Z8].

11. *See, e.g.*, Brian Croce, *Business, Trade Association Leaders Urge Senate Action on SECURE Act*, PENSIONS & INV. (Nov. 5, 2019) ("The leaders of 91 businesses, trade associations and community groups sent a letter Tuesday to Senate leadership urging prompt action on a sweeping retirement security package. . . . The letter was signed by a variety of organizations, including the U.S. Chamber of Commerce, the American Council of Life Insurers, the ERISA Industry Committee, Principal Financial Group and Mercer.").

12. Anne Tergesen & Richard Rubin, *House Passes Bill Making Big Changes to U.S. Retirement System*, WALL. ST. J. (May 23, 2019), https://www.wsj.com/articles/house-on-track-to-pass-bill-making-big-changes-to-u-s-retirement-system-11558625474 [https://perma.cc/9NJD-YUL2].

which eliminates prior restrictions on multiple-employer plans and permits unaffiliated employers to band together to offer 401(k)-type plans.[13] After facing some roadblocks in the Senate, the provisions of the SECURE Act were included in a "must-pass" spending bill.[14] The legislation was signed into law on December 20, 2019 and applies to plans for plan years beginning after December 31, 2020.[15]

As Congress was pursuing legislative efforts to expand access to multiple-employer plans, the Trump Administration was working toward the same goal through regulatory reform. On September 6th, 2018, President Trump issued an Executive Order to "strengthen retirement security in America" by expanding "access to workplace retirement plans for American workers."[16] The Executive Order noted that small businesses are less likely to offer retirement benefits and identified plan costs as a core concern for such businesses. Accordingly, the Executive Order stated:

> Expanding access to multiple employer plans (MEPs), under which employees of different private-sector employers may participate in a single retirement plan, is an efficient way to reduce administrative costs of retirement plan establishment and maintenance and would encourage more plan formation and broader availability of workplace retirement plans, especially among small employers.[17]

The Executive Order directed the Secretary of Labor to "clarify and expand" the circumstances under which U.S. employers may sponsor or adopt a multiple-employer plan for their employees.[18]

Six weeks after the Executive Order was issued, the Department of Labor (DOL) followed with a proposed regulation.[19] Following the notice and comment process, the DOL issued the final regulation in July of 2019.[20] The final regulation, which tracks closely the DOL's prior guidance on so-called "association health plans" or "AHPs," eliminates certain constraints on multiple-employer plans previously promulgated by the DOL.[21]

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13. *Id.* (noting that the proposed arrangement "expands a current rule that allows such multi-employer plans but only when employers have an affiliation").

14. *See* Brian Croce, *SECURE Act Attached to Year-End Spending Bill*, PENSIONS & INV. (Dec. 16, 2019), https://www.pionline.com/legislation/secure-act-attached-year-end-spending-bill (noting that the SECURE Act was "was attached Monday to a fiscal year 2020 appropriations bill that must pass by Friday").

15. Setting Every Community Up for Retirement Enhancement Act (SECURE Act), *incorporated into* Further Consolidated Appropriations Act, Pub. L. No. 116-94. *See* Croce, *supra* note 14 (observing that "[p]roponents of the SECURE Act have been publicly and privately asking lawmakers to pass the bill, either via unanimous consent or limited floor time in the Senate, or attach it to a piece of must-pass legislation"); Anne Tergesen, *Congress Passes Sweeping Overhaul of Retirement System*, WALL ST. J. (Dec. 19, 2019), https://www.wsj.com/articles/senate-spending-bill-includes-significant-changes-to-u-s-retirement-system-11576780736 [https://perma.cc/3NAM-2VDU] (noting that "[b]ackers of the legislation recently added it to the spending bill in an effort to gain passage by year-end").

16. Executive Order on Strengthening Retirement Security in America, Exec. Order No. 13,847, 83 Fed. Reg. 45,321 (Aug. 31, 2018).

17. *Id.*

18. *Id.*

19. Definition of "Employer" Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans, 83 Fed. Reg. 53,534 (proposed Oct. 23, 2018) (to be codified at 29 C.F.R. § 2510) [hereinafter Proposed Regulation].

20. Definition of "Employer" Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans, 84 Fed. Reg. 37,508 (to be codified at 29 C.F.R. § 2510) [hereinafter Final Regulation].

21. Definition of "Employer" Under Section 3(5) of ERISA—Association Health Plans, 29 C.F.R. § 2510

Under the final guidance, multiple-employer plans may be sponsored by a "bona fide" group or association of employers, including a group or association whose "primary purpose" is to offer and provide MEP coverage.[22] In addition, the DOL for the first time explicitly embraced MEPs sponsored by bona fide "professional employer organizations" (PEOs), so long as such PEOs perform "substantial employment functions" on behalf of the client employers.[23]

The DOL's embrace of PEO-sponsored MEPs reflects the dramatic rise of PEOs, and their inroads into the retirement plan business. In recent years, PEOs have sought to provide employee benefits administration and human resources support to businesses wishing to outsource such functions. In 2018, for example, PEOs provided services to some 175,000 small and mid-range businesses employing over 3.7 million individuals.[24] In the years preceding the DOL rulemaking on PEO MEPs—when the DOL did not expressly permit PEO MEPs—the PEOs brought together unrelated employers to participate in multiple-employer plans administered by the PEOs.[25]

Both the legislative and regulatory reforms of 2019 dramatically expand access to multiple-employer plans. The final DOL regulation permits a wider range of groups and associations to sponsor MEPs and addresses, for the first time, the circumstances under which PEOs may establish valid MEPs. The SECURE Act goes even further by permitting any institution—including banks, insurance companies, recordkeepers, or other commercial enterprises—to bring together entirely unrelated employers in so-called "open MEPs."

In both cases, the support for multiple-employer plans is not based on any evidence that such arrangements have the desired effects.[26] Indeed, while there is evidence that participants in smaller plans generally pay higher fees than participants in larger plans, there is no existing assessment of fees across the multiple-employer retirement plans that have been established to date.[27] This is particularly troubling given a history of fraud and

(June 21, 2018) [hereinafter AHP Regulation].

22. Final Regulation, *supra* note 20.

23. *Id.* at 37,543.

24. LAURIE BASSI & DAN MCMURRER, AN ECONOMIC ANALYSIS: THE PEO INDUSTRY FOOTPRINT IN 2018 1 (Nat'l Assoc. of Prof. Employer Orgs. ed., 2018), https://www.napeo.org/docs/default-source/white-papers/2018-white-paper-final.pdf?sfvrsn=6 [https://perma.cc/QVK3-Y5XQ].

25. A typical defined-contribution MEP arrangement allows for the adopting employers to choose from a variety of plan design options, including the specific terms of vesting, eligibility, and matching contributions. The PEO takes on the tasks of plan administration, fund selection and monitoring, asset management, recordkeeping, plan document maintenance and interpretation, and Form 5500 preparation and audit.

26. After the passage of the SECURE Act, a simulation by the Employee Benefits Research Institute concluded that under certain "baseline" assumptions, the expanded access to multiple employer plans could produce 1.4% overall reduction in the retirement savings deficit. Jack VanDerhei, *How Much More Secure Does the SECURE Act Make American Workers: Evidence From EBRI's Retirement Security Projection Model*, EBRI (Feb 20, 2020), https://www.ebri.org/publications/research-publications/issue-briefs/content/how-much-more-secure-does-the-secure-act-make-american-workers-evidence-from-ebri-s-retirement-security-projection-model [https://perma.cc/H8LK-9BK9].

27. *See infra* Part III.A.; U.S. GOV'T ACCOUNTABILITY OFF., GAO–12–665, PRIVATE SECTOR PENSIONS: FEDERAL AGENCIES SHOULD COLLECT DATA AND COORDINATE OVERSIGHT OF MULTIPLE EMPLOYER PLANS (2012) (finding that "little is known about the characteristics of private sector MEPs," and documenting extensive uncertainty about the merits of multiple employer plans as well as concerns about the potential for fraud and abuse in such arrangements) [hereinafter GAO MEPS REPORT].

abuse in multiple-employer plans that provide healthcare benefits.[28]

This Article seeks to fill important gaps in the prevailing wisdom about multiple-employer plans. It offers the first empirical assessment of the structure and quality of existing multiple-employer defined-contribution plans, with a particular focus on 401(k) MEPs administered by PEOs. The analysis focuses on plan costs, which play a determinative role in the plans' ability to provide adequate retirement savings for plan participants.[29] Even seemingly small differences in plan fees have a significant effect on total savings for retirement.[30] As the DOL has documented, over a 35-year period, a 1% difference in fees and expenses reduces an account balance at retirement by 28%.[31]

The analysis in this Article yields several contributions to the existing scholarship on multiple-employer plans. First, using a newly developed methodology to identify PEO MEPs in the required DOL filings, the Article catalogs the growth of PEO-sponsored 401(k) retirement plans between 2001 and 2016. Even absent clear regulatory guidance to permit such arrangements, PEO MEPs have proliferated over the last two decades, operating throughout this period with little agency oversight or external scrutiny.[32]

Second, the empirical analysis of fees in PEO plans suggests that, despite the intuitive appeal and the policymaker enthusiasm for such arrangements, closer scrutiny of PEO plans—and fees—is warranted. From a theoretical perspective, it is far from obvious that the aggregation of assets in PEO-sponsored MEPs will reduce fees in the same way that such aggregation has done across single-employer plans. First, the pooling of employers in a single plan may increase certain administrative requirements and expenses.[33] While investment management costs should decrease with larger pools of assets, the involvement of non-employer sponsors and administrators may introduce additional agency costs that offset the benefits of aggregation. PEOs, for example, may seek to maximize the revenue that they generate from plan administration.[34] Employers that participate in PEO-

28. For a discussion of past challenges with multiple-employer welfare benefit plans, see *infra* Part II.

29. *See infra* Part II.D. The focus of the analysis is on plan costs. Plan cost is an important, but certainly not the only measure of plan "quality." Plan cost is, however, the focus of recent regulatory and legislative proposals to expand multiple-employer plans. Beyond cost, plans vary in the generosity of the employer contributions, the qualification and vesting terms, and various plan ancillary features. In addition, plan participation rates and employee savings may be additional measures of the "quality" of different plans.

30. *See, e.g.*, Ayres & Curtis, *supra* note 7, at 1501 (finding that in the average 401(k) plan, "an investor making optimal menu allocations [has been] forced to pay forty-three basis points in expenses over [a low-cost] benchmark," and noting that, in some cases, the additional fees from poorly constructed plan menus have eliminated the preferential tax treatment afforded to 401(k) plans).

31. U.S. DEP'T OF LABOR, A LOOK AT 401(K) PLAN FEES 1–2 (2013), https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/a-look-at-401k-plan-fees.pdf [https://perma.cc/H8LK-9BK9]; *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-21, PRIVATE PENSIONS: CHANGES NEEDED TO PROVIDE 401(K) PLAN PARTICIPANTS AND THE DEPARTMENT OF LABOR BETTER INFORMATION ON FEES (2006) (finding that, over a twenty-year period, an "additional 1 percent annual charge for fees would reduce the account balance at retirement by about 17 percent").

32. *See, e.g.*, Barry L. Salkin, *Multiple Employer Plans and PEOs*, WAGNER L. GROUP (Feb. 19, 2019), https://www.wagnerlawgroup.com/resources/erisa/deal-breaking-ma-issues-related-to-employee-benefit-plans-and-executive-compensation-0 [https://perma.cc/B6WL-VSSZ] (noting the "DOL's apparent non-enforcement policy with respect to PEO-sponsored 401(k) plans").

33. Final Regulation, *supra* note 20, at 37,535 (acknowledging that "under some circumstances small employers might actually incur slightly higher reporting and audit costs by joining a MEP").

34. *See infra* Part II.A (describing typical PEO arrangements); *see also* GAO MEPS REPORT, *supra* note 27, at 22 (listing potential abuses in MEPs, including "layering of fees, misuse of the assets, or falsification of

sponsored plans, meanwhile, may be less incentivized to exert meaningful oversight over the PEO plans. High switching costs may limit competition among PEOs. Finally, absent meaningful new measures to address agency costs in MEP arrangements, the decades-old fiduciary model for retirement plan governance is unlikely to serve as a serious constraint on PEO conduct or fees.[35]

Newly hand-collected data on 2016 plan fees reveals that while PEO 401(k) plans may provide the smallest employers with retirement plans that are less costly than the plans typically available to the smallest individual employers, the considerable aggregation of assets and expertise in the largest PEO MEPs has not produced the kinds of cost-savings that are evident in the largest single-employer plans. At a time when nearly a third of private sector workers lack access to employer-sponsored retirement plans, and when many more have plans that offer poorly constructed investment menus or charge relatively high fees, this Article seeks to inform recent efforts to pursue pooling arrangements as a means of improving retirement security in the United States.[36] The analysis proceeds in four parts. Part II surveys the current regulatory landscape for multiple-employer plans, with a particular focus on the changes proposed and enacted in 2018 and 2019. After describing the legal landscape for MEPs, Part II examines the fees associated with 401(k) retirement plans generally. In reviewing the existing analyses of fee structures across retirement plans, Part II highlights the lack of scholarship on multiple-employer plans. Part III introduces newly collected data on such plans, describes the study design, and presents the findings of the empirical analysis. Part IV presents the policy implications of the analysis, including the need for an increased focus on MEP governance, as well as more standardized disclosure requirements for all retirement plans. Finally, Part V concludes.

II. A BRIEF HISTORY OF MULTIPLE-EMPLOYER PLANS

As this Article goes to print, the Department of Labor's regulation expanding access to association and PEO MEPs, proposed in 2018 and finalized in July of 2019, is in effect. At the same time, following the passage of the SECURE Act in December of 2019, the Department of Labor is working on required regulations to implement the new law. The regulatory and legislative changes represent a significant departure from prior guidance. Parts A-C below detail the changes enacted in 2019 and the path leading to the recent reforms.

A. The Regulatory Framework Prior to 2018

At present, workers in the United States rely primarily on individual employers to provide health insurance and retirement benefits.[37] While arrangements that bring together

benefit statements" and citing to the case of Mathew Hutchenson, a trustee of several MEPs who was convicted for "using plan funds for personal use and misrepresenting the fund investments to clients").

35. *See infra* Part III.A.

36. GAO REPORT, *supra* note 4, at 23 (finding that "[a]bout two-thirds of private-sector workers in the United States had access to an employer-sponsored retirement plan in 2016, and about a third did not") (internal citations omitted).

37. Individuals do have the ability to save for retirement outside of the employer context, but the available savings vehicles—most notably individual retirement accounts or IRAs—are not as favorable in several respects. As compared to participants in employer-sponsored plans, those who choose to save through IRAs face lower

multiple employers—including the so-called multiemployer pension plans[38] and multiple-employer welfare arrangements (MEWAs)[39]—have gained traction at various points over the last half century, their record has been marred by serious underfunding and mismanagement challenges.[40] Until recently, regulators in the United States—and particularly at the Department of Labor—have viewed employer-pooling arrangements with some skepticism.[41] In 2013, the Department of Labor made the following observation in an enforcement memo:

> Although MEWAs can be provided through legitimate organizations, they are sometimes marketed using attractive but actuarially unsound premium structures that *generate large administrative fees for their promoters*. These high fees are

contribution limits, higher investment management fees, and a weaker set of consumer protections. *See, e.g.*, INTERNAL REVENUE SERV., CAT. NO. 66302J, PUBLICATION 590-A: CONTRIBUTIONS TO INDIVIDUAL RETIREMENT ARRANGEMENTS (IRAS) (2018), https://www.irs.gov/pub/irs-pdf/p590a.pdf [https://perma.cc/3JGP-HBSZ].

38. A multiemployer or "Taft-Hartley" plan is a collectively bargained plan maintained by more than one employer, usually within the same industry, and a labor union. As of 2018, "[t]here [were] about 1,400 multiemployer defined benefit pension plans, covering [some] 10 million participants" across industries such as building and construction. *Introduction to Multiemployer Plans*, PENSION BENEFIT GUARANTY CORP., https://www.pbgc.gov/prac/multiemployer/introduction-to-multiemployer-plans [https://perma.cc/ZV65-9QTM] (last visited Feb. 21, 2018).

39. A MEWA is a health insurance plan (or other plan providing non-pension welfare benefits) that covers employees of multiple, unaffiliated employers. 29 U.S.C.A. § 1002(40)(A)-(B) (West 2008).

40. For challenges plaguing multiemployer plans, see generally ALICIA H. MUNNELL ET AL., B.C. CTR. FOR RETIREMENT RES., MULTIEMPLOYER PENSION PLANS: CURRENT STATUS AND FUTURE TRENDS (Ctr. For Retirement Res. B.C. ed., 2017), http://crr.bc.edu/special-projects/special-reports/multiemployer-pension-plans-current-status-and-future-trends/ [https://perma.cc/4ZQE-6SDD] (finding that a "substantial minority" of multiemployer plans "face serious funding problems that are exacerbated by unique structural challenges in the multiemployer sector" and explaining that such problems include "a high ratio of inactive to total participants, high rates of negative cash flow, and inadequate withdrawal penalties so that exiting companies do not cover the costs they leave behind"). MEWAs, meanwhile, have been prone to abuse by unscrupulous providers. Some of these providers collected premiums from the employers but failed—or never intended—to maintain adequate reserves to meet benefit obligations, thus ultimately leaving the MEWA participants with no health coverage. *See* U.S. DEP'T OF LABOR, MULTIPLE EMPLOYER WELFARE ARRANGEMENTS UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA): A GUIDE TO FEDERAL AND STATE REGULATION 92–93 (2013), https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/mewa-under-erisa-a-guide-to-federal-and-state-regulation.pdf [https://perma.cc/P8MK-ZQZQ]. The lack of a uniform regulatory regime for MEWAs also undermined effective oversight. Prior to 1983, there was considerable controversy—which was itself exploited by certain MEWA "entrepreneurs"—over the reach of the preemption provision under the Employee Retirement Income Security Act of 1974 (ERISA), and the ability of states to regulate MEWAs. According to Phillis Borzi, "[i]n 1983, Congress amended ERISA to clarify that (1) to the extent that a MEWA is not a plan covered under ERISA, states have full authority under their insurance powers to regulate MEWAs, (2) even if the MEWA is an ERISA plan, if the MEWA is fully insured, the state may regulate it for solvency and may adopt provisions to enforce the solvency requirements, and (3) if the MEWA is not fully insured, provisions of state insurance law may apply to it 'to the extent not inconsistent with the preceding sections of this title [Title I of ERISA].'" PHYLLIS C. BORZI, ERISA HEALTH PLANS: KEY STRUCTURAL VARIATIONS AND THEIR EFFECT ON LIABILITY 11 (Ctr. Health Servs. Res. & Pol'y, 2002), https://hsrc.himmelfarb.gwu.edu/cgi/viewcontent.cgi?article=1837&context=sphhs_policy_facpubs [https://perma.cc/P63J-P47X]. Even after 1983, however, different states approached MEWAs differently, resulting in a patchwork regulatory framework. *Id.*

41. The change in attitude is evidenced most clearly by the 2018 final rule on association health plans and the 2019 final rule on multiple-employer retirement plans, as described *infra* Part II.B.

often paid before any claims are paid, leaving insufficient funds available to pay for the benefits promised by the promoters.[42]

In light of such history, prior to 2018, the regulatory regime permitted MEP arrangements in limited circumstances.[43] The limiting principle stemmed from the statutory provisions in the Employee Retirement Income Security Act of 1974 ("ERISA"). Pursuant to Section 3(2) of ERISA, an "*employee* pension benefit plan" must be sponsored by an "employer."[44] Section 3(5) of ERISA defines an "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes *a group or association of employers* acting for an employer in such capacity."[45]

Prior to 2018, the DOL guidance on the definition of "employer" facilitated the growth of three types of MEPs: (1) MEPs sponsored by industry trade groups or associations, (2) MEPs sponsored by PEOs, and (3) corporate MEPs. While industry participants also sought to obtain favorable DOL guidance for MEPs comprised of unrelated employers, the DOL has held that the so-called "open MEPs" do not constitute single plans.[46] Each type of arrangement and the relevant regulatory guidance is described in greater detail below.

1. Group or Association MEPs

The DOL has historically embraced MEPs sponsored by organizations such as the American Medical Association, the Alabama Grocers Association, and the Chesapeake Automotive Business Association, among others. Before 2018, MEPs sponsored by industry or trade groups, or by associations with members that are related by industry or trade, stood on clearest ground under DOL guidance, which provided that a "multiple-employer plan" exists where a "bona fide" employer group or association "acting in the interest of its employer members, establishes a benefit program for the employees of member employers and exercises control of the amendment process, plan termination, and other similar functions on behalf of these members."[47] The DOL's analysis of whether a

42. U.S. DEP'T OF LABOR EMP. BENEFITS SEC. ADMIN., FACT SHEET: MEWA ENFORCEMENT (2013), https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/factsheets/mewa-enforcement.pdf [https://perma.cc/5B2H-3NJC] (emphasis added).

43. As described in this section, while DOL guidance pre-2018 explicitly permitted MEPs in limited circumstances, by its absence of enforcement actions, the DOL appears to have allowed MEPs outside the scope of its guidance to continue operating.

44. ERISA Section 3(2) defines an employee pension benefit plan as "any plan, fund, or program . . . established or maintained *by an employer* or by an employee organization, or by both, to the extent that by its express terms . . . it provides retirement income to employees. . . ." 29 U.S.C.A. § 1002(2)(A) (West) (emphasis added).

45. 29 U.S.C.A. § 1002(5) (West) (emphasis added).

46. U.S. Dep't of Labor, EBSA Advisory Opinion Letter 2012-04A, at 5 (May 25, 2012), https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/guidance/advisory-opinions/2012-04a.pdf [https://perma.cc/D2UY-4WNE] [hereinafter Advisory Opinion Letter 2012-04A]; U.S. Dep't of Labor, EBSA Advisory Opinion Letter 2012-03A, at 4 (May 25, 2012) [hereinafter Advisory Opinion Letter 2012-03A].

47. Advisory Opinion Letter 2012-04A, *supra* note 46, at 5. According to the Department of Labor:

> [R]elevant factors in determining whether a purported plan sponsor is a bona fide group or association of employers include the following: how members are solicited; who is entitled to participate and who actually participates in the association; the process by which the association was

group or association is "bona fide" turned on "whether there [was] a sufficient common economic or representational interest or genuine organizational relationship" in the group or association.[48] To answer this question, the DOL looked to

> (1) [w]hether the group or association is a bona fide organization with business/organizational purposes and functions *unrelated* to the provision of benefits; (2) whether the employers share some commonality and genuine organizational relationship *unrelated* to the provision of benefits; and (3) whether the employers that participate in a plan, either directly or indirectly, exercise control over the plan, both in form and substance.[49]

Given the DOL requirements that the function of the group or association be unrelated to the provision of benefits, and that the participating employers share "some commonality of interest," the number of such group or association plans has been relatively limited.[50]

2. PEO MEPs

The PEO industry has grown quickly over the last several decades. While only approximately 200 PEOs existed in 1984, by 2019 there were nearly a thousand PEOs that contracted with over 175,000 small and mid-sized businesses and provided human resources support to roughly 3.7 million employees.[51] In a typical PEO arrangement, the PEO provides various human resources (HR) services and employee benefits to client employers. To facilitate this kind of HR outsourcing, PEOs commonly serve as the "employers-of-record" for the "worksite employees" of the participating employers ("clients"). The "co-employment" arrangement is intended to allow a participating employer to transfer many of its key employer responsibilities to the PEO while retaining control over its operations and workforce management.[52] In each case, the allocation and

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> formed, the purposes for which it was formed, and what, if any, were the preexisting relationships of its members; the powers, rights, and privileges of employer members that exist by reason of their status as employers; and who actually controls and directs the activities and operations of the benefit program. The employers that participate in a benefit program must, either directly or indirectly, exercise control over the program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the program.

Id.

48. Final Regulation, *supra* note 20, at 37,511.

49. *Id.* (emphasis added).

50. While plans do not self-identify as group or association MEPs and the DOL does not provide any relevant statistics on this point, an analysis of Form 5500s filed by MEPs in 2016 suggests that there are fewer than one hundred group or association plans. By comparison, there are several hundred PEO MEPs, several thousand corporate MEPs, and over two hundred thousand individual employer plans. *See infra* Part III.C.

51. Salkin, *supra* note 7, at 35 ("In 1984 only approximately 200 PEOs existed, while in 2001 it was estimated that there were over 2,000 PEOs in operation. They are found in every state, believed to be growing at a rate of 20% to 30% per year, and in 2001 were estimated to employ between two and three million individuals."); *Industry Statistics*, NAT'L ASS'N PROF. EMPLOYER ORGS., https://www.napeo.org/what-is-a-peo/about-the-peo-industry/industry-statistics [https://perma.cc/WN6E-AJKL] (last visited Feb. 21, 2019) (stating that there are currently "907 PEOs in the United States").

52. For example, a PEO such as Oasis Outsourcing Holdings, Inc. describes the retirement plan as follows:

> The Plan is a defined contribution plan established by Oasis Outsource Holdings, Inc. (the "Company"), a professional employer organization ("PEO"). A PEO provides a comprehensive,

sharing of employer responsibilities between the PEO and the client is delineated in a client services agreement.[53]

In addition to handling payroll functions, some PEOs offer retirement benefits through a MEP structure. In such arrangements, the client employers may be permitted to customize certain plan design options, including the specific terms of vesting, eligibility, and matching or profit-sharing contributions. The PEO serves as the plan sponsor and handles the tasks of plan administration, fund selection and monitoring, asset management, recordkeeping, plan document maintenance and interpretation, and compliance with various DOL reporting and audit requirements. Like other plan sponsors, PEOs may delegate certain functions to third-party service providers. In such cases, PEOs handle the selection and oversight of the service providers to the plan.

Despite the proliferation of PEOs, prior to 2018, the DOL had never directly addressed the status of PEO-sponsored benefit plans. In particular, while Section 3(5) defines an "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan," prior to 2018, the DOL had not articulated a test for determining whether a PEO is an "employer" under ERISA.[54]

The IRS, however, had begun to address the status of PEOs and PEO-sponsored retirement plans. The IRS had recognized that a PEO may offer a MEP for its clients under the Internal Revenue Code (IRC). The IRC explicitly recognizes MEPs under Section 413(c), which provides that a MEP is a single qualified plan that is maintained by two or more unrelated employers.[55] Notably, before the legislative reforms of 2019, participating employers in MEPs were treated as a single employer for some purposes[56] but as separate employers for others.[57] Even where participating employers were analyzed separately under various IRC requirements for qualified retirement plans, under the so-called "one bad apple" rule, the IRS historically considered one employer's violation of the rules as infecting the entire MEP. One employer's failure to comply with tax code requirements for "qualified" retirement plans could cause the entire MEP to become "disqualified" and lose

> bundled outsourcing solution, including payroll, human resources, benefits, and workers' compensation to its clients. To reflect the coemployment relationship among the Company, its adopting affiliated companies, if any, and other employers and employees, the Company deemed it advisable and in the best interests of the employees that the Plan qualify as a multiple employer plan. Employers in a multiple employer plan may have different benefit formulas for their participating employees. Accordingly, each adopting employer executes an adoption agreement with terms and conditions specific to such employer.

Form 5500 2016 Annual Report, OASIS RETIREMENT SAVINGS PLAN, *Notes to Financial Statements*.

53. Salkin, *supra* note 7, at 34. For additional background on PEOs, see generally BASSI & MCMURRER, *supra* note 24.

54. 29 U.S.C.A. § 1002 (West 2019).

55. In a 2002 Revenue Procedure, the IRS stated explicitly that plans provided by PEOs would be treated as MEPs under the Code. IRS Rev. Proc. 2002-21, 26 C.F.R. § 601.201 (May 13, 2002), https://www.irs.gov/pub/irs-drop/rp-02-21.pdf [https://perma.cc/K384-JU3Z].

56. Employers participating in a MEP were treated as one employer for the following provisions under the Internal Revenue Code: eligibility, exclusive benefit rule, vesting, Section 415 limits, Section 402(g) limits, and plan disqualification provisions. 26 CFR § 1.413-2 - Special rules for plans maintained by more than one employer.

57. Employers participating in a MEP were treated as separate employers for the following provisions under the Internal Revenue Code: coverage testing, highly compensated employee determination, IRC § 413(c)(6), benefits, rights, and features testing, Treas. Reg. 1.415(a)-1(e), and top heavy testing, Treas. Reg. 1.416-1, G-2.

its tax-advantaged status.[58] The "one bad apple" rule, together with the lack of clear DOL guidance on the legal status of PEO MEPs prior to 2018, had limited the growth of PEO-sponsored plans.[59] In July of 2019, the IRS proposed an exemption to the "one bad apple" rule that compliant employers could claim under certain circumstances.[60] In December of 2019, the SECURE Act eliminated the one bad apple rule entirely.[61]

3. Corporate MEPs

A common—and less controversial type of MEP—arises as a result of corporate combinations and reorganizations.[62] Such "corporate MEPs" cover employees of related employers where the common ownership is insufficient to treat the employers as a single employer under the Internal Revenue Code.[63] Such MEPs tend to cover fewer individual employers and, in many respects, resemble more traditional single-employer plans.

4. Open MEPs

In contrast, the so-called "open MEP" has generated the most controversy, and has been the focus of most legislative reform proposals. While the DOL did not permit "open MEPs" in its 2019 regulation, the SECURE Act allows for this very arrangement.[64] An "open MEP" covers employees of employers with no relationship other than their joint participation in the MEP.[65] Prior to 2012, several entities had attempted to sponsor and administer 401(k) plans covering their own employees in addition to employees of hundreds of unrelated employers, each of which adopted the respective plans as "co-sponsor[s]."[66] These "open MEPs" sought to be treated as single "employee pension benefit plan[s]" within the meaning of ERISA Section 3(2). In two Advisory Opinions

58. Treas. Reg. § 1.413-2(a)(3)(iv) (2020).

59. *See* Hazel Bradford, *IRS Proposes 'One Bad Apple' Multiple Employer DC Plan Exemption*, PENSIONS & INV. (July 3, 2019) (observing that "[t]he notice of proposed rule-making . . . addresses what many consider the biggest barrier to employers joining MEPs, the risk that one employer's non-compliance could disqualify all members").

60. Prop. Treas. Reg. § 413(c), 84 Fed. Reg. 31,777 (proposed July 3, 2018) (to be codified at 26 C.F.R. pt. 1).

61. SECURE Act, *incorporated into* Further Consolidated Appropriations Act, Pub. L. No. 116-94, § 101(a).

62. For example, per its 2016 Form 5500, the Flower City Group, Inc. Savings Plan is a multiple-employer plan that is sponsored by Flower City Group, Inc. The plan includes as participating employers Flower City Group, Inc., Flower City Printing, Inc., Flower City Packaging, Panther Solutions, and Lazer, LLC. Flower City Group is the parent company of Flower City Printing, Inc.

63. Participating employers in these types of MEPs are not related under the terms of IRC § 414(b) (controlled groups), IRC § 414(c) (trades or businesses under common control), or IRC § 414(m) (affiliated service groups). *See generally* Heidi Eckel Alessi et al., *Multiple Employer Plans: Keys to Compliance and Operation*, AM. L. INST. CONTINUING LEGAL EDUC. (June 15, 2015).

64. Final Regulation, *supra* note 20, at 37,517 (noting that the DOL rule does not cover open MEPs); SECURE Act, *incorporated into* Further Consolidated Appropriations Act, Pub. L. No. 116-94 (stating that "no common interest required for pooled employer plans").

65. Proposed Regulation, *supra* note 19, at 53,542 (identifying open MEPs as "plans that cover employees of employers with no relationship other than their joint participation in the MEP").

66. Advisory Opinion Letter 2012-04A, *supra* note 46 (citing Advisory Opinions 2003-17A and 2001-04A).

issued in 2012, the Department of Labor rejected this position.[67] The DOL opined that "where several unrelated employers merely execute [participation agreements] . . . as a means to fund or provide benefits, in the absence of any genuine organizational relationship between the employers, no employer association can be recognized for purposes of ERISA Section 3(5)."[68] The DOL further held that the open MEP sponsor appeared to be acting more as a service provider to the plan—like a third-party administrator or investment advisor—rather than "in the interest" of the employers.[69] Accordingly, the arrangements at issue would be treated as a collection of individual plans and each individual employer would be subject to ERISA's reporting, audit, and bonding requirements.[70]

B. The 2018-2019 Regulatory Guidance

While the 2012 DOL guidance halted the growth of open MEPs, PEO-sponsored MEPs continued to exist and to attract new participants.[71] Then in 2018 and 2019, the Department of Labor issued two regulations, one addressing health plans and the other addressing retirement plans. These regulations significantly alter the previous agency guidance on the definition of "employer" under ERISA. While stopping short of embracing truly open MEPs, both rules make it easier for employers to join association MEPs. In addition, the rule on retirement plans addresses, for the first time, PEO-sponsored plans.

1. Association Health Plans

To understand the 2018 and 2019 DOL guidance on retirement MEPs, it is necessary to understand the rule that set forth the agency's new position on employer-pooling arrangements. In June of 2018, the DOL finalized regulatory guidance on so-called "association health plans."[72] The regulation—which is currently being challenged in court[73]—broadens the criteria under ERISA Section 3(5) for determining when unrelated employers may join together in an employer group or association that is treated as the "employer" sponsor of a *single* multiple-employer group health plan. The final rule eliminates the DOL's prior "touchstone" requirement that a group or association must have

67. *Id.* at 1, 7; Advisory Opinion Letter 2012-03A, *supra* note 46 at 1, 4.

68. Advisory Opinion Letter 2012-04A, *supra* note 46, at 5.

69. *Id.* at 4–5.

70. *Id.* at 6; Advisory Opinion Letter 2012-03A, *supra* note 46, at 4.

71. Existing PEOs appear to take the position that the DOL guidance in the 2012 Advisory Opinion Letters does not apply to them. The empirical evidence suggests that such PEO MEPs function primarily through a co-employment relationship with participating employers. Although the DOL advisory letters do not expressly address PEO-sponsored MEPs, some observers interpreted footnote 2 in Advisory Opinion 2012-04A as suggesting that because PEOs act "on behalf of their client employers," the PEO plans would meet the Section 3(5) definition of "employer" and thus be treated as single plans under ERISA.

72. AHP Regulation, *supra* note 21, at 28,912.

73. The DOL rule—and specifically the liberalization of the commonality requirements—was challenged by a dozen attorneys general, who filed a suit in the U.S District Court for the District of Columbia. *See, e.g.*, Madison Alder, *Labor Dept. Health Rule Faces Legal Challenge from 12 States*, BLOOMBERG BNA (July 26, 2018), https://news.bloomberglaw.com/employee-benefits/labor-dept-health-rule-faces-legal-challenge-from-12-states-1 [https://perma.cc/6WZZ-JBSE]. On March 28, 2019, U.S. District Judge John Bates struck down the DOL's expansion of the term "employer" under ERISA, finding that it marked an unlawful attempt to expand the meaning of the term. New York v. United States Dep't of Labor, 363 F. Supp. 3d 109, 136 (D.D.C. 2019), *appeal docketed*, No. 19-5125 (D.C. Cir. Apr. 30, 2019).

"a sufficiently close economic or representational nexus to the employers and employees that participate in the plan" in order to be treated as an ERISA Section 3(5) employer.[74] Instead, the final rule allows employers to band together for the express purpose of offering health coverage if they either are: "(1) in the same trade, industry, line of business, or profession; or (2) have a principal place of business within a region that does not exceed the boundaries of the same State or the same metropolitan area (even if the metropolitan area includes more than one State)."[75] Under the new guidance—and in an important departure from past precedent—employers may band together in new organizations whose "primary purpose" is to "to offer and provide health coverage to its employer members and their employees" so long as the group or association has "*at least one* substantial business purpose unrelated to offering and providing health coverage or other employee benefits to its employer members and their employees."[76] As an example, the final rule suggests that to satisfy this requirement "a bona fide group or association could offer other services to its members, such as convening conferences or offering classes or educational materials on business issues of interest to the association members."[77]

While the 2018 regulation specifically addressed the provision of *health insurance* by groups of unrelated employers, because it modified the meaning of "employer" under ERISA Section 3(5), it strengthened the regulatory foundation for the expansion of employer-pooling arrangements for retirement plans.[78] Indeed, less than four months after the DOL finalized the new guidance for association health plans, it applied the very same approach to the pooling arrangements for the provision of retirement benefits.

2. Association Retirement Plans and PEO MEPs

In October of 2018, the Department of Labor issued a proposed regulation addressing association retirement plans and "other multiple employer plans."[79] After the notice and comment period, the DOL issued the final regulation in July of 2019.[80] With the goal of improving "access to employer-sponsored retirement savings plans in America," the final regulation modifies prior agency guidance on two types of multiple-employer plans: association plans and plans sponsored by PEOs.[81] With respect to the former, the DOL's guidance seeks to "distinguish bona fide group or association MEPs," which are permitted under the final rule, from products and services offered by purely commercial pension administrators, managers, and record keepers, which do not qualify as multiple-employer plans under the DOL guidance.[82]

74. AHP Regulation, *supra* note 21, at 28,913.

75. *Id.* at 28,962.

76. *Id.* at 28,918 (emphasis added).

77. *Id.*

78. Notably, the Department of Labor has stated explicitly that it "is of the view, however, that the term 'employer' should have the same meaning in this context whether applied to the term welfare plan or pension plan." Advisory Opinion Letter 2012-04A, *supra* note 46, at 6.

79. Proposed Regulation, *supra* note 19, at 53,534–37.

80. Final Regulation, *supra* note 20, at 37,511–12.

81. *Id.* at 37,509–10.

82. By distinguishing "bona fide" associations "from products and services offered by purely commercial pension administrators, managers, and record keepers," the DOL rule in effect rejected the so-called "open MEPs." As the DOL explained, even though "it is possible to say" in a "broad colloquial sense" that commercial service providers act indirectly in the interest of their customers, permitting commercial pension administrators,

The criteria for identifying a bona fide group or association for purposes of sponsoring a retirement plan are identical—with one exception—to the criteria for identifying a bona fide group or association for health plans.[83] Under the new guidance, to be considered "bona fide," the group or association must, among other factors,

> (1) have at least one substantial business purpose unrelated to offering and providing MEP coverage or other employee benefits, although the primary purpose of the group or association may be to offer and provide MEP coverage,
> (2) have a formal organizational structure with a governing body and have by-laws or other similar indications of formality;
> (3) have the functions and activities of the group or association be controlled—in form and substance—by its employer members,
> (4) have employer members that share a commonality of interest, such that the employers are in the same trade, industry, line of business or profession; or each employer must have a principal place of business in the same region that does not exceed the boundaries of a single State or a metropolitan area, and
> (5) not be a bank or trust company, insurance issuer, broker-dealer, or other similar financial services firm (including pension record keepers and third-party administrators), or owned or controlled by such an entity or any subsidiary or affiliate of such an entity.[84]

In addition to revising the guidance for association or group MEPs, the new rule surprised many observers by providing the Department's first direct guidance on professional employer organizations.[85]

To support the inclusion of retirement plans sponsored by PEOs—while simultaneously rejecting plans sponsored by purely commercial pension administrators, managers, and record keepers—the new guidance seeks to identify "bona fide" PEOs that act "indirectly in the interest of [its client] employers" and, as such, can qualify as "employers" under ERISA Section 3(5). Specifically, the final regulation requires the PEO to perform "substantial employment functions on behalf of its client employers."[86] According to the Department of Labor, requiring the PEO to stand in the shoes of the participating client employers—by assuming and performing substantial employment

managers, and record keepers to sponsor group or association plans would read ERISA's employment-based limitation out of the statute. *Id.* at 37,513.

83. *Id.* at 37,543.

84. *Id.*

85. In this regard, the final regulation differs significantly from the rule on association health plans, in which the Department made the decision to not to address PEOs.

86. Although the determination of whether a PEO performs "substantial employment functions" is based on the relevant facts and circumstances, pursuant to a safe harbor in the regulation, a PEO shall be considered to perform substantial employment functions if it satisfies the following criteria concerning the PEO's responsibilities and obligations with respect to its client employers: payment of wages to employees of client-employers, without regard to the receipt or adequacy of payment from those client employers; reporting, withholding, and paying any applicable federal employment taxes, without regard to the receipt or adequacy of payment from those client employers; recruiting, hiring, and firing workers; responsibility for and has substantial control over the functions and activities of any employee benefits which the service contract may require the PEO to provide, without regard to the receipt or adequacy of payment from those client employers for such benefit. Final Regulation, *supra* note 20, at 37,544.

functions that the client employers otherwise would fulfill with respect to their employees—is what distinguishes bona fide PEOs from service providers or other entrepreneurial ventures that in substance merely market or offer client employers access to retirement plan services and products.[87]

In addition to requiring the PEO "to stand in the shoes" of the client employers, the final regulation also requires the PEOs to "have substantial control over the functions and activities of the MEP" as the plan sponsor, the plan administrator, and a named fiduciary. Pursuant to ERISA, the assumption of such roles necessarily imposes fiduciary obligations on the PEO. The preamble to the final regulation makes clear, however, that participating employers would retain fiduciary responsibility for selecting and monitoring the PEO arrangement and forwarding required contributions.[88] The preamble also makes clear that the DOL believes that the MEPs permitted by the agency guidance will improve access to employment-based retirement savings by reducing the various costs associated with such arrangements.[89]

C. 2019 Legislative Reform – The SECURE Act

The goals and benefits of multiple-employer plans that the DOL set forth in its 2019 regulation also feature prominently in the SECURE Act. The SECURE Act is premised on the notion that "a single, multiple employer plan can provide economies of scale that result in lower administrative costs than apply to a group of separate plans covering the employees of different employers."[90] Accordingly, the aim of the legislation is to "remove possible barriers to broader use of multiple employer plans."[91] The law accomplishes this by eliminating the so-called "one bad apple" rule under the Internal Revenue Code, and the prior requirements under ERISA for a common interest among participating employers in a multiple-employer plan.[92]

Under the SECURE Act framework, a so-called "pooled plan provider" can establish a multiple-employer plan for employers without any common characteristics. The pooled employer provider must register with the DOL and be subject to extensive discretion by the DOL to impose administrative, reporting, and disclosure requirements in forthcoming regulations. The pooled plan provider also must be designed by the terms of the plan as a named fiduciary, as the plan administrator, and as the person responsible for performing all administrative duties. The individual employers, meanwhile, retain fiduciary responsibility for the selection and monitoring of the pooled plan provider. To support employers in these tasks, the SECURE Act requires pooled employer plans to provide that employers in the plan, and participants and beneficiaries, are not subject to "unreasonable restrictions, fees, or penalties with regard to ceasing participation, receipt of distributions,

87. *Id.* at 37,518.

88. *Id.* at 37,510.

89. *Id.*

90. REPORT OF THE COMMITTEE ON WAYS AND MEANS HOUSE OF REPRESENTATIVES ON H.R. 1994, H.R. REP., NO. 116-65, pt. 1 (2019).

91. *Id.*

92. Before the passage of the SECURE Act, under the so-called "one bad apple" rule, the failure by one employer to satisfy applicable qualification requirements under the Internal Revenue Code could result in disqualification of—and the loss of favorable tax treatment for—the plan as a whole.

or otherwise transferring assets of the plan."[93]

The explicit reference to fees in the SECURE Act reflects an important acknowledgement of the significant consequences that such fees may have on the participants' savings. Part II.D below describes the different costs and summarizes existing research on fees in 401(k) plans. Part III then turns to the empirical analysis to assess the merits of the cost-savings claim at the heart of both the recent regulatory and legislative reforms.

D. The Fees Framework

The provision of a 401(k) retirement plan entails a myriad of fees that plan sponsors must negotiate and monitor. The largest component of 401(k) plan fees and expenses is typically associated with managing plan investments. Fees for investment management and other investment-related services are generally assessed as a percentage of assets invested by individual plan participants and are ultimately deducted from the investment returns. In addition, there are the administrative costs of setting up and operating the plans, including the provision of recordkeeping (maintaining plan records, processing employee contributions and distributions, and issuing account statements to employees), accounting, reporting, audit,[94] legal, and trustee services.[95] For example, the Department of Labor subjects every employee benefit plan to annual reporting requirements.[96] Plans that have at least 100 participants are also subject to annual audit requirements.[97] The Department of Labor estimates that the cost of completing the annual report ranges from $276 to $1686 per plan, while audit costs range from $6500 to $13,000 per plan.[98] Such costs may be paid by the employer but are more commonly paid out of plan assets.

In recent years, retirement plan fees have garnered the attention of researchers, markets participants, and plaintiffs' attorneys.[99] Collectively, the closer scrutiny has

93. SECURE Act, *incorporated into* Further Consolidated Appropriations Act, Pub. L. No. 116-94.

94. Certain reporting and audit requirements vary by plan size. For example, ERISA regulations generally exempt plans with fewer than 100 participants from the audit requirement. 29 C.F.R. § 2520.104–46(b)(2) (2020).

95. ERISA Section 412 requires every fiduciary of an employee benefit plan and every person who handles funds or other property of such plan to be bonded.

96. The scope of reporting requirements varies by plan size. "Small" plans with fewer than 100 participants are subject to less stringent annual reporting requirements. *See, e.g.*, U.S. DEP'T OF TREASURY & U.S. DEP'T OF LABOR, INSTRUCTIONS FOR FORM 5500: ANNUAL RETURN/REPORT OF EMPLOYEE BENEFIT PLAN 2 (2017), https://www.dol.gov/sites/default/files/ebsa/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-5500/2017-instructions.pdf [https://perma.cc/MN3X-WFUC].

97. 29 C.F.R. § 2520.104–46.

98. Final Regulation, *supra* note 20, at 37,535.

99. *See, e.g.*, Anne Tergesen, *The Lawyer on a Quest to Lower Your 401(k) Fees*, WALL ST. J. (June 9, 2017), https://www.wsj.com/articles/the-lawyer-on-a-quest-to-lower-your-401-k-fees-1497000607 [https://perma.cc/78SL-4P6Y] (discussing a plaintiff attorney who has filed numerous 401(k) fee lawsuits); DELOITTE CONSULTING & INV. CO. INST., INSIDE THE STRUCTURE OF DEFINED CONTRIBUTION/401(K) PLAN FEES, 2013: A STUDY ASSESSING THE MECHANICS OF THE 'ALL-IN' FEE 2 (2014), https://www.ici.org/pdf/rpt_14_dc_401k_fee_study.pdf [https://perma.cc/VTP5-XPL5] (discussing a study on 401(k) fees); BRIGHTSCOPE/ICI REPORT, *supra* note 3, at 51–62 (discussing 401(k) fees); Sean Collins et al., *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2016*, ICI RES. PERSP. 6 (June 2017) (discussing 401(k) fee arrangements); Dilroop Sidhu et al., *Plan Sponsor Fee Litigation Cases on the Rise*, WASH. WATCH, 18 (Fall 2017), https://www.groom.com/wp-content/uploads/2017/12/1888_Washington-Watch_Fall_2017_Final.pdf [https://perma.cc/K3QQ-B456] (discussing the rise of 401(k) fee litigation).

revealed striking disparities in the fees incurred by different plans and plan participants. On average, larger plans with greater pools of assets tend to have lower investment management costs, and can spread certain fixed administrative costs among more individual participants.[100] As illustrated in Table 1, high fees can have devastating effects on the ability of plan participants to save for retirement. In some cases, researchers have documented that the additional fees from poorly constructed plan menus "consume the tax benefits of investing in a 401(k) for a young employee."[101]

Table 1: Effect of Plan Fees (Expense Ratios) on Total Portfolio Value, Assuming $100,000 Portfolio Invested for 20 Years, No Additional Contributions[102]

	Plan A	Plan B	Plan C	Plan D
Assumed Gross Annual Return	4%	4%	4%	4%
Expense Ratio	**0.25%**	**0.50%**	**1.00%**	**1.50%**
Net Annual Return	3.75%	3.50%	3.00%	2.50%
Assets in Year 20	$208,815.20	$198,978.89	$180,611.12	163,861.64
Difference from Plan A	–	-$9,836.31	-$28,204.08	-44,953.56
Shortfall in Assets in Year 20 as Compared to Plan A	–	-4.71%	-13.51%	-21.53%

Yet while existing research documents the economies of scale in single-employer retirement plans, such research has not specifically studied whether the same effect exists in multiple-employer plans. As described in more detail below, this Article adds to existing scholarship by examining the impact of plan size and sponsor sophistication in the context of employer-pooling arrangements.

III. Empirical Analysis

While proponents of MEPs emphasize the potential benefits of plans that bring together multiple employers, this Article aims to systematically analyze both the benefits

100. Ayres & Curtis, *supra* note 7, at 1486.

101. *Id.*

102. *See, e.g.*, SEC Office of Investor Education and Advocacy, Updated Investor Bulletin: How Fees and Expenses Affect Your Investment Portfolio (June 26, 2019), https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/updated [https://perma.cc/4XGS-9SKY], https://www.sec.gov/investor/alerts/ib_fees_expenses.pdf [https://perma.cc/FKB8-F9AQ]. Various industry groups have also sought to illustrate how high expense ratios in 401(k) retirement plans can "demolish" retirement savings. For example, ForUsAll suggests that over a 40-year period in which a plan participant invests $10,000 a year, and is able to get a 7% return on investments, the difference between fees of .11% and 1.34% is over half a million dollars of lost potential retirement assets. Evan Ross, *401(k) Expense Ratios: What Are Average 401(k) Fund Fees?*, ForUsAll (Mar. 25, 2019), https://www.forusall.com/401k-blog/401k-expense-ratio/ [https://perma.cc/KA8R-NQGE]; *see also* Dayana Yochim & Jonathan Todd, *How a 1% Fee Could Cost Millennials $590,000 in Retirement Savings*, NerdWallet, https://www.nerdwallet.com/blog/investing/millennial-retirement-fees-one-percent-half-million-savings-impact/ [https://perma.cc/GB9H-QMSV] (last visited Mar. 6, 2020) (demonstrating that under certain circumstances "paying just 1% in fees would cost a millennial more than $590,000 in sacrificed returns over 40 years of saving").

and the potential pitfalls of such employer-pooling arrangements.[103]

A. Theoretical Expectations

In theory, MEPs—and particularly PEO MEPs—facilitate the pooling of resources and bargaining power, and provide economies of scale in plan administration and asset management that are otherwise unavailable to small employers acting on their own. In addition, many individual employers lack the knowledge and expertise to optimize plan administration on behalf of their employees.[104] Such employers frequently cite regulatory complexity—and the associated legal liability exposure—as significant deterrents to plan sponsorship.[105] PEOs, at their very core, aim to centralize and professionalize all forms of human resources expertise, and some PEOs explicitly market the resulting decrease in potential legal liability for participating employers.[106]

Given the pooling of assets and the relative sophistication of the plan sponsors, it is reasonable to expect that participants in multiple-employer plans should have access to lower investment management fees than they would as part of small or medium single-employer plans.[107] The expectation with respect to administrative expenses, however, is subject to competing influences. On the one hand, the multiple-employer structure eliminates the reporting requirements for individual participating employers, thus leaving the MEP itself with one set of reporting requirements for the plan as a whole.[108] MEPs

103. *See, e.g.*, MORSE & ANTONELLI, *supra* note 8, at 1 ("A MEP offers several advantages for employers, including: reduced investment and administrative fees; a simplified turnkey process for obtaining a plan document, selecting and monitoring the investment platform and the recordkeeper, IRS reporting, obtaining an independent audit, and similar chores; and the ability to outsource most of the heavy lifting to the sponsor and its team of outside experts so employers can significantly minimize their exposure to possible ERISA liability.").

104. U.S. GOV'T ACCOUNTABILITY OFF., GAO 13-748T, RETIREMENT SECURITY: CHALLENGES AND PROSPECTS FOR EMPLOYEES OF SMALL BUSINESSES (2013), http://www.gao.gov/assets/660/655889.pdf [https://perma.cc/P4FL-3GRP] (stating that "GAO's work demonstrates the need for plan sponsors, particularly small sponsors, to understand fees in order to help participants secure adequate retirement savings").

105. U.S. GOV'T ACCOUNTABILITY OFF., GAO 12-326, PRIVATE PENSIONS: BETTER AGENCY COORDINATION COULD HELP SMALL EMPLOYERS ADDRESS CHALLENGES TO PLAN SPONSORSHIP (2012), https://www.gao.gov/assets/590/589055.pdf [https://perma.cc/4B36-LHKV] (finding that "many small employers said they feel overwhelmed by the number of retirement plan options, administration requirements, and fiduciary responsibilities"). According to a 2017 PEW survey, "employers that do not offer [retirement] plans pointed to the financial cost (37 percent) and organizational resources (22 percent) needed to start a plan as barriers." *Employer Barriers to and Motivations for Offering Retirement Benefits*, PEW CHARITABLE TRS. (June 21, 2017), http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/06/employer-barriers-to-and-motivations-for-offering-retirement-benefits#0-overview [https://perma.cc/DB6L-GN8E].

106. Despite such marketing, however, individual employers are unlikely to be able to avoid all liability and, under the current regulatory regime, remain ERISA fiduciaries in selecting and monitoring PEOs. *See generally* Colleen E. Medill, *Regulating ERISA Fiduciary Outsourcing*, 102 IOWA L. REV. 505 (2017).

107. Final Regulation, *supra* note 20, at 37,510 (noting that "investment companies often charge lower fund fees for plans with greater asset accumulations" and suggesting that "because MEPs facilitate the pooling of plan participants and assets in one large plan, rather than many small plans, they enable small businesses to give their employees access to the same low-cost funds as large employers offer").

108. *Id.* at 37,533 (pointing to the fact that "a MEP can file a single annual return/report and obtain a single bond in lieu of the multiple reports and bonds necessary when other providers of bundled financial services administer many separate plans"). With respect to bonding in particular, the Final Regulation suggests that a single bond covering a large number of individuals may be cheaper than a large number of bonds covering the same individuals separately or in smaller groups. Furthermore, the structure of the MEPs may mean that there are

may also take advantage of certain scale efficiencies and relatively greater bargaining power to reduce the costs charged by various third-party service providers to the plan.[109] On the other hand, certain factors may diminish or offset the potential cost savings described above. First, relative to the reporting and audit requirements for plans with fewer than 100 participants, larger MEPs face more extensive reporting and audit obligations.[110] Second, the aggregation of numerous small employers may increase the marginal cost of certain types of services—such as product distribution—provided to plans.[111]

Furthermore, with respect to both asset management and administrative expenses, the PEO may not necessarily have the incentive to minimize the costs or to pass on the cost savings to their employer customers.[112] Unlike individual employers, PEO plan sponsors are in the business of benefits administration and derive their profits from providing various administrative services to client employers. As is evident from the required disclosures, at least some of the administrative services are likely to be provided to the MEPs by the PEOs themselves, or by entities affiliated with the PEOs.[113] Even where the services are provided

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fewer individuals handling plan funds, and thus fewer people subject to ERISA's bonding requirements. *Id.* The Final Regulation provides some estimates of the potential cost-savings:

> In terms of cost savings associated with Form 5500 filings without accounting for audit costs, cost savings for small single-employer DC plans filing Form 5500-SF would be $259.50 per filer if it joins an association-sponsored MEP or $272.15 per filer if it joins a PEO-sponsored MEP; for small single employer DC plans not eligible for Form 5500-SF cost savings would be $417.76 per filer if it joins an association-sponsored MEP as opposed to $430.40 per filer if it joins a PEO-sponsored MEP; for large single employer DC plans cost savings would be $1,668.91 per filer if it joins an association-sponsored MEP as opposed to $1,681.55 per filer if it joins a PEO-sponsored MEP.

Id. at 37,536 n.103.

109. *Id.* at 37,533 (stating that "[a]s with asset management, scale efficiencies often are available with respect to other plan services" so that "the marginal costs for services such as marketing and distribution, account administration, and transaction processing often decrease as customer size increases").

110. As compared to a small plan with fewer than one hundred participants, a large plan "is generally subject to more stringent reporting and audit requirements." *Id.* at 37,535. Notably, however, the SECURE Act permits the Secretary of Labor to prescribe by regulation simplified annual reports for any MEP that covers fewer than 100 participants; or that covers fewer than 1000 participants, but only if no individual employer has 100 or more participants covered by the plan. *See* SECURE Act, *incorporated into* Further Consolidated Appropriations Act, Pub. L. No. 116-94.

111. Final Regulation, *supra* note 20, at 37,533 (observing that while scale efficiencies are generally available for administrative services, "[i]t is also possible, however, that the cost to MEPs of servicing their small employer-members may diminish or even offset such efficiencies").

112. The Final Regulation assumes that "[m]any MEPs would benefit from scale advantages that small businesses do not currently enjoy, and the Department expects that MEPs *will pass some of the attendant savings onto participating employers and participants*." *Id.* at 37,532–33 (emphasis added). Furthermore, the Final Regulation states that "[v]ery large plans may sometimes exercise their own market power to negotiate lower prices, *translating what would have been higher revenue for financial services providers into savings for member employers and employee participants*." *Id.* at 37,533 (emphasis added). Notably, the DOL invited but did not receive comments on "the conditions under which MEPs will pass more or less of the attendant savings to different participating employers." *Id.* at 37,533.

113. Consider, for example, Oasis Outsourcing, a PEO identified in a recent complaint. *See infra*, note 114. The Oasis Retirement Savings Plan is a PEO MEP sponsored by Oasis Outsourcing Holdings, Inc. and its affiliates. For this plan, Schedule C (Service Provider Information) of the 2016 Form 5500 lists Oasis Outsourcing as the "plan administrator," a service for which it was paid $277,167 by the plan. Oasis Retirement Savings Plan, Form 5500, Annual Return/Report of Employee Benefit Plan (2016). Recent litigation has also drawn light to potential challenges associated with PEO plans paying for various proprietary services provided by the plan

by third parties, higher participant fees may allow the PEO to minimize its own "out-of-pocket" expenses, or to enjoy various benefits—such as marketing or promotion of PEO services—from service providers that collect the individual participant fees.[114]

This economic reality—coupled with the history of abuse in employer pooling arrangements—raises the broader question of agency costs in PEO MEP arrangements.[115] To the extent that participating employers delegate or "outsource" the majority of plan administration to MEP sponsors—and particularly PEOs—they risk that such PEOs will abuse their control over the plan assets and administration. The risk is particularly acute given the regulatory complexity associated with qualified retirement plans and the difficulty of monitoring service providers in this opaque space. Employers that choose to "outsource" their human resources functions may be in an even weaker position to exert meaningful oversight, particularly if the fees for various HR services are bundled, and if leaving a PEO MEP entails high switching costs.[116] Finally, in the context of PEOs that bring together hundreds of unrelated employers, the willingness of any one employer to expend resources to monitor the PEO may be reduced by incentives to free ride on the efforts of other participating employers.

The potential agency costs described above are not likely to be mitigated by the fiduciary governance framework that applies to single-employer plans in the United States. Both before and after the reforms adopted in 2019, in a PEO MEP, the PEO assumes fiduciary responsibilities on behalf of the plan, while the client employer retains fiduciary responsibility for selecting and monitoring the PEO.[117] Both the PEO and the client employers are subject to ERISA's fiduciary standards, a fact that the DOL believes will limit any fraud or abuse concerns. According to the Department of Labor, "[r]equiring PEOs to act as MEP fiduciaries mitigates fraud concerns related to the expansion of PEO-sponsored plans, because the final rule ensures that PEOs will assume ERISA fiduciary status and bear all associated responsibilities."[118] The SECURE Act similarly requires the

sponsor or its affiliates. *See, e.g.*, Complaint at 14–15, Pledger v. Reliance Tr. Co., 240 F. Supp. 3d 1314 (N.D. Ga. 2017).

114. *See, e.g.*, Complaint at 11, Clark v. Oasis Outsourcing Holdings, Inc. (S.D. Fla., Aug. 18, 2018).

115. For a discussion of the problems that have plagued MEWAs, multiemployer plans, and MEPs, see *supra* note 40. Although the DOL does not address agency costs per se, the Final Regulation states that "[t]he Department is aware that MEPs could be the target of fraud or abuse. By their nature, MEPs have the potential to build up a substantial amount of assets quickly and the effect of any abusive schemes on future retirement distributions may be hidden or difficult to detect for a long period." Final Regulation, *supra* note 20, at 37,527. The Final Regulation also does not offer any mechanism to mitigate such concerns. Instead, the DOL emphasizes that it "is not aware of direct information indicating that the risk for fraud and abuse is greater for MEPs than for other defined contribution pension plans" and that "single employer DC plans are also vulnerable to these abuses and to mismanagement." *Id.* In the case of association MEPs, the DOL claims that "[m]any small employers have relationships based on trust with trade associations that may sponsor MEPs under the proposal, and those associations have an interest in maintaining these trust relationships by ensuring that fraud does not occur in MEPs they sponsor." *Id.* at 37,538.

116. *See* Medill, *supra* note 106, at 512 (urging the Department of Labor to clarify "complete outsourcing cannot be used as a means for an employer to escape entirely its ERISA fiduciary responsibilities").

117. Per the DOL, "the MEP structure can . . . effectively transfer substantial legal risk to professional fiduciaries responsible for the management of the plan. . . . Although employers retain fiduciary responsibility for choosing and monitoring the arrangement and forwarding required contributions to the MEP . . . ." Final Regulation, *supra* note 20, at 37,510.

118. *Id.* at 37,538.

pooled plan provider to serve as a named fiduciary while maintaining that each employer in the plan retains fiduciary responsibility for selecting and monitoring the pooled plan provider.[119]

The governance model for PEO MEPs thus relies primarily on the fiduciary standard to constrain behavior that would not be in the best interest of plan participants and beneficiaries. In recent years, however, scholars have raised serious doubts about the effectiveness of the ERISA fiduciary regime. In the context of single-employer plans, scholars have emphasized the adversarial position of employers and employees with respect to matters of compensation,[120] the weakening of the fiduciary standard through case law,[121] and the challenges of enforcing the standard and obtaining remedies.[122] All of these factors are likely to be exacerbated in the context of PEO-sponsored plans. While the DOL suggests in its guidance that requiring "bona fide" PEOs to take on certain employment functions will mitigate fraud concerns, and that such a requirement distinguishes the PEOs from service providers or other ventures that merely offer client employers access to retirement plan services and products, the research on single-employer plans raises doubts about this claim.[123] Furthermore, to the extent that the SECURE Act permits such service providers and ventures to establish and administer multiple-employer plans, the governance risks referenced by the DOL become an even greater concern.

B. Data and Study Design

At a time when pooling arrangements are gaining traction as an alternative to single-employer plans, the critical challenge is to assess the merits of existing MEPs. At present,

119. SECURE Act, *incorporated into* Further Consolidated Appropriations Act, Pub. L. No. 116-94, § 101(a).

120. *See, e.g.*, Beverly Cohen, *Divided Loyalties: How the* Metlife v. Glenn *Standard Discounts ERISA Fiduciaries' Conflicts of Interest*, 2009 UTAH L. REV. 955, 973–74 (2009) (describing employers' conflicts of interest); Brendan S. Maher, *Regulating Employment-Based Anything*, 100 MINN. L. REV. 1257, 1297–1302 (2016) (describing the benefits and challenges of employment-based interventions); Brendan S. Maher & Peter K. Stris, *ERISA & Uncertainty*, 88 WASH. U. L. REV. 433, 472–73 (2010) (calling for a fundamental reexamination of the ERISA regulatory framework); Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391, 394 (2000) (examining the "perverse operation of ERISA's fiduciary regime" in the "administration of modern health care and pension benefit plans"); Jacob Hale Russell, *The Separation of Intelligence and Control: Retirement Savings and the Limits of Soft Paternalism*, 6 WM. & MARY BUS. L. REV. 35, 35 (2015) (explaining how "soft paternalism" has failed in a domain "rife with conflicts of interest"); Natalya Shnitser, *Trusts No More: Rethinking the Regulation of Retirement Savings in the United States*, 2016 BYU L. REV. 629, 656 (2016) (questioning the reliance on a trust-based fiduciary regime to regulate employer and employee conduct in the provision of retirement benefits).

121. *See, e.g.*, Peter J. Wiedenbeck, *Untrustworthy: ERISA's Eroded Fiduciary Law*, 59 WM. & MARY L. REV. 1007, 1024–33 (2018) (showing that case law developments have limited the intensity and strictness of ERISA fiduciary duties within their limited domain of application); *see also* Dana Muir & Norman Stein, *Two Hats, One Head, No Heart: The Anatomy of the ERISA Settlor/Fiduciary Distinction*, 93 N.C. L. REV. 459, 480–82 (2015) (describing how the courts' distinction between "fiduciary" and "settlor" conduct by employers has permitted some employers "to bypass express and implied ERISA requirements" and to "exploit ERISA's broad preemption of state law to insulate plans actions from judicial or state legislative oversight").

122. Ayres & Curtis, *supra* note 7, at 1508–10; James Kwak, *Improving Retirement Savings Options for Employees*, 15 U. PA. J. BUS. L. 483, 501–506 (2013); Anne M. Tucker, *Locked In: The Competitive Disadvantage of Citizen Shareholders*, 125 YALE L.J. F. 163, 181–82 (2015).

123. Final Regulation, *supra* note 20, at 37,518; Proposed Regulation, *supra* note 19, at 53,555 (noting that "[r]equiring the PEO to provide employment functions mitigates to some extent fraud concerns").

there are glaring gaps in the scholarship on multiple-employer plans. This Article tackles several fundamental questions about the fees and investment options available to participants in multiple-employer plans. For example, what are the plan administration fees across existing MEPs, and particularly across PEO MEPs? What can we learn about the investment menus of existing MEPs generally, and of PEO MEPs in particular? And how do the PEO MEP terms and characteristics compare to (1) those of single-employer plans of similar size, (2) those of other kinds of MEPs, including association and corporate MEPs, and (3) the terms that would otherwise be available to individual participating employers?

This Part provides a brief overview of the methodology used in this Article. The methodology relies primarily on the publicly available disclosures (Forms 5500) that virtually all employee benefit plans must file with the Department of Labor.[124] In recent years, the DOL has made the filings available on its website and has generated large-volume datasets tracking certain relevant information about the filers. For example, the 2016 Form 5500 file includes extensive information for nearly 250,000 retirement and welfare benefit plans.

The first step in the study is to isolate the filings submitted by multiple-employer 401(k) retirement plans, and then to further identify the MEPs administered by PEOs.[125] While employee benefit plans are required to self-identify on the Form 5500s as multiple-employer plans, there is no direct "marker" for MEPs sponsored by PEOs. This project develops a novel methodology that uses required industry-code reporting to identify potential PEO-sponsored plans, as well as PEOs sponsored by employer groups and associations.[126] On its own, this step generates new information about the prevalence and growth of different types of MEPs in the United States.

The second step is to analyze the filings submitted by MEPs, with a particular focus on the features and fees of PEO and association MEPs. The Department of Labor has digitized the majority of information provided on the Form 5500, including information about various plan administrative expenses.[127] Other information—such as the number of participating employers and the asset-based investment management fees—is not reported directly and must be calculated manually. In the case of asset-based investment management fees, for example, individual plans must submit with their Form 5500 a list of investments held by the plan in the reporting year. To estimate total investment

124. The Department of Labor notes that "[t]he Form 5500 Series is an important compliance, research, and disclosure tool for the Department of Labor, a disclosure document for plan participants and beneficiaries, and a source of information and data for use by other Federal agencies, Congress, and the private sector in assessing employee benefit, tax, and economic trends and policies." *Form 5500 Series*, U.S. DEP'T LABOR, https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-5500 [https://perma.cc/XXF8-8SN4] (last visited Feb. 15, 2020).

125. The analysis focuses specifically on multiple-employer plans that offer 401(k)-type benefits.

126. After industry codes are used to identify potential PEO plans, additional manual review is necessary to confirm that only PEO plans have been selected. The same methodology is used to identify group or association MEPs.

127. The administrative expense information is provided on Schedule H of Form 5500. Per the Form 5500 instructions for 2016, filers must include the total fees for outside accounting, actuarial, legal, and valuation/appraisal services, fees for a contract administrator for performing administrative services for the plan, fees for advice to the plan relating to its investment portfolio, and any other plan expenses not included in the listed categories.

management fees, this Article merges investment holdings information from individual plans with fee information from the Center for Research in Security Prices (CRSP) Survivor-Bias Free Mutual Fund Database and any available fee data provided by individual plan sponsors and recordkeepers.[128] Because the reporting requirements are not clear as to the level of detail required, there is significant variation in the specificity about particular investments, particularly with respect to share classes. The analysis in the Article follows the approach of the Investment Company Institute in making any assumptions about plan investment menus and associated fees.[129]

As described in Part II.D, the operation of a retirement plan involves numerous service providers, each of which charges fees for their services.[130] Fees may be paid by the plan itself, by the plan sponsor, or by the plan participants. To understand the complete impact of fees, and in keeping with the methodology used in existing analyses, this Article calculates a "total plan cost" measure that includes the administrative fees reported on the DOL Form 5500s, as well as the fees paid through expense ratios for investment management.[131]

The third step is to analyze the newly collected data, with a focus on plan fees across different types of MEPs. The new data on MEPs can be compared to the available fee data for 401(k) plans of various sizes in the United States. Accordingly, the analysis reveals how fees incurred by individual employers in multiple-employer plans compare to the average fees incurred by comparable individual employers that administer their own retirement plans. Ultimately, the analysis sheds light on both the potential cost-savings from pooling and PEO administration, as well as the agency costs associated with such arrangements.

128. CRSP data is available only for mutual funds. The availability of plan materials to non-plan participants varies widely across plans. In some cases, the investment menu and fee information—including information for collective investment trusts or separate accounts is publicly available online, or is accessible through the recordkeeper for the plan. In some cases, while the list of investment holdings is disclosed in the 2016 form 5500, fee data could be located only for subsequent years. Notably, because investment management fees have generally declined over the last several years, the limited use of post-2016 fee information is likely to generate fee estimates that are lower than actual fees in the reporting year. *See, e.g.*, George S. Mellman & Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What Are the Causes and Consequences?*, B.C. CTR. FOR RETIREMENT RES. 1, 5 (May 2018), http://crr.bc.edu/wp-content/uploads/2018/04/IB_18-8.pdf [https://perma.cc/C4C8-XQ47] (showing that "[o]n the investment side, the average share of assets paid to fees for 401(k) participants in mutual funds" has declined consistently since 2009, and noting that "these declines have been accompanied by corresponding decreases in 401(k) administrative and recordkeeping costs").

129. For example, where the mutual fund is known, but not the specific share class, the analysis in this Article follows the ICI/BrightScope approach and "assigns a share class to the mutual fund holdings in a given DC plan based on the size of the plan's investment in the mutual fund. If the DC plan has less than $1 million invested in the mutual fund, a retail-type share class is assigned to the holding. If the DC plan has $1 million or more invested in the mutual fund, then an institutional-type share class is assigned." BRIGHTSCOPE/ICI REPORT, *supra* note 3, at 55.

130. The many types of services required to operate a 401(k) plan include administrative services (such as recordkeeping and transaction processing), participant-focused services (such as participant communication, education, or advice), regulatory and compliance services (such as plan document services, consulting, accounting, audit services, and legal advice), and investment management.

131. *See, e.g.*, BRIGHTSCOPE/ICI REPORT, *supra* note 3, at 80 ("BrightScope's measure of the total cost of operating the 401(k) plan, which includes asset-based investment management fees, asset-based administrative and advice fees, and other fees (including insurance charges) from the Form 5500 and audited financial statements of ERISA-covered 401(k) plans.").

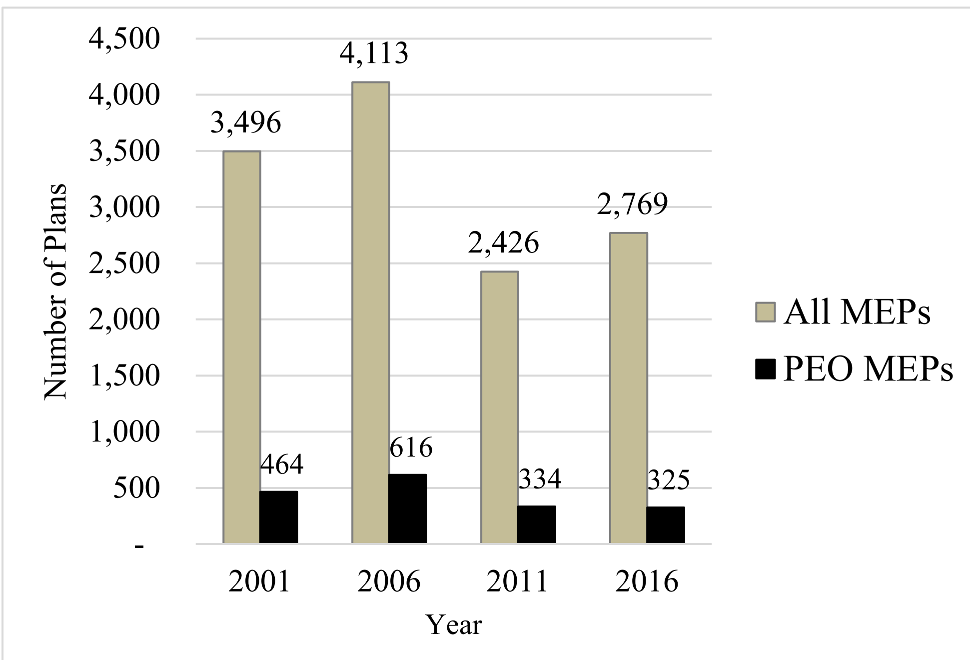
C. Results and Discussion

This Part presents the findings from the first empirical analysis of multiple-employer plans. Table 1 of the Appendix provides the summary statistics for the plans considered in the analysis. The results below suggest that even in the absence of clear regulatory guidance, professional employer organizations have used the MEP structure to offer 401(k) retirement plans to client employers. The empirical analysis also suggests that the costs associated with existing multiple employer plans—and the dominant claim that such pooling arrangements reduce or "spread out" plan costs—deserve far greater scrutiny.

1. PEO MEP Formation and Size Over Time

As indicated in Figures 1–3, between 2001 and 2016, the total number of all MEPs and PEO MEPs has declined, but the total number of employees participating in PEO MEPs, as well as the average number of participants per PEO MEP have increased. The latter trends suggest possible consolidation among MEP providers in the United States.

Figure 1: Prevalence of 401(k) MEPs & PEO MEPs Over Five-Year Intervals Between 2001-2016[132]



132. The findings in Figures 1–3 rely exclusively on the industry code methodology described in Part III.B, *supra*, to identify PEO MEPs.

Figure 2: Total Participants in 401(k) PEO MEPs Over Five-Year Intervals Between 2001-2016

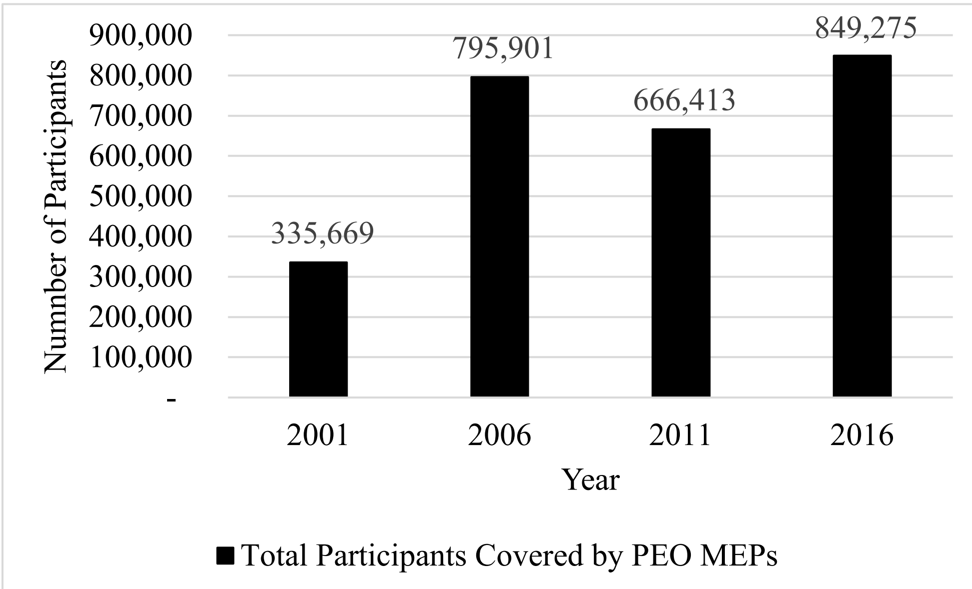
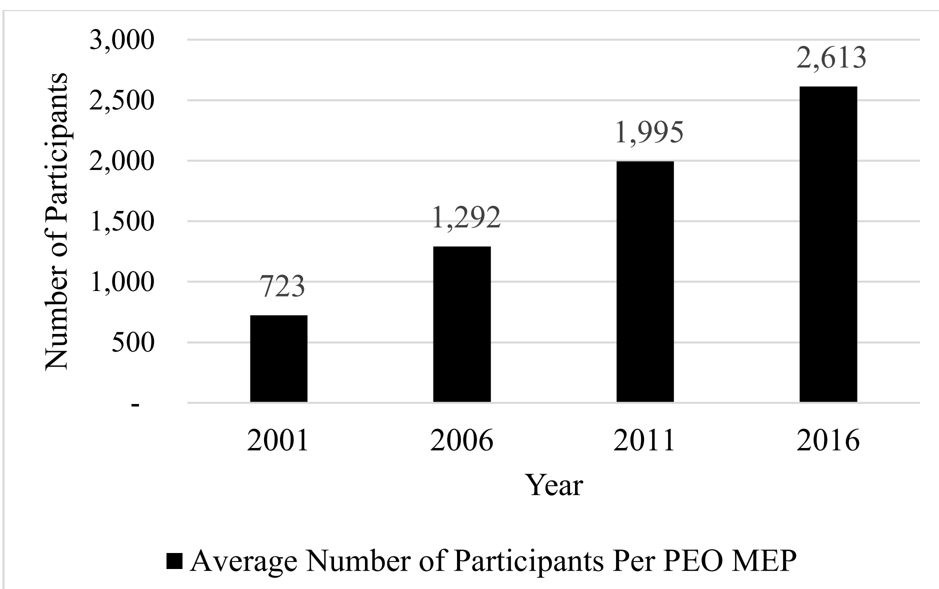


Figure 3: Average Number of Participants Per 401(k) PEO MEP Over Five-Year Intervals Between 2001-2016



2. Plan Size and Administrative Expenses Across Plans

The PEO 401(k) plans vary considerably in the value of total assets and the number of employees covered by the plans. In 2016, less than 3% of PEO plans had aggregate assets of less than $1 million, while approximately half of the PEO 401(k) plans had aggregate assets of less than $10 million. Most participants, however, were in larger plans. Some 62% of participants were in PEO MEPs with over $50 million each in total assets, and over 50% in PEO MEPs with over $100 million each. By comparison, 58% of single-employer 401(k) plans had less than $1 million in plan assets, while 58% of participants were in plans with more than $50 million in plan assets.[133] Table 1 and Figure 1 of the Appendix further illustrate the distribution of plan sizes across single and multiple-employer 401(k) plans.

Table 1 of the Appendix and Figures 4–5 below present findings concerning administrative expenses[134] across four kinds of 401(k) plans: single employer plans, PEO MEPs, association MEPs and other (primarily corporate) MEPs.[135] Most notably, as compared to single-employer plans, in 2016, all MEPs had higher average administrative expenses. PEO MEPs had the highest administrative expenses as a percentage of plan assets, while association MEPs had the highest administrative expenses on a per participant basis. The fees of other (corporate) MEPs, meanwhile, more closely resembled those of single-employer plans.

133. BRIGHTSCOPE/ICI REPORT, *supra* note 3, at 13 ("Although most plans are small (58.1 percent have less than $1 million in plan assets), most participants are in larger plans (58.1 percent are in plans with more than $50 million in plan assets).") (internal citation omitted).

134. Data on administrative expenses is taken from individual Form 5500s and includes four types of fees: professional fees, contract administrator fees, investment advisory and management fees, and other administrative fees. Such reported figures do not include investment-based expenses charged to plan participants. Investment-based expenses are added to the analysis and discussion in Part III.C.3.

135. For the analysis in this Part, PEO and association MEPs are identified using a combination of the industry code analysis and manual review. *See* discussion, *supra* note 126.

Figure 4: Average Administrative Expenses as % of Plan Assets across 401(k) Plans in 2016

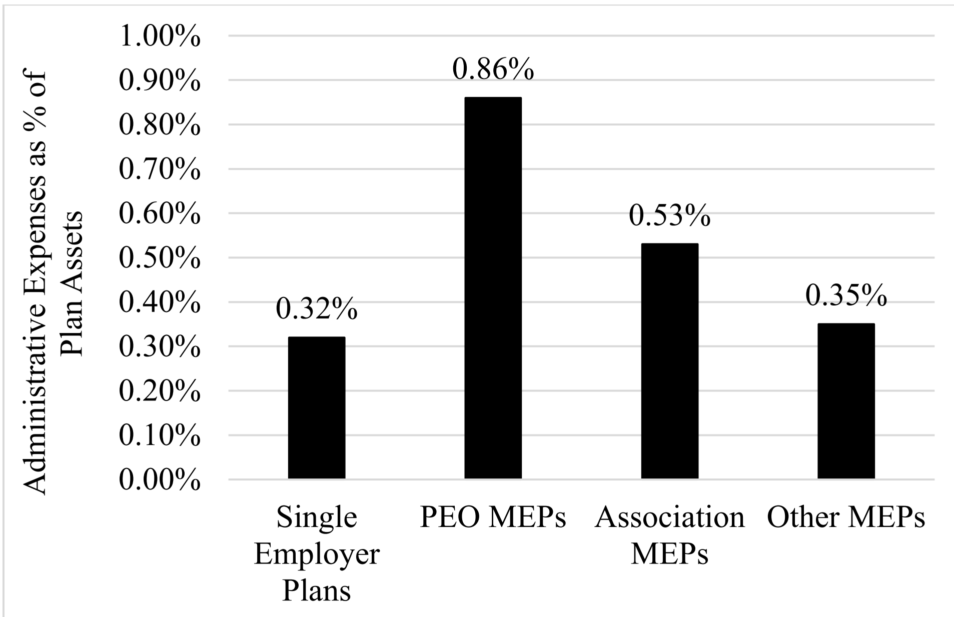
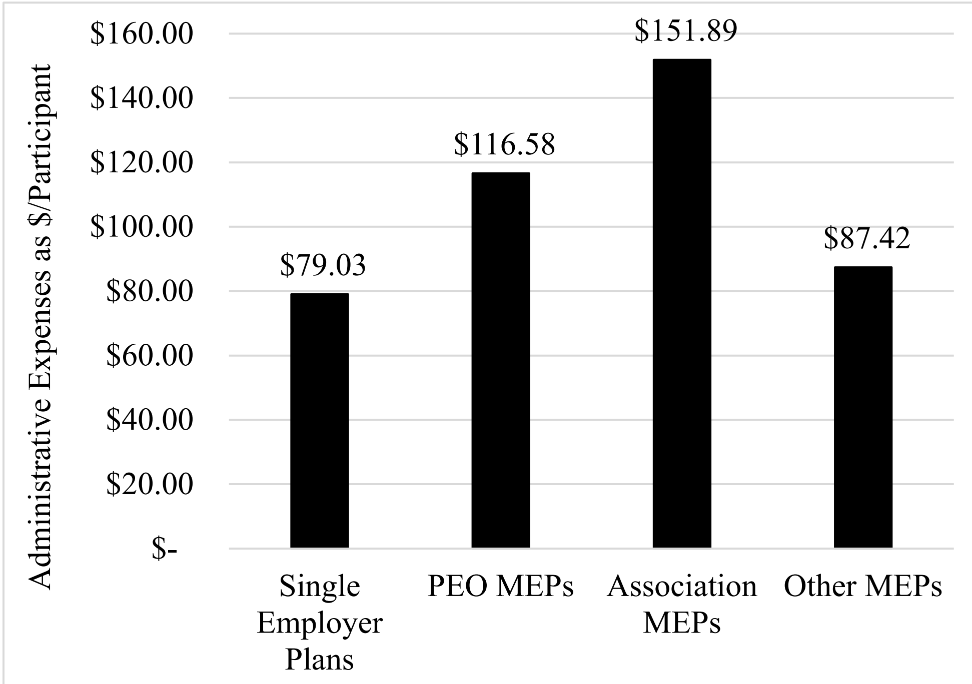


Figure 5: Average Administrative Expenses ($) Per Participant across 401(k) Plans in 2016



Figures 6–8 below compare administrative expenses in PEO MEPs with those of single employer, association plans, and other (corporate) MEPs of similar size, measured either by total plan assets, by the number of plan participants, or by average assets per plan participant. The findings are presented across the relevant quartiles (plan assets, plan participants, assets per plan participant) for PEO MEPs. Even when various measures of plan size are considered, and when fee comparisons are performed across plans of similar size, PEO MEPs still have higher average administrative expenses. Thus, differences in plan size cannot explain away the higher expenses in PEO MEPs. Notably, in most specifications, costs for association MEPs are lower than those for PEO MEPs but higher than those for other (corporate) MEPs and for single-employer plans. The data also show that the administrative fees for other (corporate) MEPs that do not entail plan administration by a PEO or an association more closely resemble the fees for single-employer plans.

Figure 6: Average Administrative Expenses as % of Plan Assets in 2016 – Comparison by Plan Size (Quartiles Set by PEO MEP Data)

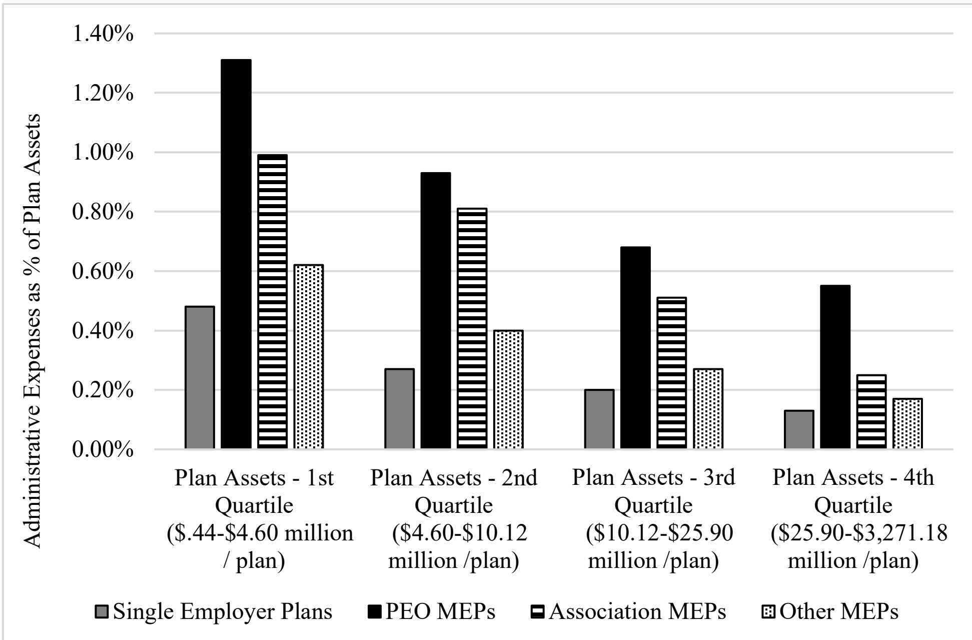


Figure 7: Average Administrative Expenses as % of Plan Assets in 2016 – Comparison by Assets per Plan Participant (Quartiles Set by PEO MEP Data)

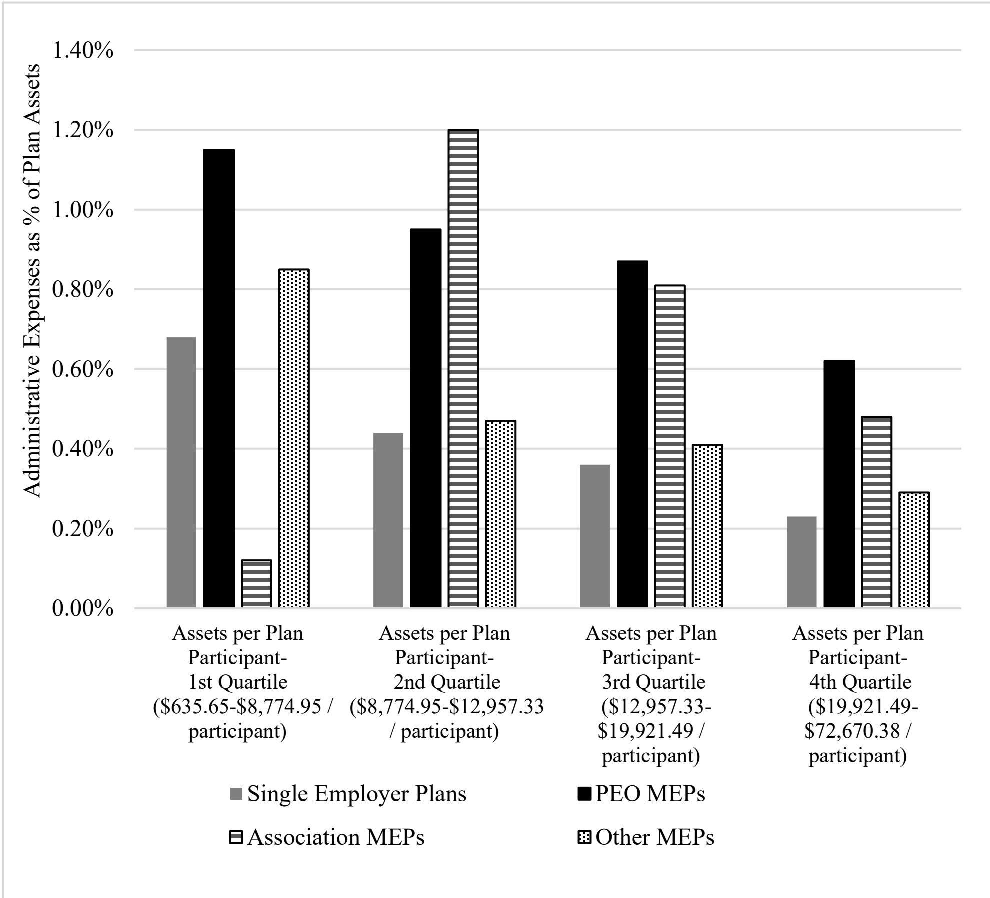
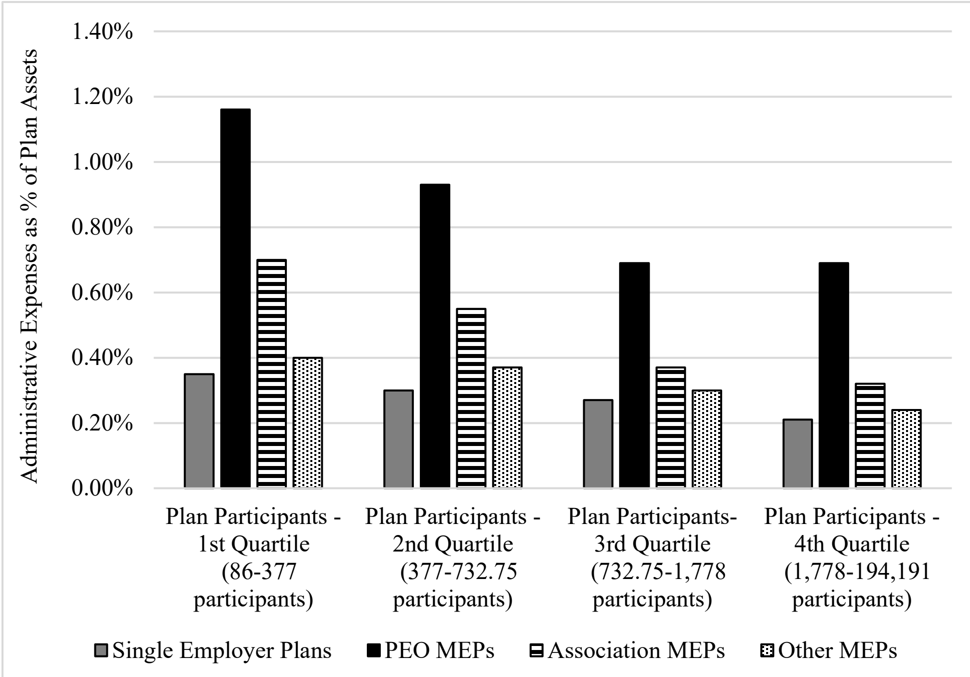


Figure 8: Average Administrative Expenses as % of Plan Assets in 2016 – Comparison by Total Plan Participants (Quartiles Set by PEO MEP Data)



Regression analysis results presented in Table 2 of the Appendix further confirm the findings illustrated in the figures above. Controlling for plan size, assets per participant, total number of plan participants, as well as the age of the plans, MEPs of all kinds—but especially PEO MEPs—are associated with higher administrative expenses measured either as a percentage of total plan assets, or on a per participant basis. The findings are statistically significant at all conventional levels.

3. Total Plan Costs in PEO MEPs

While the analysis in the previous section focused on comparing reported administrative expenses across plans, this Part adds in investment-based expenses to calculate *total* plan costs for a subset of plans. Table 2 presents certain key characteristics and *total* plan cost data for the five PEO MEPs with the greatest number of plan participants as of 2016.[136] Total plan costs include (1) the administrative expenses reported on the Form 5500, as well as (2) the investment-based expenses derived by merging investment holdings disclosure with fee data for individual investment options.

The five largest PEO MEPs cover nearly half of all participants. The plans are also among the largest PEO plans by total assets. As of 2016, these five plans held

136. For a description of the total plan cost measure, see *supra* note 131.

approximately 52% of all assets in the PEO MEPs. Because plan fees decrease with plan size, the fees for the plans profiled below are likely the *lowest* in this category of MEPs.

Table 2: Case Studies: Estimated Total Plan Costs in Five Largest PEO MEPs by Number of Participants in 2016[137]

Number of Individual Participants	Number of Participating Employers	Total Plan Assets Over Year ($)	Average Assets ($) Per Plan Participant	Estimated Total Investment Menu Costs as % of Plan Assets	Reported Administrative Expenses as % of Plan Assets	Estimated Total Plan Cost as % of Plan Assets
194,191	4,003	3,271,184,384	16,845	0.66%	0.46%	**1.12%**
67,272	3,898	1,619,218,944	24,070	0.40%	0.29%	**0.69%**
61,388	39	46,508,136	758	0.85%	0.39%	**1.24%**
51,572	917	514,539,648	9,977	0.34%	0.47%	**0.81%**
24,907	673	282,701,408	11,351	0.61%	0.16%	**0.77%**

To appreciate the key findings in Table 2, it is necessary to compare the total plan cost data for all 401(k) plans. The Investment Company Institute (ICI) reports that in 2015, the average total plan cost for 401(k) plans was 0.88% of assets.[138] As Table 3 illustrates, total plan costs decrease as plan size (total assets) increases. The ICI report also shows that 401(k) plans with $1 million to $10 million in plan assets had an average total plan cost of 1.17% of plan assets, compared with 0.52% for plans with more than $100 million to $250 million, 0.46% for plans with more than $250 million to $500 million, 0.41% for plans with more than $500 million to $1 billion, and 0.30% for plans with more than $1 billion.[139] Figure 9 integrates the ICI statistics on all 401(k) plans with the findings presented in Table 2 to show the striking differences in fees between the largest PEO MEPs and other 401(k) plans in the same asset category.

137. The findings presented in Table 2 are calculated as follows: The number of participating employers is derived from the list of participating employers that every MEP must provide with its Form 5500 filing. The number of individual participants is calculated as the average of the number of participants at the beginning of the year and the number of participants at the end of the year. Total plan assets over the year is an average of the plan assets at the beginning of the year and the plan assets at the end of the year. The average assets per participant is derived by dividing the total assets by the number of participants. The methodology for calculating the total investment menu expenses is described in Part III.B. The reported administrative expenses are taken from Schedule H of Form 5500, as described *supra* note 127.

138. BRIGHTSCOPE/ICI REPORT, *supra* note 3, at 52.

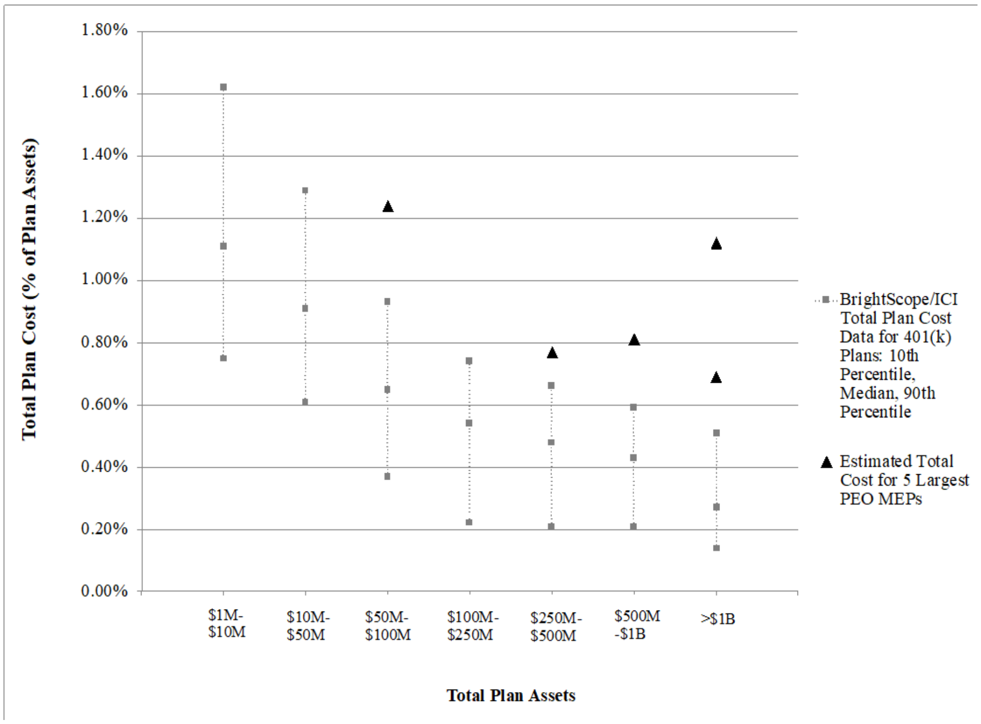
139. *Id.* at 53.

Table 3: BrightScope/ICI 401(k) Total Plan Cost Data for 2015[140]

	Total plan cost (% of plan assets)		
Plan assets	10th percentile	Median	90th percentile
\$1M–\$10M	0.75%	1.11%	1.62%
\$10M–\$50M	0.61	0.91	1.29
\$50M–\$100M	0.37	0.65	0.93
\$100M–\$250M	0.22	0.54	0.74
\$250M–\$500M	0.21	0.48	0.66
\$500M–\$1B	0.21	0.43	0.59
More than \$1B	0.14	0.27	0.51

140. According to the ICI/BrightScope report, the data is plan-weighted and the sample is plans with audited 401(k) filings in the BrightScope database for 2015, which comprises 18,853 plans with $3.2 trillion in assets and between 4 and 100 investment options. *Id.* at 54. The report does not reference any attempt to distinguish between single and multiple-employer plans. Since 401(k) MEPs represents a relatively small portion (under 1%) of all 401(k) plans, the ICI/Brightscope statistics are, in effect, the fee statistics for single-employer plans.

Figure 9: Comparing Total Plan Costs for Largest PEO MEPs vs. All 401(k) Plans in Same Asset Category



Across the PEO MEPs included in Table 2, two plans had assets in excess of $1 billion, yet total plan costs were 1.12% and 0.69%, respectively (as compared to an average of 0.30% for all 401(k) plans with more than $1 billion in assets). One plan had more than $500 million in assets and total plan costs were 0.81% (as compared to an average of 0.41% for all 401(k) plans with $500 million to $1 billion in assets). Another plan had more than $250 million in assets and total plan costs were 0.77% (as compared to an average of 0.46% for all 401(k) plans with $250 to $500 million in assets). Finally, a plan with nearly $50 million in assets had a total plan cost of 1.24%, a figure that is closer to the average cost for 401(k) plans with $1 million to $10 million in plan assets, according to the ICI. Furthermore, in many cases, the asset-based investment expenses for the PEO plans do not appear to reflect the kind of leverage or bargaining power that would be expected from plans of that size. The plan with over $3 billion in assets had investment menu costs of 0.66%, which is considerably higher than average expenses for 401(k) plans of comparable size.[141]

141. For 401(k) plans with assets over $1 billion, average expense ratios in 2015 ranged from 0.36% for domestic equity mutual funds, 0.52% for international equity mutual funds, 0.48% for target date balanced mutual funds, 0.32% for non-target date mutual funds, 0.26% for domestic bond mutual funds, 0.65% for international bond mutual funds, and 0.13% for money market mutual funds. BRIGHTSCOPE/ICI REPORT, *supra* note 3 at 57.

While comprehensive cost data for the subset of the smallest single-employer plans—particularly those with fewer than 100 participants—is harder to obtain, various surveys suggest that total plan costs commonly exceed one percent of plan assets, and may be considerably higher in some cases.[142] Accordingly, some multiple-employer plans—and some PEO MEPS in particular—may provide the smallest employers with retirement plans that are less costly than the plans that such individual employers would likely be able to obtain on their own. At the same time, however, the considerable aggregation of assets in the largest PEO MEPs does not appear to produce the kinds of cost-savings that are evident in the largest single-employer plans. The likely reasons for such results and the policy implications are offered below.

IV. POLICY IMPLICATIONS AND FURTHER RESEARCH

In the wake of recent regulatory and legislative reforms to expand access to multiple-employer plans, there is a renewed interest in such arrangements.[143] The newly collected data in this Article suggests that policymakers should proceed with caution in their embrace of PEO and open MEPs, and with a particular focus on the governance challenges posed by the pooling of multiple employers.[144] While the pooling of employers and capital in the

142. Sarah O'Brien, *Why High 401(k) Fees Are Likely to Stick Around*, CNBC (July 17, 2017), https://www.cnbc.com/2017/07/17/why-high-401k-fees-are-likely-to-stick-around.html [https://perma.cc/C3T7-8HEX]; *see also* Proposed Regulation, *supra* note 19, at 53,551 (explaining, per a Deloitte Consulting and Investment Company Institute report, that "small plans with 10 participants are paying approximately 50 basis points more than plans with 1,000 participants," while "small plans with 10 participants are paying about 90 basis points more than large plans with 50,000 participants"); *Frequently Asked Questions*, BRIGHTSCOPE, https://www.brightscope.com/faq/401k-retirement/ [https://perma.cc/4BBJ-3KK4] (last visited Feb. 21, 2019); *Fees Run High for Small Business 401(k) Plans*, AKB (Dec. 2017), http://americasbest401k.com/wp-content/uploads/2017/12/ABk_SmallBizFees_FINAL.pdf [https://perma.cc/NZ97-PHT7]; Margarida Correia, *Online Providers Filling a Void for Small-Employer 401(k)s*, PENSIONS & INV. (May 27, 2019), https://www.pionline.com/article/20190527/PRINT/190529884/online-providers-filling-a-void-for-small-employer-401-k-s (citing statistics that suggest that "plan sponsors with 10 participants and $100,000 in assets would pay an average of 3.96% of assets for record keeping, administration and investment services," while for plans with "10 participants and $500,000 in assets, the combined cost for all three services would average 1.85%"); Aron Szapiro, *Could Multiple-Employer Plans Be a Game Changer for Retirement Security?*, MORNINGSTAR (Dec. 19, 2019), https://www.morningstar.com/blog/2019/12/19/mep-retirement.html [https://perma.cc/6GKF-E8ZP] (suggesting that "small plans currently pay around four times as much for administrative costs as large plans").

143. *See, e.g.*, Brian Croce, *Group Acting to Plug a Gap in Retirement*, PENSIONS & INV. (Dec. 9, 2019), https://www.pionline.com/defined-contribution/group-acting-plug-gap-retirement (noting that following the issuance of the final DOL rule in July of 2019, the U.S. Chamber of Commerce has launched a "portal" for chamber members interested in learning more about association retirement plans and connecting small employers with local chambers and service providers).

144. Even among those who have previously expressed skepticism about multiple employer plans, solutions to "redesign" the U.S. retirement system focus on the pooling of employers and the centralization of administrative expertise. For example, Phyllis Borzi, former Assistant Secretary of Labor, envisions a system where "regardless of whether you were self-employed, a full-time employee, an independent contractor or a leased employee, a professionally managed not-for-profit company with an independent board of directors would collect and invest retirement contributions from you and your employers." According to Borzi, such companies would operate "large regional pools of capital. The resulting balances would automatically move with you as you changed jobs." *See* Jason Zweig, *Forget the 401(k). Let's Invent a New Retirement Plan*, WALL ST. J. (Feb. 10, 2019), https://www.wsj.com/articles/forget-the-401-k-lets-invent-a-new-retirement-plan-11549854600 [https://perma.cc/68ZS-DULR].

provision of retirement benefits has the potential to improve access to workplace retirement plans in the United States, further analysis is needed to examine the sources of higher costs in existing MEPs and the strategies to mitigate such costs in the pooled employer plans permitted under the SECURE Act.

Among the multiple-employer plans examined in this Article, the higher administrative costs may reflect, at least in part, the additional costs of administering numerous smaller accounts. The lack of cost-savings in investment management fees among the largest PEO MEPs, however, is harder to explain without consideration of agency costs and conflicts of interest. Even so, it is possible that such fees will decrease with time as the PEO industry matures, becomes more saturated and, in light of the legislative reforms enacted in 2019, is able to draw new entrants that may have previously sought to avoid the legal uncertainty associated with PEO MEPs.[145] As it grows, the MEP industry will also draw increased scrutiny from plaintiffs' attorneys,[146] and competitive pressure from a host of companies relying on new technology to offer lower-cost plans to smaller employers.[147]

The current disclosure and reporting regime, however, does not facilitate the study of fees across different types of multiple-employer plans. While retirement plans are required to self-identify as multiple-employer plans, there is no further requirement to identify as association or PEO-sponsored plans. As described above, such plans can be identified only through time-intensive analysis and manual review. Even once such plans are identified, there is simply no direct way to compare total plan costs across different plans. Despite various reforms to the disclosure and reporting regime over the last decade, true fee transparency is nowhere in sight.[148]

The ability to scrutinize fees is particularly critical in the PEO and open MEP context since the PEO plan sponsors may be, in effect, paying themselves—or affiliated entities—for the administrative and investment services provided to the retirement plans. Unlike

145. *See, e.g.*, Nick Thorton, *Industry Cautiously Optimistic as Labor Prepares Ground Rules on Open MEPs*, BENEFITSPRO (Jan. 9, 2020), https://www.benefitspro.com/2020/01/09/industry-cautiously-optimistic-as-labor-prepares-ground-rules-on-open-meps/ [https://perma.cc/G7Y7-TZSD] (quoting Morningstar analyst Aron Szapiro's observation that "[g]iven the amount of money and time spent lobbying for Open MEPs, it's clear industry really wants to make these things work . . . . I do think you will see some attractive pricing").

146. Plaintiff class-action lawyers have already begun to challenge the fees charged to participants in multiple-employer plans. *See, e.g.*, Complaint at 11, Clark v. Oasis Outsourcing Holdings, Inc., No. 9:2018-cv-81101 (S.D. Fla. Aug. 18, 2018); Intravaia v. Nat'l Rural Elec. Coop. Ass'n, No. 1:19-cv-00973, 2020 WL 58276 (E.D. Va. July 25, 2019). They may have even more of an incentive to do so as MEPs become larger in number and in size and as MEP sponsors, including PEOs and commercial sponsors, assume fiduciary responsibility under the SECURE Act.

147. Guideline is an example of one such company. *See, e.g.*, Jeff Rosenberger, *The SECURE Act is Here—See What It Could Mean for Your Business*, GUIDELINE (Jan. 6, 2020), https://www.guideline.com/blog/secure-act-2020/ [https://perma.cc/Y5MY-AZB5] (expressing general support for the long-term potential of multiple-employer plans but noting that "with Guideline you can start a low-cost, full-service, individualized 401(k) plan today").

148. Research on plan fees has indicated that employers themselves often lack an understanding of the various fees associated with their own plans. *See, e.g.*, Christopher Carosa, *Exclusive Interview with Phyllis C. Borzi: Why Plan Sponsors Shouldn't Treat Their 401k Plans Like Cheap T-Shirts*, FIDUCIARYNEWS (Sept. 24, 2013), http://fiduciarynews.com/2013/09/exclusive-interview-with-phyllis-c-borzi-why-plan-sponsors-shouldnt-treat-their-401k-plans-like-cheap-t-shirts/ [https://perma.cc/99Z2-LFB8] (citing Phyllis Borzi's observation that as of 2013, many plan sponsors did not understand the pricing structure for bundled services and mistakenly thought that "services like recordkeeping were being provided free of charge").

individual employer sponsors that may provide administrative support to their retirement plans (through HR personnel and senior management), PEOs rely on the provision of such services to generate revenue. Their interests are not perfectly aligned with the interests of participating employers, and such participating employers may face high switching costs.[149]

The DOL's final regulation argues that requiring PEOs to "stand in the shoes" of participating employers and to provide enough "employment functions" will mitigate fraud and abuse concerns because the PEO will be a fiduciary and "bear all [of the] associated responsibilities."[150] While such a claim is difficult to test empirically, existing research has highlighted the challenges with "employer fiduciaries" and the limits of fiduciary governance in ensuring that U.S. workers have access to well-designed and reasonably priced retirement plans.[151]

In contrast to the DOL's final regulation, the SECURE Act embraces truly open MEPs without any restrictions on the types of entities that can serve as "pooled plan providers."[152] The 2019 legislation defines a "pooled employer plan" as a "single employee pension benefit plan or single pension plan" and specifically eliminates any commonality requirements among participating employers.[153] The SECURE Act requires that pooled employer plans be administered by "pooled plan providers" who would be responsible for performing all administrative duties for the plans.[154]

Like the DOL regulation, the SECURE Act relies on the governance principles—and most notably the fiduciary framework—developed for single-employer plans. The SECURE Act provides that individual employers would retain fiduciary responsibility for the selection and monitoring of the pooled plan providers, while simultaneously requiring the pooled plan providers to explicitly acknowledge their fiduciary status to the plans. The "dual fiduciary" model merely clarifies the legal framework that currently applies to plan sponsors and service providers under ERISA. Unlike the model set forth in the DOL regulation, there is no requirement for the pooled plan provider to assume any employment functions.

Notably, the governance framework in the SECURE Act extends beyond the imposition of fiduciary obligations on plan sponsors and plan administrators. The SECURE Act tasks the Secretary of Labor with developing new compliance and oversight mechanisms. For example, the SECURE Act requires the Secretary to publish model plan language and to establish a procedure by which pooled plan providers would register with

149. To the extent that PEOs commonly offer additional HR services to their employer clients, it is critical to consider the pricing models used for such arrangements, and the extent of any cross-subsidization for different PEO services or across different PEO clients.

150. Final Regulation, *supra* note 20, at 37,538.

151. *See supra* notes 120–121 (summarizing research on employer fiduciaries).

152. Setting Every Community Up for Retirement Enhancement Act (SECURE Act), incorporated into Further Consolidated Appropriations Act, Pub. L. No. 116. Unlike Congress, the Department of Labor was constrained by ERISA's statutory provisions, including the reference to an "employee pension benefit plan" that must be sponsored by an "employer" as defined in Section 3(5) of ERISA. In its regulation, the DOL acknowledged the legislative interest in "open MEPs" and specifically requested comments "on whether, and under what circumstances, so-called "open MEPs" or "pooled employer plans," as depicted in the various legislative proposals, could be operated as an employment-based arrangement, as contemplated by ERISA's text.

153. *Id.*

154. *Id.*

the DOL before providing any services to individual employers. Pooled plan terms must provide that "employers in the plan, and participants and beneficiaries, are not subject to unreasonable restrictions, fees, or penalties with regard to ceasing participation."[155] The SECURE Act also permits the Secretary of Labor to perform audits, examinations, and investigations of pooled plan providers, and to establish disclosure requirements "to facilitate the selection or any monitoring of the pooled plan provider by participating employers."[156] While the inclusion of additional oversight measures is promising, the analysis in this Article suggests that there are serious reasons to doubt that individual employers will serve as effective monitors of the pooled plan providers, no matter the level of required disclosure. The role of the DOL is therefore critical. Ultimately, effective regulation and oversight of multiple-employer plans may require more substantive regulation of fee arrangements and a greater role for non-employer intermediaries—whether private or public—to monitor pooled plan providers.[157] In the immediate future, how the DOL defines its oversight and licensing role in the forthcoming regulations, and how actively it engages with multiple-employer plans on the ground, will determine whether MEPs will meaningfully contribute to promoting retirement security for U.S. workers.

V. CONCLUSION

This project seeks to provide critical information about employer pooling as an increasingly popular but poorly understood solution for the retirement security crisis in the United States. Despite the intuitive appeal of such arrangements, the empirical results suggest that policymakers should proceed with caution, and with a particular focus on the internal governance and external oversight of such arrangements. Merely imposing the existing governance model for single-employer plans onto new pooling arrangements is unlikely to be effective at constraining the unique agency costs in the pooling arrangements. Nevertheless, to the extent that employer-pooling arrangements can operate successfully, they may offer a promising alternative to the traditional model of employment-based and employer-administered benefits in the United States. Finally, while the immediate focus of the analysis in this Article is employer-pooling for the provision of retirement benefits, the growth of professional employer organizations, the outsourcing of traditional "human resources," and the embrace of multiple-employer plans will have consequences beyond retirement security. A longer-term research agenda will consider the range of ramifications for workers and the workplace in the 21st century.

155. *Id.*

156. *Id.*

157. The government or third-party "certification" model for retirement service providers has gained considerable traction outside the United States. *See generally* BIPARTISAN POL'Y CTR., SECURING OUR FINANCIAL FUTURE: REPORT OF THE COMMISSION ON RETIREMENT SECURITY AND PERSONAL SAVINGS 40 (2016), http://bipartisanpolicy.org/wp-content/uploads/2016/06/BPC-Retirement-Security-Report.pdf [https://perma.cc/D2FV-DCH6] (describing a certification process for providers of pooled plans whereby the providers "would be required to pass a certification process to prevent bad or unprepared actors from entering this market" while "employers would not have any fiduciary responsibility for the selection or ongoing monitoring of the plan provider, so long as the provider passe[d] the certification process").

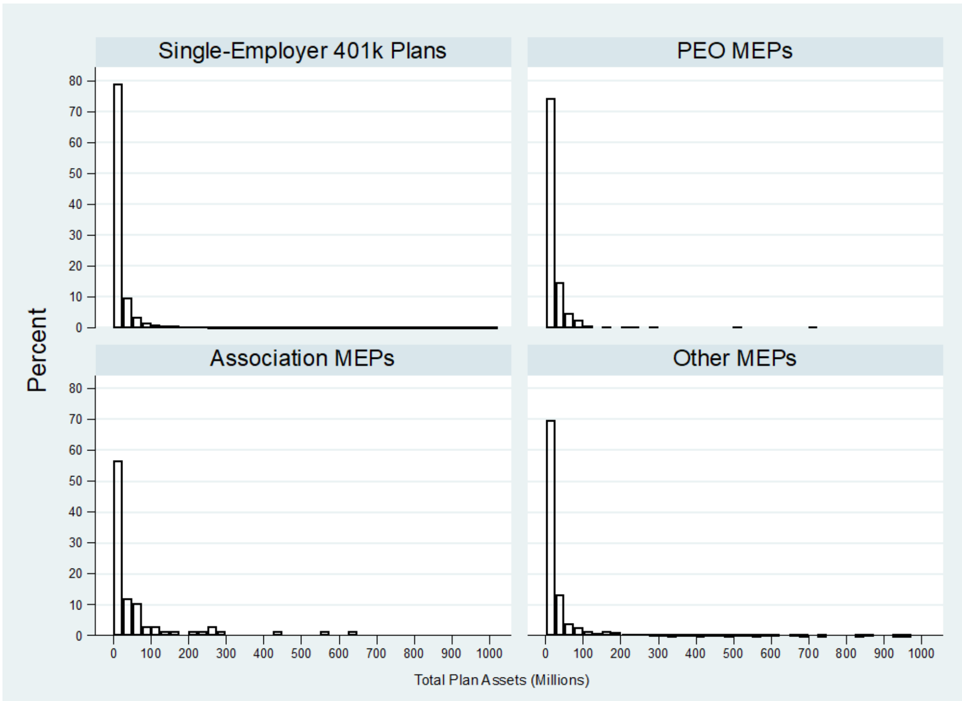
APPENDIX

Table 1: Summary Statistics for 2016

This table presents summary statistics for defined-contribution 401(k) plans. The data is drawn from the DOL Forms 5500. Industry codes and manual review are used to identify PEO and association MEPs. The analysis of administrative expenses disclosed on the Form 5500 excludes plans that were not in operation for the full year, plans that were in their final year of operation, plans that did not report a positive, non-zero value for administrative expenses, and plans with fewer than 100 participants that did not file the relevant schedules.

	Mean	Standard Deviation	25th Percentile	50th Percentile	75th Percentile	N
Assets Per Plan ($ millions)						
Single-Employer Plans	60.37	539.86	3.41	8.19	20.94	50,303
PEO MEPs	47.82	245.21	4.60	10.12	25.90	233
Association MEPs	217.45	1,046.97	6.30	23.54	73.11	69
Other MEPs	110.42	841.53	5.16	12.04	35.33	1,517
Participants Per Plan						
Single-Employer Plans	1,116.72	9,594.22	163.50	258.00	543.00	50,331
PEO MEPs	3,323.99	14,487.65	377.00	732.75	1,778.00	234
Association MEPs	2,901.79	8,835.71	249.50	526.50	1,756.50	69
Other MEPs	2,202.32	11,241.15	222.50	418.00	1,025.00	1,519
Assets Per Plan Participant ($)						
Single-Employer Plans	44,867.94	53,695.19	13,148.10	29,117.97	58,011.13	50,299
PEO MEPs	15,908.03	11,448.39	8,774.95	12,957.33	19,921.49	233
Association MEPs	47,247.83	37,418.53	18,303.83	30,331.89	70,173.55	69
Other MEPs	42,454.74	41,473.32	14,266.14	29,368.52	56,876.02	1,517
Administrative Expenses as a Percentage of Plan Assets						
Single-Employer Plans	0.32%	0.0234	0.04%	0.15%	0.41%	50,100
PEO MEPs	0.86%	0.0053	0.48%	0.86%	1.17%	232
Association MEPs	0.53%	0.005	0.11%	0.41%	0.84%	69
Other MEPs	0.35%	0.0048	0.05%	0.20%	0.49%	1514
Administrative Expenses Per Plan Participant ($)						
Single-Employer Plans	79.03	126.51	11.41	37.09	102.07	50,113
PEO MEPs	116.58	90.17	53.03	102.55	154.87	233
Association MEPs	151.89	130.64	46.41	116.93	236.58	69
Other MEPs	87.42	105.56	16.82	50.35	119.87	1,514
Years in Existence						
Single-Employer Plans	21.01	12.06	13	20	28	50,331
PEO MEPs	14.13	6.6	10	15	18	234
Association MEPs	15.97	15.13	4	11	28	69
Other MEPs	22.45	11.79	15	22	29	1,519

Figure 1: Distribution of Plan Size Across Different Types of 401(k) Plans in 2016[158]



158. These figures include over 99% of plans in the sample. For improved readability, 160 plans with assets over $3 billion in assets are excluded.

Table 2: Correlates of 401(k) Administrative Plan Costs in 2016

This table presents regressions of measures of the log of plan costs (as a percentage of assets and on a per participant basis) on the log of plan assets, log of plan assets per participant, number of plan participants, and plan type (PEO, Association or Other (Corporate) MEP versus a baseline single-employer 401(k) plan).

	Log (Administrative Expenses As Percentage of Plan Assets)	Log (Administrative Expenses Per Plan Participant)
Log (Plan Assets)	-0.110***	-0.110***
	(0.006)	(0.006)
Log (Plan Assets Per Participant)	**-0.447*** **	**0.553*** **
	(0.008)	**(0.008)**
Number of Plan Participants	0.000***	0.000***
	(0.000)	(0.000)
PEO MEPs	**1.389*** **	**1.389*** **
	(0.054)	**(0.054)**
Association MEPs	0.861***	0.861***
	(0.239)	(0.239)
Other MEPs	**0.259*** **	**0.259*** **
	(0.036)	**(0.036)**
Years in Existence	0.004***	0.004***
	(0.001)	(0.001)
Constant	**-0.445*** **	**-0.445*** **
	(0.069)	**(0.069)**
Observations	**50,774**	**50,774**
R-squared	**0.174**	**0.137**
Robust standard errors in parentheses		
***** p<0.01, ** p<0.05, * p<0.1**		