“Professional” Employers and the Transformation of Workplace Benefits

Natalya Shnitser†

Workers in the United States depend on their employers for a host of benefits beyond wages and salary. From retirement benefits to health insurance, from student loan repayment to dependent-care spending plans, from disability benefits to family and medical leave, U.S. employers play a uniquely central role in the financial lives of their employees. Yet not all employers are equally willing or capable of serving as such financial intermediaries. Larger employers commonly offer more and better benefits than smaller employers. In recent years, so-called Professional Employer Organizations (PEOs) have pitched themselves as a private-sector solution to the challenges traditionally faced by smaller employers. PEOs have pioneered and marketed a "co-employment" model pursuant to which a business and the PEO agree to share certain employer rights and responsibilities, with the PEO taking on all of the human resources matters and the client-employer otherwise retaining control over the business.

While PEOs respond to long-standing challenges faced by smaller employers and have the potential to increase access to workplace benefits, this Article argues that they also introduce new and significant governance concerns that are not adequately addressed by the existing regulatory framework. Empirical evidence suggests that as currently structured, PEOs may not, in fact, provide "Fortune 500" benefits to employees at smaller companies and may instead lock participating employers into costly benefit bundles and expose them to the risk of unpaid employment taxes and health insurance claims. To protect participants in arrangements where PEOs provide key workplace benefits, this Article recommends strengthening and uniformly applying registration, disclosure and oversight requirements for all non-employer intermediaries, including PEOs. In the longer term, comprehensive retirement reform is needed to account for the transformation of workplace benefits in the United States.

Introduction 100
I. The History of PEOs: A Tale of Rebranding 108
II. The Current Regulatory Framework for PEOs 110
A. Situating PEOs within the Existing Regulatory Framework 111
B. Direct Federal Recognition of and Requirements for PEOs 116

1. Creation of Certified Professional Employer Organizations: The Tax Increase Prevention Act of 2014 116
2. Embrace of PEOs and Multiple-Employer Retirement Plans in 2019 DOL Regulations and the SECURE Act 117
C. State Regulatory Requirements for PEOs 119
D. Self-Regulation by the PEO Industry 122
III. Evaluating the PEO Model: Promise and Pitfalls 123
A. Agency Costs & Governance Considerations 123
B. Evaluating PEO Sponsored Plans 126
1. PEO Sponsored Retirement Plans 126
2. Evaluating PEO Sponsored Healthcare Plans 129
IV. Rethinking Workplace Benefits: Employer vs. Non-Employer Intermediaries 131
Conclusion 133

Introduction

Employers in the United States currently serve as key intermediaries for a host of benefits beyond wages and salary. From retirement plans to health insurance, from student loan repayment to dependent-care spending plans, from short-term disability benefits to family and medical leave, individual employers play a central role in the financial lives of their employees. The COVID-19 pandemic has underscored the extent of employer responsibility and discretion in the provision of both temporary and long-standing benefit programs that increasingly affect both the physical and financial health of employees.[1]

Yet not all employers are equally willing or capable of serving as financial and welfare intermediaries. As a result, access to benefits and the quality of benefits available to workers depends on whether an individual

---

† Associate Professor, Boston College Law School. Thank you to the participants of the Fifteenth Annual Colloquium on Scholarship in Employment & Labor Law, the Tenth Annual Employee Benefits & Social Insurance Annual Conference, the Law & Society Household Finance Section 2021 Meeting, and the Boston College Regulation & Markets Workshop for comments and feedback on earlier drafts. Margaret Green provided excellent research assistance. All errors are my own.

1. *See, e.g.*, Tim Allen, *The Pandemic Is Changing Employee Benefits*, HARV. BUS. REV. (Apr. 7, 2021), https://hbr.org/2021/04/the-pandemic-is-changing-employee-benefits [https://perma.cc/5YNQ-NGX5]; Hiba Hafiz, Shu-Yi Oei, Diane Ring & Natalya Shnitser, *Regulating in Pandemic: Evaluating Economic and Financial Policy Responses to the Coronavirus Crisis* 28-42, 52-56 (B.C. L. Sch. Legal Stud. Research Paper No. 527, 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3555980 [https://perma.cc/B8XE-9MC6] (describing the centrality of employers in implementing and administering the range of new paid leave, health insurance, and retirement plan benefits enacted by the Families First Coronavirus Responses Act and the Coronavirus Aid, Relief, and Economic Security Act).

employer decides to offer particular benefits and whether that employer is able to obtain favorable terms from third-party providers. Larger employers in the United States commonly offer more and better benefits than smaller employers.[2]

These differences between "large" and "small" employers reflect both legal requirements and market dynamics. Federal and state laws tether the requirement to offer certain benefits—such as health insurance and family and medical leave, among others—to employer size, as measured by the average number of employees.[3] Smaller employers are commonly subjected to fewer requirements to offer benefits.[4] In addition, by virtue of having a more limited employee pool, smaller employers have less leverage with third-party benefit providers.[5] As a result, those who work for smaller employers often have access to fewer employer-sponsored benefits, and the benefits offered may be worth less than comparable benefits sponsored by larger employers.[6] In the case of retirement benefits, for example, which are entirely voluntary as a matter of federal law, the Department of Labor

---

2. *See, e.g.*, Jessica Dickler, *Why Small Businesses Are Banking on Better Benefits*, CNBC (Jan. 25, 2020, 9:46 AM EST), https://www.cnbc.com/2020/01/24/why-small-businesses-are-banking-on-better-benefits.html [https://perma.cc/A83B-Q6P6] (noting that "[t]here are more small companies and startups than ever before yet, because of their size, these firms have traditionally been at a disadvantage when it comes to benefit packages").

3. *See generally* Barry Kozak, *Portfolio 353-4th: Employee Benefit Plans and Issues for Small Employers*, BUREAU OF NAT'L AFFS. 19-20, 316-22 (2021), https://www.bloomberglaw.com/product/blaw/document/2652784680 [https://perma.cc/7FU8-FGTS] (listing the employee thresholds for various benefit requirements and noting that "there is not a uniform definition of a small employer, and the number of employees varies based on different statutory provisions"). As a result, "[i]dentifying employers and employees is essential to the application of a broad range of federal, state, and local laws governing employment, tax, benefit, and other subjects with a wide range of policy objectives." Alden J. Bianchi & Edward A. Lenz, *The Final Code § 4980H Regulations; Common Law Employees; and Offers of Coverage by Unrelated Employers*, BLOOMBERG INDUS. GRP. 2 (Sept. 8, 2014) https://www.mintz.com/sites/default/files/viewpoints/orig/5/2014/09/Bloomberg-BNA-Tax-Management-Memo-The-Final-Code.pdf [https://perma.cc/5ZWL-YRBD].

4. Kozak, *supra* note 3. In the absence of a requirement to provide health insurance, for example, in 2019, only 30.8% of firms with fifty or fewer employees offered their workers a group health insurance plan. *See* Sabrina Corlette, Erik Wengle, Megan Houston & Tyler W. Thomas, *The Impact of the COVID-19 Pandemic and Recent Federal Policies on Small Business Health Insurance*, URB. INST. 2 (Aug. 2021), https://www.urban.org/sites/default/files/publication/104641/the-impact-of-the-covid-19-pandemic-and-recent-federal-policies-on-small-business-health-insurance_0.pdf [https://perma.cc/J4Z6-RL69]; *see also* John Aloysius Cogan, Jr., *Does Small Group Health Insurance Deliver Group Benefits? An Argument in Favor of Allowing the Small Group Market to Die*, 93 WASH. L. REV. 1121, 1162 (2018) ("[T]he percentage of small employer[s] not offering coverage has grown from about half in the early 1990s to roughly two-thirds today.").

5. U.S. GOV'T. ACCOUNTABILITY OFF., GAO-13-748T, CHALLENGES AND PROSPECTS FOR EMPLOYEES OF SMALL BUSINESSES 12 (July 16, 2013) (noting that "participants in smaller plans typically pay higher fees than participants in larger plans" and reporting that "representatives of a retirement industry organization said that it may be difficult for sponsors of small plans to negotiate for lower fees because assets in these plans are modest").

6. *See* Allison K. Hoffman, Howell E. Jackson & Amy Monahan, *A Public Option for Employer Health Plans* 16 (Univ. of Pa. L. Sch., Research Paper No. 21-12, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787675 [https://perma.cc/T8C6-V9WW] ("Larger firms are more likely to offer better health insurance and to require employees to pay a lower share of costs, as compared to smaller firms.").

(DOL) reported that in 2018, approximately eighty-five percent of workers at private-sector establishments with one hundred or more workers were offered a retirement plan, compared with just fifty-three percent of workers at private-sector establishments with fewer than one hundred workers.[7] The lack of access to high-quality retirement savings opportunities undermines workers' ability to save for retirement, with half of all working-age households in America currently at risk of being unable to maintain their standards of living in retirement.[8]

But what if smaller employers could offer the same benefits as Fortune 500 companies? And what if the individual employers did not have to handle any of the administrative responsibilities for managing those benefits? In recent years, so-called Professional Employer Organizations (PEOs) have pitched themselves as a private-sector solution to the challenges traditionally faced by smaller employers.[9] PEOs have marketed to smaller and mid-sized employers the possibility of letting someone else handle all human resources (HR) matters, including payroll and tax administration, benefits, employee manuals, workplace safety, training, compliance, and more.[10]

7. Definition of "Employer" Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans, 84 Fed. Reg. 37,508, 37,508 (July 31, 2019) (codified at 29 C.F.R. § 2510) [hereinafter 2019 DOL Regulation]. Among all private-sector workers, as of 2020, about one-third did not have access to a workplace retirement plan. *See 67 Percent of Private Industry Workers Had Access to Retirement Plans in 2020,* U.S. BUREAU OF LAB. STAT. (Mar. 1, 2021), https://www.bls.gov/opub/ted/2021/67-percent-of-private-industry-workers-had-access-to-retirement-plans-in-2020.htm [https://perma.cc/JV26-8BZY]. Although federal law does not require employers to offer any retirement benefits to private-sector employees, in recent years, some fourteen states have passed legislation requiring private-sector employers that do not offer retirement plans to their employees to enroll such employees in state-run retirements savings programs. *See*, *e.g.*, *State Initiatives 2021: More New Programs to Launch While Others Consider Action*, GEO. UNIV. CTR. FOR RET. INITIATIVES, https://cri.georgetown.edu/states [https://perma.cc/PQB4-BU2N].

8. Alicia H. Munnell, Anqi Chen & Robert L. Siciliano, *The National Retirement Risk Index: An Update from the 2019 SCF*, B.C. CTR. FOR RET. RSCH. 1 (Jan. 2021), https://crr.bc.edu/wp-content/uploads/2021/01/IB_21-2.pdf [https://perma.cc/KBH6-P4XM].

9. *See, e.g.*, BILL J. LYONS, WE ARE HR (2021). Professional Employer Organization (PEO) industry groups have reported statistics showing that small businesses that use PEOs grow faster, have less employee turnover, and are less likely to go out of business. *Id.* at 9-10 (claiming that between 2010 and 2018, employment growth among PEO clients was nine percent higher than among other small businesses, and stating that companies that work with PEOs are fifty percent less likely to go out of business). Notably, these statistics do not address the selection bias that could contribute to these findings.

10. For example, the Paychex PEO offers the following menu of services to client employers: recommendations from a dedicated Human Resources (HR) professional, group health insurance, health benefit accounts (Flexible Spending Accounts (FSA), Health Savings Accounts (HSA), Health Reimbursement Accounts (HRA)), 401(k) retirement plan, workers' compensation insurance, payroll processing, time and attendance, employee benefits administration, recruiting services, employee performance management, workplace risk management expertise, learning management system and training offerings, insurance plans, state unemployment insurance (SUI) administration, employee assistance program (EAP), employment practices liability insurance (EPLI) and cyber liability insurance. *Professional Employer Organization (PEO)*, PAYCHEX, https://www.paychex.com/peo [https://perma.cc/WKD8-FTZU].

But the modern PEO is not merely a third-party service provider.[11] Instead, PEOs have pioneered a "co-employment" model, pursuant to which a business and the PEO agree contractually to share certain employer rights and responsibilities.[12] Specifically, the PEO and the client-employer agree that the PEO will become the statutory employer for certain purposes and, in exchange for a service fee, will become responsible for processing payroll, paying payroll taxes, and providing a range of employee benefits.[13] The client or "worksite" employer retains control over staffing decisions and the day-to-day management of the business.[14] Under this PEO-developed co-employment arrangement, PEOs bring together multiple—in some cases thousands—of unrelated employers and serve as the "large" statutory employer for all of their employees. As of 2020, industry estimates suggest that some 487 PEOs provided services to 173,000 small and mid-range businesses employing approximately four million individuals in the United States.[15]

---

11. *See* Colleen E. Medill, *Regulating ERISA Fiduciary Outsourcing*, 102 IOWA L. REV. 505, 507 (2017) (noting the increased interest from private employers in using "outside professional fiduciaries" to perform key plan functions).

12. *See* Edward A. Lenz, *Co-Employment—A Review of Customer Liability Issues in the Staffing Services Industry*, 10 LAB. LAW. 195, 199 (1994) (emphasizing that in a co-employment relationship, the PEO and the client-employer each has "actual or potential legal rights and duties with respect to the same employee or group of employees").

13. PEOs typically use one of two pricing models: a set amount per employee per month (depending on what services the PEO is providing), or a percentage of total gross pay. *See How Much Does a PEO Cost?*, NETPEO, https://www.netpeo.com/faqs/how-much-does-a-peo-cost [https://perma.cc/DT73-BPUR].

14. Paychex, for example, states that

> [t]he PEO acts as the administrative employer for certain administrative services and the client acts as the worksite employer. The client company maintains the responsibility for hiring and managing the employees and for handling all other non-employee related aspects of the business operations (such as sales, marketing, and customer service). The PEO is now responsible for processing employee wages, benefits, and withholdings and for remitting and reporting taxes to any applicable state and federal authorities for the duration of the [Client services Agreement (CSA)]. Certain responsibilities, such as development of an employee handbook may be shared between the client company and the PEO as outlined in the CSA.

What Is a PEO? A Guide to Professional Employer Organizations, PAYCHEX (Apr. 9, 2020), https://www.paychex.com/articles/human-resources/what-is-a-peo-hr-experts-explain [https://perma.cc/C3EH-LLLW].

15. Laurie Bassi & Dan McMurrer, *The PEO Industry Footprint 2021*, NAT'L ASS'N OF PRO. EMP. ORGS. 1-2 (May 2021), https://www.napeo.org/docs/default-source/white-papers/2021-white-paper-final.pdf [https://perma.cc/XLX8-CHEA] (describing new methodology to identify PEOs and observing that "a significant percentage" of companies registered as PEOs with a state "do not actually offer PEO services"). Notably, calculations performed three years earlier that relied primarily on state registrations produced a considerably higher number of unique PEOs. *See* LAURIE BASSI & DAN MCMURRER, AN ECONOMIC ANALYSIS: THE PEO INDUSTRY FOOTPRINT R at 1 (Nat'l Assoc. of Prof. Emp. Orgs. ed., 2018), https://www.napeo.org/docs/default-source/white-papers/2018-white-paper-final7fae50ac2ab0647c9e4fff00004fd204.pdf?sfvrsn=a51e34d4_2 [https://perma.cc/K6MS-W544] (estimating that "at the end of 2017, the 907 PEOs in the United States employed a total of 3.7 million worksite employees (WSEs), who …. worked for approximately 175,000 different PEO clients").

The "co-employment" model created by PEOs does not fit neatly within the existing employer-centric benefits framework, which relies on the identification of a single employer to which certain rights and responsibilities are allocated.[16] PEOs have been able to take advantage of this ambiguity to minimize the scope of regulations applicable to them. However, as PEOs have grown in size and influence,[17] they have caught the attention and imagination of regulators.[18] Today, forty-one states have enacted legislation specifically targeting PEOs, although registration and licensing requirements vary extensively across states.[19] At the federal level, the Tax Increase Prevention Act formally recognized the PEO model in 2014. It also clarified the liability of PEOs for certain tax matters and established a voluntary certification program.[20] Then, in 2019, the Department of Labor for the first time permitted PEOs to sponsor multiple-employer retirement plans as "employers" under the Employee Retirement Income Security Act of 1974 (ERISA).[21] Congress likewise embraced the multiple-employer retirement plan model widely used by

---

16. *See, e.g.*, Justworks, Inc. Form S-1 Registration Statement, SEC 34, https://www.sec.gov/Archives/edgar/data/1623414/000162828021025176/justworkss-1.htm [https://perma.cc/6QD2-Z7L9]. The S-1 for Justworks, Inc, a self-identified PEO, provides the following description of risks related to regulatory compliance:

Our operations are governed by numerous federal, state, and local laws relating to labor, tax, benefits, insurance, and employment matters. We provide benefits to our PEO customers, and by entering into co-employer relationships with WSEs, we assume certain obligations, responsibilities and potential legal risks of an employer under these laws. However, many of these laws (such as the Employee Retirement Income Security Act ("ERISA"), and federal and state employment tax laws) do not specifically address the obligations and responsibilities of a provider of outsourced HR services in a co-employer relationship, and the definition of employer under these laws is not uniform. In addition, many states have not addressed the co-employer relationship for purposes of compliance with applicable state laws governing the relationship between employers and employees and state insurance laws.

Id.

17. According to Lyons, "[b]etween 2008 and 2018 the number of workers coemployed by a PEO grew at a compounded annual rate of 8.3 percent," which is approximately fourteen times higher "than the compounded annual-growth rate of employment in the economy overall during the same period." LYONS, *supra* note 9, at 19; *see also* Bassi & McMurrer, *supra* note 15 (estimating an annual growth rate for PEOs of 7.6% between 2009 and 2020, or 8.3% excluding the pandemic period).

18. For a discussion of lobbying efforts by PEO industry groups, see Timothy J. Bartkiw, *Regulatory Differentials and Triangular Employment Growth in the U.S. and Canada*, 19 EMP. RTS. & EMP. POL'Y J. 1, 36 (2015) (describing the efforts of the National Association of Professional Employment Organizations (NAPEO) to "proactively" develop model legislation and lobby at the state level).

19. As discussed in Part II, *infra*, some states require the submission of audited financials and impose working-capital and minimum-net-worth thresholds on PEOs, while others do very little to regulate or track the PEOs operating in their states. *See State PEO Laws Chart: Overview 4-616-7435*, PRACTICAL L. LAB. & EMP., Westlaw (database updated Oct. 19, 2021); *PEO—Professional Employer Organizations Licensing by State*, STAFFMARKET, https://www.staffmarket.com/directory/licensing [https://perma.cc/Q2H9-JSZD].

20. Tax Increase Prevention Act of 2014 (TIPA), Pub. L. No. 113-295, 128 Stat. 4010 (codified in scattered sections of I.R.C.). *See generally* Katherine Sanford Goodner & Ursula Ramsey, *Certified Professional Employer Organizations and Tax Liability Shifting: Assessing the First Two Years of the IRS Certification Program*, 16 BERKELEY BUS. L.J. 571 (2019) (providing an overview of TIPA, its new certification process, and its impact on and implications for PEOs).

21. 2019 DOL Regulation, *supra* note 7.

PEOs when it passed the Setting Every Community Up for Retirement Enhancement Act (SECURE Act) at the end of 2019. The Act allows PEOs, as well as other financial services companies, to serve as "pooled plan providers" for unrelated employers.[22] In the eleven months since the SECURE Act went into effect, seventy-seven pooled plan providers have registered with the Department of Labor, and more registrations are expected in the months ahead.[23] Finally, in September of 2021, the Department of Labor proposed changes to its disclosure and reporting regime to better reflect the rise of multiple-employer plans, including those sponsored by PEOs.[24]

The increased recognition of PEOs by states and the federal government over the last decade has been accompanied by growing scrutiny of PEO arrangements. PEOs have begun to appear as defendants in class-action litigation challenging their retirement plan arrangements and fees,[25] as well as the targets of DOL investigations into health insurance plans administered by PEOs.[26]

---

22. Setting Every Community Up for Retirement Enhancement Act (SECURE Act), incorporated into Further Consolidated Appropriations Act, Pub. L. No. 116-94, 133 Stat. 2534 (2019) (eliminating prior restrictions on multiple-employer plans and permitting "pooled plan providers" to bring together unaffiliated employers to offer 401(k)-type plans).

23. *Filing Search*, DEP'T OF LAB., https://www.efast.dol.gov/portal/app/disseminatePublic?execution=e1s1 [https://perma.cc/38XQ-TAUZ] (select "Registration for Pooled Plan Provider" from the Search Type dropdown; then select "Initial Filing" for the Filing Type and search to generate Pooled Plan Provider Registrations); *see also* Margarida Correia, *New PEPs Targeting Firms Without Retirement Plans*, PENSIONS & INVS. (Apr. 5, 2021, 12:00 AM), https://www.pionline.com/defined-contribution/new-peps-targeting-firms-without-retirement-plans [https://perma.cc/RW2K-3CLC] (reporting that Paychex Inc., which offers a PEO service, has already signed up one thousand employers previously lacking any retirement plan into Paychex's pooled employer plan).

24. *See* Annual Reporting and Disclosure, 86 Fed. Reg. 51,284 (proposed Sept. 15, 2021) (to be codified at 29 C.F.R. pt. 2520); Proposed Revision of Annual Information Return/Reports, 86 Fed. Reg. 51,488 (proposed Sept. 15, 2021) (to be codified at 29 C.F.R. pts. 2520, 301, 4065).

25. *See, e.g.*, Nevin E. Adams, *ADP MEP Tapped in Excessive Fee Suit*, NAT'L ASS'N OF PLAN ADVISORS (May 5, 2020), https://www.napa-net.org/news-info/daily-news/adp-mep-tapped-excessive-fee-suit [https://perma.cc/P8RE-5FPQ] (noting that "[a] new excessive fee suit has been filed—one that purports to represent a class of some 5,000 employers participating in a multiple employer plan, or MEP" against ADP TotalSource Group, Inc. and the administrative committee of its Retirement Savings Plan); Emile Hallez, *TriNet Sued over MEPs*, INV. NEWS (Oct. 6, 2020), https://www.investmentnews.com/trinet-sued-meps-197793 [https://perma.cc/QK7R-QV6V] (stating that TriNet and other MEP providers, including Pentegra and ADP, "have similarly been targeted in class-action lawsuits this year"); Rebecca Moore, *Settlement Reached in Insperity 401(k) Excessive Fee, Self-Dealing Suit*, PLANSPONSOR (Oct. 14, 2020), https://www.plansponsor.com/settlement-reached-insperity-401k-excessive-fee-self-dealing-suit [https://perma.cc/XC34-29P6] (reporting on a lawsuit "filed in 2015 by participants in [a] plan . . . which Insperity, a professional employer organization (PEO), offers to employees of small and medium-sized businesses"); Robert Steyer, *Pentegra Retirement Services Hit with ERISA Lawsuit*, PENSIONS & INVS. (Sept. 17, 2020, 3:35 PM), https://www.pionline.com/courts/pentegra-retirement-services-hit-erisa-lawsuit [https://perma.cc/7KVD-PN8C] ("Participants in a multiple employer plan managed by Pentegra Retirement Services Inc. filed a lawsuit against the company and fiduciaries alleging ERISA violations.").

26. *See* Christine Monahan, *Updates from the MEWA Files: The Good, the Bad, and the Ugly of Federal Enforcement Efforts*, CTR. ON HEALTH INS. REFORMS BLOG (Dec. 18, 2019), http://chirblog.org/mewa-files-part-3-good-bad-ugly [https://perma.cc/PE6T-7EQY].

Despite their growing popularity among employers and policymakers, and the recent attention from plaintiffs' attorneys and DOL enforcement teams, the PEO model remains underexamined and poorly understood. The centrality of individual employers in the provision and administration of retirement and healthcare benefits has long been the subject of scholarly debate[27] and in recent years scholars have increased their focus on human capital management.[28] Yet PEOs—and the origins, promise and pitfalls of the co-employment model—have received only limited scholarly attention to date.[29]

This Article aims to fill the gaps in scholarship on PEOs. Part I first traces the origins and evolution of PEOs in the United States, including the history of fraud and abuse by prior "iterations" of the PEO model, and the regulatory responses over time. Part II then examines the co-employment model within the existing regulatory framework.

This Article suggests that while PEOs respond to legitimate long-standing challenges faced by smaller employers, they also introduce new and significant governance concerns. The Department of Labor, while certainly aware of the troubled history of employer-pooling arrangements, has allowed PEOs to proliferate for decades without directly recognizing PEO-sponsored plans.[30] More recently, amidst a growing push to expand

27. *See* Brendan S. Maher, *Regulating Employment-Based Anything*, 100 MINN. L. REV. 1257, 1257 (2016) (emphasizing that "[i]n the United States, [] employment-based interventions are massive: they affect trillions of dollars, billions in tax breaks, and millions of people" and yet they are less well-theorized than other government interventions). As alternatives to voluntary employer-sponsored benefits, scholars have set forth a range of proposals to make certain benefits mandatory, increase the role of the government in benefits administration, or to alter the regulatory regimes for employer-sponsored benefits. *See, e.g.*, Hoffman, Jackson & Monahan *supra* note 6, at 5-6 (proposing an "employer public option" pursuant to which "[e]mployers could choose to enroll their workforce in a public plan, based on Medicare, instead of having to design and administer their own private plan"); Dana M. Muir, *Choice Architecture and the Locus of Fiduciary Obligation in Defined Contribution Plans*, 99 IOWA L. REV. 1, 6-7 (2013) (proposing the creation of "Safe Harbor Automated Retirement Products" as a means of shifting "portions of the fiduciary responsibility currently shouldered by employers that sponsor 401(k) plans" to financial services providers).

28. *See, e.g.*, George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TULANE L. REV. 639, 639 (2021) (noting that since the mid-2010s, human capital management—"[a] notion that workers can be viewed as 'assets' and ought to be managed just as carefully as firms manage physical and capital assets"—has "become an increasingly prominent part of U.S. corporate governance").

29. *See, e.g.*, Britton Lombardi & Yukako Ono, *Professional Employer Associations: What Are They, Who Uses Them and Why Should We Care?*, 32 ECON. PERSP. 2 (2008); Brian S. Klaas, *Professional Employer Organizations and Their Role in Small and Medium Enterprises: The Impact of HR Outsourcing*, 28 ENTREPRENEURSHIP THEORY & PRAC. 43 (2003); Goodner & Ramsey, *supra* note 20. While scholarship on PEOs is limited, scholars have considered the evolution of and challenges associated with employee-leasing arrangements and multiple-employer welfare arrangements (MEWAs). For scholarship on MEWAs, *see infra* note 64. For scholarship on employee leasing, *see infra* note 33.

30. For a discussion of the troubled history of multiple-employer welfare arrangements, see *infra* notes 58-63 and accompanying text. Notably, as of 2021, the Department of Labor stated that it does not have information on how many PEOs are currently sponsoring defined contribution plans, but that it "assumes a substantial percentage of PEOs do sponsor MEPs,

access to workplace health and retirement benefits, the Department of Labor and Congress have acknowledged and embraced the PEO model.[31] They have done so, however, without fully addressing the problems and the regulatory gaps that have plagued similar multiple-employer arrangements in the past. At present, neither the patchwork of state and federal regulation aimed at PEOs nor the federal benefits framework for "traditional" employers adequately addresses the unique agency costs inherent in the PEO model.

Part III then turns to an examination of the empirical data on PEOs and PEO-sponsored plans. Although empirical analyses are extremely limited, some preliminary evidence suggests that PEOs may not, in fact, provide "Fortune 500" benefits to smaller employees and may instead lock participating employers into costly benefit bundles and expose them to the risk of unpaid employment taxes and health insurance claims. While recent class-action litigation and DOL investigations serve as notable checks on PEOs' conduct, in order to allow policymakers and scholars to comprehensively assess the PEO model, this Article proposes reforms to facilitate systematic analysis of both PEO-sponsored benefits and workplaces subject to the co-employment model.

Finally, Part IV situates the growth of PEOs in the transformation of employee benefits in the United States, including recent efforts to expand access to health insurance and retirement savings plans.[32] The last decade has witnessed the proliferation of non-employer intermediaries in the provision of workplace benefits. In addition to PEOs, such intermediaries include state and local governments, as well as industry groups and associations, insurance companies, banks, and other financial services providers that have sought to take the place of traditional employer intermediaries in the provision of workplace benefits. This Article suggests that federal law must recognize and analyze the important differences between employer and non-employer plan sponsors. Professional

including defined contribution MEPs." Annual Reporting and Disclosure, 86 Fed. Reg. 51,284, 51,291 (proposed Sept. 15, 2021) (to be codified at 29 C.F.R. pt. 2520).

31. *See* 2019 DOL Regulation, *supra* note 7, at 37,508 (observing that "[a]pproximately 38 million private-sector employees in the United States do not have access to a retirement plan through their employers" and that expanding access to workplace retirement plans is therefore "critical to helping more American workers financially prepare to retire"). In the regulation, the DOL states that prior "uncertainty about the ability of PEOs and associations to sponsor MEPs as "employers" may have hindered the creation of MEPs and notes that the lack of "clear standards" may have discouraged PEOs from setting up MEPs "to the detriment of employers, especially small employers." By acknowledging PEOs and providing regulatory clarity for PEO-sponsored plans, the 2019 DOL Regulation facilitates the growth of PEO-sponsored MEPs. *Id.* at 37,509.

32. Mike Dorning, *Democrats Aim to Push Firms into Auto-Sign-Up Retirement Plans*, BLOOMBERG (Sept. 7, 2021, 4:52 PM EDT), https://www.bloomberg.com/news/articles/2021-09-07/democrats-aim-to-push-firms-into-auto-sign-up-retirement-plans [https://perma.cc/YDF8-SCLL] (reporting that "House Democrats proposed requiring companies to automatically enroll workers for IRAs or 401(k)-type retirement plans under a provision tucked into draft legislation enacting the bulk of President Joe Biden's economic plan").

employer organizations—despite what their name may suggest—have more in common with non-employer intermediaries than with traditional employers. To the extent that Congress has already developed additional governance and oversight requirements for such non-employer intermediaries, they should apply with equal force to PEOs.

I. The History of PEOs: A Tale of Rebranding

While the term "professional employer organization" is relatively new, PEOs represent the latest iteration in a series of arrangements that have over many decades sought to outsource or "lease" employees.[33] Earlier iterations involved a client terminating its entire workforce, followed by a leasing company employing that workforce, and then the leasing company providing that same workforce to the client as "leased" employees.[34]

Earlier versions of the PEO model were established to take advantage of loopholes in pension law, workers' compensation requirements, and unemployment taxes. Following the passage of the Employee Retirement Income Security Act in 1974, employee leasing arrangements provided a work-around the nondiscrimination requirements in ERISA and in the Internal Revenue Code. Such nondiscrimination requirements sought to curb the practice of employers making far more generous pension contributions to officers and key employees (and deducting the contributions as a business expense) while offering much less generous contributions to their rank-and-file employees. Since ERISA did not require separate organizations with common ownership to be aggregated for purposes of the nondiscrimination rules, predecessors of the PEO helped clients consolidate highly-compensated and non-highly compensated employees into separate entities, thereby allowing businesses to skirt the nondiscrimination rules.[35]

---

33. Lombardi & Ono, *supra* note 29. For scholarship on employee leasing arrangements, see Sheldon S. Cohen, *Employee Leasing: Industry in a Time of Change*, 20 FORUM 657 (1985); Jonathan P. Hiatt, *Policy Issues Concerning the Contingent Work Force*, 52 WASH. & LEE L. REV. 739 (1995); Note, *Pension Plans and the Employee Leasing Provision: A Proposal for Clarifying Change*, 53 GEO. WASH. L. REV. 852 (1985); Barbara McIntosh, *Employee Leasing Issues: Employer Determination and Liability Considerations*, 38 LAB. L.J. 11 (1987); Orly Lobel, *The Slipperiness of Stability: Contracting for Flexible and Triangular Employment Relationships in the New Economy*, 10 TEX. WESLEYAN L. REV. 109, 135 (2003) (observing that "the traditional employer is no longer the single significant, and often not even the primary, actor of the labor market"); Harris Freeman & George Gonos, *Taming the Employment Sharks: The Case for Regulating Profit-Driven Labor Market Intermediaries in High Mobility Labor Markets*, 13 EMP. RTS. & EMP. POL'Y J. 285 (2009); and David A. Pratt, *Too Big to Fail? The U.S. Retirement System in 2019*, 27 ELDER L.J. 327 (2019).

34. *See* Goodner & Ramsey, *supra* note 20, at 576-77.

35. *Id.* (describing the use of employee leasing to "avoid ERISA's 'same employer' requirements").

In 1980, the passage of Section 414(m) of the Internal Revenue Code amended the common ownership rules to make leasing arrangements considerably less attractive.[36] Legislative developments in 1982 and 1986 further restricted the ability of employee leasing firms to skirt nondiscrimination requirements.[37] By that time, however, businesses in the employee leasing space had evolved and begun to offer clients other benefits that could be achieved through employee pooling. In the latter decades of the twentieth century, employee leasing firms brought together employees from different industries and took advantage of lax underwriting standards and technical loopholes to obtain lower insurance premiums for workers' compensation[38] and lower State Unemployment Tax Act (SUTA) rates.[39] While subsequent legislative developments limited certain practices like SUTA dumping,[40] by creating a large and relatively more stable pool of employees, PEOs could still offer clients lower SUTA rates than what the clients could obtain on their own.

Yet even as legislators gradually eliminated the loopholes and pension-plays that had first drawn clients to employee leasing firms, clients continued to use leasing firms for the other benefits they had to offer,

36. I.R.C. § 414(m) (West 2020) (expanding the definition of an "affiliated service group" and providing that "all employees of the members of an affiliated service group shall be treated as employed by a single employer").

37. *See* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (establishing that highly compensated employees of a particular company could not be provided a different pension plan than other employees and clarifying that leased employees had to be treated as employees of the client company unless specific safe harbor provisions were satisfied); Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2085 (further limiting the safe harbors for leased employees).

38. Workers' compensation insurance generally provides wage replacement and medical benefits to employees injured in the course of employment. Premiums for workers' compensation insurance is determined by factors such as a particular employer's industry, the type of work performed by each employee, the company's claims history, and company payroll. Employee-leasing arrangements sought to take advantage of workers' compensation rules through a scheme known as "mod laundering" whereby the employee leasing company would claim that, as a new employer, the workers' compensation premium charged to the leasing company should not be affected by the accident experience of its clients before they joined the employee-leasing arrangement. *See, e.g.*, *Guidelines for Regulations and Legislation on Workers' Compensation Coverage for Professional Employer Organization Arrangements*, NAT'L. ASS'N OF INS. COMM'RS 3 (Oct. 2010), https://content.naic.org/sites/default/files/GL1950.pdf [https://perma.cc/MZ2W-ZJNK] ("The opaque, poorly documented nature of some employee leasing arrangements also fostered 'shell games,' in which workers and worksites fell into gaps where neither the client nor the leasing company was paying the premium for the exposure. Occasionally, the leasing company simply charged its clients for insurance it never bought.").

39. The State Unemployment Tax Act (SUTA) is a payroll tax required of employers. The taxes collected by each state's unemployment fund are subsequently used to provide unemployment benefits. In calculating SUTA rates, states consider a number of factors, including the number of former employees filing unemployment claims, account status, age of the business, and the turnover rate in the relevant industry.

40. *See, e.g.*, SUTA Dumping Prevention Act of 2004, 42 U.S.C. § 503 (2018); *see also SUTA Dumping: You Could Pay the Price for Your PEO*, Axiom Hum. Res. Sols. (Aug. 13, 2012), https://axiomhrs.com/hris/benefits/suta-dumping [https://perma.cc/Q4L9-KZZJ] (explaining that "SUTA dumping is a form of tax avoidance through 'dumping' or exchanging a relatively high unemployment tax rate for a lower one by setting up a shell company, shifting employees, or other fraudulent schemes").

including payroll, health benefits, and HR compliance. In 1994, the industry made concerted efforts to move away from the "employee leasing" terminology and to shed its past reputation, coining and embracing instead the term "professional employer organization," which has been used since. The next Part turns to the evolution of the regulatory framework for PEOs.

II. The Current Regulatory Framework for PEOs

As PEO leaders themselves acknowledge, employee leasing arrangements and early PEO prototypes were plagued by both "outright theft" and "pure incompetence" as the large sums of money that passed through these firms made them a tempting target for unscrupulous actors.[41] Clients of employee leasing firms would remit payroll taxes to an employee leasing firm, only to discover that those taxes had never been paid to the IRS.[42] Yet PEOs continued to draw clients for the payroll, benefits, and HR support services that they could provide.[43] Interest in PEOs increased following the passage of the Affordable Care Act, which added to the administrative complexity and responsibilities facing individual employers.[44]

This Part begins by situating PEO arrangements within the traditional U.S. regulatory framework for employee benefits. It then traces the recent regulatory developments specifically aimed at PEOs, including those

41. LYONS, *supra* note 9, at 31-32; *see also* Mukul Pandya, *Earning It; Employee Leasing: The Risks of Swimming in a Big Pool*, N.Y. TIMES (June 11, 1995), https://www.nytimes.com/1995/06/11/business/earning-it-employee-leasing-the-risks-of-swimming-in-a-big-pool.html [https://perma.cc/5R77-YYWJ] (describing the ability of leasing organizations to negotiate better health plans and other benefits, but also characterizing certain leasing arrangements as "minefield[s]" that have "le[d] to bounced paychecks, unpaid insurance premiums, even looted benefit plans").

42. Goodner & Ramsey, *supra* note 20, at 573 (describing the "familiar story" in which "the customer provided the funds to the PEO to cover the employment taxes" but "the PEO failed to pay the taxes owed and instead, as seen in many cases, used the money for the PEO owners' personal use and expenditures").

43. John Richards, *Welfare Benefits Provided by PEOs*, 55 TAX LAW. 5, 7-8 (2001) (noting the concern that "employers may use PEOs . . . to circumvent the tax rules requiring that employee benefits be provided in a nondiscriminatory manner" and that "PEOs may be used to circumvent state insurance laws"); Goodner & Ramsey, *supra* note 20, at 577 (noting the appeal of outsourcing "human resource woes").

44. In addition to the administrative complexity of the Affordable Care Act (ACA), the ACA also established group rating rules that require insurance policies sold in the "small group" market to generally include certain mandatory benefits and to be priced based upon the rating experience within the community in which such policy is sold. Some small employers that believed their employee population's rating experience was better than the community group rating have looked to self-insured plans, including those that bring together a large enough number of employees to make self-insuring actuarially viable, as an alternative to small-group markets for health insurance. *See* Erin Turley, Heidi Alessi & Jennifer S. Addis, *Benefits Guide: Basics, Welfare and Fringe Benefits, Multiple Employer Welfare Arrangements (MEWAs)*, BLOOMBERG LAW (2021) https://www.bloomberglaw.com/product/blaw/document/XO40HVH8 [https://perma.cc/QWD9-8SJC].

brought about by the Tax Increase Prevention Act in 2014 and the SECURE Act of 2019. Next, it reviews state efforts to regulate PEOs and the influence of PEO industry groups on the development of state-level policies. Finally, this Part turns to regulatory efforts by the PEO industry groups themselves. Despite these industry initiatives and the recent regulatory efforts at various levels of government, this Part suggests that the patchwork of state and federal regulation provides limited oversight over existing PEOs.

A. Situating PEOs within the Existing Regulatory Framework

The U.S. regulatory framework for employee benefits dates back to the post-World War II era and is anchored in the conventional employer-employee relationship. ERISA regulates "employee benefit plans," which by definition includes any plans, funds, or programs sponsored by "*employers*" or "*employee organizations.*"[45] In the 1960s and early 1970s, ERISA's drafters sought to protect participants in employee benefit plans—particularly retirement plans—by imposing substantive qualification, vesting, funding, and insurance requirements on plans that employers chose to establish for their employees, and by imposing prudence and loyalty requirements on plan fiduciaries.[46] The drafters also sought to establish a more uniform regulatory regime for plan sponsors, including those with employees in multiple states. To achieve the latter result, the drafters included a very broad preemption provision, thereby limiting the reach of individual states in the realm of employee benefits regulation.[47]

The application of ERISA to a particular set of workplace benefits turns on several key definitions. ERISA defines an "employer" as any person acting "directly as an employer, or indirectly in the interest of an employer"; and the definition of "employer" further includes "a group or association of employers" acting for an employer in such capacity.[48]

---

45. 29 U.S.C. § 1002(1) (2018) (emphasis added). Furthermore, the term "employee organization" is defined as

> any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.

29 U.S.C. § 1002(4) (2018).

46. *See* Natalya Shnitser, *Trusts No More: Rethinking the Regulation of Retirement Savings in the United States*, 2016 BYU L. REV. 629, 656.

47. 29 U.S.C. § 1144 (2018). ERISA's preemption provision has generated extensive controversy and case law since 1974. For recent scholarship on ERISA preemption, see Erin C. Fuse Brown & Elizabeth Y. McCuskey, *Federalism, ERISA, and State Single-Payer Health Care*, 168 U. PA. L. REV. 389 (2020); and Edward A. Zelinsky, *ERISA Preemption After* Gobeille v. Liberty Mutual*: Completing the Retrenchment of* Shaw, 34 HOFSTRA LAB. & EMP. L.J. 301 (2017).

48. 29 U.S.C. § 1002(5) (2018).

Sponsorship by an employer or an employee organization is a necessary condition for coverage under ERISA. For decades, federal courts have used the common law agency test to determine the existence of an employee and to identify the employer.[49] Furthermore, prior to the issuance of new regulatory guidance in 2018-2019 to "clarify" the definition of "employer," the Department of Labor and the courts had interpreted narrowly the meaning of a group or association of employers.[50]

In 2018 and 2019, the DOL issued two regulations—one addressing health plans and the other addressing retirement plans—that provided new agency guidance on the definition of "employer" under ERISA. The 2018 regulation, which was successfully challenged in court by eleven states, sought to broaden the criteria under ERISA Section 3(5) for determining when unrelated employers can join together in an association that would be treated as the "employer" sponsor of a single multiple-employer group health plan.[51] The 2019 regulation established that associations and PEOs

49. ERISA defines an "employee" as "any individual employed by an employer." *Id.* § 1002(6); *see also* National Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992) (establishing that for purposes of determining whether an individual is an employee entitled to ERISA's protective provisions, the common law employee standard is the relevant test). Notably, the "label" put on workers is irrelevant; what matters is who is deemed to be the "common law" employer of the worker under a multiple-factor test. Turley, Alessi & Addis, *supra* note 44.

50. As the DOL explained in 2019, historically the agency and the courts have "asked whether the group or association has a sufficiently close economic or representational nexus to the employers and employees that participate in the plan that is unrelated to the provision of benefits." 2019 DOL Regulation*, supra* note 7, at 37,511. According to the DOL,"[t]he analysis has focused on three broad sets of issues, in particular: (1) Whether 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." *Id.*; *see also* U.S. DEP'T OF LAB., MULTIPLE EMPLOYER WELFARE ARRANGEMENTS UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA): A GUIDE TO FEDERAL AND STATE REGULATION 8 (2013), https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/mewa-under-erisa-a-guide-to-federal-and-state-regulation.pdf [https://perma.cc/B3ME-AUD4] (explaining that "where several unrelated employers merely execute identically worded trust agreements or similar documents as a means to fund or provide benefits, in the absence of any genuine organizational relationship between the employers, no employer group or association exists for purposes of Section 3(5)"); Gruber v. Hubbard Bert Karle Weber, Inc., 159 F.3d 780, 787-88 (3d Cir. 1998) (holding that "common size is not a bona fide organizational relationship"); Matthew 25 Ministries, Inc. v. Corcoran, 771 F.2d 21 (2d Cir. 1985) (holding that the corporation operating a trust purporting to provide employees with healthcare benefits was not a bona fide employer or employee organization under ERISA, since the corporation failed to show that its trust was established or maintained by individual employer members).

51. Definition of "Employer" Under Section 3(5) of ERISA—Association Health Plans, 83 Fed. Reg. 28,912 (June 21, 2018) (codified at 29 C.F.R. § 2510) [hereinafter 2018 DOL Regulation] (eliminating the DOL's prior requirement that a group or association must have "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). The rule was challenged by eleven states, who argued that the rule "unlawfully expand[ed] ERISA to allow all employers . . . in a State or 'metropolitan area' to group together into a profit-making commercial insurance enterprise." Complaint at 7, New York v. United States Department of Labor, No. 18-cv-01747-JDB (D.D.C. July 26, 2018). While ERISA's definition of "employer" can include an

that meet certain criteria would constitute "employers" within the meaning of ERISA for purposes of establishing a retirement plan.

While the regulatory guidance in 2018 and 2019 focused on ways that a group or association could meet the definition of "employer" under ERISA and thus sponsor a single ERISA-covered plan for multiple employers, it is important to recognize that ERISA directly recognizes and regulates *welfare* benefit plans that cover employees of multiple, unaffiliated employers.[52] These "multiple-employer welfare arrangements" or "MEWAs" offer benefits (typically health insurance) that may constitute "welfare benefits" under ERISA, but the Department of Labor has taken the position that MEWAs that are not established or maintained by either an employer or an employee organization do not constitute ERISA-covered plans.[53]

The determination of ERISA coverage is critical due to ERISA's broad preemption provision, which provides that ERISA shall supersede any and all state laws insofar as they "relate to" any employee benefit plan.[54] ERISA's preemption provision, however, explicitly saves from preemption state insurance regulation, such that states can impose substantive requirements on the insurance policies used by employee benefit plans that chose to provide benefits through insurance contracts.[55] State regulation cannot reach ERISA-covered employee benefits plans that do not use insurance contracts and instead decide to "self-insure."[56]

Whether a particular arrangement—including one sponsored by a PEO—is subject to ERISA, state law, or both, depends on whether the arrangement is established by an "employer" and whether the particular arrangement uses an insurance contract. As described below, the complexities in the interplay of these ERISA provisions have generated a

association of employers "acting . . . indirectly in the interest of an employer," the states emphasized that "federal courts for decades have interpreted that phrase to cover *only* associations whose members share a true commonality of interest, or close nexus, with one another." *Id.* In 2019, the District Court for the District of Columbia vacated the key provisions of the final rule. New York v. United States Department of Labor, 363 F. Supp. 3d 109 (D.D.C. 2019).

52. 29 U.S.C. § 1002(40) (2018) (defining a "multiple employer welfare arrangement" as "an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers.").

53. *See* U.S. DEP'T OF LAB., *supra* note 50, at 7.

54. 29 U.S.C. § 1144(a) (2018).

55. *Id.* § 1144(b).

56. *Id.* ERISA's so-called "deemer clause" provides that states cannot "deem" an employee benefit plan to be an insurer in order to subject it to state regulation. *Id.* § 1144(b)(2)(B). Therefore, states are unable to impose substantive requirements on plans that choose to self-insure rather than use an insurance contract.

decades-long game of cat and mouse between the Department of Labor and various regulatory "entrepreneurs," including PEOs.[57]

Immediately after ERISA's passage, various entities began offering health insurance plans through MEWAs.[58] Such MEWA "entrepreneurs"—including persons whose primary interest was to profit from the provision of administrative services—exploited the controversy over the reach of ERISA's preemption provision and the ability of states to regulate MEWAs. The MEWAs were "rife with fraud and abuse, leaving behind a trail of unpaid claims."[59]

When states sought to enforce their own insurance laws to regulate these plans, the MEWAs invoked ERISA's preemption provision (claiming that they were ERISA plans and thus not subject to state law). At the same time, the Department of Labor claimed to lack authority over these insurance arrangements, asserting that most were not, in fact, "ERISA plans" because the groups or associations offering the plans did not satisfy ERISA's "employer" definition. The result was confusion that hindered state efforts to stop fraudulent and illegal activity.[60]

In 1983, Congress amended ERISA to attempt to clarify the scope of federal and state regulation of MEWAs.[61] The 1983 amendments added an exception to ERISA's general preemption provision for MEWAs and established 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) 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

57. For a discussion of "regulatory entrepreneurship," see Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383, 383 (2017), which examines businesses in which "changing the law is a significant part of the business plan."

58. Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment at 6, New York v. United States Department of Labor, No. 18-cv-01747-JDB (D.D.C. Aug. 23, 2018) (explaining how after ERISA's passage, entities began abusing ERISA's definition of employer to offer health insurance plans through MEWAs).

59. *See, e.g.*, Turley, Alessi & Addis, *supra* note 44, at 2 (reporting that "[i]n the early 1980s . . . the Attorney General of Illinois characterized MEWA abuse as having the potential to become the 'most sophisticated and profitable white-collar crime in America'"); *see also* Mila Kofman, *Association Health Plans: Loss of State Oversight Means Regulatory Vacuum and More Fraud*, HEALTH POL'Y INST. (2005), https://georgetown.box.com/shared/static/nih75z89vjsawwk0zfwb.pdf [https://perma.cc/T8SN-A3VY] (describing insurance scams throughout ERISA's 30-year history and the lack of federal oversight that contributed to their proliferation).

60. *Id.*; *see also* Edward A. Scallet, *The Regulation of Multiple Employer Trusts: Past, Present, & Future*, 61 WASH. U. L. REV. 359, 373-79 (describing the DOL's position that such multiple-employer arrangements were not established by an "employer").

61. Multiple Employer Welfare Arrangement Act of 1983, Pub. L. No. 97-473, 96 Stat. 2611. The amendment was a response to Congressional concern that "that certain MEWA operators were successfully thwarting timely investigations and enforcement activities of state agencies by asserting that such entities were ERISA plans exempt from state regulation by the terms of section 514 of ERISA." DOL Notice of Intent to Form a Negotiated Rulemaking Advisory Committee, 63 Fed. Reg. 18345, 18347 (Apr. 15, 1998).

inconsistent Title I of ERISA.[62] The 1983 amendment set up a dual jurisdiction regime that clarified the power of states to regulate MEWAs in an effort to limit, the ability of MEWA operators to challenge such regulation on the grounds of ERISA preemption. In particular, the 1983 amendment gives states the primary responsibility for overseeing the financial soundness of MEWAs and the licensing of MEWA operators. The Department of Labor, meanwhile, enforces the fiduciary provisions of ERISA against MEWA operators to the extent that a MEWA is an ERISA plan or holds plan assets.[63]

Even after the 1983 amendments, however, different states approached MEWAs differently, resulting in a patchwork regulatory framework that persists to this day.[64] Furthermore, numerous MEWAs persisted in casting themselves as ERISA plans not subject to state laws.[65] From 1988 to 1991, “failed MEWAs left thousands of people in dozens of states without health insurance and nearly 400,000 patients with unpaid medical claims exceeding $123 million.”[66] Abuse by MEWAs has continued, with the Department of Labor devoting “significant resources to investigating and litigating issues connected with abusive MEWAs created by unscrupulous promoters who sell the promise of inexpensive health benefit insurance, but default on their obligations.”[67]

---

62. Sec. 302(b), Pub. L. 97-473, 96 Stat. 2611, 2613 (29 U.S.C. 1144(b)(6)).

63. U.S. DEP’T OF LAB., MULTIPLE EMPLOYER WELFARE ARRANGEMENTS, *supra* note 50, at 117.

64. *See generally* Phyllis C. Borzi, *Erisa Health Plans: Key Structural Variations and Their Effect on Liability*, CTR. FOR HEALTH SERVS. RSCH. & POL’Y 11 n.17 (Sept. 2002), https://publichealth.gwu.edu/departments/healthpolicy/CHPR/downloads/ERISA-health-plans.pdf [https://perma.cc/3TXQ-6ZY3] (observing that even after 1983, “treatment of MEWAs by the states has not been uniform”). A 2004 General Accounting Office (GAO) report found that employers and individuals remained vulnerable to unlicensed or “bogus” entities selling fraudulent health insurance coverage through “associations they created or through established associations of employers or individuals.” U.S. GEN. ACCT. OFF., GAO-04-312, PRIVATE HEALTH INSURANCE: EMPLOYERS AND INDIVIDUALS ARE VULNERABLE TO UNAUTHORIZED OR BOGUS ENTITIES SELLING COVERAGE 1-4 (Feb. 2004). The GAO observed that in order to create confusion over applicable regulatory regimes, “[t]he operators of these entities often characterized the entities in one of several ways that gave an appearance of being exempt from state insurance regulation when they should have been subject to regulation.” *Id.* at 4.

65. Bartkiw, *supra* note 18. Although a plain reading of these provisions would seem to suggest that a PEO-constructed health plan arrangement, in which the PEO purports to sponsor a health insurance plan for the employees of its multiple clients, would constitute a MEWA, the PEO industry has long struggled to resist this classification. Instead, the industry has sought to have PEO health plans treated like single-employer plans, regulated by ERISA and not falling under the scope of state MEWA regulations.

66. Complaint at 18, New York v. United States Department of Labor, No. 18-cv-01747-JDB (D.D.C. July 26, 2018); *see also* U.S. GEN. ACCT. OFF., GAO/HRD-92-40, EMPLOYEE BENEFITS: STATES NEED LABOR’S HELP REGULATING MULTIPLE EMPLOYER WELFARE ARRANGEMENTS 2 (Mar. 1992) (reporting that “MEWAs have proven to be a source of regulatory confusion, enforcement problems, and, in some instances, fraud . . . . More than 600 MEWAs failed to comply with state insurance laws, and some violated criminal statutes”).

67. Emp. Benefits Sec. Admin., *Fact Sheet: MEWA Enforcement*, U.S. DEP’T OF LAB. 2 (Mar. 2013), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/mewa-enforcement.pdf [https://perma.cc/HZ6J-R3NJ].

Starting in 1991, Congress required MEWAs to register with DOL before operating in a state.[68] Even while completing such registration requirements for MEWAs, modern-day PEOs continue to deny and protest their MEWA status.[69] The debate ultimately comes back to the question of who is an "employer" and whether, as the PEOs would argue, a PEO-sponsored plan for all of the employees of client employers should be treated like a single-employer plan under ERISA.

B. Direct Federal Recognition of and Requirements for PEOs

As the previous part has shown, while there is an extensive regulatory framework for U.S. employers, much of it is centered around traditional employment relationships and incentives, rather than on co-employment arrangements.[70] Until recently, PEOs have operated without direct guidance on the treatment of co-employment arrangements under existing law. Starting in 2014, the federal government began to acknowledge PEOs explicitly and has since taken steps to help potential clients distinguish between less and more trustworthy PEOs.

1. Creation of Certified Professional Employer Organizations: The Tax Increase Prevention Act of 2014

In 2014, the Tax Increase Prevention Act introduced several key provisions for PEOs.[71] First, the Act established a voluntary IRS

68. 29 U.S.C. § 1021(g) (2018).

69. PEOs such as Oasis, for example, file the Form M-1 reports required of MEWAs, but claim that they do so as a "protective filing." Letter from Elizabeth Artiles, Oasis Manager for Benefits Compliance, to U.S. Dep't of Lab. (Feb. 27, 2021), https://www.askebsa.dol.gov/epds (select "2020" as "Plan Year," enter "Oasis" as the "Name of Sponsor," select "Florida" as the "State of MEWA Headquarters" and click search; then locate the "Oasis Outsourcing, Inc. Employee Welfare Benefits Plan" filing received on 2021-4-30 and select "Details." At the bottom of the page, the letter is included as an "Attachment" with the file name "Oasis Form M1 Protest Letter 2020 - signed.pdf.") [https://perma.cc/V9JB-EX3N]. The form submitted by Oasis in 2021 states that "Oasis does not believe, and therefore does not admit, that [its] Plan is a MEWA. The filing is made solely to avoid the assertion of non-compliance with the required reporting pursuant to Form M-1 in the event that the Department of Labor disagrees with the determination by Oasis that its employee welfare benefit plan is not a MEWA." *Id.*; *see also* Tess J. Ferrera, *PEO Health Plans—MEWAs or Not?*, 1 NAPEO LEGAL REV. 1, 3 (2003) (summarizing the National Association of Professional Employer Organizations' position that PEOs, as co-employers, also qualify as "employers" under the common-law test.).

70. The issue of *joint employer* status, however, was contemplated by the U.S. regulatory scheme and arises frequently in the context of closely related companies, such as a parent and subsidiary corporations, where both are alleged to be the employer of a particular employee. A determination of joint employment status renders joint employers individually and jointly responsible for compliance with employment statutes such as the Fair Labor Standards Act and the National Labor Relations Act. *See, e.g.*, Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 647-49 (2012).

71. Tax Increase Prevention Act of 2014 (TIPA), Pub. L. No. 113-295, 128 Stat. 4010 (codified in scattered sections of I.R.C.).

certification program for professional employer organizations that wished to be designated as "Certified Professional Employer Organizations" (CPEOs). To receive IRS certification, PEOs must meet a series of requirements related to bonding, annual audits, and quarterly attestations on employment taxes. For those PEOs that meet the certification requirements, the Act clarifies the allocation of tax benefits and responsibilities between the CPEO and its client employers. Specifically, the Act places the liability for employment taxes "squarely on the shoulders of the CPEO," while permitting client-employers to remain the employer for purposes of claiming certain employment-related tax credits.[72] The Tax Increase Prevention Act also codified that customers of CPEOs would qualify for specified federal tax credits that the said customers would be entitled to claim absent a PEO relationship. The Act also clarified when CPEOs would get Federal Unemployment Tax Return credits, and provided for "successor employer" status to eliminate potential double taxation upon the initiation or termination of a PEO relationship.

As of July 2021, the IRS had certified 124 CPEOs.[73] For those PEOs that have not pursued certification, legal uncertainty about the allocation of responsibility and liability persists because the concept of a "co-employer" is not otherwise recognized in the Internal Revenue Code. The IRS does not necessarily follow the designation that the PEO and the client-employer adopt in their agreement but instead uses the common law "control test" to identify the common law employer who will be responsible for payment of federal employment taxes.[74]

2. Embrace of PEOs and Multiple-Employer Retirement Plans in 2019 DOL Regulations and the SECURE Act

In 2019 the Department of Labor addressed the existence of PEOs and provided that PEOs could be treated as "employer" sponsors of retirement plans.[75] Yet even as it embraced PEO arrangements, the DOL acknowledged the lack of analysis of PEO-sponsored employee benefit plans and the potential for fraud and abuse.[76] Nevertheless, through its

72. Goodner & Ramsey, *supra* note 20, at 573.

73. Lorraine Lee & Ursula Ramsey, *Certified Professional Employer Organizations: The First Four Years*, J. OF ACCT. (July 1, 2021), https://www.journalofaccountancy.com/issues/2021/jul/certified-professional-employer-organizations.html [https://perma.cc/4PMD-SSWM]. Of the 124 CPEOs on the list however, only 55 represented "independent, unrelated entities." *Id.* ADP, for example, had 18 certified CPEOs. *Id.* Goodner and Ramsey report that by the end of 2018, just over eleven percent of PEOs had obtained certification. Goodner & Ramsey, *supra* note 20, at 593.

74. Goodner & Ramsey, *supra* note 20, at 577-80.

75. *See* 2019 DOL Regulation, *supra* note 7.

76. The 2019 DOL Regulation states that "[t]he Department is aware that [multiple-employer plans] could be the target of fraud or abuse. By their nature, MEPs have the potential

rulemaking process, the Department explicitly permitted multiple-employer retirement plans sponsored by "bona fide" PEOs, so long as those PEOs perform "substantial employment functions" on behalf of the client-employers.[77] After satisfying certain criteria, the PEOs would constitute "employers" within the meaning of ERISA. The DOL's final regulation argues that requiring PEOs to "stand in the shoes" of participating employers and to provide sufficient "employment functions" will mitigate fraud and abuse concerns because the PEO will be a fiduciary and "bear all [of the] associated responsibilities."[78]

Congress has likewise embraced the PEO as a possible sponsor of retirement plans for multiple unrelated employers. The 2019 SECURE Act permits any institution—including PEOs, banks, insurance companies, recordkeepers, or other commercial enterprises—to serve as "pooled plan providers" (PPPs) for a new kind of "pooled employer plan" (PEP).[79] In such plans, there is no requirement that the PEO perform substantial employment functions on behalf of its client employers. The PEO could serve as pooled plan provider to employers that do not have any common interest other than participating in the pooled employer plan.

The SECURE Act specifies that pooled plan providers are responsible for performing all administrative duties for the plans.[80] Like the DOL regulation, the SECURE Act relies on the governance principles–and most notably the fiduciary framework–developed for single-employer plans sponsored by traditional employers. The SECURE Act provides that individual employers retain fiduciary responsibility for selecting and monitoring the pooled plan providers, while simultaneously requiring the pooled plan providers—including PEOs—to explicitly acknowledge their fiduciary status to the plans.

Notably, however, the governance framework in the SECURE Act adds new registration, governance, and oversight requirements specific to pooled employer plans. It requires the terms of the pooled employer plan to provide that "employers in the plan, and participants and beneficiaries, are not subject to unreasonable restrictions, fees, or penalties with regard

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." 2019 DOL Regulation, *supra* note 7, at 37,527.

77. Whether a PEO performs "substantial employment functions" depends on the relevant facts and circumstances. However, under a safe harbor in the 2019 regulation, a PEO is deemed to perform substantial employment functions if it meets the following criteria with respect to its client-employers: payment of wages; reporting, withholding, and paying any applicable federal employment taxes; recruiting, hiring, and firing workers; and, responsibility for and substantial control over the functions and activities of any employee benefits which the service contract may require the PEO to provide. 2019 DOL Regulation, *supra* note 7, at 37,544.

78. 2019 DOL Regulation, *supra* note 7, at 37,518, 37,538.

79. Setting Every Community Up for Retirement Enhancement Act (SECURE Act), incorporated into Further Consolidated Appropriations Act, Pub. L. No. 116-94, 133 Stat. 2534 (2019).

80. *Id.*

to ceasing participation."[81] The Act also tasks the Secretary of Labor with developing new compliance and oversight mechanisms for pooled employer plans, including model plan language and registration requirement for pooled plan providers. In addition, the Secretary may perform audits, examinations, and investigations of pooled plan providers, and must establish disclosure requirements "to facilitate the selection or any monitoring of the pooled plan provider by participating employers."[82]

At present, PEOs can establish "bona fide" PEO plans pursuant to the 2019 DOL Regulation, and they can also serve as pooled plan providers for the PEPs newly established by the SECURE Act. According to the DOL, professional employer organizations are expected to make up 25% of the pooled plan providers.[83] To date, 70 providers—including several PEOs—have registered with the Department. As of November 2021, the Department of Labor has only finalized the registration procedures, thus leaving pooled employer plans without the regulatory guidance envisioned in the SECURE Act.[84]

C. State Regulatory Requirements for PEOs

Forty-one states currently have legislation addressing PEOs in some capacity, but, as Tables 1 and 2 demonstrate, the regulatory approaches—and the agencies tasked with oversight of PEOs—vary widely across jurisdictions. While some states impose licensing requirements that require PEOs to submit audited financials and maintain minimum capital requirements, others have minimal registration requirements.[85] As Table 2

---

81. *Id.*

82. *Id.*

83. Registration Requirements for Pooled Plan Providers, 85 FR 72934, Nov. 16, 2020.

84. On September 15, 2021, the Department of Labor issued proposed regulations addressing annual information return, reporting and disclosure requirements for multiple-employer plans, including those sponsored by PEOs. *See infra* note 121.

85. For example, states like Alaska, Delaware, Georgia, Idaho, Iowa, Maryland, Mississippi, South Dakota, and Wyoming don't impose any licensing or registration requirements on PEOs operating in their states. *See* State PEO Laws Chart: Overview, *supra* note 19. In contrast, in a state like New York, PEOs are overseen by the state's Department of Labor and are subject to both registration and licensing requirements. *See* New York Professional Employer Act, N.Y. Lab. Law §§ 916-924. New York law requires PEOs to provide audited financial statements and to establish a minimum net worth of $75,000. *Id.* New York also requires that professional employer agreements (PEAs) with clients provide that the PEO agrees to co-employ all or a majority of its client's employees and that the PEA is intended to be ongoing rather than temporary. *Id.* The PEA must detail how employer responsibilities for worksite employees, including hiring, firing, and disciplining, are allocated between the client and the PEO. *Id.* Specifically, a PEA must provide that the PEO "reserves a right of direction and control over the worksite employees," although "the client shall maintain such direction and control over the worksite employees as is necessary to conduct the client's business." *Id.* at § 922(a)(i). In addition, the PEA must state that the PEO "assumes responsibility for the withholding and remittance of payroll-related taxes and employee benefits for worksite employees and for which the professional employer organization has contractually assumed responsibility from its own accounts." *Id.* at § 922(a)(ii). PEOs must also submit to the state on a quarterly basis the PEO's up-to-date client list. *See* New York Professional Employer Act, N.Y. Lab. Law §§ 916-924.

shows, Departments of Labor, Departments of Insurance, Departments of Commerce and Secretary of State offices are just some of the different agencies tasked with PEO oversight across the states. In many cases, the states' lists of registered PEOs are not up to date or not publicly accessible. Notably, the National Association of Professional Employer Organizations (NAPEO)—the industry association for PEOs—claims that its Model Act has been adopted, at least in part, by thirty-eight states. The Model Act sets out certain minimum registration requirements and specifies the allocation of responsibility between the PEO and the client employer for benefits, workers' compensation, and unemployment compensation insurance.[86]

86. *NAPEO Model Legislation,* NATIONAL ASSOCIATION OF PROFESSIONAL EMPLOYER ORGANIZATIONS (2010), https://www.napeo.org/advocacy/what-we-advocate/state-government-affairs/napeo-model-legislation [https://perma.cc/U6KM-3TLG]. *See also Guidelines for Regulations and Legislation on Workers' Compensation Coverage for Professional Employer Organization Arrangements*, *supra* note 38 at 2 (noting that with respect to workers' compensation, "there is a broad disparity among the states as to how these and other types of outsourcing arrangements are regulated" and point out that "[t]he existing statutory frameworks in some states might not directly or adequately address issues related to workers' compensation, while other states are devoid of any significant statutory provisions").

Table 1: Overview of State Regulation of PEOs[87]

General Requirement	State
Registration	Alabama, Arizona, California, Connecticut, Hawaii, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, New York, Ohio, Oklahoma, Rhode Island, Tennessee, Utah, Virginia, Wisconsin
License	Arkansas, Florida, Michigan, Montana, New Hampshire, North Carolina, North Dakota, Oregon, South Carolina, Texas, Vermont, West Virginia
Certification	Colorado
Written Contract/PEO Agreement	Alabama, Arizona, Arkansas, Idaho, Louisiana, Montana, Nebraska, New York, North Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia
Written Notice to Employees	Alabama, Massachusetts, Michigan, Nebraska, New York, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia
Financial requirements (e.g. demonstrate financial capability, audited financial statement, or provide bond)	Arizona, Arkansas, Colorado, Connecticut, Georgia, Indiana, Kansas, Massachusetts, Nebraska, New Jersey, New York, Ohio, Oklahoma, Rhode Island, South Carolina, Texas, Utah, Vermont, West Virginia, Wisconsin

87. *See State PEO Laws Chart: Overview, supra* note 19.

Table 2: Agencies Primarily Responsible for PEO Oversight in a Sample of States

State	Oversight Agency	Publicly Available PEO Database
Alabama	Alabama Department of Labor	Yes
Connecticut	Connecticut Department of Labor	Yes (but out of date)
Florida	Department of Business & Professional Regulation	No
Indiana	Department of Insurance	No
Massachusetts	Department of Labor Standards	Yes
New York	Department of Labor	Yes
West Virginia	Offices of the Insurance Commissioner	Yes
Virginia	Workers' Compensation Commission	No

D. Self-Regulation by the PEO Industry

In addition to influencing state regulation, NAPEO has also set up an independent nonprofit corporation to serve as the "official accreditation and financial assurance organization for the PEO industry."[88] Established in 1995, the Employer Services Assurance Corporation (ESAC) serves as the industry's own accreditation agency and provides "over $15 million of financial assurance backing each accredited PEO's payment of important employer obligations."[89] To receive and maintain ESAC accreditation, a PEO must satisfy certain ethical, financial, and operational standards established by ESAC, whose board is comprised of former state and federal regulators, PEO operators, as well as industry attorneys and CPAs. ESAC also markets its compliance verification services to state regulators to "strengthen their PEO registration or licensing process."[90]

88. *About ESAC*, ESAC, https://www.esac.org/about-esac [https://perma.cc/Z283-RAH9].

89. *Comprehensive, Effective Compliance Verification*, ESAC, https://www.esac.org/regulators [https://perma.cc/6Z49-6D76].

90. *Id.*

Despite the purported competitive advantages of accreditation, fewer than 10% of PEOs have earned ESAC accreditation.[91] Notably, ESAC itself claims that "the current PEO regulatory framework has not proven reliable for detecting PEO issues that begin in another state before the problem unexpectedly impacts other states."[92] The next Section turns to the potential consequences of such spotty regulation.

III. Evaluating the PEO Model: Promise and Pitfalls

The rise of "professional" employers in the United States reflects the unique role of U.S. employers as financial intermediaries for their employees. The popularity of PEOs suggests that individual employers—and particularly smaller employers—are not well positioned to provide the suite of benefits that workers depend on for their financial and physical wellbeing. PEOs pitch to potential clients the advantages of pooling (i.e., scale) and the value of centralized employee benefits expertise, promising smaller employers the benefits available at Fortune 500 firms.[93] This Section examines the theoretical and empirical validity of the PEO pitch. It suggests that while PEOs are responding to a very real problem in the U.S. system of employment based benefits, PEOs also introduce new agency costs and governance risks that must be examined empirically to determine the merits of the PEO model.

A. Agency Costs & Governance Considerations

In evaluating PEOs as a long-term solution to the challenges facing smaller employers in the U.S., it is critical to consider the business model behind PEOs. Professional employer organizations are for-profit entities that enter into contractual arrangements to serve as "co-employers" and provide certain HR-related services to their client employers. While serving as "professional employers," PEOs may offer various benefits—including retirement plans, health insurance, workers' compensation, and unemployment insurance policies. In these capacities, the PEO may pay itself or an affiliated entity for the provision of administrative or investment services to a plan, charge a markup on rates that the "pool" can obtain (as in the case of State Unemployment Tax Act obligations), pay

91. *The Importance of Accreditation*, ESAC, https://www.esac.org [https://perma.cc/R6B6-U2NG] (noting that "only about nine percent of PEOs have earned this distinction").

92. *Comprehensive, Effective Compliance Verification*, ESAC, *supra* note 89.

93. The ADP PEO, for example, states that "[b]ecause PEOs manage hundreds to thousands of employees, they can often offer access to high-quality benefits at competitive prices. Many PEO-sponsored plans rival those of Fortune 500® companies." *Benefits of a PEO for Small Businesses*, ADP, https://www.adp.com/resources/articles-and-insights/articles/b/benefits-of-a-peo-for-small-business.aspx [https://perma.cc/VWH4-W77T].

itself insurance broker fees[94] or even serve as a quasi-insurer, as in the case of self-funded health insurance plans and workers compensation policies. A PEO may be owned and operated by a third-party administrator that manages the health insurance plan offered by the PEO.[95] PEOs with effective underwriting and risk-management policies may self-fund a high-deductible workers' compensation plan, ideally qualifying for a master plan with a large deductible but a deeply discounted rate. The PEOs can offer clients a discount off the standard rate while still making a profit, thus turning workers' compensation plans into profit centers for the PEOs. In this way, a PEO's relationship with the employees of its clients is quite different from the relationship between more traditional employers and employees.[96]

Furthermore, while certain costs—like insurance rates, for example—may be relatively easy for client employers to track and compare, the costs of other benefit plans may be harder to track, particularly when costs may be passed onto the client's employees and bundled with the costs of other PEO services. As described below, PEOs may, for example, offset the retirement plan costs charged to client employers by passing those costs onto individual participants through higher fees for the investment options on the plan's investment menu. Individual participants in U.S. retirement plans are not well positioned to review such plan costs.[97] Individual client

94. *See, e.g.*, Tess J. Ferrera, *Welfare Benefits, Insurance Commissions, Fees, and PEOs,* PEO INSIDER (2007) (observing that "[a] growing number of PEOs are earning commissions from the sale of health insurance products to worksite employers either directly or through an affiliate of the PEO, i.e., a wholly owned subsidiary"). A review of recent Department of Labor filings by PEOs confirms payments to affiliates. For example, in its Form 5500 filing for 2018, Abel HR, a PEO, reports that hundreds of thousands of dollars in fees and commissions were paid to an affiliated entity called Abel Benefit Solutions, Inc. *See* Abel HR, Inc. Health Insurance Plan, Form 5500 for 2018 (on file with author).

95. *Healthcare Start-Up Decent Expands Small Business Benefits, Relaunches as PEO*, YAHOOFINANCE (Oct. 19, 2021), https://finance.yahoo.com/news/healthcare-start-decent-expands-small-113000363.html [https://perma.cc/WT2J-9M3P] (describing Decent as "the only PEO in the U.S. that is owned and operated by a TPA that designs and manages the health insurance plans that Decent offers").

96. *See Health and Welfare Plans Under the Employee Retirement Income Security Act: Guidelines for State and Federal Regulation*, NAT'L ASS'N OF INS. COMM'R (Nov. 15, 2018) (emphasizing that "[u]nlike a traditional employer, the PEO is being paid by its clients to provide this coverage, either as a separate line item or part of a global PEO service fee" and that "like an insurer, the PEO makes a profit or loss depending on whether the fees are sufficient to pay for the costs of the health plan"); *see also* Jeffrey Mamorsky, *Consider Fiduciary Duties In New Combined Retirement Plans*, LAW360 (Aug. 5, 2021) (noting that MEP and PEP providers, including PEOs, "receive compensation from the plans while 401(k) single employer sponsors generally do not, and some providers are compensated at least in part for the fiduciary liability they assume by having discretion over plan administration").

97. *401(K) Retirement Plans: Many Participants Do Not Understand Fee Information, But DOL Could Take Additional Steps to Help Them*, U.S. GOV'T ACCT. OFF. 1, 2 (2021). In a 2021 report, the GAO pointed to the limitations of the existing disclosure regime for defined contribution retirement plans in the United States. The GAO survey found that "[a]lmost 40 percent of 401(k) plan participants do not fully understand and have difficulty using the fee information that the Department of Labor (DOL) requires plans to provide to participants in fee disclosures." Furthermore, the analysis revealed that "45 percent of participants are not able to

employers, meanwhile, have limited ability and incentive to monitor their PEO-sponsored benefit plans.

Indeed, the very premise of the PEO model is the shifting of responsibility—of the HR "headaches"—away from individual employers and onto the PEOs. Even though ERISA provides that employers retain fiduciary responsibility to monitor service providers to employee benefit plans, employers that choose to outsource their human resources functions completely may be in a relatively weak position to exert meaningful oversight, particularly if the fees for various HR services are bundled, and if leaving a PEO entails high switching costs.[98] Finally, in PEOs that aggregate hundreds of unrelated employers, the willingness of any one employer to expend resources to monitor the PEO may be dampened by incentives to free ride on the efforts of other participating employers.

While the PEO model may dampen the incentives of individual employers to monitor the benefit plans provided by PEOs, the pooling of employers and assets may increase incentives for "decentralized enforcement"[99] in the form of class-action lawsuits. In the last two years, multiple-employer plans have become the targets of class-action lawsuits challenging fees and service-provider arrangements in such plans, and highlighting some of the conflicts of interests facing PEOs.[100] Recently reported high dollar settlements, which result in part from the large class size, are likely to encourage additional litigation.[101] In this way, though participants in smaller retirement plans have limited incentives and means to challenge plan administration via litigation, the heightened litigation risk may serve to mitigate some of the agency costs described above.

---

use the information given in disclosures to determine the cost of their investment fee" while "41 percent of participants incorrectly believe that they do not pay any 401(k) plan fees." *Id.*

98. The drafters of the SECURE Act implicitly acknowledged the risk of high switching costs by requiring that pooled plan terms to ensure in their plan documents that "employers in the plan, and participants and beneficiaries, are not subject to unreasonable restrictions, fees, or penalties with regard to ceasing participation." SECURE Act, *supra* note 79.

99. *See, e.g.*, Dana M. Muir, *Decentralized Enforcement to Combat Financial Wrongdoing in Pensions: What Types of Watchdogs Are Necessary to Keep the Foxes Out of the Henhouse?*, 53. AM. BUS. L.J. 33, 89 (2016) (observing that "using . . . employer stock and plan fees . . . as examples, it appears that at least some class actions align with the regulatory goal of participant protection").

100. *See* Robert Steyer, *As MEPS Grow, ERISA Lawsuits Rise with Them*, PENSIONS & INV. (May 17, 2021, 12:00 AM), https://www.pionline.com/defined-contribution/meps-grow-erisa-lawsuits-rise-them [https://perma.cc/G53E-EQQ5]. Recent cases have targeted prominent PEOs such as ADP, Insperity, Pentegra, and TriNet. Notably, the complaints and the settlements in such cases have highlighted the governance challenges that PEOs pose, especially in connection with payments made to the PEO and affiliated entities for services or products provided to plan. *See, e.g.*, Complaint at 14-15, Pledger v. Reliance Tr. Co., 240 F. Supp. 3d 1314 (N.D. Ga. 2017).

101. *See, e.g.*, Emile Hallez, *Are MEPs the Next Big Target for Lawsuits?*, INVESTMENTNEWS.COM (Oct. 5, 2020), http://digitaledition.investmentnews.com/publication/?i=676822&article_id=3786335&view=articleBrowser&ver=html5 [https://perma.cc/T6Q6-PM3K]; *see also*; Robert Steyer, *Reliance Trust to Pay $40 Million to Settle ERISA Suit*, PENSIONS & INV. (Oct. 15, 2020, 2:06 PM), https://www.pionline.com/courts/reliance-trust-pay-40-million-settle-erisa-suit [https://perma.cc/7FHY-HXJ4].

B. Evaluating PEO Sponsored Plans

This Part offers preliminary evidence on the quality and costs of PEO-sponsored benefit plans. Notably, a core challenge with the PEO model is that such fee information is not readily available or easily comparable, thereby limiting the ability of both participating employers and outside observers to evaluate and monitor PEO plans.

1. PEO Sponsored Retirement Plans

Although empirical analysis of PEO plans is very limited, two studies—one by the author[102] (referred here as "2020 PEO Study") and another by Morningstar[103] (referred here as the "2020 CPEO Study")—have examined administrative expenses, investment management expenses and "all-in" fees for PEO-sponsored 401(k) plans.[104] The studies differ in their approach to identifying such plans, given that there is no direct "marker" for plans sponsored by PEOs.[105] The 2020 PEO Study uses required industry-code reporting in the DOL Form 5500s to identify PEO-sponsored plans and to develop a hand-collected dataset of multiple-employer 401(k) plans sponsored by PEOs. The Morningstar study examines the PEOs that have satisfied the IRS CPEO certification requirements and that appear on the IRS list of CPEOs.[106]

The 2020 PEO Study finds that in 2016, PEO-sponsored multiple-employer retirement plans (MEPs) had considerably higher average

102. Natalya Shnitser, *Are Two Employers Better than One? An Empirical Assessment of Multiple-Employer Retirement Plans*, 45 J. CORP. L. 743 (2020) [hereinafter "2020 PEO Study"].

103. Lia Mitchell, *Paperwork or Panacea,* MORNINGSTAR POL'Y RSCH. 1, 8 (2020) (considering only IRS certified PEOs and finding that multiple-employer plans "sponsored by PEOs often charge higher administrative fees, however, this is offset by lower investment expenses").

104. The methodology relies primarily on the publicly available disclosures (Forms 5500) that virtually all employee benefit plans must file with the Department of Labor. The operation of a retirement plan involves numerous service providers, each of which charges fees for their services. Fees may be paid by the plan itself, by the plan sponsor, or by the plan participants. Both studies calculate 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. While administrative expenses information is provided in Form 5500s, asset-based investment management fees are not reported directly and must be calculated manually from the list of investments held by the plan in the reporting year. To estimate total investment management fees, the 2020 PEO study 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. *See* Shnitser, *supra* note 102.

105. Even industry experts acknowledge the challenges of identifying PEOs, particularly since state databases for PEOs appear to include organizations that do not offer PEO services. *See* Bassi & McMurrer, *supra* note 15.

106. As noted in Section II.B.1, a fraction of PEOs have obtained the CPEO certification. *See* Goodner & Ramsey, *supra* note 20 at 593 (noting just over eleven percent of PEOs had obtained IRS certification by the end of 2018).

administrative fees than retirement plans sponsored by single employers. Average administrative expenses as a percentage of plan assets were 0.86% percent for PEO MEPs, compared to 0.32% for single-employer plans. Controlling for plan size, assets per participant, total number of plan participants, as well as the age of the plans, PEO MEPs were associated with higher administrative expenses measured either as a percentage of total plan assets, or on a per participant basis.

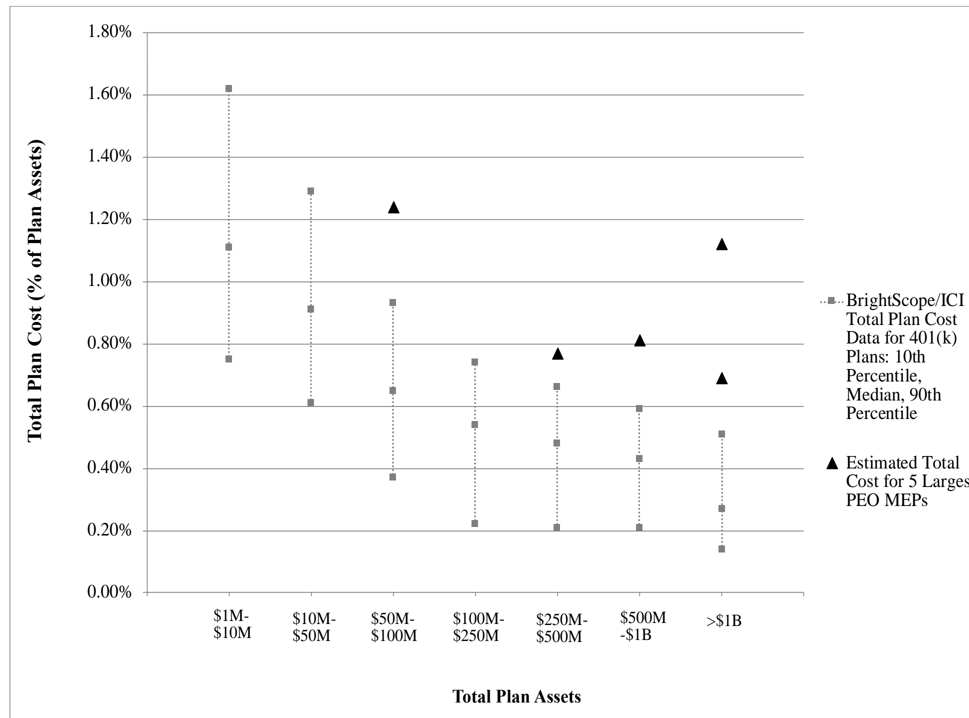
The 2020 PEO Study also analyzes the "all-in" or total plan costs as of 2016 for the largest five PEO MEPs with the greatest number of plan participants. In 2016, the five largest PEO MEPs covered nearly half of all PEO participants and together these five plans held approximately 52% of all assets in the PEO MEPs. Furthermore, because plan fees generally decrease with plan size, the fees for these five plans are likely the lowest across all plans administered by PEOs. The 2020 PEO Study findings are summarized in Table 3 below.

Table 3: Case Studies: Estimated Total Plan Costs in Five Largest PEO MEPs by Number of Participants in 2016 (from the 2020 PEO Study)

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 put these findings in context, the 2020 PEO Study compared PEO plan costs with cost data for all 401(k) plans, as reported by the Investment Company Institute (ICI). Figure 1 below integrates the ICI statistics on all 401(k) plans with the PEO MEP data to show the striking differences in fees between the largest PEO MEPs and other 401(k) plans in the same asset category.

Figure 1: Comparing Total Plan Costs for Largest PEO MEPs vs. All 401(k) Plans in Same Asset Category (from the 2020 PEO Study)



As shown in Figure 1, two PEO 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). Similar results follow for the other three plans analyzed in the 2020 PEO Study. Furthermore, the 2020 PEO Study finds that 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. For example, in the 2020 PEO Study, 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. Importantly, such differences in fees, even if seemingly small, can over time drastically reduce participants' retirement savings.[107]

107. As the Department of Labor has noted, over a 35-year period, a 1% difference in fees and expenses reduces an account balance at retirement by 28%. *A Look At 401(K) Plan Fees*, U.S. DEP'T OF LABOR 1-2 (2013); *see also Private Pensions: Changes Needed to Provide 401(K) Plan Participants and the Department of Labor Better Information on Fees*, U.S. GOV'T ACCOUNTABILITY OFF. 1, 7 (Nov. 16, 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").

The 2020 CPEO Study reaches somewhat different results, finding that, as compared to other multiple-employer plans, plans sponsored by CPEOs generally have higher administrative costs but cheaper investment options. Looking across all multiple-employer plans, whether or not sponsored by PEOs, the 2020 CPEO Study finds that the MEP marketplace reveals a wide variety of fees, including particularly high fees in the smallest MEPs. The study cautions that a fragmented MEP marketplace is unlikely to work effectively, but emphasizes that MEPs, including those sponsored by PEOs, are still less costly than the smaller single-employer plans.[108]

The 2020 PEO study likewise concludes that some PEO MEPs 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. To the extent that CPEOs appear to do a better job of leveraging plan size to bring down investment management expenses, additional research is needed to explore the differences in structure and governance between those PEOs that are certified by the IRS and those that are not.

2. Evaluating PEO Sponsored Healthcare Plans

The data on PEO-sponsored health insurance plans appears even more limited than the data on PEO-sponsored retirement plans. As discussed above, multiple-employer welfare arrangements (MEWAs) have a history of fraud and abuse by unscrupulous providers who take premiums payments from participating employers but fail to maintain adequate reserves, leaving participants with unpaid claims. The Department of Labor continues to devote “significant resources to investigating and litigating issues connected with abusive MEWAs created by unscrupulous promoters who sell the promise of inexpensive health benefit insurance, but default on their obligations.”[109] While many modern-day PEOs have claimed that the plans that they sponsor are not MEWAs, there is considerable debate and skepticism over this point.[110]

---

108. Mitchell, *supra* note 103.

109. U.S. Dept. of Lab., MEWA Enforcement, *supra* note 67. In fact, investigations of “a number of large failed multiple employer welfare arrangements with substantial unpaid claims” prompted EBSA to start a MEWA Solvency Project in fiscal year 2019. *Employee Benefits Security Administration: Enforcement Efforts to Protect Participants’ Rights in Employer-Sponsored Retirement and Health Benefit Plans*, U.S. GENERAL ACCT. OFF. (May 2021), https://www.gao.gov/assets/gao-21-376.pdf [https://perma.cc/QE5C-MYMP].

110. Numerous PEOs file the reports required of multiple-employer welfare arrangements “in protest” and as “protective filings” while disagreeing with the characterization of their plans as MEWAs. *See supra* note 69.

Hundreds of Department of Labor (DOL) investigations from the last three decades indicate that the concerns about MEWAs are not moot, particularly since nearly 2 million employees are still covered by MEWA arrangements.[111] A database of DOL cases brought against MEWAs reveals numerous PEOs in the middle of these arrangements.[112] A preliminary review of the cases reveals instances of PEOs collecting excessive premiums, failing to remit payments on time, violating disclosure obligations, comingling plan and corporate assets, failing to establish trust accounts and transmit employer contributions, self-dealing, and failing to pay participant claims. While these cases suggest ongoing potential for fraud and abuse in PEO-sponsored welfare benefit plans, further analysis is necessary to determine the scope of PEO misconduct and to compare the prevalence of such misconduct in PEO plans with misconduct in plans sponsored by individual employers.

Beyond their involvement in traditional MEWAs, PEOs have in recent years also begun to offer to small employers and sole proprietors so-called association health plans (AHPs)[113] that bypass coverage requirements in the Affordable Care Act and purchase health care coverage in the large group market.[114] State actors have begun to express concern about the products offered by the "less regulated" PEOs.[115] In 2018, the state of California, for example, enacted a bill that specifies that "the status of each distinct member of an association shall determine whether that member's association coverage is individual, small group, or large group health coverage."[116] Other states have taken varying

111. Monahan, *supra* note 26 (reporting that DOL has pursued 968 civil enforcement cases involving MEWAs since 1985 and observing that PEOs appear frequently in DOL's MEWA files).

112. The Georgetown University Health Policy Institute has used FOIA requests to obtain extensive information about DOL actions and investigations into health plans. Of the more than 350 cases detailed in the Georgetown database, at least 100 appear to involve PEOs.

113. Emma Hoo, *California Policy Perspectives on Association Health Plans*, CALIFORNIA HEALTH CARE FOUNDATION (Mar. 12, 2021), https://www.chcf.org/publication/california-policy-perspectives-association-health-plans [https://perma.cc/5X5D-CU2J].

114. The trend was prompted in large part because of the 2018 DOL guidance on Association Health Plans. *See* 2018 DOL Regulation, *supra* note 51. The rule, a key element of the Trump Administration's healthcare policy, expanded the kinds of arrangements that could qualify as "associations" for purposes of ERISA and consequently be treated as single, large employers that could evade core ACA protections applicable in the "small" employer markets. The rule was successfully challenged by eleven states, and 2019, the District Court for the District of Columbia vacated the key provisions of the final rule. New York v. United States Dep't of Lab., 363 F. Supp. 3d 109 (D.D.C. 2019) (holding that "the Final Rule's provisions defining "employer" to include associations of disparate employers and expanding membership in these associations to include working owners without employees are unlawful and must be set aside').

115. *Id*; *see also* Timothy Stoltzfus Jost, *Loopholes in the Affordable Care Act: Regulatory Gaps and Border Crossing Techniques and How to Address Them*, 5 ST. LOUIS U. J. HEALTH L. & POL'Y 27, 59 (2011) (discussing the role of PEOs in association health plans); Kofman, *supra* note 59 (reviewing state and federal government attempts to regulate AHPs).

116. HEALTH INSURANCE—SMALL BUSINESSES, S.B. 1375 (2018)

approaches, with at least ten adopting similar "look through" requirements.

Notably, when state regulation made free-standing AHPs untenable, the existing AHPs "reinvented" themselves as PEOs by offering ancillary human resources services in addition to the association health plans. In effect then, some PEOs currently allow smaller employers to bypass the ACA requirements and obtain health insurance as large employers. Given the relatively lax regulation of PEOs (versus AHPs) in many states, PEOs are able to "operate multiple large group pools with different rating criteria; operate as fully insured, self-insured, or both; collect demographic information and an organizational health history questionnaire; and apply geographic rating factors, among other rating practices."[117] Such practices allow PEOs to skirt many of the consumer protections in the ACA regulations[118] and they have prompted calls for increased disclosure and direct state regulation of health plans offered by PEOs.[119]

IV. Rethinking Workplace Benefits: Employer vs. Non-Employer Intermediaries

At a time of growing PEO popularity, this Article offers a cautionary note and a call for a bolder research agenda on PEOs specifically and on non-employer intermediaries more generally, as well as on the underlying problem that both are attempting to solve. While state regulations vary dramatically in their approaches to PEO oversight, the federal government has embraced PEOs without serious empirical analysis of existing PEO arrangements. Nor did the 2019 regulation permitting PEO-sponsored multiple-employer plans (MEPs) provide for a disclosure regime necessary to identify and assess the performance of such plans.

On September 15, 2021, the Department of Labor issued proposed regulations[120] addressing certain disclosure and reporting requirements for multiple-employer plans, including those sponsored by PEOs and the pooled employer plans established by the SECURE Act.[121] The proposed

---

117. Hoo, *supra* note 113 at 7.

118. As a result, "a small group with individual employees who have preexisting conditions or with women in their child-bearing years is likely to experience a higher premium than a group without such history." *Id.*

119. *Id.* (raising the possibility of imposing "limitations on the total number of rate tiers within a PEO consistent with state law and/or disclosure of rating tiering structure, rating criteria, and age and demographic bands"). *See also* NAT'L ASSN. OF INS. COMM'R, *supra* note 96.

120. Annual Reporting and Disclosure, 86 Fed. Reg. 51284 (proposed Sept. 15, 2021) (to be codified at 29 C.F.R. pt. 2520); Proposed Revision of Annual Information Return/Reports, 86 Fed. Reg. 51,488 (proposed Sept. 15, 2021) (to be codified at 29 C.F.R. pt. 2520).

121. In the SECURE Act, Congress recognized the need for additional substantive regulation and oversight of pooled employer plans, including the prohibition on unreasonable restrictions, fees, or penalties with regard to ceasing participation, disclosure requirements to facilitate monitoring of pooled plan providers, model plan language and registration requirement

rule would require filers to specifically identify as PEO-sponsored multiple-employer plans (as distinct from pooled employer plans). Easier identification of PEO-sponsored plans would greatly facilitate the ability of the DOL and other observers to analyze benefit plans established and administered by PEOs, and to compare the benefits provided by PEOs to benefits provided by single employers and other pooled plan providers. Facilitating comparisons across different types of plan sponsors will be critical in the coming years, particularly as individual states and the federal government consider additional requirements for employers to offer benefit plans to their employees.

Notably, however, the proposed regulation imposes different requirements on PEO-sponsored MEPs plans and pooled employer plans (for which a PEO may serve as a pooled plan provider, just like a bank, insurance company, recordkeeper, or other financial institution). Unlike PEO plans, pooled employer plans would be required to "indicate whether certain services were provided by an affiliate" and if so, whether the plan had relied on a prohibited transaction exemption.[122] The use of affiliates is as much a concern in PEO MEPs as in pooled employer plans. Therefore, the question—and the disclosure requirement—should apply equally to plans sponsored by "bona fide" PEOs.

The proposed regulation makes certain changes to the required fee disclosures for all plans. The DOL asserts that it "has pursued and required improvements in fee transparency to ensure that ERISA plan fiduciaries and plan participants are effectively informed about service provider fees and expenses, including cost and performance information of designated investment alternatives under the plan."[123] Importantly, the DOL acknowledges that "these considerations are particularly important in the case of pooled employer plans and MEPs given their structure and the roles that traditional service providers end up playing as plan sponsors and plan administrators."[124] The proposed regulation solicits comments on whether more specifically tailored questions should be added to report fee and expense information on pooled employer plans and other multiple employer plans.

Since 1974, ERISA has relied on the application of fiduciary standards of prudence and loyalty to employee benefit plan administrators—including the employers—and all those with authority or discretion over the plan and plan assets. In its 2019 regulation, the Department of Labor clarified that the PEO would be subject to such fiduciary obligations and reiterated that even if employers choose to utilize

for pooled plan providers, and the granting of authority to the Secretary to perform audits, examinations, and investigations of pooled plan providers.

122. 86 Fed. Reg. 51,500.

123. *Id.*

124. *Id.*

the services of a PEO, such individual employers retain fiduciary responsibility and liability for the selection and ongoing monitoring of service providers and PEOs.[125] While such an approach is consistent with the traditional ERISA framework, it is increasingly at odds with practices on the ground and with the very premise of the PEO arrangement. Indeed, embracing the PEO model–at the core of which is the extensive delegation of HR and benefits administration to the "professional" employer–may limit the likelihood of effective monitoring by individual client employers.

The analysis in this Article suggests that the disclosure of fees charged by PEOs should be a focus of future DOL guidance. Given the potential to bundle services, obscure plans costs, and cross-subsidize different benefits provided to client employers, the limitations of the existing disclosure regime will be exacerbated in the PEO context.[126] The DOL should develop standardized disclosure requirements that obligate PEOs to present fee information in standardized fashion, thereby facilitating "apples-to-apples" comparisons across PEO and non-PEO providers.[127] Absent such standardized disclosure, it is unlikely the small individual employers will be able to exert meaningful oversight and governance over their "professional" co-employers.[128]

Conclusion

This Article has documented the growth of "professional" employers and the introduction of "co-employment" into a regulatory framework developed in the post-World War II period primarily for plans sponsored and managed by individual employers.[129] While PEOs have been strategic

125. Medill, *Regulating ERISA Fiduciary Outsourcing*, *supra* note 11, 557 (2017) (urging the Department of Labor "to regulate the professional fiduciary services industry by declaring that, as a matter of regulatory policy pursuant to the agency's administrative authority to interpret the statute, complete outsourcing of the section 402(a) named fiduciary function does not immunize the employer who sponsors the plan from its ERISA fiduciary responsibilities, particularly the duty to monitor"); *see also* SECURE Act (stating that individual employers retain fiduciary responsibility for the selection of pooled plan providers).

126. U.S. GOV'T ACCT. OFF., *supra* note 97.

127. In this pursuit, the DOL can draw both on the extensive literature on disclosure best practices, and on lessons from abroad about ways to present fee information effectively. *Id.* (stating that "GAO's review of selected countries and the European Union (EU) found they have implemented practices to help retirement plan participants understand and use fee information from plan disclosures").

128. Additional federal level disclosures would not, however, address the issue of state-by-state variation in the treatment and oversight of MEWAs. In this regard, the MEWA exception to ERISA's preemption provision, although a logical response to the regulatory vacuum that existed pre-1983, significantly undermines ERISA's goal of uniformity in the regulation of employee benefit plans.

129. Remote work during pandemic accelerated the hiring of workers from across the globe and made the services of PEOs increasingly valuable for employers seeking to manage HR compliance across multiple states or even countries. *See, e.g.* Catherine Shu, *Employment Hero Gets $140M AUD Series E led by Insight Partners, Grows Valuation to $800M AUD,* TechCrunch (July 20, 2021, 7:00 AM), https://techcrunch.com/2021/07/20/employment-hero-gets-140m-aud-

in using regulatory uncertainty to their benefit, this Article shows that states and the federal government have allowed PEOs to proliferate without adequate regard to the serious problems that have plagued employee-leasing arrangements, MEWAs, and other predecessors to the PEOs.

To properly regulate "professional employers," policymakers must recognize that, despite their name and their marketing strategy, they are fundamentally different from traditional employers. Attempting to fit PEOs into ERISA's "employer" mold is unlikely to succeed in protecting U.S. workers, whose financial lives are uniquely dependent on workplace benefits.[130] Congress recognized the need for additional governance provisions for pooled plan providers. The same protective provisions should be extended to PEOs and potentially to other new non-employer intermediaries seeking to enter the benefits space.[131]

Finally, the growth of PEOs in the twenty-first century also raises broader questions about the long-term consequences of outsourcing to and consolidating HR services in professional employer organizations.[132] With respect to the latter, the growth of PEOs and their control over benefits

---

series-e-led-by-insight-partners-grows-valuation-to-800m-aud [https://perma.cc/43GE-SBUM] (describing the recent growth and fundraising success of a PEO that helps companies onboard and manage remote workers).

130. *See*, *e.g.*, *Review of Professional Employer Organizations and Workers' Compensation*, FLA. OFF. OF PROGRAM POL'Y ANALYSIS & GOV'T ACCOUNTABILITY (Mar. 2021) (reporting on the regulatory environment for PEOs and suggesting that regulators remain attune to reporting issues, coverage gaps, insolvency concerns, and contract cancellations that result in lapses in coverage for individual participants).

131. The fight over the definition of an "employee benefit plan" has taken a dramatic turn in the last year, with the Data Marketing Partnership (DMP) selling health coverage to the general public by inviting customers to become "limited partners" eligible to pay for membership in the partnership's "benefit plan." Under the arrangement, individuals who agree to become "limited partners" of Data Marketing Partnership LP and agree to have their internet activity tracked can join an employee-health plan. The district court in the Northern District of Texas ruled these individuals are "working owners" and compelled the Labor Department to deem the insurance plan they joined a single-employer health plan under ERISA. As an ERISA plan and a "large" plan for purposes for the ACA, the DMP arrangement is not subject to state regulation and is not required to offer the same ten essential health benefits that individual and small group plans have to offer under the ACA. The ability of such an arrangement to escape state insurance regulation, which aims to "ensure that insurers have enough money to pay claims they're obligated to pay on behalf of the policyholders" has troubled experts precisely because DMP is not a traditional employer. As Katie Keith, a health law professor at Georgetown University, has stated, "the reason ERISA plans aren't regulated by states is because they're offered by true employers that have every incentive to do right by their employees." The same cannot be said of entities such as DMP. *See* Lydia Wheeler, *Fight Over Novel Health Plan Threatens Obamacare Protections*, BLOOMBERG (Apr. 21, 2021), https://news.bloomberglaw.com/daily-labor-report/fight-over-novel-health-plan-threatens-obamacare-protections [https://perma.cc/6WX9-NV8V] (describing how the "U.S. Labor Department is fighting back against a decision from a federal judge in Texas that allowed two companies to offer health plans to individuals who agree to have their internet activity tracked and sold").

132. David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (2014) (describing the "fissuring" phenomenon and its consequences, and explaining that fissuring results from a variety of business structures, including subcontracting, temporary agencies, labor brokers, franchising, licensing, and third-party management).

for more and more workers in particular industries raises the prospect of diminishing worker leverage over benefit terms and conditions. Scholars have raised alarm about the monopsony power of "dominant" employers and the potential to further increase income inequality in the United States.[133]

At the same time, outsourcing human resources is likely to further limit corporate managers' familiarity and experience with human capital management. As the human capital management movement[134] accelerates in the U.S., outsourcing relevant expertise to "professional employers" may conflict with stakeholder and regulator expectations about management and board engagement with human capital management. At the very least, additional research is necessary to determine whether reliance on PEOs is associated with changes in management's understanding and engagement with human capital management-related matters.

133. *See, e.g.*, Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 651 (2021) (describing the disintegration of "workers' collective power against increasingly dominant employers" and the spiking income inequality that has resulted); *see also* Efraim Benmelech, Nittai K. Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?*, J. HUM. RES. (2020) (finding a negative relationship between employer concentration and wage increases when unionization rates are low).

134. Georgiev, *supra* note 28.