

plans maintained solely for the purpose of complying with workmen's compensation laws (as defined in sections 4(b)(1), 4(b)(2) and 4(b)(3) of ERISA, respectively) are not covered by Title I of ERISA, the final rule provides that a MEWA or ECE is not subject to the filing requirement if it is a governmental plan, church plan, or plan maintained solely for the purpose of complying with workmen's compensation laws. Similarly, the final rule also provides that a MEWA or ECE is not subject to the filing requirement under this section if it provides coverage only through governmental plans, church plans, or plans maintained solely for the purpose of complying with workmen's compensation laws (or other arrangements not covered by Title I of ERISA, such as health insurance coverage offered to individuals other than in connection with a group health plan, known as individual market coverage). However, if a MEWA provides coverage both to group health plans that meet the definition of a governmental plan, church plan, or plan maintained solely for the purpose of complying with workmen's compensation laws and to any group health plan that is subject to part 7 of ERISA, the MEWA is required to file the Form M-1.

(c) *Other exceptions.* Finally, the final rule also contains a clarification that reporting is not required if an entity would not constitute a MEWA or ECE but for any of the three circumstances described below.

(1) *Common control interest of at least 25 percent.* The first of these circumstances relates to the treatment of two or more trades or businesses as a single employer for purposes of the definition of MEWA if the trades or businesses are within the same control group. Section 3(40)(a)(1)(B) defines the term "control group" to mean a group of trades or businesses under common control, and provides that trades or businesses that are part of the same "control group" are deemed to be a single employer for purposes of the definition of MEWA. It then states that the determination of whether a trade or business is under "common control" with another trade or business is to be determined under regulations of the Secretary applying principles similar to the principles applied in determining whether employees of two or more trades or businesses are treated as employed by a single employer, except that common control shall not be based on an interest of less than 25 percent. The Department has not issued any regulations under this provision.

Commenters argued that arrangements where businesses maintain significant ownership interests in other businesses and provide benefits under the same health plan are not the kinds of arrangements that historically have been found to lead to problems with fraud and failure to provide promised benefits. The Department agrees and has modified the final rule accordingly.

The final rule clarifies that a filing is not required on behalf of certain plans or other arrangements that provide coverage to the employees of two or more employers that share a common control interest. Specifically, if an entity would not constitute a MEWA or ECE but for the fact that it provides coverage to the employees of two or more trades or businesses that share a common control interest of at least 25 percent at any time during the plan year (applying the principles applied under section 414(b) or (c) of the Internal Revenue Code), a Form M-1 filing is not required. However, while use of a 25 percent test may result in a determination of common control for purposes of the Form M-1 filing requirement, common control generally means, under sections 414 (b) and (c) of the Internal Revenue Code, an 80 percent interest in the case of a parent-subsidiary group of trades or businesses and a more than 50 percent interest in the case of a brother-sister relationship among organizations controlled by five or fewer persons that are the same persons with respect to each organization.

(2) *Temporary MEWAs created by a change in control.* The second of these circumstances that will not, by itself, trigger a filing relates to temporary arrangements providing medical benefits to the employees of more than one employer that are created by a change in control of the business. This exception was suggested by a commenter who argued that entities that end up covering employees of another employer for a brief period of time by virtue of a change in business ownership should not be required to file a Form M-1. The commenter suggested that the Department define "temporary" to mean that the arrangement does not extend beyond the end of the plan year following the plan year in which the change in control occurs.

Commenters explained how change in control transactions may take place over a period of time, and the health plan for a control group may therefore be providing medical benefits to the employees of more than one employer for a temporary period. According to one source cited by a commenter, reasons that a transaction may occur

over a period of time include the need to obtain financing, the need to obtain various regulatory approvals, and the need to "iron out the details" of the transaction.

The Department agrees with the comment and has modified the final rule to create an exception for arrangements that would not constitute MEWAs but for their creation in connection with a change in control of businesses (such as a merger or acquisition) and which are temporary in nature (*i.e.*, do not extend beyond the end of the plan year following the plan year in which the change in control occurs). The change in control must occur for a purpose other than avoiding Form M-1 filing.

(3) *Very small number of persons who are not employees or former employees.* The last of the circumstances that will not, by itself, trigger a filing is an exception for entities that would not be a MEWA or ECE but for the fact that they cover a very small number of persons (excluding spouses and dependents) who are not employees or former employees of the plan sponsor. For example, an arrangement may cover non-employee members of the board of directors of the plan sponsor or individuals classified as independent contractors. The final rule provides that any entity is not required to file the Form M-1 if it would not be a MEWA but for the fact that it provides coverage to persons who are not employees nor former employees (including those participants on COBRA continuation coverage)² of the sponsor (excluding spouses and dependents) and the number of such persons does not exceed one percent of the total number of employees or former employees covered by the arrangement, determined as of the last day of the year to be reported (or, in the case of a 90-day origination report, determined as of the 60th day following the origination date).

(d) *Persons not excepted.* Some commenters argued that MEWAs that are fully-insured should not be required to report. One commenter argued that coverage under insurance contracts that have been approved by state regulators complies with part 7 by virtue of this

² The term "employee" is defined in section 3(7) of ERISA as any individual employed by an employer, and includes all common law employees. See also *National Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992) ("Darden does not cite, and we do not find, any provision [of ERISA] either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results. Thus, we adopt a common-law test for determining who qualifies as an 'employee' under ERISA * * *").