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HR & BENEFITS UPDATE

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# Trends in Parental Leave

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## HUMAN RESOURCES

The Family and Medical Leave Act (FMLA) of 1993 provides 12 weeks of unpaid leave for employees to care for their own or a family member's health condition. But because of exemptions for small businesses and employee eligibility requirements, the U.S. Department of Labor estimates that 40 percent of the workforce isn't even covered by FMLA.

Worse yet, a global survey performed by U.K.-based consulting firm Citation reveals that the U.S. is among the 10 worst countries for maternity leave, tying with Swaziland and Lesotho. In contrast, Sweden lands near the top of the list, providing 480 paid parental (mother or father) leave days for each child. The same survey indicates that by 2013, 47 percent of surveyed countries had enacted legislation covering paternity leave, and 89 percent of these countries had established paid paternity leave.

Finally, the tide finally may be shifting in the U.S. In the last 12-18 months, news reports, employer surveys and research reveal that companies are increasingly expanding their parental leave policies. The rapid spread of these policies can be attributed to two primary marketplace trends:

- The need to attract top talent in highly competitive industries and/or job fields
- The increasing demand, particularly by millennial employees, for greater work-life balance and recognition of their shared parental responsibilities at home

The rise in these policies can also be attributed to two sociological factors: changes in traditional gender roles and the evolving definitions of "family" and "parent." Conventional leave policies generally offer "maternity leave" for 6-8 weeks after an employee (female) gives birth, but the time off is usually unpaid, unless the employee can supplement the leave time with any accumulated sick time. Historically, these policies have not covered male employees (married or unmarried), employees who become parents through surrogacy or some assisted reproductive technologies, or same-sex couples who welcome a child into their family.

As marketplace and sociological changes have occurred, many employers have re-examined their maternity leave policies, renamed them "parental leave" policies, and chosen to make them more gender-neutral and inclusive. Many new parental leave programs provide both male and female employees with similar leave allowances in order to bond with their new child. Most of these parental leave programs offer considerably more time off than conventional plans, provide pay during all or most of the leave period, and allow employees to retain the same benefits coverage and costs (if any) throughout the leave. This trend began – with a great deal of fanfare – in the technology sector and has been adopted by other companies across several industries.

As an example, software company Adobe introduced a new parental leave program to its 6,000 employees in November 2015. The policy provides 16 weeks of paid parental leave to employees who "become mothers or fathers through birth, adoption, surrogacy or foster care." Combined with its medical leave program, Adobe's employees may take up to 26 weeks of paid parental leave.

An even more progressive plan was announced by streaming video and DVD provider Netflix. The company now offers its salaried, non-retail employees unlimited paid parental leave during the first 12 months following the birth or adoption of a child. Once the parental leave has ended, employees have the choice to return to part-time or full-time status.

Bank of America provides employees with 12 weeks of paid parental leave for the birth or adoption of a child and an additional 14 weeks of unpaid parental leave if more time is needed. The banking company also reimburses employees for up to $8,000 in fees for each adopted child. Should the primary caregiver be ill or otherwise unavailable, B of A also provides up to 25 days of paid child care per year. In addition, the company reimburses employees for up to $240 per month per child for costs of care incurred while the employee is at work.

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Google reports that employee retention increased following the introduction of its program to provide 18 weeks of paid, vested leave to biological mothers; 12 weeks of paid leave to "primary caregivers," regardless of gender; and seven weeks of paid time off to "non-primary caregivers." The company also provides each new parent with $500 in "baby bonding bucks." Interestingly, Google's former CEO took paid parental leave five times during her tenure with the company, illustrating that the policy doesn't just exist on paper — the company has cultivated a culture in which eligible employees are encouraged to use paid parental leave, and employees feel it's acceptable to actually do so.

These companies and many others have introduced progressive parental leave programs for a variety of smart business reasons: to attract and retain top talent, to effectively compete in the global marketplace, to improve employee focus and engagement at work, to create greater equity for men, women and diverse families, and to improve parity with leave programs in other countries.

The landscape for company-sponsored parental leave programs is changing rapidly. Employers and HR practitioners are well-advised to review their company leave policies now and ensure that they're equitable across diverse employee groups. In addition, employers should research other companies' parental leave programs to identify affordable ways to enhance the competitiveness of their policies and to build their company as an employer of choice in the marketplace.

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# 3(16) ERISA Fiduciary Definition

**RETIREMENT**

Recently there's been an emergence of entities offering to provide ERISA Section 3(16) services. Plan sponsors may be interested in divesting themselves of Section 3(16) plan administrator responsibilities, and there are questions regarding this concept and its perceived desirability. The unfortunate reality is that the advertisements, marketing material and articles (often written by interested parties who sell these services) are often quite misleading and contain a substantial disconnect between the scope of services required versus those actually covered.

ERISA Section 3(16) states the definition for "plan administrator" as responsible for the daily operation of the plan. A plan administrator under ERISA 3(16) is identified in the plan document, and if the plan document isn't specific, the plan sponsor is considered to be the 3(16) fiduciary.

ERISA 3(16) fiduciary responsibilities include, but are not limited to:

- Interpretation of the plan document, required reporting and disclosures (i.e., Form 5500); and selection, evaluation and monitoring of other plan fiduciaries, service providers, plan investments, any investment advisor to the plan and reasonableness of all plan fees and contracts
- Distribution of SPD/SMM, participant fee disclosure, benefit statements, QDIA notices and other required participant disclosures; and distribution of benefits, administration of QDROs (procedures and process) and administration of loans

Approach organizations that offer 3(16) services with caution, as the strength of the purported offloading of fiduciary responsibility is untested to date. In addition, plan sponsors should review any such offerings in extreme detail, as few, if any, organizations truly accept a full 3(16) scope. Most organizations agree to serve in a 3(16) capacity that's limited to the service being provided (loan processing, hardship approval, etc.). It's highly unlikely that a plan sponsor can hope to avoid or transfer fiduciary responsibility merely by engaging an organization as a 3(16) plan administrator, because even that selection (unless it's included in the plan document) carries fiduciary implications, and thus ongoing monitoring of the selected 3(16) is required. Therefore, the plan sponsor retains potential fiduciary responsibilities — and liability exposure. Finally, when considering engaging a 3(16) advisor keep in mind:

- Few, if any, advisors have the experience, let alone the proper infrastructure, to take on the administration of the plan. This is best left to third-party administrators and recordkeepers.


- No advisor will be capable of possessing all the knowledge, data and authority necessary to act in a full scope 3(16) capacity because HR, payroll, etc. still aren't managed by the advisor.

It's important to remember that the same procedurally prudent process that accompanies any ERISA fiduciary decision certainly should apply when considering an external ERISA 3(16) fiduciary as well.

# Compliance FAQ

## May an employer offer different premium contribution amounts to different classes of employees?

The general answer is yes: the employer may choose to contribute different amounts toward premiums for different classes of employees, but there are a few things to consider, including:

- Nondiscrimination
- Affordability under the employer mandate
- Plan documents and employee communication

On nondiscrimination, there are two general sets of rules – IRC Sections 105 and 125 – that prohibit employers from discriminating in favor of highly compensated individuals (HCIs). Both sets of rules allow premium contribution variance, so long as the variance is based on a justifiable business classification and so long as the result does not favor HCIs. Justifiable business classifications include those that relate to a business reason, e.g., part-time versus full-time workers, hourly versus salaried and former versus current employee statuses. They would also include different geographic locations (like different states, cities or even buildings within a city), occupation types, job titles and hire dates. The basic idea is that there's some sort of business reason for the distinction — not just an arbitrary attempt to divide employees for purposes of benefits.

Assuming the variance has a business purpose, the result cannot favor HCIs. That may be the case where the classification with the higher employer contribution has a higher number of HCIs than non-HCIs. Examples:

- Offering a plan with a 75 percent employer contribution for the executive group of employees and 25 percent employer contribution for rank-and-file employees
- Offering $500 toward premiums for the management team and $250 for all other employees

Since the executive or management teams would likely consist of more HCIs than non-HCIs, and since that is the group getting the higher employer contribution, both plan designs would be discriminatory.

Not all plans are subject to the nondiscrimination rules. Self-insured plans are currently subject to Section 105, but fully insured plans aren't (they will be once the IRS issues rules on how that will work). If employees can pay their portion of the premium pretax via salary reduction, then Section 125 applies. Although both 105 and 125 have similar tests in determining if discrimination exists, they define "HCI" slightly differently. Under 105, an HCI is a top-five-paid officer, a more-than-10 percent shareholder/owner or any individual in the top-25 percent of all employees with respect to compensation. Under 125, an HCI is any officer, a more-than-five-percent shareholder/owner or any individual with compensation in excess of $120,000 (for 2015 and 2016, but indexed annually). So that's really the group to keep an eye out for, and in whose favor the contribution design cannot discriminate.

If a plan is discriminatory, the general consequence is that the HCIs lose some or all of the tax benefits available under the plan. Under 125, that means the HCI cannot pay their portion of the premium pretax. Under 125, that means the HCI must recognize income on some or all of the employer contribution and benefits received under the plan. Once 105 applies to fully insured plans, the consequence becomes much more severe: $100 per day per individual discriminated against, payable by the employer.

HIPAA (and other laws) also prohibit employers from discriminating based on other factors, such as health status, age, sex, sexual orientation, religion, national origin and political affiliation. So, the employee classification or distinction shouldn't be based on one of those prohibited statuses. Rather, as described earlier, it should be based on a justifiable business classification.

On affordability under the employer mandate, larger employers (those with 50+ full-time employees, including equivalents) must ensure they offer coverage to full-time employees and their dependents, and that the cost of single-only coverage is affordable. There are several ways to determine affordability, but the most basic is to use an employee's Form W-2 wages — for 2016, an employee's cost of single-only coverage may not exceed 9.66 percent of that employee's Form W-2 wages.

Based on that, anytime there's a variance in employer contribution levels, it may have an impact on affordability. Employers that choose to vary contribution levels should take steps to ensure that coverage is affordable for all full-time employees. Employers are also required to report whether coverage is affordable and, in some instances, the employee's contribution amount — this is done via Form 1095-C. So, employers should pay close attention to affordability and the actual dollar amount required for employees when it comes to designing their premium contribution strategies.

Lastly, plan documents and employee communications often contain information on employee contribution requirements. Employers that have varied contribution structures should ensure that all plan materials are consistent and that employees understand their contribution requirements.

### Need more information?

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