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# WELCOME

# BENEFITS EMERGING LEADERS WORKING GROUP

March 7, 2019

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# BENEFITS EMERGING LEADERS WORKING GROUP

**Investment Committee Meetings –  
Red Flags and Best Practices**

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# ERISA REQUIREMENTS

- ERISA requires a plan to have at least one “named fiduciary” which is typically the investment committee
- Fiduciaries under ERISA must act with the care, skill, prudence, and diligence that a prudent person familiar with such matters would use in similar circumstances
- Fiduciaries must discharge their duties solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan
- Fiduciaries must act with “substantive prudence” and “procedural prudence” when carrying out duties for the plans

# TIP #1: FOLLOW PRUDENT PROCESS

- Establish and follow an appropriate process for making investment decisions
  - Process should be reflected in the committee’s charter and the plan’s investment policy and other documents
  - Periodically review and refine process
- Establish and maintain written records of decision process and keep minutes of committee meetings
  - Retain copies of reports from consultants retained by the committee as part of written records
  - Minutes should include appropriate level of detail to document the committee’s analysis and decision reached
  - Minutes should be reviewed and approved by the committee at the next meeting
- Follow a consistent schedule for committee meetings
  - Meet at least quarterly
  - Establish processes for interim updates for the committee in the event of significant events impacting the plan

# TIP #2: EDUCATE COMMITTEE MEMBERS

- Investment committee members should receive periodic training on the terms of the plans, their role as fiduciaries of the plans and the requirements imposed on plan fiduciaries under ERISA
- Training of committee members should be documented in meeting minutes and any written materials should be retained with the plans' records

# TIP #3: RETAIN APPROPRIATE EXPERTS

- Retain appropriate consultants and other third party experts
  - Consultants and third party experts should advise the committee on information relevant to the committee's decision points
  - Committee must make independent decisions; blind reliance on consultants and third party experts is not a defense

# TIP #4: REVIEW INVESTMENT POLICIES

- Each plan should have an investment policy that includes the following:
  - Roles and responsibilities of the investment committee and other fiduciaries involved in plan investments
  - Overall investment objective for the plan
  - Asset allocation or investment funds for the plan
  - Investment objectives and guidelines for each investment fund or portion of the plan's portfolio
  - Procedures for selecting new investments
  - Procedures and performance standards for monitoring existing investments
  - Procedures and criteria for terminating underperforming investments
- Investment policies should be consulted during committee meetings to ensure procedures and criteria set forth in the policy are followed by the committee
- Investment policies should be periodically reviewed and updated

# TIP #5: SATISFY DUTY TO MONITOR

- Plan fiduciaries have “a continuing duty – separate and apart from the duty to exercise prudence in selecting investments at the outset – to monitor, and remove imprudent, trust investments” *Tibble v. Edison International* (2015 U.S. Supreme Court)
  - Case requires regular monitoring and evaluation of plan investments, but scope of duty to monitor remains unclear
  - Consider fund performance, fees, manager performance, overall investment menu, and regulatory and market developments
  - Evaluate investments in context of investment policy, including any specific policy metrics
  - Reflect clear process for monitoring investments in written committee records and meeting minutes



# TIP #6: SATISFY DUTY TO DIVERSIFY

- Fiduciaries must diversify plan investments to protect from the risk of large losses, unless it is clearly prudent under the circumstances not to do so
- For defined benefit plans, consider:
  - Investment portfolio as a whole
  - Plan’s purpose
  - Risk of loss and opportunity for gain (risk/return analysis)
  - Liquidity of portfolio vs. cash flow needs
  - Projected return relative to funding projections
- For defined contribution plans, consider selection of broad range of investment options
  - At plan level, consider plan’s primary purpose to provide retirement assets and select a broad array of investment options
  - At individual fund level, consider fund’s underlying assets

# TIP #7: MONITOR SERVICE PROVIDERS

- ERISA permits plan fiduciaries, such as investment committee, to further delegate duties; provided committee charter, plan and trust documents and investment policy reflect this authority
  - Delegations must be clear, in writing, and made to appropriate individuals, trustees, investment managers, or service providers
- Investment committee should understand which service providers are also fiduciaries to the plan in order to appropriately monitor the performance of these service providers
  - ERISA 3(21) fiduciary provides investment advice, but has not actual decision-making authority over plan investments
  - ERISA 3(38) fiduciary has discretionary decision-making authority over plan investments
  - Service provider's status as a fiduciary should be clearly documented in the services agreement
- Investment committee remains responsible for monitoring actions of all delegates, which includes monitoring fees paid to the delegate
  - Fees should be regularly benchmarked
  - Fee monitoring should include all direct and indirect compensation received by the service provider for services to the plan

# TIP #8: REPORT TO BOARD OF DIRECTORS

- Investment committee should periodically report on its activities and the performance of the plans' investments to the Board of Directors
  - Board of Directors may delegate investment authority for plans to investment committee, but remains responsible under ERISA for monitoring the investment committee's performance
  - Reports to the Board of Directors should be documented and retained with the plans' records

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Special Delivery from the IRS

# PLAY OR PAY: THE MAIL IS COMING

- Marketplace Notices
  - State Marketplaces send letters to identified employers when one of their employees receives a subsidy
  - The letter references federal IRS penalties (despite being sent by a state)
  - Many employers got this letter and panicked and immediately began mailing appeals to the state Marketplaces



# PLAY OR PAY: THE MAIL IS COMING

You are getting this notice because your employee(s) on the attached list below, was determined eligible for advanced premium tax credit (APTC) for purchasing and enrolling in a qualified health plan (QHP) through Covered California.

Applicable Large Employers (ALE) (e.g., employers with at least 50 full-time or full-time-equivalent employees) are subject to the Affordable Care Act's (ACA) Employer Shared Responsibility (ESR) provisions under section 4980H of the Internal Revenue Code (26 USC § 4980H). Under these provisions, an ALE is required to offer health coverage to its full-time employees, defined as those who average 130 or more hours of service per month, and their dependent children to avoid a penalty assessment by the Internal Revenue Service (IRS). The health coverage offered must meet the ACA's affordability and minimum value standards.

ALEs may be subject to an ESR penalty if at least one of its full-time employees receives APTC for purchasing their health coverage through Covered California.

If [redacted] is an ALE, and the employee(s) on the attached list is determined to be a full-time employee under the ACA AND was not offered an opportunity to enroll in employer-sponsored health coverage, or if the health coverage offered did not meet the ACA's affordability and minimum value standards for any month during 2018, the IRS may determine that you are subject to an ESR penalty.

# PLAY OR PAY: THE MAIL IS COMING

- Marketplace Notices
  - The accuracy of these notices depends on the individual applying for the subsidy
    - Did they correctly identify who their employer is?
    - Does their employer offer affordable, MEC, MV coverage?
    - Is it still unaffordable to the employee?
  - Appeals by employers are often denied, which can be confusing and cause fear

# PLAY OR PAY: THE MAIL IS COMING

*Covered California, as a state based marketplace, is only interested in knowing if an individual erroneously received a subsidy in the marketplace to purchase health coverage. If an employer receives a notice from CC that an employee received a subsidy, and the employer knows the employee was offered affordable, minimum value, minimum essential coverage, they should appeal the determination. In the event the employer did not offer the individual or individuals listed affordable, MEC, MV coverage, the employer has nothing to appeal to the state. Employers are not at risk of ACA related penalties for failing to offer non-employees coverage, and states do not levy ACA related penalties. At this point, there is nothing to appeal to the state given these individuals were not your employees.*



# PLAY OR PAY: THE MAIL IS COMING

ALE's are required to offer minimum value, minimum essential, affordable coverage to all full-time employees. In 2019, the affordability standard is set at 9.86%. In 2018 the standard was 9.56%.

Because employers rarely know an employee's household income, ALEs may meet the affordability requirement through one of three safe harbor options –

- The W-2 safe harbor
- The rate of pay safe harbor
- The federal poverty level safe harbor

Once an ALE meets the requirements of the safe harbor, if an employee is considered subsidy eligible, the employer would not face penalties under the employer mandate. Although it is rare, factors in an employee's personal financial and tax situation could render the coverage offered by the ALE unaffordable to the individual.

Employers should only focus on meeting the safe harbor requirements.

# PLAY OR PAY: THE MAIL IS COMING

- 226-J Letters
- These are proposed penalty letters from the IRS, when the IRS believes an employee received a subsidy
- Employers owe a penalty if they didn't offer MEC to all FT employees OR you offered MEC but it wasn't affordable or it didn't provide minimum value
- The majority of letters reviewed by Alera brokers were mailed as the result of erroneous reporting (not an actual failure to offer coverage)
- The penalties have ranged from \$10k - \$22M

# PLAY OR PAY: THE MAIL IS COMING

Dear Taxpayer:

We have made a preliminary calculation of the Employer Shared Responsibility Payment (ESRP) that you owe.

**Proposed ESRP \$0.00**

Our records show that you filed one or more Forms 1095-C, Employer-Provided Health Insurance Offer and Coverage, and one or more Forms 1094-C, Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns, with the IRS. Our records also show that for one or more months of the year at least one of the full-time employees you identified on Form 1095-C was allowed the premium tax credit (PTC) on his or her individual income tax return filed with the IRS. Based on this information, we are proposing that you owe an ESRP for one or more months of the year.

You generally owe an ESRP for a month if either:

- You did not offer minimum essential coverage (MEC) to at least 100% of your full-time employees (and their dependents) and at least one of your full-time employees was certified as being allowed the PTC; or
- You offered MEC to at least 100% of your full-time employees (and their dependents), but at least one of your full-time employees was certified as being allowed the PTC (because the coverage was unaffordable or did not provide minimum value, or the full-time employee was not offered coverage).

This letter certifies, under Section 1411 of the Affordable Care Act, that for at least one month in the year, one or more of your full-time employees was enrolled in a qualified health plan for which a PTC was allowed. Based on this certification and information contained in our records, we are proposing that you owe an ESRP of \$0.00.

# PLAY OR PAY: THE MAIL IS COMING

- 226-J Letters
- Review your past year's ACA reporting forms and look for potential errors (walk through with your broker or counsel if you feel unsure of what information should be reflected on the forms)
- Confirm your coverage was affordable, was MEC, and was MV
- If you didn't file- time to reach out to your broker and counsel and catch up before you are penalized for failure to file
- If you find errors on your forms, discuss with counsel if you should file corrections or wait

# PLAY OR PAY: THE MAIL IS COMING

- Biggest errors triggering 226J Letters
- Failure to indicate you offered MEC to 95% or more of full time employees for all months of the year
- Leaving offers of coverage blank for months the individual wasn't your employee
- Not using an affordability safe harbor code on Line 16
- Applying “limited non assessment periods” incorrectly
- Not being able to figure out what hours employees worked in years past



# BENEFITS EMERGING LEADERS WORKING GROUP

## Around the Horn – Group Discussion

Jacob Mattinson

Partner, Employee Benefits and Executive Compensation

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# GROUP DISCUSSION TOPICS

- HSA implementation
- Wellness program design and incentives
- Health & welfare fees
- Cross-plan offsetting
- Retirement plan tax reform compliance
- Administering local sick leave laws
- Benefits while on leave (FMLA, etc.)
- Committee governance and delegations
- Changing brokers, TPAs
- Annual open enrollment headaches to learn from
- *New benefits you are offering*
- *Trendy benefits you have heard about*

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# BENEFITS EMERGING LEADERS WORKING GROUP

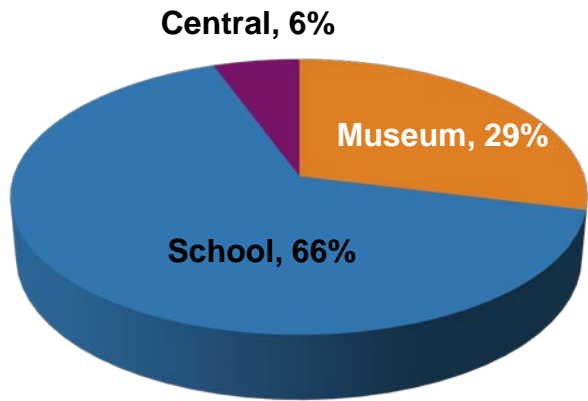
**Paid Parental & Caregiver Leave**

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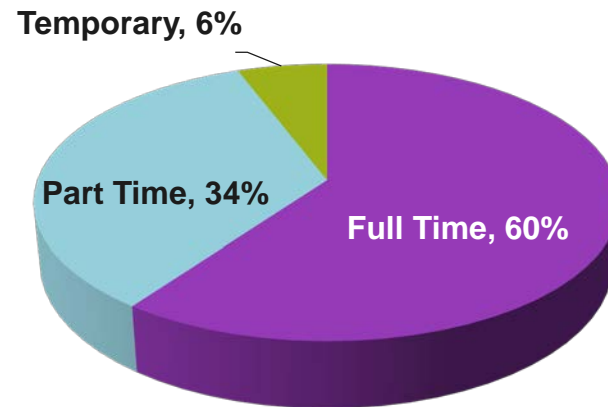


# INTRODUCTION

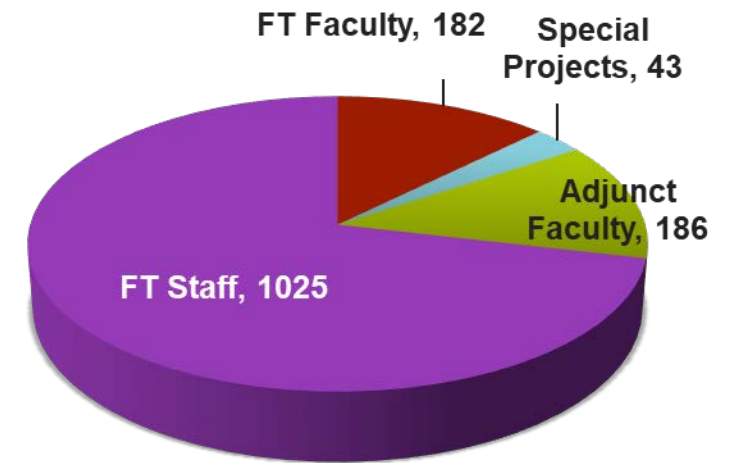
- Who we are
  - Two Entities; Three Business Units
    - ❖ The Museum /The School/Central Administration
  - Always on our mind: Inclusion and Diversity



Workforce Summary



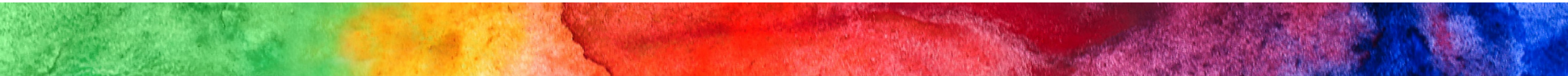
Workforce by Category



Benefits Eligible

# STARTING POINT

- AIC offers up to 8 weeks of Paid Medical Leave (PML) benefits with (60-70% of pay) – benefit is offered to birth mothers.
- Generous PTO offering – 30 days of PTO for F.T. employee (prorated for P.T. and new hires)
  - PTO can be used to supplement PML to provide 100% salary continuation for the full 12 weeks of FML and to satisfy 10 days PML waiting period.
- All type of leaves administered “in house”
- Request from the Museum staff to evaluate paid parental leave
  - Additional bonding time without losing the financial stability



# PAID PARENTAL LEAVE TRENDS

Family Friendly

Some companies are adding parental leave for all new parents

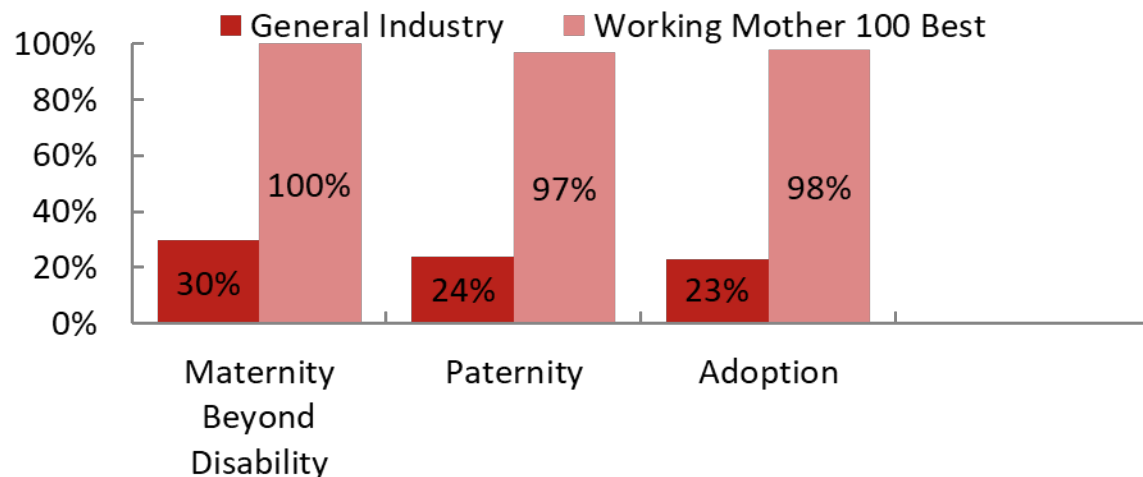
## What's the Difference?

Maternity—Medical disability leave provided to birth mothers (6-8 weeks, median additional bonding leave is 3 weeks)

Adoption—Paid leave to adopting parents (median 4 weeks)

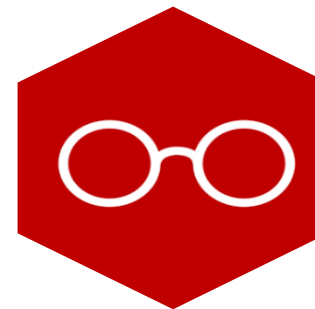
Parental—Paid leave offered to all parents with new child, provided on top of maternity disability leave (median 2 weeks)

## Paid Leave Prevalence



Source: SHRM Employee Benefits Survey, 2017

## Leading the Way

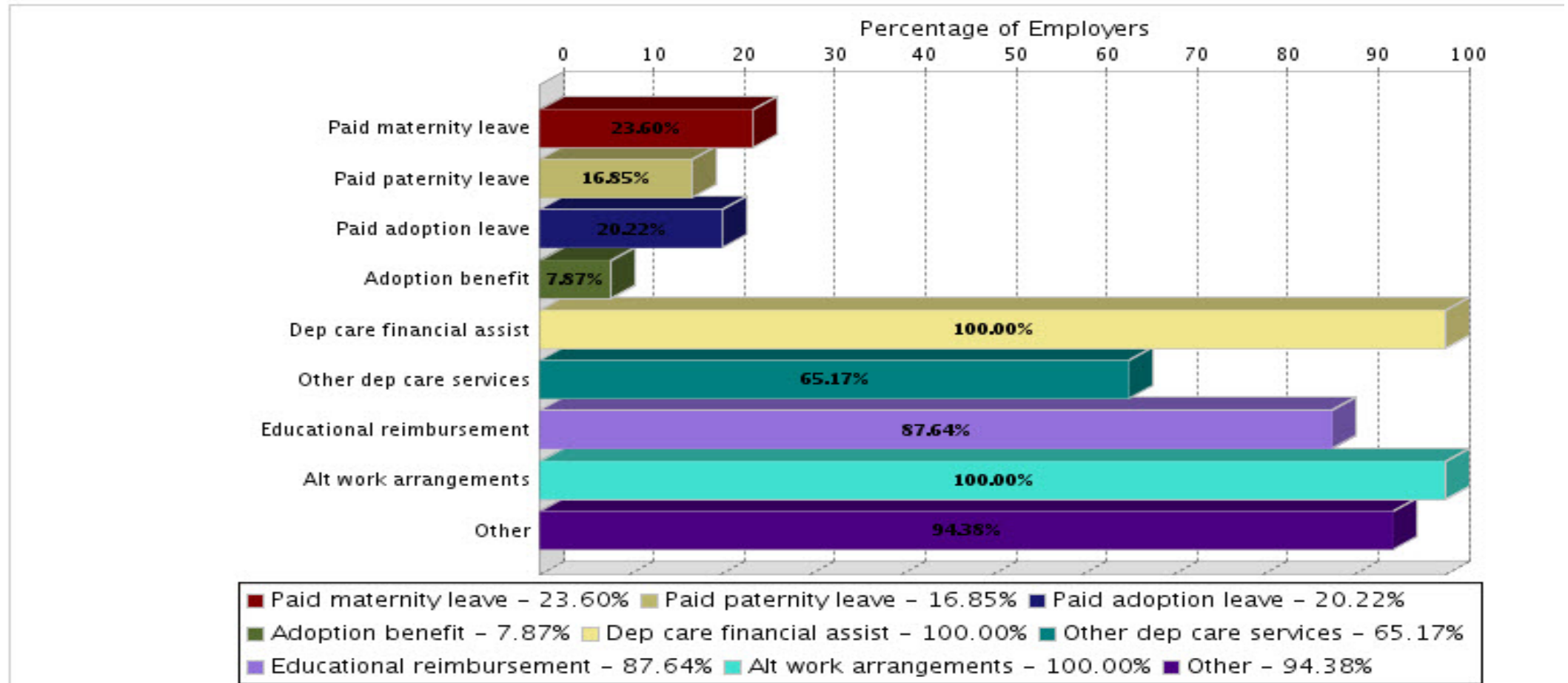


Many in Tech & Finance—Netflix, Amazon, Microsoft, Google, Facebook, and others

2-4 months—Paid parental leave common for leaders

Objectives—Attract and retain key talent, increase engagement, and promote work/life balance

# AIC COMPARATOR LEAVE PREVALENCE



N=89

Source: Aon Benefit SpecSelect Database, 2017

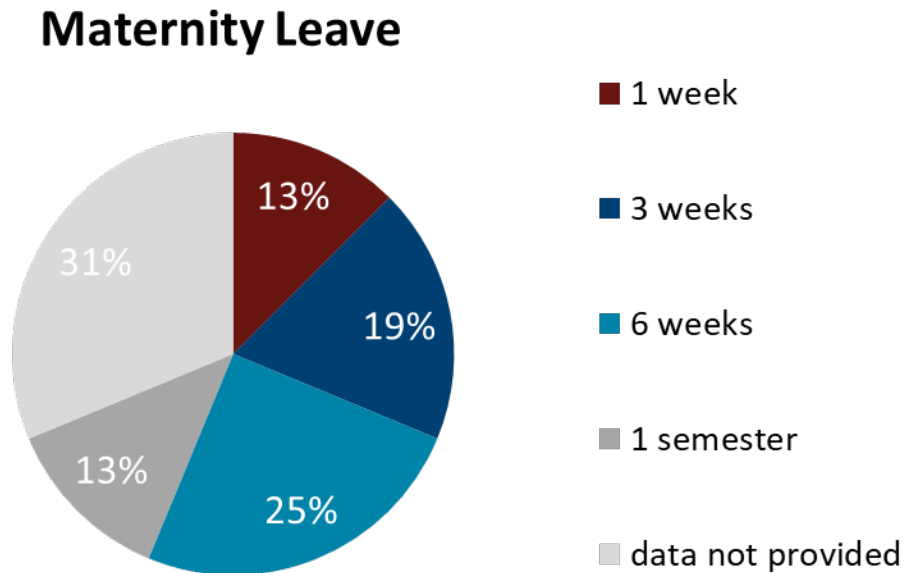
Industry: College/University-Public, 1000+ employees

\*Includes exempt, non-exempt and faculty populations

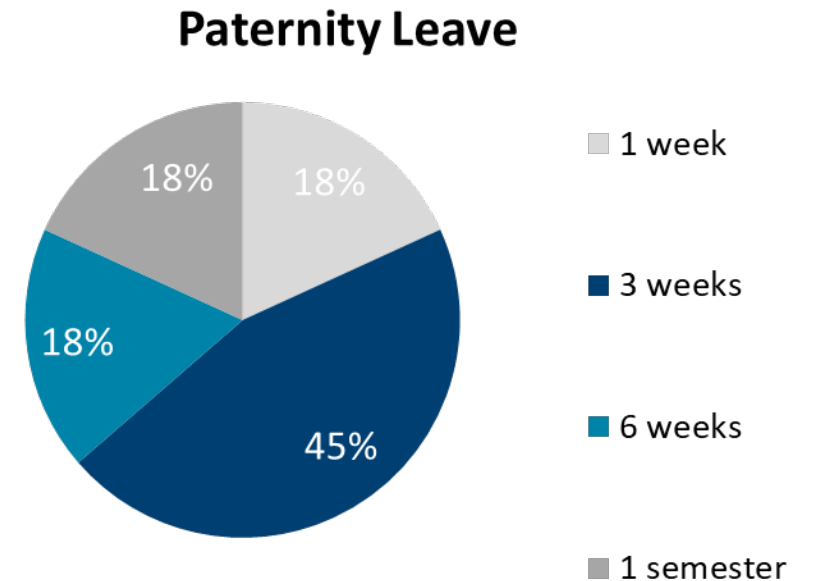
# AIC COMPARATOR LEAVE BENCHMARK

Out of 63 comparators- 16 offer paid maternity leave, 11 offer paid paternity leave and 14 offer paid adoption leave

- Of the companies who offer paid maternity leave:



- Of the companies who offer paid paternity leave:



Maternity leave is in addition to STD benefits

Source: Aon Benefit SpecSelect Database, 2017

**Industry:** College/University-Public, 1000+ employees

*\*Includes exempt, non-exempt and faculty populations*

# CULTURAL CENTERS & MUSEUMS

Company	Parental Leave			Max time out	Family Support Company offers backup childcare	Comments
	Fully paid weeks off for new moms (average)	Fully paid weeks off for new dads (average)	Fully paid weeks off for adoptive parents (ave)			
9/11 Memorial	12	12	12	16 weeks	no	EEs who have been employed < 3 months are eligible for 8 weeks of leave at 1/2 pay, capped at PFL max. Can extend leave up to 4 weeks if vacation is available. Can phase in RTW at less than 100%.
Art Institute of Chicago				FMLA	discount	Updating telecommuting policy
JASA				FMLA/PFL	no	FMLA and PFL only.
Lincoln Center	6 weeks after 1 year 8 weeks after 3 years			Up to 16 weeks (depending on length of service)	no	Sick time during disability. Begin ER paid time once sick time (or STD) ends. No option to extend beyond STD and PFL.
Met				26 weeks	no	Sick time during disability. EE's option to use PTO after disability
MFA Boston				12 weeks, requests for additional time reviewed on a case-by-case basis	no	Standard 12 weeks off, some have been approved for up to 16 weeks. No paid parental
MoMA				9 months (7 months + disability)	no	
New Museum	3	3	3	FMLA/PFL	no	Concurrent with FMLA and PFL
Newfields (Indianapolis)				FMLA	no	FMLA, though many come back part-time or on condensed schedules. STD at 60% after exhausting sick and vacation. Considering paid parental at 60% or 100% for entire 12 weeks
NYPL				Union - 3 years Non-union - 1 year	yes	FMLA and PFL only
Philadelphia Museum of Art				FMLA	no	STD for up to 6-8 weeks after birth (14 day elimination period, and after all sick time is exhausted) option to extend at manager's discretion
Queens Botanical				FMLA/PFL requests for additional time reviewed on a case-by-case basis	no	FMLA and PFL only. Option to use sick and vacation to supplement unpaid and PFL.
The Frick Collection	2-12 weeks depending on length of service	2-12 weeks depending on length of service	2-12 weeks depending on length of service	Negotiable depending on sick accruals, which can be up to 180 days; unpaid available	no	
Transit Museum	4	4	4			must be with the museum for two years to be eligible
Wave Hill				FMLA/PFL	no	FMLA and PFL only. Sick time during FMLA
Broad Institute	12	12	12		Yes	Business: Medical Research Up to \$7500 child care reimbursement
WellStar Health System	3	3	3		Yes	Business: Health
Working Mother Average	10	4	6		92%	



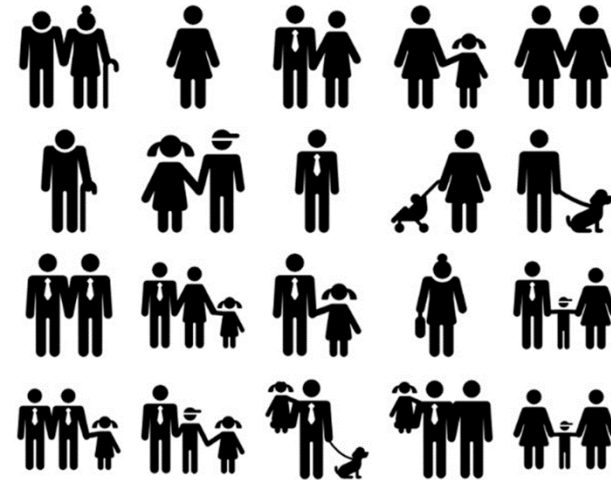
# CUPA – HR BENCHMARKING

Benefits Survey: Paid Time Off  
 Focus Institution: School of the Art Institute of Chicago  
 Comparison Group: All Institutions That Contributed Data  
 Year: 2017-18

2017-18	Focus Institution	All Institutions That Contributed Data						
	Response	% Yes	% No	Median	Average	Low	High	N
Number of paid holidays each year (actual # of days)				12	13	0	25	389
PaidTimeOff (PTO) Plan								
Institution has PTO that combines vacation and sick leave or other benefits?	Yes	9%	91%					389
Number of PTO days new employees get 1st year								
Exempt staff				22	21	0	39	36
Non-exempt staff				18	19	10	39	36
Number of PTO days new employees get 10th year								
Exempt staff				28	28	0	42	36
Non-exempt staff				27	27	13	42	36
Can unused PTO days be accrued								
Exempt staff	Yes	88%	12%					34
Non-exempt staff	Yes	91%	9%					35
If Yes: Is there a limit to PTO accrual								
Exempt staff	Yes	90%	10%					30
Non-exempt staff	Yes	91%	9%					32
If PTO accrual limited: Maximum number of days								
Exempt staff				27	26	3	64	26
Non-exempt staff				28	26	3	66	27
Do you have paid leave for new parents over and above vacation and sick leave?								
For biological mothers?	No	24%	76%					388
If Yes: For how many weeks?				6	7	1	15	95
For biological fathers?	No	21%	79%					388
If Yes: For how many weeks?				6	6	1	15	82
For adoptive mothers?	No	22%	78%					388
If Yes: For how many weeks				6	6	1	15	87
For adoptive fathers?	No	21%	79%					388
If Yes: For how many weeks				6	6	1	15	83

## HOLISTIC APPROACH – LEAVES OFFERING

- Paid Medical Leave\* – pay all benefits at 70%. Eliminate distinction based on years of service.
- Caregiver Leave –up to 2 weeks of paid leave (70% of pay) for benefits eligible employees to care for spouse/domestic partner, child, or parent. Leave may be taken in two one-week blocks.
- Parental Leave –to give benefits eligible employees up to 4 weeks of paid leave to bond with a new born or newly adopted child. Applies to birth mothers, non-birth parents, and adoptive parents. Leave may be taken in two two –week blocks.
- Leaves run concurrent with family and medical leave.

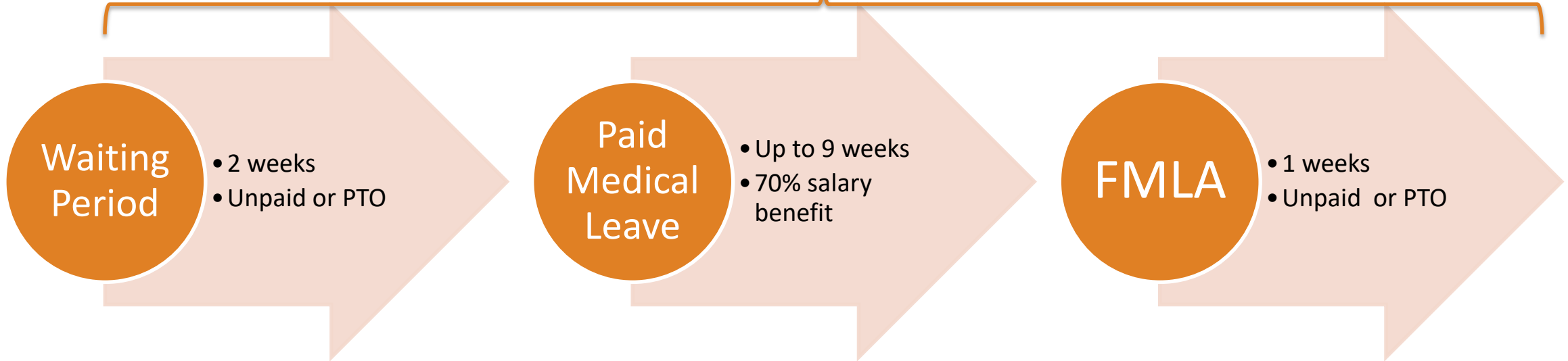


\*Formerly know as Short Term Disability (STD)



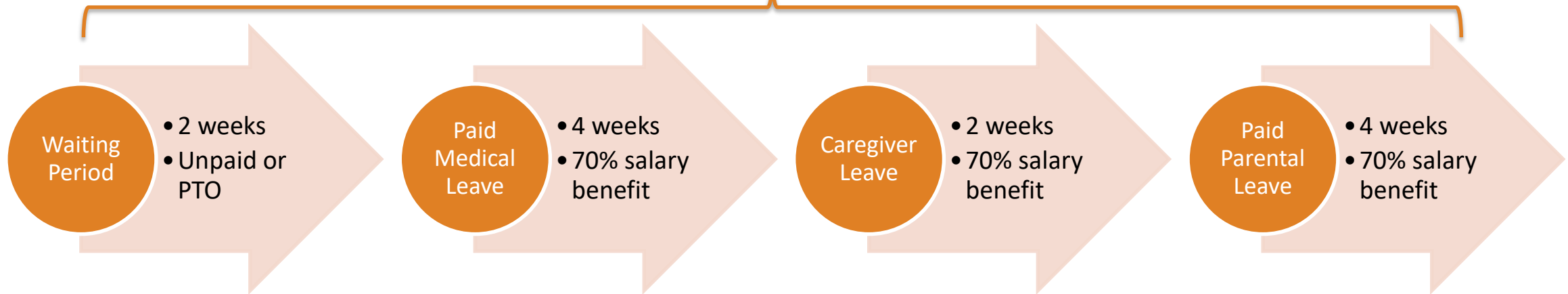
## Scenario 1: Timeframe for Paid Medical Leave

12 weeks Family and Medical Leave (FMLA)



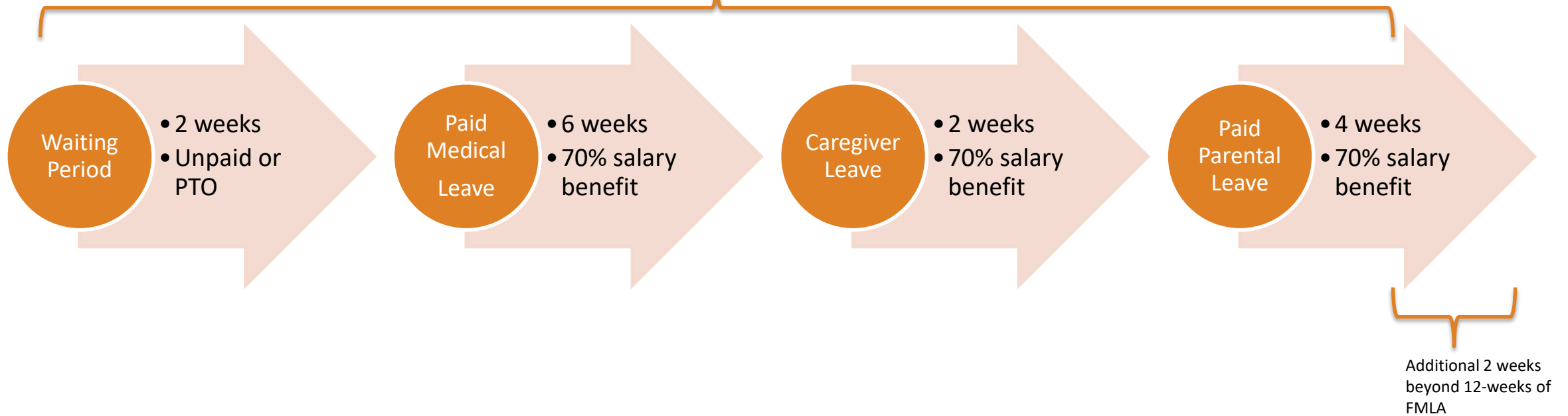
## Scenario 2: Timeframe for Childbirth Leave (Normal Delivery)

12 weeks Family and Medical Leave (FMLA)

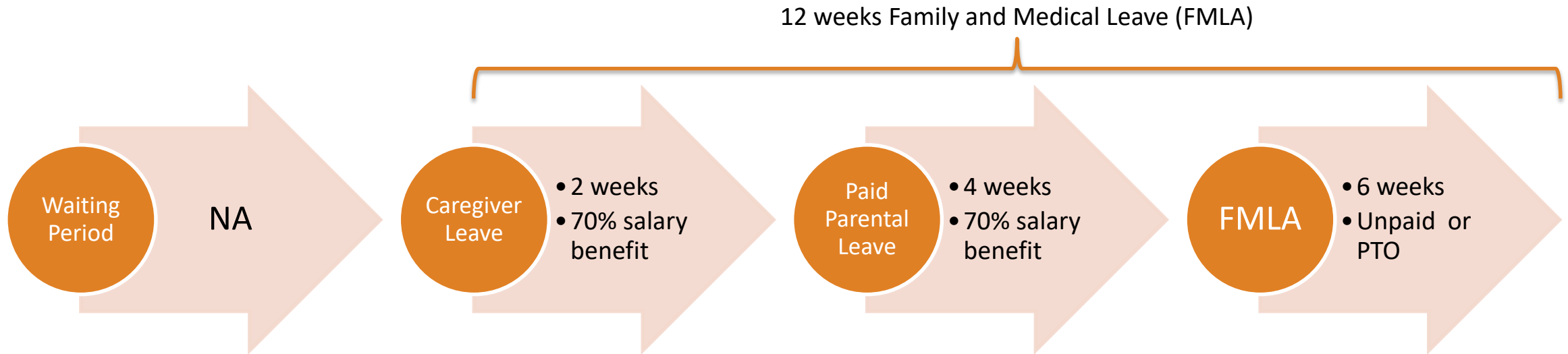


### Scenario 3: Timeframe for Childbirth Leave (C-Section)

12 weeks Family and Medical Leave (FMLA)



## Scenario 4: Timeframe for Non-Birth Parent or Adoption Leave



## Scenario 5: Timeframe for a Caregiver Leave





# BENEFITS EMERGING LEADERS WORKING GROUP

## What's Happening in Washington?

Emily Rickard

Associate, Employee Benefits and Executive Compensation

McDermott Will & Emery LLP

# WHAT GOVERNS BENEFIT PLANS?

- Two primary laws
  - Internal Revenue Code (the “Code”)
  - Employee Retirement Income Security Act of 1974 (“ERISA”)
- Four primary agencies
  - Department of Labor (“DOL”)
  - Internal Revenue Service (“IRS”)
  - Pension Benefit Guaranty Corporation (“PBGC”)
    - Primarily affects defined benefit plans
  - Department of Health and Human Services (“HHS”)

# WHAT'S NEW?

- Lawmakers!
- DOL Penalties!
- HSA/FSA Limits!
- Proposed HRA regulations
- ACA is Unconstitutional?
- Official removal of EEOC wellness regulations
- Novel litigation!



# WHAT'S NEW? LAWMAKERS!

- The Congressional committees responsible for retirement policy have new faces in the 116th Congress
- Senate Health, Education, Labor and Pensions Committee
  - Mitt Romney, Mike Braun, and Jacky Rosen have replaced Orrin Hatch, Todd Young, and Michael Bennet
    - Could help with those EEOC regs...
- Led by newly-minted Chairman Richard Neal, the House Ways and Means Committee has appointed 10 new Democrats to open positions:
  - Gwen Moore, Dan Kildee, Brendan Boyle, Don Beyer, Dwight Evans, Brad Schneider, Tom Suozzi, Jimmy Panetta, Stephanie Murphy, and Steven Horsford

# WHAT'S NEW? DOL PENALTIES!

- The DOL has slightly raised—by approximately 2.5%—civil penalties for companies that violate ERISA mandates
  - The per day maximum penalty for failing to file a Form 5500 is raised to \$2,194 (from \$2,140)
  - The per day maximum penalty for a failure to furnish plan-related information as requested \$156 (not to exceed \$1,566 per request) up from \$152 per day (not to exceed \$1,527 per request)

# WHAT'S NEW? HSA/FSA LIMITS!

- The IRS has raised 2019 HSA and FSA limits in accordance with 2019 cost-of-living adjustments
  - The HSA annual contribution limits are raised to:
    - \$3,500 (from \$3,450) - Self-only
    - \$7,000 (from \$6,900) - Family
  - The maximum salary reduction limit for FSAs is raised to \$2,700 (from \$2,650)

# WHAT'S NEW? PROPOSED HRA REGULATIONS

- Liberalize standards for health reimbursement arrangements (“HRAs”)
  - Integrated HRA
  - Excepted Benefit HRA
- Response to executive order directed at IRS, DOL, and HHS
- IRS Notice 2018-88 addresses the application of ACA employer mandate and prohibited discrimination
  - Criteria for applicable large employers (“ALE”) to avoid Code Section 4980H penalties
  - Offer of coverage determination includes HRA
  - Safe harbor benchmarks based on primary worksite rather than residence
- Maximum dollar amount can increase with the age of the employee

# WHAT'S NEW? NO MORE EEOC WELLNESS REGS!

- *AARP v. EEOC, D.D.C.*, No. 16-2113 (D.D.C. December 20, 2017) vacated the regulations effective January 1, 2019
  - Judge found that EEOC wellness regulations based on Americans with Disabilities Act (“ADA”) and Genetic Information Nondisclosure Act (“GINA”) standards were not clear enough on why they went with various policies, numbers, and limits
- Consistent with that decision 29 CFR 1635 (RIN 3046–AB02) removes the incentive section of the ADA regulations at 29 CFR 1630.14(d)(3)
  - Published in Federal Register on December 20, 2018

# WHAT'S NEW? ACA IS UNCONSTITUTIONAL?

- Texas District Court based decision on *NFIB v. Sebelius*,
  - Tax reform reduced individual mandate penalty to zero dollars
  - A “tax,” that is not a tax = un-severable = unconstitutional!
- No injunction, so law stands
  - Will appeal to Fifth Circuit, and then (likely) to the Supreme Court
- Both of the justices that President Trump has replaced (Antonin Scalia and Anthony Kennedy) voted against the ACA
  - 5-justice majority that upheld the ACA in *NFIB v. Sebelius* remains

# WHAT'S NEW? NOVEL LITIGATION!

- PepsiCo, American Airlines, MetLife, and US Bancorp have all been sued in recent months over defined benefit plan “conversion factors”
  - Claim violations of ERISA when a plan uses “unreasonable” actuarial conversion factors
  - All involve early retirement benefits and/or optional forms of annuity payments
- Plaintiffs in these cases point to “outdated mortality tables” and urge courts to:
  - Revise actuarial conversion factors
  - Amend ERISA-governed plan documents
  - Allow participants to recover “actuarially equivalent amounts,”
  - Hold individual fiduciaries liable for failure to monitor the use of outdated factors and amend the plans to reflect reasonable actuarial factors based upon current life spans and interest rate assumptions

# WHAT'S COMING?

- Conditions for compliance with Code Section 105(h) nondiscrimination rules
  - Without further guidance, age-based increase could = taxable income
- New Wellness Regulations!
  - EEOC Regulatory Agenda notes that the EEOC will issue a proposal by June 2019
- Retirement reform legislation?



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**THANK YOU FOR JOINING US**

**BENEFITS EMERGING LEADERS  
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March 7, 2019

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