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Regulatory Update



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Additional FAQs Released on Employer Tax Credit for Paid Leave

It was previously reported that the 2017 Tax Cuts and Jobs Act (TCJA) created a new employer tax credit where an employer provides paid family and medical leave to its employees. The tax credit applies to wages paid between January 1, 2018, and December 31, 2019.

Beginning January 1, 2018, eligible employers may claim a general business credit equal to 12.5 percent of wages paid to qualifying employees during any period in which such employees are on paid family and medical leave, if the rate of payment under the employer's leave program is at least 50 percent of the wages normally paid to an employee. The credit is increased by 0.25 percentage points (but not above 25 percent) for each percentage point by which the rate of payment exceeds 50 percent.

- For example, if an employee on Family and Medical Leave Act (FMLA) leave is paid 60 percent of their normal wages, the credit would increase to 15 percent of the wage amount (12.5% plus $(10\% \times 0.25 = 2.5\%)$).
- In contrast, if an employee on FMLA leave is paid 100 percent of their normal wage, the credit would be 25 percent of the wage amount (12.5% plus $(50\% \times 0.25 = 12.5\%)$).

The tax credit applies for up to 12 weeks per employee in any year. Eligible employers must have a written policy that allows all qualifying full-time employees at least two weeks of paid FMLA leave per year, and allows part-time employees a commensurate amount of leave on a pro rata basis. A "qualifying employee" is any employee who has been employed for one year or more, and who, for the preceding year, had compensation not in excess of 60 percent of the compensation threshold for highly compensated employees under qualified plan rules (i.e., no more than \$72,000 in 2017 (60 percent of \$120,000)).

Paid leave provided in the form of vacation, personal, or other medical or sick leave would not qualify for the tax credit. Further, any leave either paid for by a state or local government, or required by state or local law, does not qualify for the tax credit.

On April 9, 2018, the Internal Revenue Service (IRS) posted "Frequently Asked Questions" (FAQs) related to the credit. The IRS has now posted an additional 10 FAQs to its website.

Some with examples are as follows:

Q: What's the general rule for when an employer's written policy must be in place?

A: Except for the first taxable year of an employer beginning after December 31, 2017* an employer can claim the credit only for leave taken after the written leave policy is in place. The written policy is in place on the later of the policy's adoption date or the policy's effective date.

Example

An employer adopts a written policy that satisfies all requirements of Section 45S on June 15, 2019, with an effective date of July 1, 2019.

Conclusion: Assuming the employer met all other requirements for the credit, the employer may claim the credit for family and medical leave paid per that policy to qualifying employees for leave taken on or after July 1, 2019.

*A transition rule in Q&A 6 of Notice 2018-71 applies for the first taxable year of an employer beginning after December 31, 2017.

Q: What must an employer's written leave policy include?

A: In their written policy, an eligible employer must allow at least two weeks of paid family and medical leave (prorated for part-time employees) for all qualifying

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employees at a rate of at least 50 percent of the wages normally paid to them. For any qualifying employees not covered by Title I of the Family and Medical Leave Act (FMLA), the employer needs to make sure the employer will not interfere with, restrain, or deny any right under the policy. They also need to make sure they will not discharge or discriminate against any individual for opposing any practice prohibited by the policy. Q&A 3 of Notice 2018-71 has sample language to satisfy this “noninterference” requirement.

Employers must make the leave available to all qualifying employees, which means all employees who’ve been employed for at least one year and had compensation from the employer for the preceding year that didn’t exceed a certain dollar amount. (For 2017 or 2018, the amount is \$72,000.) The law allows an employer to prorate the two-week leave period for part-time employees (those customarily employed for fewer than 30 hours per week).

Q: Can paid leave allowed under an employer’s short-term disability program be characterized as family and medical leave?

A: Yes. Paid leave allowed under an employer’s short-term disability program, whether self-insured by an employer or through a short-term disability insurance policy, may be characterized as family and medical leave if it meets the requirements under the law.

Q: How does an employer figure whether an employee has been employed for one year or more?

A: Until further guidance is issued, an employer may use any reasonable method to figure whether an employee has been employed for one year or more. Treating employees as employed for one year or more if they’ve been employed for 12 months, per the FMLA regulations, is an example of a reasonable method. But, requiring twelve consecutive months of work to be a qualifying employee isn’t a reasonable method for deciding whether an employee has been employed for one year.

For a copy of all the employer tax credit FAQs provided by the IRS to date, click on the link provided below.

<https://www.irs.gov/newsroom/section-45s-employer-credit-for-paid-family-and-medical-leave-faqs>

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