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IRS Issues FAQs on Employer Tax Credit for Paid FMLA

On April 9, 2018, the Internal Revenue Service (IRS) posted "Frequently Asked Questions" (FAQs) related to the new employer credit for paid family and medical leave, which was established by the 2017 Tax Cuts and Jobs Act (P.L. 115-97) and IRC Section 45S. The tax credit applies to wages paid between January 1, 2018 and December 31, 2019.

Background

Beginning January 1, 2018, eligible employers may claim a general business credit equal to 12.5% 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% of the wages normally paid to an employee. The credit is increased by 0.25 percentage points (but not above 25%) for each percentage point by which the rate of payment exceeds 50%.

- For example, if an employee on Family and Medical Leave Act (FMLA) leave is paid 60% of their normal wages, the credit would increase to 15% of the wage amount (12.5% plus (10% x 0.25 = 2.5%)).
- In contrast, if an employee on FMLA leave is paid 100% of their normal wage, the credit would be 25% of the wage amount (12.5% plus (50% x 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% of the compensation threshold for highly compensated employees under qualified plan rules (i.e., no more than $72,000 in 2017 (60% 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.

Although more detailed regulations continue to be expected, the new "Frequently Asked Questions" provides important guidance for employers.

FAQs Clarify Key Elements

The FAQs clarify, for example, that qualifying family and medical leave can be for one or more of the following reasons:

a) Birth of an employee's child and to care for the child

b) Placement of a child with the employee for adoption or foster care

c) To care for the employee's spouse, child, or parent who has a serious health condition

d) A serious health condition that makes the employee unable to perform the functions of his or her position

e) Any qualifying exigency due to an employee's spouse, child, or parent being on covered active duty (or having been notified of an impending call or order to covered active duty) in the Armed Forces

f) To care for a service member who is the employee's spouse, child, parent, or next of kin

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Another FAQ states that an employer must reduce its deduction for wages paid by the amount of any tax credit for paid FMLA leave. Also, any wages taken into account in determining any other general business credit may not be used in determining this credit.

The IRS expects to issue further guidance to address issues such as:

- When the written policy must be in place
- How paid "family and medical leave" relates to an employer's other paid leave
- How to determine whether an employee has been employed for "one year or more"
- The impact of state and local leave requirements, and,
- Whether members of a controlled group of corporations and businesses, under common control, are treated as a single taxpayer in determining the credit.

In the meantime, employers who wish to take advantage of the new tax credit should consult with their legal and tax advisors.

For details, see the IRS **FAQ** document at **https://www.irs.gov/newsroom/section-45s-employer-credit-for-paid-family-and-medical-leave-faqs**

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Updated on April 12, 2018