

IRS Issues Initial Guidance on Paid FMLA Tax Credit

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The IRS has finally issued its first round of guidance on the new Section 45S Family and Medical Leave employer credit, in the form of [FAQs](#). By way of background, the [Tax Cuts and Jobs Act](#), signed into law by President Trump in December 2017, created a new business credit for employers that offer paid family and medical leave. To qualify for the credit, an employer must have a *written* policy that provides at least two weeks of paid family and medical leave (prorated for part-time employees). Credit is only provided for a qualifying leave for lower paid individuals who have been employed with the company for at least one year and who earn no more than 60 percent of the Section 414(q) (1)(B) threshold for a highly compensated employee (for 2018, the credit is available for employees who earned \$72,000 or less in 2017). Leave must be paid at a level equal to *at least* 50 percent of regular wages. The tax credit starts at 12.5 percent of wages paid to an employee on leave, and increases by 0.25 percent for each percentage point by which the rate of leave pay exceeds 50 percent of the employee's regular wages, with the credit capped at 25 percent. The credit is available for up to 12 weeks of paid family and medical leave per tax year.

The tax credit is available for protected leave under the Family and Medical Leave Act of 1993 (FMLA) for any of the following reasons:

- Birth of the employee's child and to care for such child;
- Placement of a child with the employee for adoption or foster care;
- To care for the employee's spouse, child, or parent who has a serious health condition;
- The employee's serious health condition that makes the employee unable to perform the functions of his or her position;
- Any qualifying exigency due to an employee's spouse, child, or parent being on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces; or
- To care for an Armed Forces service member who is the employee's spouse, child, parent, or next of kin.

An employer cannot claim the credit for any paid leave provided by the employer to comply with a state or local law or for leave paid by a state or local government. In addition, paid leave provided under a vacation or personal leave policy, or provided as medical or sick leave that does not qualify as FMLA leave for a reason described above, is not eligible for the credit. The credit is available to both employers subject to FMLA requirements, as well as to

employers not covered by the FMLA that offer FMLA-like leave protections. One aspect that makes this credit less attractive is that it is available on a temporary basis—it applies only with respect to wages for an eligible family and medical leave paid in taxable years beginning after December 31, 2017, and unless extended by Congress, it will not be available for taxable years beginning after December 31, 2019.

Employers interested in exploring this tax credit have been eagerly awaiting IRS guidance. Although the FAQs now issued offer little in the way of new guidance, the FAQs provide a helpful summary of the credit eligibility rules. Notably, the FAQs clarify that the wages used for the Section 45S credit may not be used for other business credits and that an employer must reduce its deduction for any wages related to credit by the amount of the credit. (In other words, if an employer pays \$50,000 in wages, which includes \$5,000 of paid FMLA leave for which the employer received a \$1,250 credit, the employer may only deduct \$48,750 of the wage expense.) The FAQs indicate that additional information will be forthcoming, relating to when the written leave policy must be in place, how paid “family and medical leave” relates to an employer’s other types of 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. Until additional guidance is issued, employers are left to interpret the tax code text describing the credit.

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