

IRS Issues Notice 2018-71 to Clarify Tax Credit for Paid Medical Leave

By Kelly A. Starr and Anna Zielinski

October 23, 2018

Any employer who offers employees paid family or medical leave may benefit from the new Internal Revenue Code Section 45S, added by the Tax Cuts and Jobs Act and clarified on September 24, 2018 by Internal Revenue Service Notice 2018-71. The credit available under Section 45S is currently available only for 2018 and 2019, unless extended into additional years.

Background on Section 45S

Section 45S offers employers a tax credit equal to a percentage of wages paid to certain employees while they are on paid family or medical leave. If an employer offers employees paid leave for any purpose for which employees may take leave under Title I of the Family and Medical Leave Act (FMLA), and such paid leave equals at least 50% of the wages an employee would normally earn, the employer is eligible for and should claim a tax credit by filing IRS Form 8994, Employer Credit for Paid Family and Medical Leave, along with IRS Form 3800, General Business Credit, with its tax returns. Employers need not be subject to the FMLA to claim this credit.

Eligibility Criteria

To be eligible for the credit, an employer's paid leave policy must be documented in writing and must cover all employees who have been employed for at least one year, but not those who earned more than a specified amount in the preceding year (\$72,000 for purposes of determining eligibility in 2018), as the credit is not available for wages paid to such employees. Additionally, the credit is not available for any wages that are required to be paid pursuant to state or local law.

Part-Time Employee Considerations

If an employer hires part-time employees, its written policy must also provide a proportionate amount of paid leave for such part-time employees who have been employed for at least one year. Paid leave provided pursuant to an employer's short-term disability program, whether self-insured or provided through a short-term insurance policy, does qualify for the credit as long as all other requirements are met.

What Qualifies?

Wages paid to a qualifying employee on leave for any of the following purposes will qualify for the credit: (1) the birth of a child and in order to care for the child; (2) the placement of a child for adoption or foster care; (3) caring for a spouse, child or parent who has a serious health condition; (4) the employee's serious health condition, rendering the employee unable to perform the functions of his or her position; (5) any qualifying exigency arising out of the fact that the employee's spouse, child or

parent is a member of the Armed Forces and on active duty; and (6) caring for a member of the Armed Forces with a serious injury or illness if the employee is the spouse, child, parent or next of kin of the Armed Service member.

Calculating the Credits

If an employer is eligible for the credit, the amount of the credit is equal to a percentage of the wages paid pursuant to the employer's paid leave policy, based on the percentage of employees' normal wages that are paid pursuant to the policy. The credit amount ranges from 12.5% of wages paid under a policy that pays employees 50% of their normal wages while on paid leave to 25% of wages paid under a policy that pays employees 100% of their normal wages while on paid leave. Each employer should calculate whether claiming the credit or not claiming the credit results in greater savings, but expectations are that claiming the credit will be beneficial to each employer that is eligible.

Learn More

If you have questions about this credit or want your potential or existing paid leave policy reviewed for credit eligibility, please contact **Kelly A. Starr** +1 (312) 609-7768, **Anna Zielinski** +1 (312) 609-7602 or any other Vedder Price attorney with whom you have worked.

vedderprice.com