

BUSINESS TAX CREDITS

¶585 Employer Credit for Paid Family and Medical Leave

Employer credit for paid family and medical leave provided.—A new credit for paid family and medical leave (FML) is available. An eligible employer is allowed the FML credit in an amount equal to the applicable percentage of the wages paid to qualifying employees during the period in which such employees are on FML (Code Sec. 45S(a)(1), as added by the Tax Cuts and Jobs Act). Applicable percentage means 12.5 percent increased (but not above 25 percent) by 0.25 percentage points for each percentage point by which the rate of payment exceeds 50 percent (Code Sec. 45S(a)(2), as added by the 2017 Tax Cuts Act).

CAUTION

The credit is only available with respect to wages paid in tax years beginning in 2018. Wages incurred but unpaid in a tax year beginning in 2018 do not qualify for the credit (Act Sec. 13403(e) of the 2017 Tax Cuts Act; Code Sec. 45S(i), as added by the 2017 Tax Cuts Act).

The credit allowed with respect to any employee for any tax year shall not exceed an amount equal to the product of (1) the normal hourly wage rate of the employee for each hour (or fraction thereof) of actual services performed for the employer and (2) the number of hours (or fraction thereof for which FML is taken) (Code Sec. 45S(b)(1), as added by the 2017 Tax Cuts Act). If an employee is not paid an hourly wage rate, the wages of such an employee should be prorated to an hourly wage rate in accordance with regulations established by the IRS (Code Sec. 45S(b)(2), as added by the 2017 Tax Cuts Act). The maximum amount of leave subject to the credit for any employee for any tax year may not exceed 12 weeks (Code Sec. 45S(b)(3), as added by the 2017 Tax Cuts Act).

An eligible employer is an employer that has a written policy in place that meets the following requirements:

- The policy provides: (a) in the case of a qualifying employee who is not a part-time employee, not less than 2 weeks of annual paid FML, and (b) in the case of a qualifying employee who is a part-time employee, annual paid FML that is not less than an amount which bears the same ratio to the amount of annual paid FML that is provided to a qualified employee who is not part-time as (i) the number of hours the employee is expected to work during any week, over (ii) the number of hours an equivalent qualifying employee who is not part-time is expected to work during the week.
- The policy requires that the rate of payment under the program is not less than 50 percent of the wages normally paid to the employee for services performed for the employer (Code Sec. 45S(c)(1), as added by the 2017 Tax Cuts Act).

An "added employer" is not treated as an eligible employer unless the employer provides FML that conforms with a written policy that ensures that the employer (i) will not interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under the policy, and (ii) will not discharge or in any other manner discriminate against any individual for opposing any practice prohibited by the policy (Code Sec. 45S(c)(2)(A), as added by the 2017 Tax Cuts Act). An "added employee" is defined as a qualifying employee who is not covered by Title I of the Family and Medical Leave Act of 1993 (P.L. 103-3) (Code Sec. 45S(c)(2)(B)(i), as added by the 2017 Tax Cuts Act). An "added employer" is defined to mean an eligible employer whether or not covered by Title I of the Family and Medical Leave Act, who offers paid family and medical leave to added employees (Code Sec. 45S(c)(2)(B)(ii), as added by the 2017 Tax Cuts Act).

Entities that are treated as a single employer under Code Secs. 52(a) and (b) are treated as a single taxpayer for purposes of the family and medical leave credit (Code Sec. 45S(c)(3), as added by the 2017 Tax Cuts Act). In addition, any leave that is paid by a state or local government or is required by state or

local law is not considered in determining the amount of paid FML that is provided by the employer (Code Sec. 45S(c)(4), as added by the 2017 Tax Cuts Act). Failure to provide paid family and medical leave by an employer will not subject an employer to any penalty, liability, or other consequence, except that the employer is not eligible to take the credit (Code Sec. 45S(c)(5), as added by the 2017 Tax Cuts Act).

A qualifying employee is any employee, which is defined in section 3(e) of the Fair Labor Standard Act of 1938, who has been employed by the employer for at least 1 year and, in the preceding year, received compensation not in excess of an amount equal to 60 percent of the amount applicable for such year under Code Sec. 414(q)(1)(B)(i) (Code Sec. 45S(d), as added by the 2017 Tax Cuts Act).

KEY RATES AND FIGURES

The Code Sec. 414(q)(1)(B)(i) amount is \$80,000, adjusted for inflation. In 2018, the amount is \$120,000.

Family and medical leave is defined as leave for any one or more purposes described in Sections 102(a)(1)(A)-(E) or (3) of the Family and Medical Leave Act of 1993, whether that leave is provided under the Act or due to an employer's policy (Code Sec. 45S(e)(1), as added by the 2017 Tax Cuts Act). An eligible employee is entitled to FML under the following circumstances, according to the Family and Medical Leave Act:

- the birth of a child of the employee and in order to care for such child;
- the placement of a child for adoption or foster care;
- a serious health condition of a spouse, child, or parent requiring the employee to care for such person;
- the employee's serious health condition that makes the employee unable to perform the functions of the employee's position;
- any "qualifying exigency" arising out of the fact that the employee's spouse, child, or parent is a military member on covered active duty or call to covered active duty status; or
- to care for a covered service member with a serious injury or illness.

If the employer provides paid leave as vacation leave, personal leave, or medical or sick leave (other than leave specifically for one or more of the purposes referred to above), that paid leave is not considered FML (Code Sec. 45S(e)(2), as added by the 2017 Tax Cuts Act). Determinations as to whether an employer or employee meets the requirements to be an "eligible employer" or "qualifying employee" are made by the IRS (Code Sec. 45S(f), as added by the 2017 Tax Cuts Act). The term wages has the same meaning as that given in Code Sec. 3306(b), which is generally all remuneration paid for employment, including the cash value of all remuneration, including benefits, paid in any medium other than cash. Wages do not include any amount taken into account for purposes of determining any other credit allowed under Subpart D—Business Related Credits (Code Sec. 45S(g), as added by the 2017 Tax Cuts Act). An employer may elect to have the credit for paid family and medical leave not apply (Code Sec. 45S(h)(1), as added by the 2017 Tax Cuts Act). The election can be made at any time before the expiration of the three-year period beginning on the last day for filing the tax return for the year of the election (without regard to extensions) (Code Sec. 45S(h)(2), as added by the 2017 Tax Cuts Act). The election is made in the manner prescribed by regulations as issued by the Secretary (Code Sec. 45S(h)(2), as added by the 2017 Tax Cuts Act).

The credit for paid FML is treated as a component of the general business credit (Code Sec. 38(b), as amended by the 2017 Tax Cuts Act). The credit for paid FML is allowed as a credit against the alternative minimum tax (AMT) (Code Sec. 38(c)(4)(B), as amended by the 2017 Tax Cuts Act).

Effective date. The provision applies to wages paid in tax years beginning after December 31, 2017 (Act Secs. 13403(e) of the Tax Cuts and Jobs Act).