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# Regulatory Update

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## More Employer Paid Leave Tax Credit Guidance Provided

It was previously reported that the 2017 Tax Cuts and Jobs Act (TCJA) created a new employer tax credit available to employers who provide paid family and medical leave to their employees. The tax credit applies to wages paid to qualifying employees between January 1, 2018, and December 31, 2019. The Internal Revenue Service (IRS) has now released Notice 2018-71 which provides guidance to employers wishing to claim the Employer Credit for Paid Family and Medical Leave in 2018 and 2019.

### Background

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% 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 annual paid 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.

### Notice 2018-71

Some of the highlights of the IRS guidance are as follows:

- As the guidance was released late in 2018, the IRS will allow retroactive payments for qualifying leave in 2018 to qualify for the credit, as long as employers pay the leave and either adopt or amend a written policy before December 31, 2018.
- Notice 2018-71 clarifies that the credit is limited to paid leave used for purposes defined by the FMLA as follows:
  - o A child's birth or placement for adoption or foster care
  - o Care for a spouse, son, daughter, or parent who has a serious health condition
  - o Care for the employee's own serious health condition
  - o A "qualifying exigency" that arises because a spouse, son, daughter, or parent is on active military duty
  - o Care for a related service member with a "serious injury or illness"
- An employer paid leave policy for more general purposes, such as sick leave or paid time off (PTO), will not qualify the employer for the tax credit.
- The notice clarifies that the paid leave must be available to all qualifying employees, regardless of hours worked. If the policy excludes a group of otherwise qualified employees (such as collectively bargained employees), the employer will not be eligible for the tax credit. To determine whether an employee has been employed for at least one year, employers may use any reasonable method, as long as it does not require a minimum number of hours worked.

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- Allows for a broader definition of "family" as defined under FMLA. Many employers have policies in place that offer paid or unpaid leave for FMLA purposes, but broadly define "family" to include more relatives than the FMLA recognizes. For example, under the FMLA, a covered employee is entitled to job-protected leave to care only for a spouse, son, daughter, or parent with a serious health condition. Notice 2018-71 clarifies that an employer policy may go beyond the scope of the federal FMLA and allow paid leave to care for other relatives — a sibling, grandparent, grandchild, or domestic partner — who have a serious health condition. However, in this situation, the employer can only claim the credit for paid leaves provided to care for a qualifying employee's spouse, son, daughter, or parent as specified in the FMLA.
- Notice 2018-71 contains 34 frequently asked questions regarding the paid family and medical leave tax credit, addressing the following topics:
  - o Eligible Employer
  - o Family and Medical Leave
  - o Minimum Paid Leave Requirements
  - o Calculating and Claiming the Credit
  - o Effective Date

It is also important to note that the IRS has posted a draft form (8994) titled "Employer Credit for Paid Family and Medical Leave" and Instructions (links below). Per the IRS: **Caution: *DRAFT — NOT FOR FILING***. This is an early release draft of an IRS tax form, instructions, or publication, which the IRS is providing for your information as a courtesy. ***Do not file draft forms***. Also, do **not** rely on draft forms, instructions, and publications for filing.

## Draft Form 8994:

**https://www.irs.gov/pub/irs-dft/f8994--dft.pdf**

## Draft Instructions Form 8994:

**https://www.irs.gov/pub/irs-dft/i8994--dft.pdf**

For a copy for 2018-71, click on the link provided below:

**https://www.irs.gov/pub/irs-drop/n-18-71.pdf**

## ADP Compliance Resources

ADP maintains a staff of dedicated professionals who carefully monitor federal and state legislative and regulatory measures affecting employment-related human resource, payroll, tax and benefits administration, and help ensure that ADP systems are updated as relevant laws evolve. For the latest on how federal and state tax law changes may impact your business, visit the ADP *Eye on Washington* Web page located at **www.adp.com/regulatorynews**.



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