



Employer Tax Credit under IRC § 45S for Paid Family & Medical Leave

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Background. In the 2017 Tax Cuts & Jobs Act, Congress introduced an employer tax credit for wages paid to employees on paid family and medical leave. The credit was initially available only for tax years 2018 and 2019 but was extended for 2020 in late 2019. To take advantage of this credit, employers must have offered qualifying employees at least two weeks of paid family and medical leave at a rate of at least 50% of their normal hourly wages in addition to any leave and rate of pay required by state or local government. The amount of the credit ranged from 12.5-25% of the wages paid to each employee while on family and medical leave. Given the credit's initially short lifespan and complexity, many employers concluded that the tax credit was not worth pursuing.

What's New? In the Consolidated Appropriations Act of 2021, Congress extended the availability of this credit for family and medical leave wages paid through 2025. Now that this credit is available through the next five years, employers not already offering paid leave may want to seriously consider creating a family and medical leave program that qualifies while employers with an existing leave program should determine whether the program can be modified to qualify.

Potential Opportunities

- Employers without paid family and medical leave might decide to create a paid leave program. In addition to generating a tax credit, a leave program may help employers recruit and retain employees.
 - The leave offered does not need to be uniform for all employees, as long as the minimum required leave is provided. For example, an employer could provide a larger period of paid leave to employees who have met certain service thresholds, for example, five years of service.
- Employers that currently offer paid leave should evaluate whether their program already meets, or could be tweaked to meet, the statutory requirements necessary to receive the credit.
 - For example, employers offering short-term disability to all qualifying employees may qualify for the credit even if they do not have a separate leave program.

Limitations

- No paid family and medical leave that is required by or paid by state or local government can be considered when determining an employer's eligibility for, or the amount of, the credit.
 - This means that, to qualify for the credit, an employer must provide at least 2 weeks of 50%-paid leave in addition to leave provided for by the relevant state or local government. This may pose challenges for employers who have employees in states or localities with generous leave requirements.

- Paid leave must be provided to all qualifying employees. See definition in the chart below. Employers offering paid family and medical leave to only a subset of employees (e.g., non-bargained employees) would likely not qualify for the credit.
- Paid leave must be designated specifically for one of several enumerated purposes. See list in the chart below.
 - Employers that allow the paid medical and family leave to be used for any reason other than those specifically enumerated reasons would not qualify for the credit. For example, an employer that provides 21 days of leave for any reason, including vacation or personal, would not qualify for the credit.
- Qualifying for the credit can be administratively burdensome.
 - Employers must track the period of paid leave taken by each employee and the corresponding rate of pay. Employers with employees in multiple states need to keep track of required leave requirements across each state and locality in which they have employees.
- For 2020 and 2021, eligibility for the tax credit must be coordinated with the CARES Act Employer Retention Credit. Employers cannot receive both credits for the same paid leave wages.

Contact us. If you have reactions or comments or would like more information, we would be happy to hear from you.

OVERVIEW OF LEGAL REQUIREMENTS FOR §45S PAID FAMILY AND MEDICAL LEAVE CREDIT

Amount of Credit	The amount of wages paid while on family and medical leave multiplied by an <i>applicable percentage</i> ranging from 12.5% to 25% (higher credit for employers who provide full pay, reduced credit for employers who provide partial pay).
Eligible Employers	An employer with a written policy that: <ol style="list-style-type: none"> a) Provides least two weeks of paid family and medical leave to all qualifying full-time employees and a proportional amount to all qualifying part-time employees; b) Provides a rate of pay during such paid leave of at least 50% of the employees' normal hourly wages (or the equivalent thereof); and c) If providing leave to employees not covered by Title I of the FMLA (e.g., employees working less than 1,250 hours/year), includes noninterference rules designed to prevent the employer from interfering with an employee's ability to take the offered paid leave.
Minimum Rate of Pay for Paid Family and Medical Leave Wages	50% of an employee's normal hourly wages (or the equivalent thereof) in addition to any rate of pay provided or required by state or local law.
Minimum Period of Paid Family and Medical Leave	Two weeks in addition to any paid family and medical leave period required or paid by state and/or local governments.
Eligible Family and Medical Leave Purposes	<ul style="list-style-type: none"> • The birth of a child and in order to care for the child; • The placement of a child with the employee for adoptions or foster care; • Caring for the employee's spouse, child, or parent who has a serious health condition; • A serious health condition that makes the employee unable to perform the functions of the employee's position; • A qualifying exigency arising out of the fact that the employee's spouse, child, or parent is a member of the Armed Forces who is on covered active duty (or has been notified of an impending call or order to covered active duty); and • Caring for a covered service member with a serious injury or illness if the service member is the employee's spouse, child, parent, or next of kin.
Qualified Employees	Employees who have been employed for at least one year and are not paid more than \$78,000 (indexed for inflation) for the prior year.
Plan Document Requirements	The leave policy must be documented in a written plan or policy.
Interaction with State & Local Mandatory Leave Laws	<ul style="list-style-type: none"> • Paid leave required under state and local law does not count toward eligibility for, or the amount of, the credit. • Employers need to consider how best to coordinate their policy with state and local laws, or else risk inadvertently losing eligibility for the tax credit.