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**PAID FAMILY LEAVE TAX CREDIT:
ADDITIONAL GUIDANCE ISSUED**

The Tax Cuts and Jobs Act enacted last December added a new tax credit wages paid to qualifying employees during any period in which an employee is absent from work due to a family and medical leave event. An employer is eligible for a general business tax credit under Code Section 45S if it has a separate written policy in place that allows all qualifying full-time employees a minimum of two weeks of annual paid family and medical leave. The policy must also allow non-full time qualifying employees a comparable amount of leave on a pro rata basis.

Important to note that this credit is available to an employer without regard to whether it is subject to the federal Family and Medical Leave Act (FMLA), as long as the employer maintains the written policy that meets the wage payment criteria. The credit generally is effective only for wages paid in taxable years of the employer beginning after December 31, 2017, and before January 1, 2020.

Earlier this year, the Internal Revenue Service released guidance relating to the paid family leave tax credit (see *IRS Guidance: Paid Family Leave Credit, Benefit Beat, 5/31/18*). On September 24, 2018, the IRS released additional guidance in a question and answer format (**IRS Notice 2018-71**) providing further clarifications.

The recently issued guidance outlines the requirements an employer must satisfy to be an eligible employer, the types of leave, the minimum paid leave requirements, calculation of the credit, and the impact of state-mandated leave. Any employer contemplating seeking the tax credit should study this guidance, simply to ensure whether they are entitled to the credit.



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With regard to the written policy requirement, the guidance makes the following clarifications:

- ♦ As long as the employer's paid leave policy is adopted by December 31, 2018, or an existing policy is amended by that date, the credit can be taken for the entire 2018 tax year.
- ♦ If an employer employs at least one qualifying employee who is not covered by FMLA, for example, one who works less than 1,250 hours per year, the employer must include "non-interference" language in its written policy. This applies to an employer subject to FMLA that employs at least one qualifying employee who is not covered by the FMLA, as well as to an employer who is not subject to FMLA. The IRS provides some sample language that can be used for this purpose:

"[Employer] will not interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this policy. [Employer] will not discharge, or in any other manner discriminate against, any individual for opposing any practice prohibited by this policy."

The guidance affirms that the paid family leave plan for the types of leave for which the credit can be requested are restricted to FMLA events; specifically, birth or adoption of a child, leave to care for the serious health condition of an individual or his/her family member (as defined by FMLA), as well as leave for certain military exigency events.

The guidance clarifies that the credit can be taken even if the leave is through a short term disability plan as long as it is for an FMLA reason. The tax credit is not available for paid leave required by state or local law.

For purposes of claiming the credit, an employer would file a Form 8994, *Employer Credit for Paid Family and Medical Leave*, together with its tax return and Form 3800, *General Business Credit*. The IRS is expected to be releasing a draft Form 8994 in the near future.

UPDATED SAFE HARBOR ROLLOVER NOTICE ISSUED

Retirement plans are required to provide information to plan participants of their rollover rights when a distribution from the plan is forthcoming. These rollover notices, as required by Code Section 402(f), must be provided not more than 180 days nor less than 30 days prior to the distribution date.

Due to recent statutory and legislative changes affecting these notices, the IRS issued updated safe harbor rollover notices by way of **IRS Notice 2018-74**; specifically:

- ♦ The revised notice explains the extended due date for qualified loan offset distribution. Generally, if an individual ceases making payments toward a loan from a qualified retirement plan, such as a 401(k) plan, prior to repaying the loan, the balance of the loan is generally treated as a distribution and subject to the 10% early distribution tax penalty unless the unpaid loan balance or offset is rolled over into an eligible retirement plan within 60 days. The Tax Cuts and Jobs Act enacted last year extended the deadline of the plan loan offset from 60 days to the due date, including extensions, of the participant's tax return for the year the distribution occurs.
- ♦ The updated notice explains the self-certification that can occur in the limited instance the taxpayer has a valid excuse for missing the 60-day rollover date. This self-certification option was made available in 2016 and should already be included in rollover notices.

There are two types of safe harbor distribution notices that can be used: one for Roth distributions and one for all other plans. It is not required for plan sponsors to use these model notices; a plan sponsor can design a rollover notice specific to its plan. Appendix A of the IRS Notice incorporates the amended changes in the model rollover notice, and Appendix B provides instructions on how to amend just the safe harbor explanations in existing Section 402(f) notices.

MANDATORY E-FILE OF RETIREMENT PLAN CORRECTIONS

Qualified retirement plan errors can be corrected under certain conditions, as delineated in the IRS' Employee Plans Compliance Resolution System (EPCRS). The EPCRS is divided into three parts: the Self-Correction Program, the Voluntary Correction Program, and the Audit Closing Agreement Program.

The IRS released a Revenue Procedure on September 28, 2018 (**Rev. Proc. 2018-52**) making a few modifications to the Voluntary Correction Program (VCP). The primary change made by this IRS pronouncement is that all corrections made under the VCP must be done electronically through Pay.gov. This change is mandatory beginning April 1, 2019. Between January 1, 2019 and March 31, 2019, a submission can be made electronically, or by paper.



Any plan sponsor contemplating utilizing the voluntary correction program should become familiar with these updated procedures. Additional guidance is also available on the IRS' dedicated webpage, [Updated Retirement Plan Correction Procedures](#).

SAN FRANCISCO HCSO EXPENDITURE RATES FOR 2019

Covered employers subject to **San Francisco's Health Care Security Ordinance** (HCSO) are required to make health care expenditures to, or on behalf of, their covered employees. These expenditure amounts are adjusted annually, in accordance with the Ordinance. These expenditure rates do not apply to businesses with 19 or fewer employees or nonprofits with 49 or fewer employees. The required minimum health care expenditure is calculated by multiplying the total number of "hours paid" to that employee by the applicable expenditure rates, which for 2019 and 2018 are as follows:

HCSO HEALTH CARE EXPENDITURE RATES		
Employer Size (company-wide)	2019	2018
100+ Employees	\$2.93 / hour	\$2.83 / hour
20-99 Employees	\$1.95 / hour	\$1.89 / hour
Nonprofits 50-99 Employees		

2019 INFLATIONARY UPDATES FOR NEW YORK PAID FAMILY LEAVE PROGRAM

The New York paid family leave benefit took effect on January 1 of this year. This law builds on the state temporary disability law and provides paid time off for baby bonding, to care for a family member, or military exigency. Recently, the New York Department of Financial Services announced **inflationary changes** relating to the duration and amount of the paid family leave benefit, as well as the payroll contribution amount for 2019.

The paid family leave benefit is fully funded by employees through a payroll deduction. At its discretion, the employer can choose to pay all or a portion of the cost of the program. The 2018 payroll contribution is 0.126% of an employee's weekly wage and capped at an annual maximum of \$85.56. For 2019, the contribution increases to 0.153% of an employee's gross wages each pay period and capped at a maximum of \$107.97.

Beginning January 1, 2019, the amount of leave available to an eligible employee increases from 8 weeks to 10 weeks. Further, the benefit amount increases to 55% of an individual's average weekly wage, up to a cap of 55% of the current Statewide Average Weekly Wage of \$1,357.11. The maximum weekly benefit for 2019 is capped at \$746.41.

Additional information about the New York Paid Family Leave Program is available on the state's dedicated [webpage](#).

PAID SICK LEAVE UPDATES IN NEW JERSEY AND MICHIGAN

New Jersey's earned sick leave takes effect later this month. In response, the enforcing state agency released the required workplace poster together with a set of proposed rules. And, from ballot to law, Michigan may become the next state to require paid sick leave.

□ Updates on New Jersey Earned Sick Leave Law
Beginning October 29, 2018, employers in the state of New Jersey are required to provide their employees with one hour of paid sick leave for every 30 hours worked. As a reminder, this law applies to employers without regard to size. It provides benefits to any employee working in New Jersey without regard to employment status, i.e., both full-time and part-time employees are eligible for the benefit. For a summary of the law, see [New Jersey Joins the Earned Sick Leave Party \(Benefit Beat, 5/7/18\)](#).

Under this law, employers are required to provide written notification of the earned sick leave benefit to its employees 1) upon the date of hire, 2) upon request by the employee; and 3) within 30 days following issuance of the notice by the New Jersey Department of Labor and Workforce Development (DLWD). In addition, the employer is required to post a notice of the provisions of the earned sick time benefit in a conspicuous place at its worksite locations in both English and Spanish, as well as in the primary language of the majority of the employer's workforce. To assist employers in their notification obligations, the DLWD issued a **model workplace notice/poster** in 13 different languages that can be used for this purpose. The notice can be provided electronically, either by posting it on the employer's internet site or intranet site that is exclusively used and accessible by employees; or, it can be provided individually to employees by email.



In addition, the agency released **proposed rules** on September 13, 2018 in its effort to implement the law. The proposed rules clarify certain matters relating to employee eligibility, the accrual, use, payment, payout and carry over of earned sick leave, notification requirements, the prohibition against retaliatory personnel actions and discrimination, as well as recordkeeping requirements. The rules are scheduled for publication on October 15th, followed by a hearing on November 13th. The comment period on these rules ends December 14, 2018. The DLWD encourages affected employers to review these rules in anticipation of the law's effective date.

❑ Michigan Joins the Paid Sick Leave Ranks, Maybe

On September 5, 2018, the Michigan Legislature passed an earned sick leave law as a result of citizen-initiated movement initiative. The passage of this legislation ensures that the sick leave question will not appear on the November ballot. Since this was a citizen-initiated action, the legislation becomes law without the requirement of the governor's signature, according to Michigan law. What this also means is that the Legislature may modify the newly enacted law by a simple majority vote rather than the 75% vote which would be required had the measure become law by a vote of the general population. It is expected that the Legislature will consider changes to the law following the general November elections.

The law as it stands today requires employers in Michigan to provide one hour of paid sick leave to its employees for every 30 hours worked. The earned sick leave benefit would be available to virtually all employees. Individuals are entitled to accrue up to 72 hours of earned leave per year, which can be used to attend to the health needs of the individual or his/her family member (defined very broadly). Employers employing fewer than 10 employees need only provide 40 hours of paid leave; 32 hours may be unpaid. Further, the earned sick leave can be used to obtain victim services in the case of domestic violence, or used for school visitation or time off when schools or offices are closed.

The law is scheduled to take effect on April 19, 2019. Employers with employees in Michigan will want to keep an eye on developments after the November elections.

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