PALEY ROTHMAN
ATTORNEYS AT LAW

Tax Bill Creates New Employer Credit for Paid FMLA Leave

By Jessica Summers

SUMMARY: Amidst the many new provisions in the tax bill that President Trump signed into law on December 22, 2017, is a credit for employers who pay employees leave they take under the federal Family and Medical Leave Act (FMLA). This limited credit will only be available if certain conditions are met and (at this point) only for the 2018 and 2019 tax years.

If all of the conditions described are met, employers will be able to claim a business tax credit of up to 25% of the amount they have paid qualifying employees on FMLA leave (provided the amount of the credit does not exceed the employee's regular rate of pay). If the employer only meets the minimum requirement and pays employees 50% of their regular rate of pay, the employer will only get a credit of 12.5% of the amount they pay for the paid leave. For each percent above 50% of the regular rate of pay the employer pays, the credit will increase .25% (for a maximum 25% credit if the employer pays 100%).

Whether the paid leave will qualify the employer for a credit depends on few big things:

- **Which employees are being offered the paid leave.** The credit will only be available for leave provided to employees who have been employed for at least one year and who make $72,000 or less (this threshold could change as it is based on the salary threshold for highly compensated employees). Similarly, the requirements for the leave (described below) only apply to these "qualifying employees." In other words, employers are still free to provide paid FMLA leave for employees who have been employed less than a year or who make more than the threshold, but they will not count toward any credit. Eligibility for paid leave, and the terms of the paid leave, need to be set forth in a written policy.
- **How much paid leave the employer is offering.** Employers need to offer all "qualifying" full-time employees at least two weeks of paid federal FMLA per year. Employers must also offer paid FMLA leave to qualifying part-time employees, but the amount of leave may be pro-rated based on how much they work (i.e. a part-time employee who works half time only needs to get at least one week of paid FMLA).
- **Does the employer pay for more than two weeks of federal FMLA. Employers can get the credit for up twelve weeks of paid leave per employee per tax year.** This means that even if an employee is entitled to take more than twelve weeks of FMLA leave in a tax year (for example where the employee is eligible for 26 weeks for servicemember family leave), and the employer pays for that leave, the employer will only be able to get a credit for the payments made for 12 weeks of leave.
- **The rate at which the leave is paid.** Employers need to pay qualifying employees for paid FMLA hours at a rate of at least half of the employee's regular hourly rate (*i.e.* for a $20 an hour employee, the leave must be paid at a rate of at least $10 per hour). This amount must actually be paid by the employer. Employers will not get a tax credit for leave that is paid for by a state or local government.
- **What type of leave is in play.** The credit only applies to employer-paid leave while the employee is on federal FMLA leave. The credit is not available on paid leave that is voluntarily provided by the employer or that is required by state or local law that can be used for purposes other than FMLA leave (such as vacation or sick leave).

Although many employers will surely be happy to take advantage of the new credit, employers can elect not to take the credit if they wish.

Unless this provision is extended by Congress, it will expire on December 31, 2019. **Accordingly, employers who are covered by the federal FMLA will have the next two years to receive this credit if they establish or maintain a paid FMLA policy that meets the requirements.**