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US tax reform
Paid Family and Medical Leave

Overview

The Family and Medical Leave Act (FMLA) requires employers to allow employees to take up to 12 weeks of leave each year for certain qualified medical and family reasons. Qualifying leave includes leave taken for pregnancy, adoption, foster care placement of a child, personal or family illness, or family military leave. Employees have the right to continue health benefits during FMLA leave, and are afforded other job-related protections. However, there is no requirement for employers to pay employees when taking FMLA leave.

New Law

Recent legislation (P.L. 115-97), commonly referred to as The 2017 Tax Reform Act (the "Act") was enacted on December 22, 2017. The Act added new Section 45S to the Code, providing an additional tax credit. Under the Act, employers are provided an incentive to offer FMLA leave on a paid basis. The Act did not mandate that employers provide FMLA leave on a paid basis, nor did it change any other aspect of FMLA. Instead, the Act provides certain employers with a tax credit as an incentive to provide FMLA leave on a paid basis.

In order to be eligible to receive the tax incentive employers must:

- Establish a written paid family and medical leave policy; and
- Have the policy provide certain benefits. In particular, the policy must:
    - Offer not less than 2 weeks of paid family and medical leave to full-time employees and a commensurate amount of pro-rated paid family and medical leave to part-time employees. Leave paid for by the state or local government is not counted in this two week measurement period or the amount of credit available to the employer;
    - The paid leave must be available to all employees who have been employed by the employer 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 ($72,000 for 2018);
    - The rate of payment under the paid family and medical leave policy must be no less than 50 percent of wages normally paid to an employee.

As a condition for receiving the credit, all employees (as defined in section 3(e) of the Fair Labor Standards Act of 1938) who earn less than 60% of the highly compensated employee threshold for the year (i.e., $72,000 during 2018) must be offered paid FMLA leave in order for the employer to be eligible for the credit. Nothing prohibits offering paid FMLA leave to employees who make more than this threshold, but there is no credit available for any of these employees.

Family and medical leave is defined by cross-reference to the FMLA; it specifically does not include paid vacation, personal, or other medical or sick leave. However, the credit is available even to those employers not subject to FMLA, so long as they offer certain FMLA-like protections to employees taking paid family and medical leave. The credit does not apply with respect to paid leave that is mandated under state or local law. For those employers who do not offer leave under FMLA the leave policy must include a non-retaliation provision in the policy that would not penalize employees for taking the paid leave.

The Act would allow eligible employers to claim a general business credit equal to 12.5 percent of the amount of wages paid to qualifying employees during any period in which such employees are on family and medical leave if the rate of payment under the program is 50 percent of the wages normally paid to an employee. Employers that replace a higher percentage of wages will be able to claim a larger credit. For each point over 50 percent that the employer replaces wages, the credit will increase by a quarter of a point, up to a maximum credit of 25 percent for employers who pay employees 100 percent of pay during family and medical leave. The credit may not be claimed with respect to an employee for more than 12 weeks of paid leave during a taxable year.

The new credit is effective for wages paid in taxable years beginning after December 31, 2017 and is scheduled to expire after December 31, 2019.

Deloitte's view

As a next step, employers should:

- Consider tax incentives provided under the new regulations;
- If you already provide pay during FMLA leave – review current policies and determine if the company is eligible for the tax credit;
- If you do not provide pay during FMLA consider the tax benefits of implementing a paid family and medical leave policy.