



AMERICAN BENEFITS
COUNCIL

November 19, 2018

CC:PA:LPD:PR (Notice 2018-71)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

**Re: Notice 2018-71, Employer Tax Credit for Paid Family and Medical Leave -
Internal Revenue Code Section 45S**

Dear Sir or Madam:

We are writing to respond to Notice 2018-71 and to provide additional input as the Internal Revenue Service (“IRS”) and Department of the Treasury (“Treasury”) develop proposed regulations (or other further guidance) on the new employer tax credit for paid family and medical leave added by Section 13403 of H.R. 1, also known as the Tax Cuts and Jobs Act of 2017 (the “Act”). Those changes added a new section to the Internal Revenue Code – Section 45S – and make available a new tax credit for 2018 and 2019 for certain employers providing paid family and medical leave (“FML”) to their employees.

The American Benefits Council (the “Council”) is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council’s members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans. We regularly engage on paid leave issues, and are pleased to follow up on our letter of February 22, 2018, to provide our input on this important new tax provision.

While the credit is only available for 2018 and 2019 under current law, we believe it is possible Congress may extend the credit in future years. Accordingly, we think it is valuable for the IRS and Treasury to issue proposed regulations that are consistent with Congress’ intent to encourage adoption of paid family and medical leave programs.

I. Guidance that Should be Retained in the Proposed Regulations

Notice 2018-71 provides helpful guidance on a number of areas that we recommend be retained in the proposed regulations or other future guidance.

- **Short Term Disability.** Many of the Council's members provide short term disability benefits that meet the requirements of Section 45S. Notice 2018-71 states that paid leave provided under an employer's short-term disability program, whether self-insured by an employer or provided through a short-term disability insurance policy, may be characterized as FML under Section 45S if it otherwise meets the requirements to be FML under Section 45S. We recommend this be incorporated in the proposed regulations to prevent confusion.
- **Full-Time / Part-Time Employees.** The new credit is conditioned on employers making certain benefits available to full-time employees and certain benefits available to part-time employees. Notice 2018-71 provides that an employer may use "any reasonable method" to determine how many hours an employee customarily works per week for the employer, including allowing employers to use the hours of service method allowed for qualified retirement plans. We recommend that the flexibility of Q&A-17 be retained.
- **One-Year Requirement for Qualifying Employees.** Similarly, Notice 2018-71 provides that an employer may use any reasonable method to determine whether an employee has been employed for one year or more. We continue to believe that flexibility is critical, as long as the method used is reasonable. Accordingly, we recommend Q&A-13 be retained in the proposed regulations.

II. Adoption of *De Minimis* Rule for Part-Time Workers

Q&A-14 of Notice 2018-71 states that Section 45S does not require an employee to work a minimum number of hours per year to be a qualifying employee. It is a common practice that employers do not provide paid leave (whether FML or not) to employees that work only a *de minimis* number of hours. While we appreciate and agree that Congress expected the credit to be available to employers that provide pro rata paid leave to part-time employees, we find it hard to believe Congress intended employees that work only a *de minimis* number of hours need to be provided paid FML.

Imagine, for example, an employee that works only 5 hour per week to shelve books in the employer's library or to transport files to offsite storage. Because such an employee works so infrequently, it is not even clear what it would mean for such an employee to be "out" on paid leave. If employers were forced to provide paid FML to these workers, the incremental cost would be significant.

The IRS routinely adopts *de minimis* rules to the extent consistent with sound tax administration and Congressional intent. Section 45S(f) provides the Secretary of the Treasury authority to make determinations as to whether an employee meets the qualifying employee requirements. As the Notice points out, Congress included a minimum hours rule in Section 101(2)(A)(ii) of the Family and Medical Leave Act, and Section 45S refers repeatedly to the Family and Medical Leave Act. In short, we believe the IRS has sufficient authority to create a *de minimis* rule.

We fear that Congress' goal – to encourage adoption of paid family and medical leave policies – will be undermined if employers must provide paid leave to part-time workers with very few hours. Accordingly, we recommend the IRS adopt a *de minimis* rule, such as 20 hours per week, that may apply under an employer's paid FML program without the employer being disqualified from receiving the credit.

III. Disqualification for Leave Programs Required by State and Local Laws

As we stated in our February 22 letter, the Council believes that the exclusion for employer-paid FML when mandated or paid for by a State or local government is fundamentally unfair to employers. We see no policy reason for why one employer should pay more in federal taxes than another employer providing identical FML benefits simply because one employer happens to be in a jurisdiction that includes a paid leave mandate or fund. We also think it raises serious federalism concerns for an employer to be punished with higher federal taxes simply because the employer is located in a state that requires the employer to provide a particular benefit that would generate a federal tax credit if provided voluntarily.

Section 45S(c)(4) states: "For purposes of this section, any leave which is paid by a State or local government or required by State or local law shall not be taken into account in determining the amount of paid family and medical leave provided by the employer." We urge the IRS and Treasury to interpret this exclusion as narrowly as possible to limit this unfairness. Unfortunately, the guidance set forth in Q&A-21 does not take such an approach. Accordingly, we strongly encourage the IRS and Treasury to consider whether Section 45S can be read consistent with sound policy and to avoid serious federalism concerns.

IV. Meaning of "Independently Satisfy" the Minimum Paid Leave under Section 45S

Q&A-21 states that to be eligible to claim the credit, an employer subject to State or local law requirements must "independently" satisfy the minimum paid leave requirements, including providing a rate of payment of at least 50 percent of wages

normally paid to an employee. This standard has caused some confusion among Council members and we suggest the IRS provide additional clarification.

For example, imagine an employer that must provide paid leave pursuant to State or local law (i.e., the leave is not paid by the State or local government) of 50 percent of wages normally paid. Such an employer meets the minimum paid FML to receive the 45S credit, although it is not clear if the employer “independently” meets the requirements. Example 2 in Q&A-21 states that “[w]ages paid pursuant to State law are not used in calculating the credit,” but Example 2 is referencing the State program described in Example 1, which provides benefits under a State insurance fund. Example 3 does not provide additional clarification, because that example involves a State law that does not require *paid* FML leave.

One source of confusion is that there are two separate issues: First, an employer must determine *if* it provides sufficient paid FML to be eligible for the credit. Second, if the employer is eligible, it must determine upon which wages paid during a period of leave is multiplied by the “applicable percentage” in Section 45S(a)(2). And it is not clear that the answer with respect to State or local law is the same; the relevant provision (45S(c)(4)) appears in connection with the definition of eligible employer.

Consistent with our prior comments, we believe that payments made by an employer during a period of FML should be counted towards *eligibility* and *calculation* of the Section 45S credit, even if State or local law requires such payments. For example, State A requires an employer to provide paid FML at a rate of 50 percent of wages, we believe that an employer should be eligible for the credit and be allowed to take the entire 50 percent into account for calculating the credit.

In the alternative, payments required by State or local law should be counted for purposes of eligibility for the Section 45S credit, but may be taken into account for calculating the credit to the extent that any such employer-paid leave exceeds the paid leave benefit mandated by State or local law. For example State A requires an employer to provide paid FML at a rate of 50 percent of wages, but an employer decides to provide a 70 percent payment; in that case the 20 percent excess would be included in the credit calculation.

V. Paid Leave Programs Available for Other Purposes

Code Section 45S(e)(2) states that if “an employer provides paid leave as vacation leave, personal leave, or medical or sick leave (other than leave [for certain specific purposes described by the Family and Medical Leave Act], that paid leave shall not be considered to be family and medical leave [for purposes of the credit].” Q&A-9 states that paid leave will only be considered FML if the leave cannot be used for any other

purpose. We urge the IRS to reconsider this interpretation. Many employers are responding to the variety of State and local paid leave mandates by offering open-ended universal paid leave policies that are unrelated to any particular purpose (e.g., vacation, personal, sick, or family leave). By adopting such a policy, employers who operate in many different States and local jurisdictions can preemptively ensure that they comply with the paid leave rules of any jurisdiction. The interpretation set forth in Q&A-9 unfortunately, creates an incentive for employers to *reduce* their paid leave policies by limiting them to policies that are exclusively limited to FML.

We think Congress intended that paid leave taken for another purpose cannot be counted toward the credit, not that leave taken for family and medical purposes is excluded solely because the employer would have allowed paid leave for other purposes. Had Congress intended what Q&A-9 concludes, it would have written Section 45S(e)(2) to state that “if an employer *offers* paid leave” as vacation leave, personal leave, or other non-FML leave, then all such leave will not be taken in account.

Accordingly, we recommend that proposed regulations or other future guidance reconsider Q&A-9 and provide that, to the extent that an employee can demonstrate that he or she qualifies for the type of leave described under Section 103(a)(1)(D) of Family and Medical Leave Act, the employer should be able to account for such paid leave for purposes of the credit.

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While we have made some significant suggestions for improvements to Notice 2018-71, we want to close by applauding the IRS and Treasury for issuing Notice 2018-71 and for seeking comment as proposed regulations are developed. We hope to continue to work with you in our shared goal of encouraging employers to offer paid family and medical leave.

Sincerely,



Ilyse Schuman
Senior Vice President, Health Policy