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New federal tax credit for employer-paid family and medical leave-- Is it an opportunity your Company should consider?

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Employers providing, or thinking about providing, paid family and medical leave may be able to structure their program to take advantage of a new tax credit added by the recent Tax Cuts and Jobs Act. The tax credit, which is available only for 2018 and 2019, equals the "applicable percentage" of wages paid to "qualifying employees" on family and medical leave for up to 12 weeks. The applicable percentage equals 12.5%, increased by 0.25% for each percentage point by which the leave's pay rate exceeds 50% of the employee's wages. To avoid receiving a double tax benefit, employers must reduce their annual tax deduction for compensation paid to employees by the amount of any credit taken for paid family and medical leave.

In order to qualify for the credit, Section 45S of the Internal Revenue Code requires:

1. *Written Policy*. The employer must have a written policy that provides for paid family and medical leave.

2. *Eligibility.* The paid family and medical leave must be available to any full-time or part-time employee who (i) has been employed by the employer for at least one year; and (ii) had prior-year compensation not exceeding 60% of the prior year's threshold for determining a highly compensated employee; for 2018, this amount is $72,000 (60% of the $120,000 highly compensated employee compensation threshold for 2017). Of course, an employer can provide paid family and medical leave to employees earning more than the threshold or employed for less than one year, but such leave payments to those employees will not be eligible for the credit.

3. *Length of paid family and medical leave.* The family and medical leave policy must provide at least two weeks of paid leave to full-time

employees, and a commensurate prorated amount for part-time employees.

4. *Qualifying leave*. The policy must provide paid leave for one or more of the purposes protected by the Family and Medical Leave Act of 1993 (FMLA), regardless of whether FMLA actually applies to the employer or employee. Paid leave for the following purposes qualifies for the tax credit:

    - The birth of a child and to care for the child;
    - A child's placement for adoption or foster care;
    - To care for a spouse, son, daughter, or parent who has a serious health condition;
    - An employee's serious health condition that makes the employee unable to perform the functions of his or her position;
    - A "qualifying exigency" arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces; and
    - To care for a covered "service member" with a serious injury or illness.

    If FMLA leave is paid by requiring the employee to use vacation, personal, paid time off (PTO), medical, or sick leave, such paid leave is not eligible for the credit. In addition, the tax credit is not applicable to any leave required or paid under a mandatory state or local program.

5. *Amount of leave pay.* Employers must pay at least 50% of an employee's regular wages during the leave.

6. *Compliance with FMLA protections.* The paid medical and family leave must be provided in compliance with a written policy that ensures the employer will not (i) interfere with or restrain any employee's right to paid family and medical leave under the policy, or (ii) terminate or otherwise discriminate against any individual for using the benefit. This requirement applies whether or not the employer or employee is covered by the FMLA.

Considerations for Employers

Employers will need to weigh several factors in determining whether to adopt a paid leave program, or modify an existing leave program, to take advantage of the new credit. Since the cost of providing paid leave will greatly exceed any tax credit, employers must not let the "tax tail" wag the dog. Employers will need to determine that adding paid family and medical leave is consistent with and promotes its business objectives, and is otherwise worth the cost of providing the benefit. In evaluating the overall cost of implementing a qualifying paid family and medical leave policy, an employer will need to:

- weigh the value of the tax credit relative to the corporate deduction for employee compensation to which they would otherwise be entitled, keeping in mind that the tax credit expires after 2019, and that ending a newly added leave program after the tax credit expires could prove difficult;

- determine whether state or local paid leave mandates will impact the level of paid leave that qualifies for the credit; and

- evaluate the administrative costs of maintaining the paid leave policy, including whether existing payroll and leave administration systems/vendors can properly administer the policy.

King & Spalding would be pleased to assist you in evaluating your existing leave programs, and if it is right for you, help implement a paid medical and family program that qualifies for the new tax credit.

May and June 2018 Filing and Notice Deadlines for Qualified Retirement and Health and Welfare Plans

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Employers and plan sponsors must comply with numerous filing and notice deadlines for their retirement and health and welfare plans. Failure to comply with these deadlines can result in costly penalties. To avoid such penalties, employers should remain informed with respect to the filing and notice deadlines associated with their plans.

The filing and notice deadline table below provides key filing and notice deadlines common to calendar year plans for the next two months. If the due date falls on a Saturday, Sunday, or legal holiday, the due date is generally delayed until the next business day. Please note that the deadlines will generally be different if your plan year is not the calendar year. Please also note that the table is not a complete list of all applicable filing and notice deadlines (including any available exceptions and/or extensions), just the most common ones. King & Spalding is happy to assist you with any questions you may have regarding compliance with the filing and notice requirements for your employee benefit plans.

Deadline	Item	Action	Affected Plans
May 15 (within 45 days after the close of the first quarter of plan year)	Benefit Statements for Participant-Directed Plans	Deadline for plan administrator to send benefit statement for the first quarter of the plan year to participants in participant-directed defined contribution plans.	Defined Contribution Plans that allow participants to direct investments

Deadline	Item	Action	Affected Plans
	Quarterly Fee Disclosure	Deadline for plan administrator to disclose fees and administrative expenses deducted from participant accounts during the first quarter of the plan year. Note that the quarterly fee disclosure may be included in the quarterly benefit statement or as a stand-alone document.	
May 15 (the 15th day of the 5th month after the end of the plan year)	IRS Forms 990 and 990-EZ	Deadline for tax-exempt trusts associated with qualified retirement plans and voluntary employee beneficiary associations (VEBAs) to file Forms 990 or 990-EZ with the IRS for prior year. A 3-month extension may be obtained by filing a Form 8868, which must be filed by this date.	Qualified Retirement Plans Voluntary Employee Beneficiary Associations
June 30 (last day of 6th month following the plan year)	Excess Contributions	Deadline for plan administrator to distribute EACA excess contributions and earnings from the prior year to avoid 10% excise tax.	401(k) Plans with EACA