

Employer Credit for Paid Family and Medical Leave

Cross References

- IRC §45S
- Notice 2026-28

The IRS recently provided guidance on the employer credit for paid family and medical leave under IRC section 45S, as amended by the One Big Beautiful Bill Act (OBBBA). The IRS intends to publish proposed regulations that include the guidance contained in Notice 2026-28.

The credit was originally enacted to apply to wages paid in tax years beginning on or before December 31, 2019. The termination date was later extended. OBBBA amended various provisions and made the credit permanent.

Under IRC section 45S, an eligible employer can claim a business credit ranging from 12.5% to 25% of certain wages paid to a qualifying employee while the employee is on family and medical leave. The 12.5% credit applies if the rate of employee pay during the paid leave is 50% of normal wages. The credit increases by 0.25 percentage points for each percentage point by which the rate of pay exceeds 50%, up to a maximum credit of 25% if the employee's pay is 100% of normal wages.

A qualifying employee is an employee who has been employed by the employer for one year or more and whose compensation for the previous year does not exceed 60% of the compensation threshold for that year for highly compensated employees ($\$155,000 \times 60\% = \$93,000$ in 2025). An employee is not required to work a minimum number of hours per year to be a qualifying employee.

Family and medical leave is leave taken for purposes defined in the Family and Medical Leave Act (FMLA). Paid leave is qualifying leave only if it is specifically designated for one of these purposes.

- The birth or care of a child.
- Adoption or foster care of a child.
- Caring for a spouse, child, or parent with a serious health condition.
- An employee's serious health condition that makes the employee unable to perform the functions of the position.
- A qualifying exigency arising out of the fact that a spouse, child, or parent is a member of the U.S. Armed Services and is on covered active duty.
- Caring for a service member with a serious injury or illness if the employee is the spouse, child, parent, or next of kin of the service member.

Under amendments made by the OBBBA, if the employer has an insurance policy with regard to the provision of paid family and medical leave, the employer may elect to

determine the amount of the credit based on the premiums paid or incurred on the insurance policy. The rate of payment under the insurance policy is determined without regard to whether any qualifying employee is on family and medical leave during the tax year. Any credit claimed under this provision decreases the deduction for premiums paid.

Employers can elect to include employees who have worked a minimum of 6 months for purposes of the credit. OBBBA also added a 20-hour work-per-week requirement for claiming the credit.

Notice 2026-28 provides the following questions and answers for purposes of using the premium method for determining the amount of the credit.

Q-1. To determine whether an employer is eligible to claim the credit, and to calculate the amount of the credit, how do the criteria under the premium method compare to the criteria under the wage method?

A-1. The determination of whether an employer is eligible to claim the credit and the amount of the credit under the premium method is based on whether and the extent to which the premium funds a benefit for which a credit would be available under the wage method. Thus, a credit may be claimed for a premium that funds a benefit for which a credit would be available under the wage method if the benefit were paid (creditable coverage). If any portion of the premium provides funding for leave that would not be eligible for credit under the wage method, that portion of the premium is not eligible for credit under the premium method.

Q-2. Is a premium (or portion thereof) paid or incurred (as defined in IRC section 7701(a)(25)) for creditable coverage if it is for coverage with respect to leave that would not be paid family or medical leave as defined in IRC section 45S(e)?

A-2. No. A premium (or portion thereof) is not paid or incurred for creditable coverage if it is for coverage with respect to leave that would not be paid family or medical leave as defined in IRC section 45S(e).

Q-3. Is a premium (or portion thereof) paid or incurred for creditable coverage if it is for coverage with respect to leave that would be payable to an individual who is not a qualifying employee within the meaning of IRC section 45S(d) at the time the premium is paid or incurred?

A-3. No. A premium (or portion thereof) is not paid or incurred for creditable coverage if it is for coverage with respect to leave that would be payable to an individual who is not a qualifying employee within the meaning of IRC section 45S(d) at the time the premium is paid or incurred.

Q-4. Is a premium (or portion thereof) paid or incurred for creditable coverage if it is for coverage with respect to leave that is required by state or local law or paid for by a state or local government?

A-4. No. A premium (or portion thereof) is not paid or incurred for creditable coverage if it is for coverage with respect to leave that is required by state or local law or paid for by a state or local government.

Q-5. Is a premium (or portion thereof) paid or incurred for creditable coverage if it is for coverage that provides a benefit that would not constitute wages as defined in IRC section 45S(g)?

A-5. No. A premium (or portion thereof) is not paid or incurred for creditable coverage if it is for coverage that provides a benefit that would not constitute wages as defined in IRC section 45S(g). For an example of compensation that does not constitute wages as defined in IRC section 45S(g), see **Q&A-24**, Example 2 of Notice 2018-71.

Q-6. How does an employer determine the amount of premiums that are paid or incurred for creditable coverage for purposes of the premium method if the premiums are for an insurance policy that provides both creditable coverage and noncreditable coverage?

A-6. In the case of a premium paid or incurred for an insurance policy that provides both creditable coverage and noncreditable coverage (a blended premium), an eligible employer must allocate the premium between the creditable coverage and the noncreditable coverage. A premium is a blended premium if, for example, it is for coverage that provides both qualifying paid family and medical leave and other types of leave, or coverage for qualifying employees and nonqualifying employees. A blended premium may be allocated using any reasonable method that is consistent with the policy terms and supported by contemporaneous records. To be reasonable, a method must include objective criteria and must be applied consistently for the taxable year and to all persons treated as a single employer under the aggregation rule in IRC section 45S(c)(3).

Q-7. May an employer claim the credit using both the wage method with respect to certain leave, and the premium method with respect to other leave?

A-7. Yes, provided that both the premium and the wage credit are not claimed as to a particular instance of leave. An employer may claim the credit using the wage method for certain leave, and the premium method for other leave. However, an employer may not use the wage method to claim a credit for wages paid to the extent that the employer claims a credit using the premium method for creditable coverage that funds such benefits (or vice versa). For example, if an employer pays a premium for creditable coverage and claims a credit for that premium, the employer may not also claim the credit for benefits later funded by that same premium (via reimbursement or otherwise). In contrast, if the benefits paid during that instance of leave are partially funded by the premium and partially funded from the employer's general assets, the wage credit may be claimed for the portion funded from the employer's general assets and the premium credit may be claimed for the portion funded by the premium.