

Employee Benefit Plan Review

Ask the Experts

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POLICY REQUIREMENT FOR PAID LEAVE CREDIT

Q What are the written policy requirements for an employer to take advantage of the new tax credit for paid family and medical leave?

A You are referring to Internal Revenue Code (Code) Section 45S, which was added to the Code in December 2017 as part of the Tax Cuts and Jobs Act of 2017 (TCJA). Section 45S permits businesses to take a tax credit (equal to a percentage of wages paid) for paid family and medical leave that they provide to their qualifying employees. To be eligible to receive this credit, a business must have a written policy in place that applies to all qualifying employees and provides at least a statutorily-prescribed minimum level of paid leave to those employees. Also, if any of the qualifying employees are not covered by the Family and Medical Leave Act, then the written policy must also include “non-interference” language, which essentially advises the employees that they may avail themselves of the policy without fear of retaliation or other adverse action by the employer. The policy can be contained in a single document or in multiple documents, and must be in place before the paid leave for which the employer wants to take the credit is used. A policy is considered to be in place on the later of its adoption date or effective date. One exception to this general rule is a transition rule that applies to an employer’s first taxable year after December 31, 2017 (which, in most cases, is the 2018 calendar year). For that year,

a policy may be adopted retroactively to an earlier effective date in 2018 if the policy is adopted by December 31, 2018 and the employer brings its leave practices into compliance with the policy retroactive to that effective date.

DEDUCTIBILITY OF BUSINESS MEALS FOR CLIENTS

Q My company entertains clients by taking them out to dinner, sporting events, and similar outings. I heard that under the new tax law, companies will no longer be able to deduct any of these types of entertainment expenses. Does this mean that we can no longer deduct any meal expenses for such client entertainment?

A Not necessarily. The new law, the Tax Cuts and Jobs Act (TCJA), amended Section 274 of the Internal Revenue Code (Code) (Section 274) to generally disallow a deduction for expenses with respect to entertainment, amusement, and recreation. However, the TCJA does not specifically address the deductibility of expenses for business meals. Recently, the Internal Revenue Service (IRS) issued Notice 2018-76, in which it announced its intention to publish proposed regulations under Section 274, which will include guidance on the deductibility of expenses for certain business meals. Until the proposed regulations become effective, the IRS has stated that taxpayers may rely on the guidance in Notice 2018-76 for the treatment under Section 274 of certain business meals.

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Under Section 274(k), a deduction is not allowed for food or beverages unless (1) the expense is not lavish or extravagant under the circumstances, and (2) the taxpayer (or an employee of the taxpayer) is present at the furnishing of such food or beverages. Under Section 274(n)(1), the amount that can be deducted for any such expense for food or beverages cannot exceed 50 percent of the expense that otherwise would be allowable. Under law prior to the enactment of the TCJA, taxpayers could deduct 50 percent of meal expenses and could also deduct 50 percent of entertainment expenses that were directly related to the active conduct of the taxpayer's trade or business, or preceded or followed a substantial and bona fide business discussion associated with the active conduct of the taxpayer's trade or business. The TCJA repealed the 50 percent deduction for entertainment expenses, so entertainment expenses are no longer deductible at all. However, the IRS has now clarified that otherwise allowable meal expenses remain deductible, subject to the 50 percent limitation in Section 274(n)(1) and guidance under Notice 2018-76.

Under Notice 2018-76, the IRS has stated that taxpayers may deduct 50 percent of an otherwise allowable business meal expense if:

- 1) The expense is an ordinary and necessary expense under Internal Revenue Code Section 162(a) paid or incurred during the taxable year in carrying on any trade or business;
- 2) The expense is not lavish or extravagant under the circumstances;
- 3) The taxpayer, or an employee of the taxpayer, is present at the furnishing of the food or beverages;
- 4) The food and beverages are provided to a current or potential business customer, client,

consultant, or similar business contact; and

- 5) In the case of food and beverages provided during dining or at an entertainment activity, the food and beverages are purchased separately from the entertainment, or the cost of the food and beverages is stated separately from the cost of the entertainment on one or more bills, invoices, or receipts. The entertainment disallowance rule may not be circumvented through inflating the amount charged for food and beverages.

Based upon examples provided by the IRS, if your company invites a client to a sporting event and purchases tickets to the sporting event, and then purchases hot dogs and drinks for the client while at the game, the cost of the tickets to the sporting event are an entertainment expense that may not be deducted by the company, but your company may take a deduction of 50 percent of the separate cost of the hot dogs and drinks that were purchased separately from the event tickets. However, if your company invites a client to a sporting event in a suite that includes access to food and drinks, and purchases tickets to the sporting event with an invoice that includes the food and drinks provided in the suite, your company may not take any deduction for expenses associated with the event or the food and drinks (because the sporting event is an entertainment event and the food and drinks were not purchased separately from the event tickets and are not stated separately on the invoice). The Treasury Department and IRS have requested comments for future guidance to further clarify the treatment of business meal expenses and entertainment expenses under Section 274, which comments were due by December 2, 2018.¹

VOLUNTARY CORRECTION PROGRAM SUBMISSION

Q I am preparing a Voluntary Correction Program application to correct an operational failure under my company's 401(k) plan. I read somewhere that the IRS is going to require companies to file VCP applications electronically starting at the beginning of 2019. Is that true and, if so, where do I find information on how to file electronically?

A That is partially true. The Internal Revenue Service (IRS) will require plan sponsors to submit Voluntary Correction Program (VCP) applications electronically, but the requirement to file electronically applies only to VCP applications filed on and after April 1, 2019. Plan sponsors who file VCP applications on and after January 1, 2019 through March 31, 2019 may choose to file VCP applications electronically or by paper submission. The new filing requirements are set forth in Revenue Procedure 2018-52.

In Revenue Procedure 2018-52, the IRS states that, beginning April 1, 2019, all VCP submissions must be filed using the www.pay.gov website. On the www.pay.gov website, applicants must file a VCP submission and pay applicable user fees online. Plan sponsors (or other authorized representatives) may submit an IRS Form 14568 (Model VCP Compliance Statement) and attach separate narrative documents that describe the qualification failure, correction methods and other items set forth in Section 11.04 of Revenue Procedure 2018-52.

The IRS has included detailed instructions for submitting VCP applications in Section 11.03 of Revenue Procedure 2018-52. The instructions are outlined generally here (we have modified the IRS list to shorten and simplify it and all section references are to Section 11 of Revenue Procedure 2018-52):

- 1) *Read the instructions to Form 8950.* Before using the www.pay.gov website, read the instructions to Form 8950, Application for Voluntary Correction Program (VCP) Submission Under the Employee Plans Compliance Resolution System. The instructions are located at <https://www.irs.gov/pub/irs-pdf/i8950.pdf>.
- 2) *Combine required items into PDF file.* Convert all applicable items required in Section 11.04 into PDF documents and combine them into a single PDF file that follows the suggested ordering of documents in Section 11.11. If the combined PDF file exceeds 15 MB, remove some documents (or parts of documents) so that the PDF file does not exceed 15MB. Applicable documents that cannot be included in the PDF file because of the size limitation must be faxed to the IRS as described in Section 11.03(7).
- 3) *Create a pay.gov account.* Create a pay.gov account on the www.pay.gov website. Using the pay.gov account, complete and sign Form 8950.
- 4) *Upload and attach PDF.* After completing and signing the Form 8950 on the www.pay.gov website, upload the single PDF that contains copies of all submission documents required by Section 11. See Section 11.03(7) for instructions for faxing VCP submission documents that are not included in the PDF file due to the 15 MB limitation.
- 5) *Pay the applicable user fee.* Pay the applicable user fee using the payment methods available on the www.pay.gov website.
- 6) *Payment confirmation.* The www.pay.gov website will generate a payment confirmation notice after the VCP submission has been filed. The Pay.gov Tracking ID on this receipt will serve as the IRS control number for the VCP submission. The confirmation may be emailed to the pay.gov account holder, with copies to other email addresses that the account holder chooses to provide. You should retain a copy of the payment confirmation notice. If a payment confirmation is not generated by the www.pay.gov website, then the VCP submission process has not been successful and you should contact IRS customer account services at (877) 829-5500.
- 7) *Required documents not part of uploaded PDF due to size limitation.* If there are required VCP submission documents that cannot be part of the submitted PDF file due to the www.pay.gov attachment file size limitation, fax these documents to the IRS using fax number (855) 203-6996. Include the EIN, applicant name, plan name, and Pay.gov Tracking ID (the IRS control number) on the fax coversheet. This fax number may be used only to supplement VCP submissions filed with the IRS on the www.pay.gov website. A fax used to submit documents that cannot be part of the submitted PDF file due to the www.pay.gov 15 MB limitation must include the IRS control number in order for the documents to be associated with the appropriate submission in a timely manner and to avoid significant delays in case processing.
- 8) *Subsequent changes or revisions.* If you need to revise or amend a filed VCP submission (or any of its attachments), before it is assigned to an IRS representative, you should not file a new submission. Instead, you should call the VCP Status Inquiry Line at (626) 927-2011 (not a toll-free number). The IRS will assist you to determine how the revised documents should be submitted. 🌀

NOTE

1. See Notice 2018-76 for further information.

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