PRESENT LAW AND BACKGROUND ON DEPENDENT CARE AND PAID LEAVE

Scheduled for a Public Hearing
Before the
HOUSE COMMITTEE ON WAYS AND MEANS
on April 21, 2021

Prepared by the Staff
of the
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INTRODUCTION

The House Committee on Ways and Means has scheduled a public hearing for April 21, 2021, called, "In Their Own Words: Paid Leave, Child Care, and an Economy that Failed Women." This document,[1] prepared by the staff of the Joint Committee on Taxation, describes the legal background, empirical information, and policy considerations related to topics to be considered in the hearing.

Policymakers who wish to give public benefits such as education, health care, employment leave, and dependent care assistance can choose different instruments. The Federal government and State and local governments may provide benefits directly. Public schools are an example of government-provided benefits. A government may instead require employers to give their employees a benefit. For example, the Federal government and some State governments impose family and medical leave requirements, and there are Federal and State minimum wage and worker safety requirements. Rather than directly providing benefits or requiring employers to provide benefits, governments may offer subsidies, including tax incentives such as income tax or payroll tax credits, to private parties who provide benefits. The Internal Revenue Code[2] includes provisions intended to subsidize taxpayers' expenditures for the care of children and other dependents and to encourage employers to provide workplace leave and dependent care benefits. Policymakers face cost, efficiency, and fairness tradeoffs when choosing whether to provide benefits through government directly, through employer mandates, or through voluntary incentives.

This pamphlet provides background information about leave and dependent care law and policy. Part I describes selected temporary and permanent Federal tax rules related to child and dependent care expenses, employer-provided dependent care assistance programs and child care expenditures, and paid family and medical leave. Part II presents empirical information and summarizes policy considerations related to mandatory and voluntary child care and leave arrangements.

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[1] This document may be cited as follows: Joint Committee on Taxation, *Present Law and Background on Dependent Care and Paid Leave* (JCX-19-21), April 19, 2021. The document can be found on the Joint Committee on Taxation website, www.jct.gov.

[2] Unless otherwise noted, section references in this document are references to sections of the Internal Revenue Code of 1986, as amended (the "Code").

I. SELECT FEDERAL TAX LAW RELATED TO DEPENDENT CARE AND PAID FAMILY AND MEDICAL LEAVE

A. Child and Dependent Care Tax Credit

Present Law

Nonrefundable and refundable income tax credits

An individual may reduce his or her income tax liability by available income tax credits. In some instances, a credit is wholly or partially refundable. That is, if the amount of a taxpayer's refundable income tax credits exceeds the taxpayer's income tax liability (net of other nonrefundable credits), these credits create an overpayment, which may generate a refund or be credited against any other internal revenue tax liability.[3] A refund or credit is authorized for a taxable year only if an overpayment exists, that is, if the amounts paid or deemed paid exceed the tax liability for that year.[4]

Child and dependent care tax credit

General structure

Under section 21, a taxpayer with one or more qualifying individuals may claim a credit against income tax liability for employment-related expenses for child and dependent care.[5] For this purpose, employment-related expenses are expenses for household services and expenses for the care of a qualifying individual.[6] These expenses must be incurred to enable the taxpayer to be gainfully employed during any period for which there are one or more qualifying individuals with respect to the taxpayer.

Employment-related expenses generally cannot exceed the taxpayer's earned income.[7] In the case of a joint return, expenses cannot exceed the earned income of the spouse with the least earned income.[8] The amount of employment-related expenses that may be taken into account for

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[3] See secs. 37, 6401, and 6402.

[4] See sec. 6402(a).

[5] Sec. 21.

[6] Sec. 21(b)(2). Expenses do not include amounts paid for a camp where a qualifying individual stays overnight. Household services are the performance in and about the taxpayer's home of ordinary and usual services necessary to the maintenance of the household and attributable to the care of the qualifying individual. Treas. Reg. sec. 1.21-1(d)(3)

[7] Sec. 21(d). Earned income has the same definition as for purposes of the EITC. Treas. Reg. sec. 1.21-2(b)(3).

[8] Special rules apply to married couples in cases where one spouse is either a full-time student or physically or mentally incapable of caring for himself or herself. Sec. 21(d)(2). In these cases, the student or

purposes of the credit is subject to a limitation. The applicable limitation is reduced by any amount excluded from income under an employer-provided dependent care assistance program under section 129.

Generally, a qualifying individual is: (1) a dependent of the taxpayer who is under the age of 13, or (2) a dependent or spouse of the taxpayer if the dependent or spouse is physically or mentally incapable of caring for himself or herself and shares the same principal place of abode with the taxpayer for over one half the year.[9] Married taxpayers must file a joint return in order to claim the credit.

Credit for 2021

For taxable years beginning in 2021, the credit is refundable for a taxpayer who has a principal place of abode in the United States for more than one half of the taxable year.[10] In the case of a joint return, refundability is allowed if at least one spouse satisfies the principal place of abode requirement. Principal place of abode is determined as provided in section 32.[11] A taxpayer who does not satisfy the principal place of abode requirement may still be able to claim a nonrefundable credit.

The amount of the credit is 50 percent of employment-related expenses up to a limitation of $8,000 in the case of one qualifying individual and $16,000 if there are two or more qualifying individuals.[12] Thus, the maximum credit is $4,000 if there is one qualifying individual and $8,000 if there are two or more qualifying individuals.

The credit is subject to a two-part phaseout to the 50-percent credit rate.[13] Under the first part, the 50-percent credit rate is reduced, but not below 20 percent, by one percentage point for each $2,000 (or fraction thereof) of adjusted gross income ("AGI") above $125,000. Under the second part, the 20-percent credit rate is reduced, but not below zero, by one percentage point for each $2,000 (or fraction thereof) of AGI above $400,000. Thus, for taxpayers with AGI between $183,000 and $400,000, the credit rate is 20 percent and, for taxpayers with AGI above $438,000, the credit is fully phased out. Figure 1 illustrates the credit amount by AGI for a taxpayer with one qualifying individual and for a taxpayer with two or more qualifying

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incapacitated spouse is deemed to be employed and deemed to have earned income of no less than $250 (if the household has one qualifying individual) or $500 (if the household has two or more qualifying individuals).

[9] Sec. 21(b)(1).

[10] Sec. 21(g)(1).

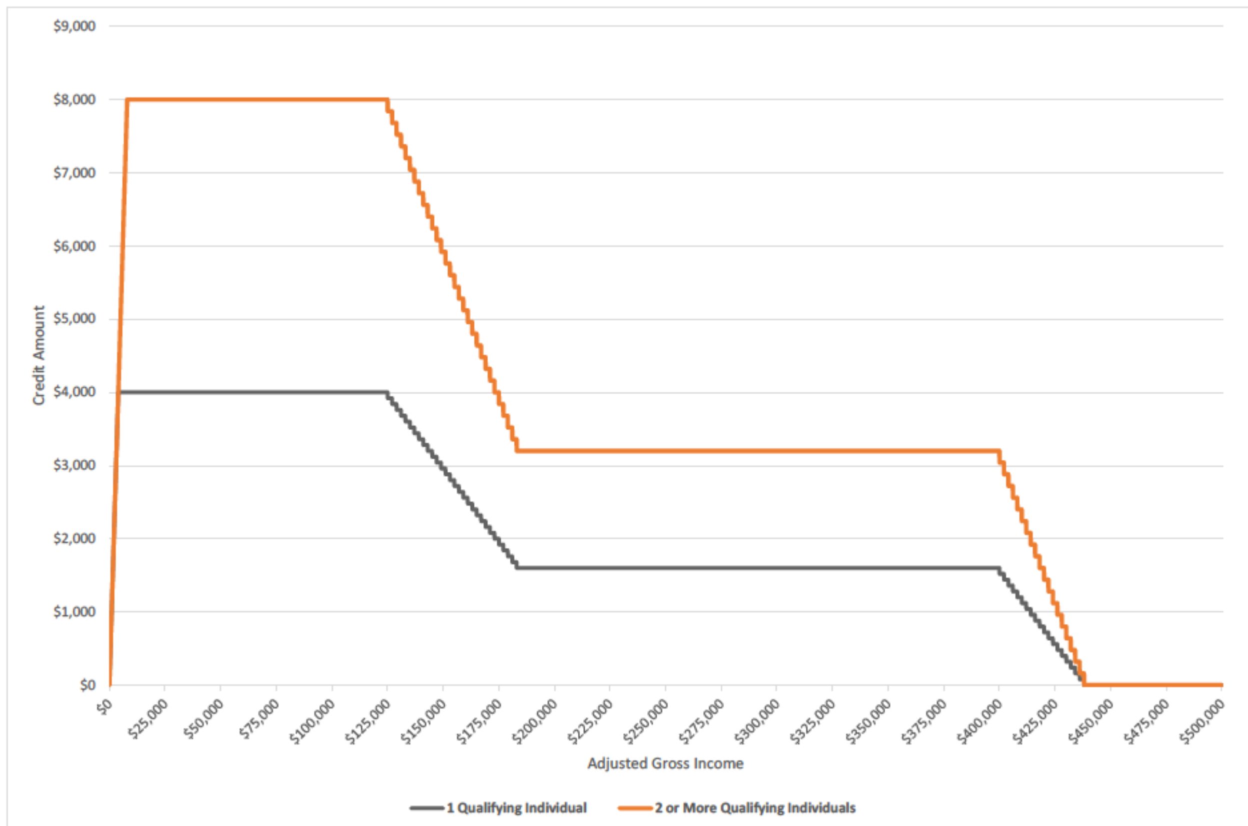
[11] Thus, a member of the Armed Forces of the United States stationed outside the United States while serving on extended active duty is treated as having a principal place of abode in the United States.

[12] Sec. 21(g)(2), (3).

[13] Sec. 21(g)(4).

individuals, in each case assuming that the taxpayer has the maximum amount of employment-related expenses ($8,000 and $16,000, respectively).[14]

Figure 1.– Child and Dependent Care Tax Credit for 2021 by AGI for Selected Taxpayers



Source: Joint Committee staff calculations.

Credit for years after 2021

For taxable years beginning after 2021, the credit is nonrefundable. A taxpayer's employment-related expenses for which the credit is allowed are limited to $3,000 if the taxpayer has one qualifying individual or $6,000 if the taxpayer has two or more qualifying individuals.[15] Thus, the maximum credit is $1,050 if there is one qualifying individual and $2,100 if there are two or more qualifying individuals.

[14] Figure 1 assumes AGI and earned income are equal for these taxpayers.

[15] Sec. 21(c).

The 35-percent credit rate is reduced, but not below 20 percent, by one percentage point for each $2,000 (or fraction thereof) of AGI above $15,000.[16] Thus, for taxpayers with AGI above $43,000, the credit rate is 20 percent, and the maximum credit is $600 if the taxpayer has one qualifying individual or $1,200 if the taxpayer has two or more qualifying individuals. The phaseout threshold and the amount of expenses eligible for the credit are not indexed for inflation.

Dependents

Under section 152, a taxpayer's dependents include both the taxpayer's qualifying children and the taxpayer's qualifying relatives. A dependent must be a citizen, national,[17] or resident of the United States or of a country contiguous to the United States (*i.e.*, Canada or Mexico).[18]

Generally, a qualifying child of a taxpayer is any individual who (1) meets the age test,[19] and (2) is the taxpayer's son, daughter, stepson, stepdaughter, adopted child, foster child, brother, sister, stepbrother, stepsister, or a descendant of any such individual.[20] The individual also (3) must share the same principal place of abode as the taxpayer for more than one-half of the taxable year,[21] (4) may not have provided over one-half of his or her own support for the taxable year,[22] and (5) may not file a joint return with a spouse.[23] The age test requires that the qualifying child must be either (1) under the age of 19 at the end of the calendar year, (2) under

[16] Sec. 21(a).

[17] Non-citizen U.S. nationals include (i) individuals born in American Samoa or (ii) certain individuals born in the Commonwealth of the Northern Mariana Islands who have chosen to be U.S. nationals instead of U.S. citizens. See 8 U.S.C. sec. 1408; *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015); 48 U.S.C. sec. 1801 note, Article III.

[18] Sec. 152(b)(3). There are special rules for certain adopted children.

[19] Sec. 152(c)(1)(C) and (c)(3).

[20] Sec. 152(c)(1)(A), (c)(2), and (f)(1).

[21] Sec. 152(c)(1)(B).

[22] Sec. 152(c)(1)(D).

[23] Sec. 152(c)(1)(E); see also sec. 152(b)(2).

the age of 24 at the end of the calendar year and a full-time student,[24] or (3) permanently and totally disabled at any time during the calendar year, regardless of age.[25]

A qualifying relative of a taxpayer is any individual who (1) bears the appropriate relationship to the taxpayer,[26] (2) has gross income for the taxable year that does not exceed the personal exemption amount,[27] (3) receives over one-half of his or her support from the taxpayer,[28] and (4) is not a qualifying child of the taxpayer or any other taxpayer.[29] A qualifying relative who files a joint return with a spouse does not qualify as a dependent.[30]

For purposes of the definition of a qualifying relative, an individual bears the appropriate relationship to the taxpayer if the individual is the taxpayer's lineal descendent or ancestor, brother, sister, aunt, uncle, niece, or nephew.[31] Some relations by marriage also qualify, including stepmothers, stepfathers, stepbrothers, stepsisters, sons-in-law, daughters-in-law, fathers-in-law, mothers-in-law, brothers-in-law, and sisters-in-law. In addition, an individual bears the appropriate relationship if the individual has the same principal place of abode as the taxpayer and is a member of the taxpayer's household.[32]

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[24] Sec. 152(f)(2). To qualify as a full-time student, the individual must be, during five calendar months during a calendar year: (1) a full-time student at a school that has a regular teaching staff, course of study, and regular student body at the school; or (2) a student taking a full-time, on-farm training course given by a school described in (1), or a state, county, or local government.

[25] An individual is permanently and totally disabled if he or she cannot engage in any substantial gainful activity because of a physical or mental condition and a doctor determines the condition has lasted or can be expected to last continuously for at least a year or can lead to death. Secs. 22(e)(3) and 152(c)(3)(B).

[26] Sec. 152(d)(1)(A) and (d)(2).

[27] Sec. 152(d)(1)(B). For taxable years beginning in 2018 through 2025, the reduction of the personal exemption amount to zero under section 151(d)(5) is not taken into account in determining whether an individual is a qualifying relative under section 152(d)(1)(B). The exemption amount referenced in section 152(d)(1)(B) will be treated as $4,150 (adjusted for inflation for taxable years beginning after 2018 and before 2026). See Treas. Reg. sec. 1.152-2(e)(1); Notice 2018-70, 2018-38 I.R.B. 441. The personal exemption amount for this purpose is $4,300 for taxable years beginning in 2021. Rev. Proc. 2020-45, 2020-46 I.R.B. 1016.

[28] Sec. 152(d)(1)(C).

[29] Sec. 152(d)(1)(D).

[30] Sec. 152(b)(2).

[31] Sec. 152(d)(2).

[32] Sec. 152(d)(2)(H).

Child and dependent care tax credit in the U.S. territories

General income tax rules for the territories

Citizens of the United States are generally subject to Federal income tax on their U.S. and foreign income regardless of whether they live in a State, a foreign country, or a U.S. territory. Residents of the five U.S. territories[33] are generally subject to the Federal income tax system based on their status as U.S. citizens or residents of the territories, with certain special rules for determining residence and source of income specific to the territory. Broadly, a bona fide individual resident of a territory is exempt from U.S. tax on income derived from sources within that territory but is subject to U.S. tax on U.S.-source and non-territory-source income.[34] A bona fide resident of a territory for a taxable year is generally an individual (1) who is present for at least 183 days during the taxable year in the territory, and (2) who does not have either a tax home outside the territory or a closer connection to the United States or a foreign country than to the territory.[35]

The application of the Federal tax rules to the territories varies from one territory to another. Three territories—Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands—are referred to as mirror Code territories because the Code serves as the internal tax law of those territories (substituting the particular territory for the United States wherever the Code refers to the United States).[36] Thus, there is a mirror Code version of the child and dependent care tax credit under the internal revenue laws of each mirror Code territory. A resident of one of those territories generally files a single tax return only with the territory of which the individual is a resident, and not with the United States.[37]

American Samoa and Puerto Rico, by contrast, are non-mirror Code territories. These two territories have their own internal tax laws, and a resident of either American Samoa or Puerto Rico may be required to file income tax returns with both their territory of residence and the United States.

The non-mirror Code territories may offer individual refundable income tax credits to their residents under their own tax laws. In addition, residents of the territories may be entitled to individual refundable income tax credits from the U.S. Treasury under the Code.

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[33] The Code refers to the territories as "possessions."

[34] See secs. 932, 933, and 937; see also former sec. 935 (1986), which remains in effect pursuant to the Tax Reform Act of 1986, Pub. L. No. 99-514, sec. 1277(b), October 22, 1986; 48 U.S.C. sec. 1801 note, sec. 601.

[35] Sec. 937.

[36] 48 U.SC. sec. 1397 (U.S. Virgin Islands); 48 U.S.C. sec. 1421i (Guam); 48 U.S.C. 1801 note, sec. 601 (Commonwealth of the Northern Mariana Islands).

[37] Sec. 932 and former sec. 935.

The child and dependent care credit in the territories

With respect to taxable years beginning in 2021, the Secretary is directed to make payments to each mirror Code territory that relate to the cost to that territory of the child and dependent care tax credit. The Secretary is further directed to make similar payments for 2021 to each non-mirror Code territory.

The Secretary is directed to pay to each mirror Code territory amounts equal to the aggregate amount of the credits allowable by reason of the application of section 21. This amount is determined by the Secretary based on information provided by the government of the territory.[38]

The Secretary is directed to pay to each non-mirror Code territory amounts estimated by the Secretary as being equal to the aggregate benefits that would have been provided to the residents of the territory under section 21 if a mirror Code tax system had been in effect in the territory.[39] The Secretary is prohibited from making these payments unless the territory has a plan approved by the Secretary to promptly distribute the payments to its residents.

No credit against U.S. income taxes is permitted for any person to whom a credit is allowed against territory income taxes as a result of the territory's mirror Code.[40] Similarly, no credit against U.S. income taxes is permitted for any person who is eligible for a payment under a non-mirror Code territory's plan for distributing to its residents the payment described above from the Secretary.

[38] Sec. 21(h)(1).

[39] Sec. 21(h)(2).

[40] Sec. 21(h)(3).

B. Employer-Provided Dependent Care Assistance Programs

In general

An employer may provide non-taxable child care assistance to employees by establishing a dependent care assistance program. Amounts paid or incurred by an employer for dependent care assistance provided to an employee are excludable from the employee's wages if the amounts are furnished pursuant to a dependent care assistance program.[41] A dependent care assistance program is a separate written plan of an employer for the employees' exclusive benefit that provides dependent care assistance and meets certain other requirements. Those requirements relate to non-discriminatory benefits, limits on principal shareholders, and information to be provided to eligible employees.[42] A dependent care flexible spending account ("dependent care FSA") is a type of dependent care assistance program.[43]

Dependent care assistance means the payment or provision of services that would be considered employment-related expenses[44] if paid for by the employee.[45] Such employment-related expenses include expenses for the care of a qualifying individual. Prior to 2021, a qualifying individual is defined as (i) a dependent of the taxpayer[46] who has not attained age 13, or (ii) a dependent[47] or spouse of the taxpayer who is physically or mentally incapable of caring for himself or herself and who has the same principal place of abode as the taxpayer for more than one-half of the taxable year.[48]

For the purposes of this wage exclusion, the following individuals are employees: (1) a current employee; (2) a leased employee who has provided services to the employer on a substantially full-time basis for as least 12 months if the services are performed under the employer's primary direction and control; (3) a sole proprietor; and (4) a partner who performs services for a partnership.

The amount that may be excluded from an employee's gross income under a dependent care assistance program, including a dependent care FSA, is limited to $5,000 ($2,500 in the case of a separate return by a married individual).[49] In addition, a plan may permit an individual who

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[41] Sec. 129(a)(1).

[42] Sec. 129(d).

[43] Prop. Treas. Reg. sec. 1.125-5(h).

[44] Relating to expenses for household and dependent care services necessary for gainful employment.

[45] Secs. 21(b)(2) and 129(e)(1).

[46] As defined in sec. 152(a)(1).

[47] As defined in sec. 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B).

[48] Sec. 21(b)(1). Special rules related to COVID-19 are outlined below.

[49] Sec. 129(a)(2).

has ceased participation in a dependent care FSA (due to, for example, termination of employment) to apply unused amounts remaining in the dependent care FSA to expenses incurred through the last day of that plan year, and special rules for plan years ending 2020 or 2021 related to COVID-19 described below expand carry over options. Employer-provided dependent care assistance in excess of $5,000 (or $2,500, as applicable) in a calendar year is generally taxable wages.

Dependent care assistance provided by an employer to an employee is reported on the employee's Form W-2, Wage and Tax Statement, for the taxable year in which the dependent care services were provided.[50] These amounts are reported in Box 10, Dependent care benefits, of Form W-2.

Flexible spending arrangements

A FSA generally is defined as a benefit program which provides employees with coverage under which specific incurred expenses may be reimbursed (subject to reimbursement maximums and other conditions) and the maximum amount of reimbursement reasonably available is less than 500 percent of the value of such coverage.[51] A flexible spending arrangement under a cafeteria plan (as defined below) allows an employee to make salary reduction contributions for use in receiving reimbursements for certain incurred expenses.[52] The arrangement can also include non-elective employer contributions (known as employer flex-credits) that the employer makes available for every employee eligible to participate in the employer's cafeteria plan, to be used only for certain tax-excludable benefits (but not as cash or a taxable benefit).[53] Types of expenses that may be reimbursed under a flexible spending arrangement in a cafeteria plan include dependent care benefits.

Cafeteria plans

A cafeteria plan is a separate written plan of an employer under which all participants are employees, and participants are permitted to choose among at least one permitted taxable benefit (for example, current cash compensation) and at least one qualified benefit.[54] Qualified benefits are generally employer-provided benefits that are not includable in gross income by reasons of an express provision of the Code.[55] In order to be excludable, any qualified benefit elected under a cafeteria plan must independently satisfy any requirements under the Code section that provides the exclusion. If an employee receives a qualified benefit based on his or her election

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[50] Sec. 6051(a)(9); Notice 89-111, 1989-2 C.B. 449, Notice 2005-61.

[51] Sec. 106(c)(2) and Prop. Treas. Reg. sec. 1.125-5(a).

[52] Sec. 125 and Prop. Treas. Reg. sec. 1.125-5. Another type of flexible spending arrangement is a health reimbursement arrangement (HRA). HRAs are paid for solely by the employer and are not provided under a cafeteria plan. Notice 2002-45, 2002-2 C.B. 93, July 15, 2002.

[53] Prop. Treas. Reg. sec. 1-125-5(b).

[54] Sec. 125(d).

[55] Benefits under a dependent care FSA are excludable under section 129.

between the qualified benefit and a taxable benefit under a cafeteria plan, the qualified benefit generally is not includable in gross income.[56] However, if a plan offering an employee an election between taxable benefits (including cash) and nontaxable qualified benefits does not meet the requirements for being a cafeteria plan, the election between taxable and nontaxable benefits results in gross income to the employee, regardless of the benefit elected and when the election is made.[57]

Cafeteria plans generally may not provide for the deferral of compensation.[58] Elections under a cafeteria plan generally must be made prior to the first day of the plan year and must be irrevocable, except under certain circumstances, such as if the participant experiences a change in status.[59] In addition, a cafeteria plan may be amended during a plan year, but the amendment must only be effective prospectively.[60]

Dependent care FSAs are subject to the general requirements for cafeteria plans, including the requirement that the plan generally may not provide for the deferral of compensation.[61] Under normal circumstances, amounts remaining in a dependent care FSA at the end of a plan year generally must be forfeited by the employee (referred to as the "use-or-lose" rule).[62] However, a cafeteria plan may allow a grace period not to exceed two and one-half months immediately following the end of the plan year during which unused amounts may be paid or reimbursed to participants for qualified expenses incurred during the grace period.[63]

<u>Special rules relating to COVID-19</u>

The Consolidated Appropriations Act of 2021 ("CAA 2021") provided that, for plan years ending in 2020 or 2021, a plan that includes a dependent care FSA could allow participants to carry over (under rules similar to the rules applicable to health FSAs) any unused benefits or contributions remaining in the FSA from such plan year to the following plan year.[64] Thus, for

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[56] Sec. 125(a).

[57] Prop. Treas. Reg. sec. 1.125-1(b).

[58] Sec. 125(d)(2).

[59] Treas. Reg. sec. 1.125-4.

[60] Prop. Treas. Reg. sec. 1.125-1(c)(5).

[61] Sec. 125(d)(2).

[62] *Ibid.* and Prop. Treas. Reg. sec. 1.125-5(c).

[63] Notice 2005-42, 2005-1 C.B. 1204, June 6, 2005 and Prop. Treas. Reg. sec. 1.125-1(e).

[64] Pub. L. No. 116-260, sec. 214 (December 27, 2020). In May 2020, the IRS provided special rules for a dependent care FSAs for 2020, due to the public health emergency posed by the outbreak of COVID-19. A cafeteria plan could permit participants to apply unused amounts remaining in a dependent care FSA as of the end of a grace period ending in 2020 or a plan year ending in 2020 to pay or reimburse expenses incurred under the FSA through December 31, 2020. In addition, the guidance provided that a plan could permit mid-year elections during calendar

example, a cafeteria plan may permit a participant in a dependent care FSA to be paid or reimbursed for dependent care expenses incurred during the plan year ending in 2021 by applying unused amounts remaining in that participant's dependent care FSA at the end of the plan year ending in 2020. In addition, for plan years ending in 2020 or 2021, a cafeteria plan may extend the grace period applicable to a dependent care FSA (with respect to unused benefits or contributions remaining in the FSA) to 12 months after the end of the plan year.

The CAA 2021 also modifies the definition of qualifying individual as it applies to a dependent care FSA in certain circumstances so that a dependent includes individuals who have not yet reached age 14 (rather than age 13). To qualify for this treatment, an employee must be enrolled in a dependent care FSA for the last plan year with respect to which the end of the regular enrollment period for the plan year was on or before January 31, 2020. In addition, the employee must either have a dependent who attains age 13 during such plan year, or, in the case of an employee who has an unused balance remaining in the FSA at the end of the plan year, must have a dependent who attains age 13 during the subsequent plan year. In the former case, the amended definition of qualifying individual (substituting age 14 for age 13) applies for that plan year (*i.e.*, the last plan year with respect to which the end of the regular enrollment period for the plan year was on or before January 31, 2020). In the latter case, the amended definition applies during the subsequent plan year, and applies only to so much of the amounts paid for dependent care assistance with respect to the dependent who attains age 13 during that subsequent plan year as does not exceed the unused balance.

Another special rule for plan years ending in 2021 allows employees to make changes to their elections. A cafeteria plan may permit an employee to modify prospectively the amount (but not in excess of any applicable dollar limitation) of the employee's contributions to a dependent care FSA (without regard to any change in status).

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year 2020 with respect to a dependent care FSA (without requiring the employee to meet the criteria set forth in the Treasury regulations, such as a change in status). Notice 2020-29, 2020-22 I.R.B. 864, May 26, 2020.

C. Tax Credit for Employer-Provided Child Care Expenditures

Present Law

In general

Taxpayers may claim a general business credit for certain expenses associated with providing child care for their employees. The amount of the credit is equal to 25 percent of qualified child care expenditures and 10 percent of qualified child care resource and referral expenditures for the taxable year.[65] The maximum total credit that may be claimed by a taxpayer cannot exceed $150,000 per taxable year.[66]

Qualified child care expenditures include costs paid or incurred: (1) to acquire, construct, rehabilitate, or expand property that is to be used as part of the taxpayer's qualified child care facility ("qualified construction expenditures");[67] (2) for the operation of the taxpayer's qualified child care facility, including the costs of training and certain compensation for employees of the child care facility, and scholarship programs; or (3) under a contract with a qualified child care facility to provide child care services to employees of the taxpayer.[68] Qualified child care expenditures do not include expenses in excess of the fair market value of providing child care.[69]

A qualified child care facility is a facility with the principal use of providing child care assistance that meets all applicable State and local laws and regulations, including any licensing laws.[70] A facility is not treated as a qualified child care facility with respect to a taxpayer unless: (1) its enrollment is open to the employees of the taxpayer; (2) at least 30 percent of the children enrolled in the center are dependents of the taxpayer's employees, if the facility is the principal trade or business of the taxpayer; and (3) use of the facility (or eligibility to use such facility) does not discriminate in favor of highly compensated employees of the taxpayer (within the meaning of section 414(q)).[71]

Qualified child care resource and referral expenditures are amounts paid or incurred under a contract to provide child care resource and referral services to an employee of the

[65] Sec. 45F(a).

[66] Sec. 45F(b).

[67] The property must be subject to depreciation or amortization and must not be part of the principal residence (within the meaning of section 121) of the taxpayer or any employee of the taxpayer.

[68] Sec. 45F(c)(1)(A).

[69] Sec. 45F(c)(1)(B).

[70] Sec. 45F(c)(2)(A). If the facility is the principal residence (within the meaning of section 121) of the operator of the facility, it does not satisfy the "principal use of providing child care assistance" requirement.

[71] Sec. 45F(c)(2)(B).

taxpayer.[72] These services must be provided (or be eligible for use) in a way that does not discriminate in favor of highly compensated employees of the taxpayer (within the meaning of section 414(q)).[73]

Denial of double benefit and recapture

No deduction or credit is allowed with respect to the amount of credit claimed for qualified child care expenditures and qualified child care resource and referral expenditures.[74] Additionally, if the credit is taken with respect to qualified construction expenditures, the taxpayer's basis in the property acquired, constructed, rehabilitated, or expanded is reduced by the amount of the credit attributable to such expenditures.[75]

A credit claimed with respect to qualified construction expenditures is subject to recapture for the first ten years after the qualified child care facility is placed in service. Under the recapture provision, a percentage of the credit claimed with respect to qualified construction expenditures is treated as an increase in tax liability in the year of recapture.[76] The recapture percentage is reduced over the 10-year recapture period:[77]

If the recapture event occurs in:	*The applicable recapture percentage is:*
Years 1-3	100
Year 4	85
Year 5	70
Year 6	55
Year 7	40
Year 8	25
Years 9 and 10	10
Years 11 and thereafter	0

A recapture event occurs if the taxpayer either (1) ceases operation of the qualified child care facility or (2) transfers its interest in the qualified child care facility without securing an agreement to assume recapture liability for the transferee.[78] The recapture tax is not treated as a tax for purposes of determining the amount of other income tax credits or for determining the

[72] Sec. 45F(c)(3)(A).

[73] Sec. 45F(c)(3)(B).

[74] Sec. 45F(f)(2).

[75] Sec. 45F(f)(1)(A).

[76] Sec. 45F(d)(1).

[77] Sec. 45F(d)(2).

[78] Sec. 45F(d)(3). Cessation of operations due to a casualty loss is not a recapture event to the extent that the loss is restored by reconstruction or replacement of the facility within a reasonable period established by the Secretary. Sec. 45F(d)(4)(C).

amount of the alternative minimum tax.[79] Only a credit that previously reduced tax liability may result in an increase in tax liability under the recapture rule; if the credit resulted in a carryforward or carryback, the recapture instead causes an adjustment of the carryforward or carryback.[80]

Any increase in tax liability or adjustment of carryforward or carrybacks is treated as an increase in basis immediately before the event giving rise to the recapture.[81] Thus, the taxpayer is not subject to both a reduction of basis and recapture, and may use the increase in basis to offset any gain on disposition of the facility (if applicable).

Special rules

All persons treated as a single employer under sections 52(a) and (b) are treated as single taxpayer for purposes of the credit.[82] There are guidelines that govern the allocation of the credit between a trust or estate and the beneficiaries of such trust or estate, and for the allocation of the credit among partners in a partnership.[83]

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[79] Sec. 45F(d)(4)(B).

[80] Sec. 45F(d)(4)(A). The carryforward and carryback rules for the general business credit are provided in section 39.

[81] Sec. 45F(f)(1)(B).

[82] Sec. 45F(e)(1).

[83] Sec. 45F(e)(2), (3).

D. Employer Credit for Paid Family and Medical Leave

In general

The Family and Medical Leave Act of 1993, as amended (the "FMLA"), generally requires covered employers to provide eligible employees with up to 12 or 26 weeks of job protected leave under certain circumstances.[84] In general, FMLA does not require that the employer continue to pay employees during such leave, although employers may choose to pay for all or a portion of such leave. State and local governments may provide, or State and local laws may require employers to provide, employees with up to a certain amount of paid leave for family caregiving and medical leave that may or may not fall under the FMLA.[85]

Employer credit for paid family and medical leave

Eligible employers that provide family and medical leave may temporarily claim a general business credit that ranges from 12.5 percent to 25 percent of wages paid in taxable years beginning after December 31, 2017, and before January 1, 2026.[86] The amount of the credit is equal to 12.5 percent of the amount of eligible wages (based on the normal hourly wage rate)[87] 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 for actual services performed for the employer.[88] The credit is increased by 0.25 percentage points (but not above 25 percent) for each percentage point by which the rate of payment exceeds 50 percent of wages normally paid. The maximum amount of family and medical leave that may be taken into account with respect to any qualifying employee for any taxable year is 12 weeks.

An employer's paid leave program must meet certain requirements in order for that employer to claim the general business credit under section 45S.[89] An "eligible employer" is one

[84] Pub. L. No. 103-3 (Feb. 5, 1993); 29 U.S.C. sec. 2601, *et. seq*.

[85] Ten State governments and the District of Columbia have created paid family and medical leave insurance programs that provide cash benefits to eligible workers during periods of specified leave. These insurance benefits are funded via payroll taxes. For further discussion of State paid family and medical leave laws, see "Paid Family and Medical Leave in the United States," R44835, Feb. 19, 2020, available at https://crsreports.congress.gov/product/pdf/R/R44835.

[86] Pub. L. No. 115-97, as amended by Pub. L. No. 116-260 (December 27, 2020).

[87] Wages for this purpose are Federal Unemployment Tax Act wages defined in section 3306(b), without regard to the dollar limitation, but do not include amounts taken into account for purposes of determining any other credit under subpart D of the Code. A technical correction may be necessary to reflect that the wages with respect to the credit are limited to the employee's normal hourly wage rate and do not include additional amounts, such as a bonus, that could be paid during the leave period.

[88] Pub. L. 115-97 (December 22, 2017), as amended by Pub. L. 116-94 (December 20, 2019); Notice 2018-71, 2018-41 I.R.B. 548.

[89] Sec. 45S.

which has in place a written policy that allows all qualifying full-time employees not less than two weeks of annual paid family and medical leave, and which allows all less-than-full-time qualifying employees a commensurate amount of leave (on a *pro rata* basis) compared to the leave provided to full-time employees. The policy must also provide that the rate of payment under the program is not less than 50 percent of the wages normally paid to any such employee for services performed for the employer.

An eligible employer is restricted from certain practices or acts which are also prohibited under the FMLA in order to receive the credit, regardless of whether the employer is subject to the FMLA. Specifically, the employer must provide paid family and medical leave in compliance with a written policy that ensures that the employer will not interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under the policy and will not discharge or in any other manner discriminate against any individual for opposing any practice prohibited by the policy.

A "qualifying employee" means any individual who is an employee under tax rules and principles and is defined in section 3(e) of the Fair Labor Standards Act of 1938,[90] as amended, who has been employed by the employer for 12 months or more, and who for the preceding year, had compensation not in excess of 60 percent of the compensation threshold for highly compensated employees.[91] For 2020 and 2021, this 60 percent amount is $78,000.

"Family and medical leave" for purposes of the general business credit is generally the reasons under the FMLA that would entitle an employee to 12 or 26 weeks of qualifying leave.[92] If an employer provides paid leave as vacation leave, personal leave, or other medical or sick leave[93] (unless the medical or sick leave is specifically for one or more of the "family and medical leave" purposes defined above), such paid leave would not be considered to be family and medical leave. In addition, leave paid for by a State or local government or required by State or local law (including such leave required to be paid by the employer) is not taken into account in determining the amount of paid family and medical leave provided by the employer that is eligible for the credit.

[90] Pub. L. No. 75-718 (June 25, 1938), codified as 29 U.S.C. sec. 203(e).

[91] Sec. 414(q)(1)(B) ($130,000 for 2020).

[92] FMLA section 102(a)(1) provides leave for FMLA purposes due to (A) the birth of a son or daughter of the employee and in order to care for such son or daughter; (B) the placement of a son or daughter with the employee for adoption or foster care; (C) caring for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition; (D) a serious health condition that makes the employee unable to perform the functions of the employee's position; (E) any qualifying exigency (as the Secretary of Labor shall, by regulation, determine) 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. In addition, FMLA section 102(a)(3) provides leave for FMLA purposes due to the need of an employee who is a spouse, son, daughter, parent, or next-of-kin of an eligible service member to care for such service member.

[93] These terms mean these types of leave within the meaning of FMLA section 102(d)(2).

The Secretary will make determinations as to whether an employer or an employee satisfies the applicable requirements for an eligible employer or qualifying employee, based on information provided by the employer that the Secretary determines to be necessary or appropriate.

Employer credit and paid sick and family leave related to COVID-19

The Families First Coronavirus Response Act ("FFCRA")[94] required certain employers with fewer than 500 employees to provide paid sick and expanded family and medical leave to employees unable to work or telework for specified reasons related to COVID-19. Employers that paid sick or family leave wages could receive a corresponding payroll tax credit. The paid sick leave requirements in the Emergency Paid Sick Leave Act,[95] and the expanded family and medical leave requirements in the Emergency Family and Medical Leave Expansion Act,[96] expired on December 31, 2020, but the credits were extended to September 30, 2021.[97]

Any qualified sick leave wages or qualified family leave wages taken into account for the payroll tax credits on such wages are not taken into account for purposes of determining the employer credit for certain paid family and medical leave under the section 45S general business credit.[98] Thus, the employer may not claim a general business credit under section 45S with respect to the qualified sick leave or family leave wages, but the employer may be able to take a general business credit under section 45S with respect to any additional wages paid, provided the requirements of section 45S are met with respect to the additional wages.

[94] Pub. L. No. 116-127 (March 18, 2020).

[95] Division E, FFCRA, Pub. L. No. 116-127.

[96] Division C, FFCRA, Pub. L. No. 116-127.

[97] Pub. L. No. 116-260 (December 27, 2020).

[98] Pub. L. No. 116-127 (March 18, 2020).

E. Payroll Credits for Paid Sick and Family Leave

In general

The FMLA generally requires covered employers to provide eligible employees with job-protected leave under certain circumstances.[99] The FMLA does not require that the employer continue to pay employees during such leave.

The FMLA generally applies to employer with 50 or more employees.[100] It also applies to all public agencies and local educational institutions, without regard to the number of employees.[101] Employees are generally eligible for leave from a covered employer if they have performed services for the employer for a minimum length of time and minimum number of hours at a sufficiently large worksite prior to taking leave. The FMLA generally requires employers to grant up to 12 weeks of unpaid leave in a 12-month period to eligible employees for specified reasons.[102]

The Families First and Coronavirus Response Act ("FFCRA") was enacted on March 18, 2020 and amended the FMLA. It included a mandate requiring certain employers with fewer than 500 employees to provide paid sick leave and family leave to employees who were unable to work or telework for specified reasons due to COVID-19.[103] The Emergency Paid Sick Leave Act ("EPSLA") and Emergency Family and Medical Leave Expansion Act ("EFMLEA") in the FFCRA outlined the requirements for employers to provide such paid sick or expanded family leave. To offset the cost of providing such leave, an employer was allowed a tax credit for each calendar quarter in which it paid qualified sick leave wages or qualified family leave wages,

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[99] Pub. L. No. 103-3 (Feb. 5, 1993); 29 U.S.C. sec. 2601, *et seq*.

[100] 29 C.F.R. sec. 824.104. An employee is counted for each working day of a week if the employee works any part of that week. Employees are included for this purpose if (1) the employee works in the United States, any territory, or possession of the United States, (2) the employee's name appears on payroll records, whether or not compensation is received for the work week, (3) the employee is on paid or unpaid leave (including FMLA leave) if there is a reasonable expectation that the individual will return to active performance of services, (4) employees of foreign entities operating in the United States, and (5) full-time, part-time, seasonal, and temporary employees. Employees are not included for this purpose if the employment relationship is terminated, for unpaid volunteers who are not employees, employees of United States entities working outside of the United States, its territories, or possessions, and employees of foreign entities working outside of the United States. 29 C.F.R. sec. 824.105.

[101] *Ibid.* Members of the Armed Forces generally are not eligible for FMLA leave.

[102] Qualifying reasons for providing FMLA leave include (1) the birth and subsequent care of the employee's child (to be taken within 12 months of the child's birth); (2) an adopted or fostered child is placed with the employee (to be taken within 12 months of the child's placement with the employee); (3) to care for a spouse, child, or parent with a serious health condition; (4) an employee is unable to perform the essential requirements of his or her job due to the employee's own health condition; and (5) for any qualifying exigency due to the employee's military member spouse, child, or parent on covered active duty or call to covered active duty status. The FMLA also provides additional military-related caregiving leave. Special rules apply to certain employees, such as flight crew employees.

[103] Pub. L. No. 116-127 (March 18, 2020).

subject to the limits described below. Self-employed individuals were also eligible for an equivalent tax credit to the extent they met the requirements of the EPSLA or EFMLEA. While the mandate in the EPSLA and EFMLEA expired on December 31, 2020, employers continue to be eligible for a tax credit for qualified sick leave wages and qualified family leave wages paid, subject to limitations, until September 30, 2021.[104]

Federal employment taxes

Federal employment taxes are generally imposed on wages paid to employees with respect to employment and include withholding at the source of Federal income tax as well as taxes imposed under the Federal Insurance Contributions Act ("FICA") and the Federal Unemployment Tax Act ("FUTA").[105] In addition, Tier 1 of the Railroad Retirement Tax Act ("RRTA") imposes a tax on compensation paid to railroad employees and representatives.[106]

FICA taxes are comprised of two components: the Old-Age, Survivors, and Disability Insurance ("OASDI") and Hospital Insurance ("Medicare").[107] With respect to OASDI taxes, the applicable rate is 12.4 percent with half of such rate (6.2 percent) imposed on the employee and the remainder (6.2 percent) imposed on the employer.[108] The tax is assessed on covered wages up to the OASDI wage base ($137,700 in 2020 and $142,800 in 2021).[109] There is no wage base for Medicare taxes. The Medicare tax rate is 2.9 percent with half of such rate (1.45 percent) imposed on the employee and the remainder (1.45 percent) imposed on the employer.[110]

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[104] Pub. L. No. 116-260 (December 27, 2020); Pub. L. No. 117-2 (March 11, 2021). Self-employed individuals are also eligible for a credit of the qualified sick leave equivalent amount and qualified family leave equivalent amount paid through September 30, 2021.

[105] Secs. 3401, 3101, 3111, and 3301. Employers and employees in the U.S. territories are generally subject to FICA payroll tax obligations. The U.S. territories referred to in this document are American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands. In contrast, employers and employees in the territories are generally not subject to withholding at the source for Federal income tax, although they are subject to withholding of local taxes. These payroll obligations of the employers are generally applicable to Federal agencies with personnel in the territory. Employers in the territories file quarterly tax returns with the Federal government to report and pay FICA taxes for employees in the respective territories.

[106] Sec. 3221.

[107] The Hospital Insurance tax includes two components: Medicare tax and Additional Medicare tax. Additional Medicare taxes are imposed on wages in excess of certain thresholds and are only imposed on the employee. Sec. 3101(b). There is no employer match for Additional Medicare tax. For purposes of this explanation, when referencing Medicare taxes, the term does not include Additional Medicare tax.

[108] Sec. 3101.

[109] Generally, the OASDI wage base rises based on increases in the national average wage index. Sec. 230 of the Social Security Act (42 U.S.C. sec. 430).

[110] Sec. 3101(b)(1).

Railroad retirement program

Railroad workers do not participate in the OASDI system. Compensation subject to RRTA tax is exempt from FICA taxes.[111] The RRTA imposes a tax on compensation paid by covered employers to employees in recognition for the performance of services in an amount equal to the OASDI and Medicare tax rates.[112] Employees whose compensation is subject to RRTA are ultimately eligible for railroad retirement benefits that fall under a two-tier structure. Railroad employees and employers pay tier 1 taxes at the same rate as other employment taxes.[113]

Self-employment taxes

The Self-Employment Contribution Act ("SECA") imposes a tax on the self-employment income of an individual. SECA taxes consist of an OASDI tax and Medicare tax.[114] Under the OASDI component, the rate of tax is 12.4 percent on self-employment income up to the OASDI wage base.[115] Under the basic Medicare tax component, the rate of tax is 2.9 percent of all self-employment income (without regard to the OASDI wage base).[116] As is the case with employees, an additional Medicare tax applies to the Medicare portion of SECA tax on self-employment income in excess of a threshold amount.[117]

Self-employment income subject to SECA tax is determined as the net earnings from self-employment derived by an individual during any taxable year, subject to certain exceptions. In general, net earnings from self-employment is the gross income derived by an individual from any trade or business less allowed deductions which are attributable to the trade or business and permitted under the SECA rules. Certain passive income and related deductions are not taken into account in determining net earnings from self-employment.

For purposes of computing net earnings from self-employment, taxpayers are permitted a deduction equal to the product of the taxpayer's net self-employment income (determined

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[111] Sec. 3121(b)(9).

[112] Secs. 3201 through 3233. Instead of FICA taxes, railroad employers and employees are subject, under the RRTA, to taxes equivalent to the Social Security and Medicare taxes under FICA. Under the RRTA, employers and employees are also subject to an additional tax, referred to as the "tier 2" tax, on compensation up to a certain amount.

[113] 7.65 percent, consisting of 6.2 percent for retirement on earnings up to $137,700 in 2020, and 1.45 percent for Medicare hospital insurance on all earnings. An additional 0.9 percent in Medicare taxes are withheld from employees on earnings above $200,000.

[114] Secs. 1401(a), 1401(b).

[115] Sec. 1401(a). In calculating the SECA tax for OASDI, the OASDI wage base taken into account is reduced by FICA wages paid to the individual during the taxable year.

[116] Sec. 1401(b)(1).

[117] Sec. 1401(b)(2).

without regard to this deduction) and one-half of the sum of the rates for OASDI and Medicare, *i.e.*, 7.65 percent of net earnings.[118] This deduction is determined without regard to the 0.9 percent Additional Medicare tax that may apply to an individual. This deduction reflects the fact that the FICA rates apply to an employee's wages, which do not include FICA taxes paid by the employer, whereas the self-employed individual's net earnings are economically equivalent to an employee's wages plus the employer share of FICA taxes.[119] This is generally referred to as the "regular method" of determining net earnings from self-employment, and in Internal Revenue Service forms and publications is expressed as multiplying total net earnings from self-employment by 92.35 percent.

Paid sick leave and family leave mandate

The EPSLA and EFMLEA were effective from April 1, 2020 through December 31, 2020.[120] The EPSLA required certain employers to provide an employee with paid sick time during this period to the extent that the employee is unable to work or telework due to a need for leave due to six reasons. Those reasons were when (1) the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (3) the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis; (4) the employee is caring for an individual who is subject to an order described in clause (1) or has been advised as described in clause (2); (5) the employee is caring for the employee's son or daughter if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable due to COVID-19 precautions; or (6) the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.[121] The amount of paid sick leave under the EPSLA for a qualifying reason was 80 hours.

The EFMLEA required certain employers to provide public health emergency leave to employees during this period under the FMLA.[122] This requirement generally applies when an employee is unable to work or telework due to a need for leave to care for a son or daughter under age 18 because the school or place of care has been closed, or the child care provider is

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[118] Sec. 1402(a)(12).

[119] The deduction is intended to provide parity between FICA and SECA taxes because the employer may deduct, as a business expense, its share of the FICA taxes paid. As presently written, the deduction for SECA taxes is not the exact economic equivalent to the deduction for FICA taxes. See Joint Committee on Taxation, *Options to Improve Tax Compliance and Reform Tax Expenditures*, (JCS-2-05), January 27, 2005, for a detailed description of this issue.

[120] Pub. L. No. 116-127 (March 18, 2020).

[121] Division E of the bill, sec. 5102(a).

[122] Division C of the bill, section 3102.

unavailable, due to a public health emergency. The FFCRA defined a public health emergency as an emergency with respect to COVID-19 declared by a Federal, State, or local authority.

The first 10 days of public health emergency leave required under the EFMLEA could consist of unpaid leave, after which paid leave is required. The paid leave is for the duration of the period provided in the EFMLEA, which was a maximum of 10 additional weeks. The amount of required paid leave under the FFCRA was based on an amount not less than two-thirds of an employee's regular rate of pay, and the number of hours the employee would otherwise be normally scheduled to work. Additional guidance was provided for employees with varying schedules.[123] The paid leave mandated by the EFMLEA could not exceed $200 per day and $10,000 in the aggregate.

Paid sick leave credit

Employers

For leave required to be provided under the EPSLA, an employer is allowed a credit against the OASDI tax or the equivalent amount of tax under the RRTA tax imposed on the employer for each calendar quarter in an amount equal to 100 percent of the qualified sick leave wages paid by the employer with respect to that calendar quarter, subject to limitations.[124] Qualified sick leave wages are defined as wages[125] and compensation[126] paid by an employer which are required to be paid by reason of the EPSLA between April 1, 2020 and March 31, 2021.[127] Subtitle G of the American Rescue Plan Act of 2021 ("ARPA") extended and modified the credits for paid sick leave paid after March 31, 2021 and before October 1, 2021, as discussed below.[128]

The FFCRA provides different credit limitations based on the reason why the individual received paid sick leave.[129] In the case of paid sick time qualifying under clauses (1), (2), or (3) above, the amount of qualified sick leave wages taken into account for purposes of the credit may not exceed $511 for any day (or any portion thereof) for which the individual is paid such

[123] U.S. Department of Labor, Families First Coronavirus Response Act: Questions and Answers, available at https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

[124] Notice 2020-21, 2020-16 I.R.B. 660, April 13, 2020; Notice 2020-54, 2020-31 I.R.B. 226, July 27, 2020.

[125] Sec. 3121(a).

[126] Sec. 3231(e).

[127] The expiration of the credit allowed under the FFCRA was December 31, 2020. The Consolidated Appropriations Act of 2021 extended the credit to generally also apply to qualified sick leave wages paid between January 1, 2021 and March 31, 2021 that would have been required by the EPSLA had it been extended to that date.

[128] Pub. L. No. 2017-2 (March 11, 2021).

[129] The FFCRA provides that the aggregate number of days taken into account for the calendar quarter with respect to an individual under all clauses may not exceed the excess (if any) of 10 over the aggregate number of days so taken into account for all preceding calendar quarters.

sick time. In the case of paid sick time qualifying under clauses (4), (5), or (6) above, the amount of qualified sick leave wages taken into account may not exceed $200 for any day (or portion thereof) for which the individual is paid such sick time.

There were a few other important components of the credit. The amount of the credit allowed was increased by qualified health plan expenses allocable to the paid sick leave taken by an employee or self-employed individual. Qualified health plan expenses are amounts paid or incurred by the employer to provide and maintain a group health plan,[130] but only to the extent such amounts are excluded from the employees' income as coverage under an accident or health plan.[131] Further, any credit calculated to be in excess of the OASDI or RRTA tax imposed on the employer would be treated as a refundable overpayment.[132]

If an employer claims a credit under the FFCRA, the amount so claimed is included in gross income. Thus, the credit is not taken into account for purposes of determining any amount allowable as a payroll tax deduction, deduction for qualified sick leave wages, or deduction for health plan expenses. In addition, the employer's income tax deduction for the employer's share of OASDI or RRTA tax for such quarter will not be reduced.[133] Any qualified sick leave wages taken into account under the FFCRA are not eligible for the section 45S credit against the taxpayer's income tax for certain paid family and medical leave.[134]

Certain entities are not eligible for the credit even though the mandate may apply to those organizations. The credit allowed under the FFCRA does not apply to the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of those entities. Under the FFCRA, employers in the U.S. territories may claim the credit by filing their quarterly Federal employment tax returns.

Self-Employed Individuals

An eligible self-employed individual is allowed an income tax credit for any taxable year for a qualified sick leave equivalent amount, as described below. An eligible self-employed

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[130] Group health plan for this purpose is defined in section 5000(b)(1).

[131] For the exclusion, see section 106(a). Except as otherwise provided by the Secretary, such allocations are treated as properly made under the FFCRA if made on the basis of being pro rata among covered employees and pro rata on the basis of periods of coverage (relative to the time periods of leave to which such wages relate).

[132] The excess is treated as an overpayment and refunded under sections 6402(a) and 6413(b). In addition, any amount that is due to an employer is treated in the same manner as a refund due from a credit FFCRA. 31 U.S.C. sec. 1324. Thus, amounts are appropriated to the Secretary of the Treasury for refunding such excess amounts.

[133] Note that the qualified family leave wages paid are not subject to the tax imposed by section 3111(a) or 3221(a). Employers also receive an increase in the otherwise available credit in the amount of the tax imposed by section 3111(b) on qualified family leave wages.

[134] Section 45S provides an employer credit for certain paid family and medical leave.

individual is defined as an individual who regularly carries on any trade or business[135] and would be entitled to receive paid leave during the taxable year under the EPSLA if the individual were an employee of an employer (other than himself or herself) that is subject to the requirements of the EPSLA.

The qualified sick leave equivalent amount with respect to an eligible self-employed individual is a function of the number of days during the taxable year that the self-employed individual cannot perform services for which that individual would have been entitled to sick leave pursuant to the EPSLA[136] (if the individual were employed by an employer). That number of days is multiplied by the lesser of two amounts: (a) $511 in the case of paid sick time described in clauses (1), (2), or (3) above ($200 in the case of paid sick time described in clauses (4), (5), or (6) above); or (b) 100 percent of the average daily self-employment income of the individual for the taxable year in the case of any day of paid sick time described in clauses (1), (2), or (3) above (67 percent in the case of paid sick time described in clauses (4), (5), or (6) above). The individual's average daily self-employment income under the FFCRA is an amount equal to the net earnings from self-employment for the taxable year divided by 260.

The FFCRA includes additional guidelines for self-employed individuals. For example, the credit allowed is refundable,[137] an eligible individual's tax credit is reduced to the extent he or she received qualified sick leave wages,[138] and the statute also addressed payments made in the U.S. territories.

Changes made by ARPA

The ARPA included several modifications to the paid sick leave credits originally enacted in the FFCRA.[139] First, there were "on Code" provisions added to Subtitle C of the Code, including Section 3131 related to paid sick leave credits. In addition to the six reasons allowed for paid sick leave, paid sick leave was also allowed after March 31, 2021 for circumstances where the employee (or self-employed individual) was seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID-19 and such employee has been exposed to COVID-19 or the employee's employer has requested such test or diagnosis, or the employee is obtaining immunization related to COVID-19 or recovering from any injury, disability, illness, or condition related to such immunization after medical diagnosis.

The credit was modified from a credit against OASDI tax on the employer (and the equivalent share of RRTA tax) to a credit against Medicare tax on the employer (and the equivalent amount of RRTA tax). The availability of the credits, set to expire on March 31,

[135] Within the meaning of sec. 1402.

[136] Division E of the bill.

[137] Any refund due to an individual is treated in the same manner as a refund due from a credit provision. 31 U.S.C. sec. 1324. Thus, amounts are appropriated to the Secretary of the Treasury for refunding such amounts.

[138] As defined by sec. 7001(c) of the Act, described above.

[139] These changes apply to employers and self-employed individuals.

2021, was extended by two calendar quarters to September 30, 2021. Further, the limitation on the amount of paid sick leave restarted on April 1, 2021 so that any paid sick leave taken prior to that date was not taken into account for purposes of the threshold.

In addition, non-discrimination rules were added along with an expansion of the credit to state and local governments.[140] There is also a gross up of the credit. Qualifying paid sick leave wages are taxable wages for OASDI and Medicare purposes, but the amount of the credit between April 1, 2021 and September 30, 2021 is increased by the amount of OASDI and Medicare tax on such qualifying paid sick leave wages.[141]

The paid sick leave credit was also expanded to include certain amounts paid under collective bargaining agreements.[142] Eligible amounts include defined benefit pension plan contributions and apprenticeship program contributions allocable to the qualified sick leave wages. The amount of the total credit allowed for paid sick leave and applicable thresholds included these contributions made under a collective bargaining agreement and are so aggregated, unlike allocable qualified health plan expenses.

Paid family leave credit

Employers

Under the FFCRA, employers are allowed a credit against OASDI or RRTA taxes in an amount equal to 100 percent of qualified family leave wages paid by the employer during the quarter.[143] Qualified family leave wages for purposes of the credit means wages[144] and compensation[145] paid by an employer which were required to be paid by reason of the EFMLEA between April 1, 2020 and March 31, 2021.[146] Similar to paid sick leave credits, subtitle G of the ARPA extended and modified the credits for paid family leave paid after March 31, 2021 and before October 1, 2021.[147]

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[140] There was no change for tax-exempt organizations under section 501(c)(3), which remained eligible, and the U.S. government, which remained ineligible for the credit for paid sick leave.

[141] Sec. 3133.

[142] Sec. 3131.

[143] Pub. L. No. 116-127 (March 18, 2021); Notice 2020-54, 2020-31 I.R.B. 226, July 27, 2020.

[144] Sec. 3121(a) (defining wages for FICA tax purposes).

[145] Sec. 3221(a) (defining compensation for RRTA tax purposes).

[146] The expiration of the credit allowed under the FFCRA was December 31, 2020. The Consolidated Appropriations Act of 2021 extended the credit to generally also apply to qualified sick leave wages paid between January 1, 2021 and March 31, 2021 that would have been required by the EPSLA had it been extended to that date.

[147] Pub. L. No. 2017-2 (March 11, 2021).

The maximum amount of qualified family leave wages eligible for the credit is $200 for any day (or portion thereof) for which the employee is paid qualified family leave wages, and in the aggregate with respect to all calendar quarters, $10,000. The credit is not allowed for unpaid leave.

The same components applicable to paid sick leave credits also apply to paid family leave credits insofar as qualified health plan expenses and the gross up. The amount of the family leave credit allowed was increased by qualified health plan expenses allocable to the paid family leave taken by an employee or self-employed individual. If an employer claims a credit under the FFCRA, the amount so claimed is included in gross income. Thus, the credit is not taken into account for purposes of determining any amount allowable as a payroll tax deduction, deduction for qualified family leave wages, or deduction for health plan expenses. In addition, the employer's income tax deduction for the employer's share of OASDI or RRTA tax for such quarter will not be reduced.[148] Any qualified family leave wages taken into account under the FFCRA are not eligible for the section 45S credit against the taxpayer's income tax for certain paid family and medical leave.[149]

The credit allowed under this FFCRA does not apply to the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of these entities. Under the FFCRA, employers in the territories may claim the credit by filing their quarterly Federal employment tax returns.

Self-Employed Individuals

An eligible self-employed individual is allowed an income tax credit for any taxable year for a qualified family leave equivalent amount, as described below. An eligible self-employed individual is defined as an individual who regularly carries on any trade or business[150] and would be entitled to receive paid leave during the taxable year under the EFMLEA, if the individual were an employee of an employer (other than himself or herself) that is subject to the requirements of the EFMLEA.

The qualified family leave equivalent amount with respect to an eligible self-employed individual is an amount equal to the number of days (up to 50) during the taxable year that the self-employed individual cannot perform services for which that individual would be entitled to paid leave pursuant to the EFMLEA[151] (if the individual were employed by an employer), multiplied by the lesser of two amounts: (1) 67 percent of the average daily self-employment income of the individual for the taxable year, or (2) $200. The individual's average daily self-

[148] Note that the qualified sick leave wages paid are not subject to the tax imposed by section 3111(a) or 3221(a). Employers also receive an increase in the otherwise available credit in the amount of the tax imposed by section 3111(b) on qualified sick leave wages.

[149] Section 45S provides an employer credit for certain paid family and medical leave.

[150] Within the meaning of sec. 1402.

[151] Division C of the bill.

employment income under the FFCRA is an amount equal to the individual's net earnings from self-employment for the year divided by 260.

The FFCRA includes additional rules for self-employed individuals. For example, the credit allowed is refundable,[152] an eligible individual's credit is reduced to the extent he or she received qualified family leave wages,[153] and the statute also addressed payments made in the U.S. territories.

Changes made by ARPA

The ARPA included several modifications to the paid family leave credits originally enacted in the FFCRA. First, there were "on Code" provisions added to Subtitle C of the Code, including Section 3132 related to paid family leave credits. The reasons allowed for paid family leave were expanded to include the same six reasons allowed for paid sick leave, in addition to circumstances where the employee (or self-employed individual) was seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID-19 and such employee has been exposed to COVID-19 or the employee's employer has requested such test or diagnosis, or the employee is obtaining immunization related to COVID-19 or recovering from any injury, disability, illness, or condition related to such immunization' after medical diagnosis.

The cap on the credit for amounts paid between April 1, 2021 and September 30, 2021 is two-thirds of regular pay up to $200 daily with the aggregate increased to $12,000 (from $10,000). The limitations for the qualified family leave equivalent amount also increased to reflect this change.[154]

In addition, paid family leave wages could be remitted to employees on the first day; specifically, there was no requirement that the first 10 days of leave be unpaid. These limitations "restarted" on April 1, 2021 so any leave taken prior to that date was not taken into account for purposes of the thresholds.

The credit was also modified from a credit against OASDI tax on the employer (and the equivalent share of RRTA tax) to a credit against Medicare tax of the employer (and the equivalent amount of RRTA tax). The credits, set to expire on March 31, 2021, were extended by two calendar quarters to September 30, 2021. In addition, non-discrimination rules were

[152] Any refund due to an individual is treated in the same manner as a refund due from a credit provision. 31 U.S.C. sec. 1324. Thus, amounts are appropriated to the Secretary of the Treasury for refunding such amounts.

[153] As defined by sec. 7001(c) of the Act, described above.

[154] The qualified family leave equivalent amount with respect to an eligible self-employed individual is an amount equal to the number of days (up to 60 days from 50) during the taxable year that the self-employed individual cannot perform services for which that individual would be entitled to paid leave pursuant to the EFMLEA (if the individual were employed by an employer), multiplied by the lesser of two amounts: (1) 67 percent of the average daily self-employment income of the individual for the taxable year, or (2) $200.

added along with an expansion of the credit to state and local governments.[155] Finally, there was a gross up of the credit. Qualifying paid family leave wages were taxable wages for OASDI and Medicare purposes after March 31, 2021, but the amount of the credit between April 1, 2021 and September 30, 2021 was increased by the amount of OASDI and Medicare tax on such qualifying paid family leave wages.

The paid family leave credit was also expanded to include certain amounts paid under collective bargaining agreements.[156] Eligible amounts include defined benefit pension plan contributions and apprenticeship program contributions allocable to the qualified family leave wages. The amount of the credit allowed for paid family leave and applicable thresholds included these contributions made under a collective bargaining agreement and are so aggregated.

[155] There was no change for tax-exempt organizations under section 501(c)(3), which remained eligible, and U.S. government, which remained ineligible for the credit for paid sick leave.

[156] Sec. 3132(e).

II. POLICY CONSIDERATIONS AND DATA ON EMPLOYER-PROVIDED FAMILY LEAVE, MEDICAL LEAVE, AND DEPENDENT CARE BENEFITS

In general

Policymakers, in their desire to provide certain benefits to individuals, may face a choice between providing a particular benefit directly to the individual via a public option (*e.g.,* public provision of K-12 education) or through the workplace by imposing employer mandates (*e.g.,* workers compensation plans, wage and hour laws). A third option may be to provide incentives for employer provision while stopping short of a mandate (*e.g.* the employer credit for paid family and medical leave). Public provision of desired benefits requires increased government spending and therefore additional means of finance, which may result in increased inefficiencies related to taxation. Employer mandates, on the other hand, largely avoid the increased inefficiencies associated with higher taxes,[157] but these mandates may instead result in a shifting of costs to workers if employers reduce wages to accommodate the cost of benefits. As a result, employer mandates may be more economically efficient than providing publicly funded options but may have less clear distributional effects.[158]

A third option, in which governments provide monetary incentives to employers to provide desired benefits, may also require additional taxes and so does not avoid potential efficiency losses associated with taxation. In addition, employer incentives that fall short of a mandate result in some employers choosing to provide benefits, while others do not. If workers have personal reasons for valuing these benefits differently, those who plan to use benefits heavily will be more likely to choose employers who provide these benefits. This problem of adverse selection results in elevated costs to those employers who choose to provide the benefits. In this way, the market discourages some of these employers from providing benefits even when offered a monetary incentive to do so.[159]

A variety of tax policies subsidize the provision of benefits for individuals through the workplace. Among these benefits are family leave, medical leave, as well as dependent care assistance and child care assistance. Background data on the employer provision of these various benefits follow, along with select available data on utilization of tax preferences related to these benefits.

Family leave policies

Family leave plans typically grant leave to workers to care for family members, including a newborn child, an adopted child, a sick child, or a sick adult relative. Allowed types of leave

[157] Depending on the circumstances, neither a mandate, nor a public option are necessarily entirely free of potential inefficiencies.

[158] Lawrence Summers, "Some Simple Economics of Mandated Benefits," *American Economic Review Papers and Proceedings*, vol. 79(2), May 1989, pages 177-183.

[159] Michael Rothschild and Joseph Stiglitz, "Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information," *Quarterly Journal of Economics*, vol. 90, November 1976, pages 629-50.

include maternity and paternity leave and can be paid or unpaid. Paid family leave is leave that is granted in addition to any sick leave, vacation, personal leave, or short-term disability leave available to the worker. Typical unpaid family leave plans extend leave without pay to workers for a period of up to several months while the worker cares for qualified family members.[160] Under the FMLA, eligible workers may take up to 12 weeks of unpaid leave per year for the birth, adoption, or foster care placement of a child; the care of a spouse, son, daughter, or parent with a serious health condition; or the worker's own serious health condition resulting in an inability to work. Employers with fewer than 50 workers at a worksite (and within 75 miles of that worksite) are excluded from the FMLA.[161]

Data in Table 1[162] show that as of March 2020, 20 percent of all private sector workers[163] have access to paid family leave and 88 percent to unpaid family leave. Smaller employers with fewer workers are less likely to offer paid or unpaid family leave than are larger employers. For example, 13 percent of workers in workplaces with fewer than 50 workers have access to paid family leave, compared to 31 percent of workers in workplaces with greater than 500 workers. Workers with relatively lower wages are also less likely to have access to paid or unpaid family leave than are workers with relatively higher wages, and a larger percentage of full-time workers have access to family leave benefits (paid or unpaid) than do part-time workers.

[160] U.S. Bureau of Labor Statistics, National Compensation Survey: Glossary of Employee Benefit Terms, September 2020. Available at https://www.bls.gov/ncs/ebs/national-compensation-survey-glossary-of-employee-benefit-terms.pdf.

[161] U.S. Department of Labor, Wage and Hour Division. Revised 2012. Fact Sheet #28: The Family and Medical Leave Act. Available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28.pdf.

[162] These data are from the U.S. Bureau of Labor Statistics, National Compensation Survey (NCS), a nationally representative establishment-based survey that provides comprehensive measures of (1) employer costs for employee compensation, including wages and salaries and benefits, (2) compensation trends, and (3) the incidence of employer-sponsored benefits among workers. The NCS also collects data and produces estimates on the provisions of selected employer-sponsored benefit plans. See https://www.bls.gov/opub/hom/ncs/home htm.

[163] Private sector workers do not include the self-employed, agricultural workers, and private household workers, and may include workers in the non-profit sector.

Table 1.–Percent of Private Sector Workers with Access to Workplace Family Leave Benefits, March 2020

	Paid Family Leave	Unpaid Family Leave[1]
Percentage of All Workers	20	88
Workplace Characteristics		
Number of Workers		
1-49	13	81
50-99	19	90
100-499	22	95
500+	31	94
Employment Status		
Full-time	24	91
Part-time	8	80
Average within Wage Quartiles		
Lowest 25	8	82
Second 25	19	89
Third 25	23	90
Highest 25	33	94

Source: U.S. Bureau of Labor Statistics, National Compensation Survey, March 2020.
Note: Percentages for each row may not add to 100 because some employers offer both paid and unpaid leave. [1]Access to unpaid family leave may not equal 100 percent if some workers are not considered eligible employees under FMLA.

Short-term paid medical leave policies

Paid sick leave

Some employers provide workers with access to one or both of two types of short-term medical leave: paid sick leave and short-term disability leave. Paid sick leave allows for paid absence from work for workers who are unable to work due to non-occupational illness or injury. Some plans may permit workers to be paid all or a portion of earnings up to a certain number of days per year, others may provide time off on an as-needed basis, and still others offer leave as part of a consolidated leave plan. In consolidated leave plans, multiple types of leave such as vacation, sick leave, and personal leave, are combined and used interchangeably within a single plan.

Data in Table 2 show that as of March 2020, 75 percent of all private sector workers have access to paid sick leave benefits. Smaller employers with fewer workers are less likely to offer paid sick leave benefits than are larger employers (66 percent versus 88 percent for workplaces with less than 50 versus greater than 500 workers). The vast majority of full-time workers have access to paid sick leave (86 percent), while only 45 percent of part-time workers have this same access. Also, lower paid workers are far less likely to have access to paid sick leave than higher paid workers.

Table 2.–Percent of Private Sector Workers with Access to Paid Sick Leave, March 2020

	Paid Sick Leave
Percentage of All Workers	75
Workplace Characteristics	
Number of Workers	
1-49	66
50-99	74
100-499	82
500+	88
Employment Status	
Full-time	86
Part-time	45
Average within Wage Quartiles	
Lowest 25	49
Second 25	80
Third 25	87
Highest 25	92

Source: U.S. Bureau of Labor Statistics, National Compensation Survey, March 2020.

Short-term paid disability leave

Some employers offer a second type of temporary paid medical leave in the form of short-term disability benefits. These plans provide benefits for non-occupational illnesses or accidents on a per-disability basis over a 6-month or 12-month period and typically provide benefits as a fixed percentage of a worker's earnings (covering 73 percent of all private sector workers in March 2020), a percentage that varies by a worker's annual earnings (21 percent of all private sector workers), or as a flat dollar amount (four percent of all private sector workers).[164] The generosity of benefits may vary with the amount of a particular worker's non-disability earnings, his length of service with the employer, or the length of the period over which disability benefits are paid. For 15 percent of private sector workers in 2020, short-term disability plans require employee contributions, and for the remaining 85 percent, employee contributions are not required.[165]

Data in Table 3 provide information on rates of access, participation and take-up of short-term disability benefits. Among all workers, 42 percent have access to employer-provided short-term disability benefits, and 41 percent participate in these benefits. In other words, 98 percent of workers who have access choose to participate in their employer-provided plan. As with paid family leave and paid sick leave, access is significantly higher for full-time workers, workers with large employers, and for higher paid workers relative to part-time workers, workers with small employers, and lower paid workers.

[164] U.S. Bureau of Labor Statistics, National Compensation Survey, Table 23, available at https://www.bls.gov/ncs/ebs/benefits/2020/employee-benefits-in-the-united-states-march-2020.pdf.

[165] U.S. Bureau of Labor Statistics, National Compensation Survey, Table 22, available at https://www.bls.gov/ncs/ebs/benefits/2020/employee-benefits-in-the-united-states-march-2020.pdf.

Table 3.–Access, Participation, and Take-Up Rates of Short-Term Paid Disability Leave for Private Sector Workers (percent), March 2020

	Access	Participation	Take-Up Rates
Percentage of All Workers	42	41	98
Workplace Characteristics			
Number of Workers			
1-49	29	29	99
50-99	34	34	98
100-499	50	49	98
500+	63	62	97
Employment Status			
Full-time	51	50	98
Part-time	16	15	94
Average within Wage Quartiles			
Lowest 25	17	17	96
Second 25	42	41	97
Third 25	52	51	98
Highest 25	64	63	99

Source: U.S. Bureau of Labor Statistics, National Compensation Survey, March 2020.

Dependent care flexible spending accounts

Some employers choose to provide workers with access to dependent care flexible spending accounts in which workers may designate set pre-tax amounts up to a limit to be used for out-of-pocket qualified expenses such as child care, elder care, or care for a disabled dependent. Data in Table 4 show that in March 2020, 40 percent of workers in the private sector had access to a dependent care flexible spending account. Significantly more full-time workers (47 percent) than part-time workers (17 percent) had access to this type of account, as did higher wage workers relative to lower wage workers (64 percent of workers in the top wage quartile had access compared to 18 percent of workers in the lowest wage quartile). Larger employers who employed greater numbers of workers were far more likely to offer access to such plans than were smaller employers.

Table 4.–Percent of Private Sector Workers with Access to Dependent Care Flexible Spending Accounts, March 2020

	Dependent Care Flexible Spending Accounts
Percentage of All Workers	40
Workplace Characteristics	
Number of Workers	
1-49	20
50-99	34
100-499	50
500+	72
Employment Status	
Full-time	47
Part-time	17
Average within Wage Quartiles	
Lowest 25	18
Second 25	37
Third 25	46
Highest 25	64

Source: U.S. Bureau of Labor Statistics, National Compensation Survey, March 2020.

Child care benefits

Some employers provide benefits to workers with children who face the cost of caring for children in a nursery or daycare center or by other caregiver arrangements. These benefits may be full or partial reimbursement of costs and qualifying care may be provided in facilities either on or off the employer's premises.

Data in Table 5 show that approximately 11 percent of all private sector workers have access to child care benefits, whether full or partial reimbursement, on-site or off-site. Full-time workers are more likely to have such benefits available to them (12 percent versus six percent for part-time workers), and higher wage workers with larger employers are more likely to have access than lower wage workers and those who work for smaller employers.

Table 5.–Percent of Private Sector Workers with Access to Employer Provided Child Care Benefits (percent)

	Child Care Benefits
Percentage of All Workers	11
Workplace Characteristics	
Number of Workers	
1-49	5
50-99	7
100-499	9
500+	28
Employment Status	
Full-time	12
Part-time	6
Average within Wage Quartiles	
Lowest 25	5
Second 25	7
Third 25	11
Highest 25	21
Highest 10	26

Source: U.S. Bureau of Labor Statistics, National Compensation Survey, March 2020.

Tax preferences for dependent care

As described in Parts I.A. and I.B. above, the Code provides benefits for dependent care in the form of a dependent care tax credit and an exclusion for employer-provided dependent care benefits. Selected data on claiming of these tax preferences by individual taxpayers follows.

Dependent care tax credit

In 2018, the dependent care tax credit was claimed on 6.5 million returns for a total amount of $3.8 billion. The data in Table 6 show the credit was generally claimed by both low- and high-income taxpayers.

Table 6.–Distribution of Dependent Care Credit, 2018

AGI Category	Number of Returns (Millions)	Amount ($ Billions)
Less than zero	[1]	[2]
$0 to $10,000	0	0
$10,000 to $20,000	0.1	[2]
$20,000 to $30,000	0.6	0.3
$30,000 to $40,000	0.6	0.4
$40,000 to $50,000	0.5	0.3
$50,000 to $75,000	1.0	0.6
$75,000 to $100,000	0.9	0.5
$100,000 to $200,000	2.0	1.2
$200,000 to $500,000	0.7	0.4
$500,000 to $1,000,000	0.1	0.1
$1,000,000 and over	[1]	[2]
Total, all taxpayers	6.5	3.8

Source: IRS, Statistics of Income 2018.
Notes: [1] Returns less than 50,000.
[2] Returns less than $50 million.

Employer-provided dependent care assistance programs

The Code provides an exclusion from income for certain employer-provided dependent care benefits if these benefits are furnished through established dependent care assistance programs, such as certain employer-provided child care facilities and dependent care FSAs. In 2018, this exclusion was claimed by 1.3 million taxpayers for a total of $4.6 billion. Data in Table 7 show that the majority of these benefits were claimed by taxpayers with AGI in excess of $100,000.

Table 7.–Distribution of Excluded Dependent Care Benefits, 2018

AGI Category	Number of Returns (Millions)	Amount ($ Billions)
Less than zero	[1]	[2]
$0 to $10,000	[1]	[2]
$10,000 to $20,000	[1]	[2]
$20,000 to $30,000	[1]	[2]
$30,000 to $40,000	[1]	[2]
$40,000 to $50,000	[1]	0.1
$50,000 to $75,000	0.1	0.2
$75,000 to $100,000	0.1	0.4
$100,000 to $200,000	0.5	2.0
$200,000 to $500,000	0.4	1.5
$500,000 to $1,000,000	0.1	0.2
$1,000,000 and over	[1]	0.1
Total, all taxpayers	1.3	4.6

Source: IRS, Statistics of Income 2018.
Notes: [1] Returns less than 50,000.
[2] Amount less than $50 million.