

# ALERT

## Employment Law & Employee Benefits

HINKLE

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### MARCH 26, 2020

## DOL ISSUES GUIDANCE ON NEW PAID LEAVE LAWS

We are still waiting on regulations from the Department of Labor (“DOL”) for the Families First Coronavirus Response Act (the “Act”), which requires most employers to provide paid leave due to COVID-19 issues. However, over the past few days, the DOL has issued several important pieces of guidance that you need to know about. This Alert summarizes the key information we learned from the new guidance. Links to the new guidance are at the bottom of this e-mail.

- **Effective Date.** The paid leave provisions in the Act take effect on April 1, 2020. Paid leave taken prior to April 1 is not provided under the Act and cannot be counted against the Act’s leave entitlements.
- **Poster.** The employment poster for the Act is available for download [here](#).
  - By April 1, employers are required to display the poster in a “conspicuous place” in the workplace or on an “employee information internal or external website.”
  - In lieu of posting, the poster can be emailed or mailed to all employees, including any new hires.
  - The poster does not have to be provided to laid-off/furloughed employees or applicants.
- **Small Business Exception.** In forthcoming regulations, the DOL will provide criteria that must be satisfied by employers with fewer than 50 employees who intend to claim an exemption from providing Emergency FMLA Leave because it would jeopardize their viability as a going concern. Employers will be required to document why they meet the criteria but will not be required to send the documentation to the DOL.
- **500-Employee Threshold.** For purposes of determining whether a private sector employer is under the 500-employee threshold:

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- All employees as of the first day of the requested leave are counted, including:
  - All full-time employees;
  - All part-time employees;
  - All employees on leaves of absence;
  - Any temporary employees who are jointly employed by the employer and any other employer (regardless of which employer's payroll the jointly-employed employees are maintained on); and
  - Any day laborers supplied by a temporary agency (regardless of which employer is the temporary agency or the client firm if there is a continuing employment relationship).
- If an employer is an "integrated employer" under the Family & Medical Leave Act, then all employees of the "integrated employer" are counted for purposes of the 12 weeks of Emergency FMLA Leave under the Act. (Click [here](#) to read our previous Alert that explains what Emergency FMLA Leave is.)
- The "joint employer" test under the Fair Labor Standards Act is used to determine if the "common employees" of two or more employers are counted. This test is used for Emergency Sick Leave (click [here](#) to read our previous Alert that explains what Emergency Sick Leave is) and is also used for Emergency FMLA Leave if the "integrated employer" test is not satisfied.
- The "integrated employer" and "joint employer" tests are each complex and the determination of whether separate entities must be treated as a single employer as a result of one or both of those tests will turn on the facts and circumstances uniquely facing individual employers. If you need assistance in assessing whether your entities are properly characterized as a "joint employer" and/or an "integrated employer," please let us know.
- **Transition Period.** Prior to April 18, 2020, the DOL will not bring enforcement action against any employer (private or public) that has made "reasonable good faith efforts to comply with the Act," but only if:
  - The employer remedies any violations, including by making all affected employees whole as soon as practicable;

- The employer did not know its actions were prohibited and did not show reckless disregard as to whether its actions were prohibited; and
- The DOL receives a written commitment from the employer to comply with the Act in the future.

#### **Links to DOL Guidance**

- **Poster:**  
[https://www.dol.gov/sites/dolgov/files/WHd/posters/FFCRA\\_Poster\\_WH1422\\_No-n-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHd/posters/FFCRA_Poster_WH1422_No-n-Federal.pdf)
- **Poster FAQs:** <https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>
- **Act FAQs:** <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
- **Field Assistance Bulletin No. 2020-1:** <https://www.dol.gov/agencies/whd/field-assistance-bulletins/2020-1>

#### **Links to Previous Hinkle Alerts on the Act**

- **Coronavirus Legislation – New Rules for FMLA and Paid Sick Leave:**  
<https://www.hinklaw.com/blog/alerts/coronavirus-legislation-new-rules-for-fmla-and-paid-sick-leave/>
- **More Employee Benefit Coronavirus Issues to Address:**  
<https://www.hinklaw.com/blog/alerts/more-employee-benefit-coronavirus-issues-to-address/>

If you have any questions, please do not hesitate to call the Employment Law and Employee Benefits Team at Hinkle Law Firm at (316) 267-2000.

Please be assured that our offices are still open. In the event we must move to a remote work environment, we have technology and procedures that will allow us to make the transition quickly and seamlessly. So we fully expect to be available if you need us.

#### **Employee Benefits**

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