

ALERT

Employment Law & Employee Benefits

HINKLE

LAW FIRM LLC

hinklaw.com 316.267.2000

APRIL 2, 2020

DOL ISSUES REGULATIONS FOR NEW PAID LEAVE LAWS

When a new law is enacted, it normally takes months and sometimes years before regulations are issued. But that is not the case with the Families First Coronavirus Response Act (the “Act”). On April 1, scarcely two weeks after the Act was enacted, and on the very day the Act took effect, the Department of Labor (“DOL”) rolled out temporary regulations for the Act.

The DOL regulations are loaded with important information for employers. This Alert summarizes the key information we learned from the DOL regulations, some of which was surprising, and some of which was previously communicated to the public through FAQs issued by the DOL. Links to the regulations, other DOL guidance related to the Act, and our previous alerts about the Act are at the end of this Alert.

- **References to Leave in the Regulations.** The regulations refer to the 80 hours of paid sick leave available under the Act as “Paid Sick Leave” and refer to the new type of FMLA leave that is available under the Act as “Expanded FMLA Leave.” We use those terms in this Alert.
- **Work Must be Available.** The regulations are crystal-clear that if an employer does not have work (including telework) for an employee to do, the employee cannot take Paid Sick Leave or Expanded FMLA Leave, even if the employee otherwise meets all the criteria to take the leave. In other words, leave can only be taken under the Act if the employee is supposed to be at work.
- **Telework.** If an employee can telework, the employee cannot take leave under the Act. The regulations state that an employee is able to telework if:
 - The employer has work for the employee; AND
 - The employer permits the employee to work from the employee’s location; AND
 - There are no extenuating circumstances (such as serious COVID-19 symptoms) that prevent the employee from performing that work.

WICHITA

1617 N. Waterfront Pkwy, Ste. 400 ~ Wichita, KS 67206-6639

OVERLAND PARK

6800 College Blvd, Ste. 600 ~ Overland Park, KS 66211-1533

- **Documentation of Need for Leave/Notice of Leave.** The regulations provide that when an employee wants to take leave under the Act, the employee must provide notice as soon as practicable and must provide all of the following:
 - Employee's name;
 - Date(s) for which leave is requested;
 - Qualifying reasons for the leave;
 - An oral or written statement that the employee is unable to work because of the qualifying reason for the leave;
 - The leave-specific documentation specified below; and
 - Any other documentation required by the IRS to receive tax credits for providing leave under the Act. (The IRS has published FAQs that discuss the documentation requirements. Click [here](#) to read the IRS FAQs. See Q44 for the documentation requirements.)

Importantly, the regulations prohibit employers from requiring any additional documentation.

- **Childcare Leave.** Under the Act, up to 80 hours of Paid Sick Leave and 12 weeks of Expanded FMLA Leave (10 weeks of which is paid) is available for any eligible employee who is caring for his/her child whose school or place of care is closed (or whose child care provider is unavailable) due to COVID-19 related reasons ("**Childcare Leave**"). The regulations provide that:
 - **Leave-Specific Documentation.** In addition to the documentation listed above, to take Childcare Leave, the employee must provide the following:
 - Name of the child being cared for;
 - Name of the school, place of care, or child care provider that has closed or become unavailable; and
 - A representation that no other suitable person will be caring for the child during the period for which the employee takes Paid Sick Leave or Expanded FMLA Leave.

Note: Q44 of the IRS FAQs found [here](#) states that the employee must provide the employer, “with respect to the employee’s inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.” However, neither the language of the Act nor the DOL regulations say anything about limiting Childcare Leave to “special circumstances” or to children younger than fifteen. We do not know where the IRS got those ideas, but it might have been something batted around between the IRS and DOL as the DOL regulations were being written. Regardless, based on the DOL regulations, we think employers should not ask for that type of statement from the employees or limit employees’ use of Childcare Leave to “special circumstances” or to children younger than fifteen.

- **Definition of “Child Care Provider.”** Surprisingly, although the Act defines “child care provider” as a “provider who receives compensation for providing child care services on a regular basis,” the regulations state that “the eligible child care provider need not be compensated or licensed if he or she is a family member or friend, such as a neighbor, who regularly cares for the Employee’s child.”
- **Definition of “Place of Care.”** “Place of Care” is defined to mean “a physical location in which care is provided for the Employee’s child while the Employee works for the Employer.” The regulations make it clear that such location “does not have to be solely dedicated to such care.” The regulations specifically mention that “Place of Care” includes locations such as homes, summer camps, summer enrichment programs, respite care programs, before and after school care programs, day care facilities, and preschools.
- **Interaction between Paid Sick Leave and Expanded FMLA Leave.** The first two weeks of Childcare Leave may be taken as Paid Sick Leave (unless Paid Sick Leave has already been used for another purpose), with subsequent weeks paid as Expanded FMLA Leave.
- **Interaction between Childcare Leave and Normal Leave.**
 - During the first two weeks of Expanded FMLA Leave, if Paid Sick Leave is not available for the full two weeks, the employee may choose to be paid using the employer’s normal paid leave.
 - The employee and employer can agree that while the employee is taking Childcare Leave (which is paid at 2/3 the regular rate), the employee can use the employer’s normal paid leave to provide full wages to the employee during that time.

- The employer cannot force the employee to use normal paid leave during Childcare Leave.
- **Interaction between Expanded FMLA Leave and Normal FMLA Leave.** There are special rules for employees who were eligible for FMLA leave prior to the effective date of the Act:
 - If the employee already used his/her entire allotment of 12 weeks of FMLA during the 12-month FMLA period, the employee cannot take Expanded FMLA Leave during that period but is still eligible for Paid Sick Leave as Childcare Leave.
 - If the employee used some, but not all, of his/her 12-week allotment of FMLA leave during the 12-month FMLA period, the remainder of the 12 weeks can be taken as Expanded FMLA Leave.
 - If the employee uses less than 12 weeks of Expanded FMLA Leave during the 12-month FMLA period, the remainder of the 12 weeks can be taken for any qualifying reason under the FMLA.
 - The employee can take no more than 12 weeks of Expanded FMLA Leave between April 1, 2020, and December 31, 2020, even if that period spans two 12-month FMLA periods. But if there are such periods and the employee was unable to take Expanded FMLA Leave during the first period because he/she had already used the allotment of 12 weeks for that period, the employee can take Expanded FMLA Leave in the second such 12-month FMLA period.
- **Intermittent Use.** If the employer agrees, Childcare Leave can be taken intermittently, whether the employee is working at the normal jobsite or teleworking.
- **Paid Sick Leave due to Quarantine or Isolation Order.** Under the Act, up to 80 hours of Paid Sick Leave is available to any eligible employee who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19. The regulations provide that:
 - **Leave-Specific Documentation.** In addition to the documentation listed above, to take Paid Sick Leave for this reason, the employee must provide only the name of the government entity that issued the order.

- **Definition of Quarantine or Isolation Order.**
 - Such orders include “quarantine, isolation, containment, shelter-in-place, or stay-at-home orders . . . that cause the Employee to be unable to work even though his or her Employer has work that the Employee could perform but for the order.”
 - Such orders also include situations where the government authority has “advised categories of citizens (*e.g.* of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine.”
- **Intermittent Use.** This type of leave cannot be taken intermittently unless the employee is teleworking and the employer agrees to allow intermittent use.
- **Paid Sick Leave due to Advice of Health Care Provider to Self-Quarantine.** Under the Act, 80 hours of Paid Sick Leave is available to any eligible employee who has been advised by a health care provider to self-quarantine. The regulations provide that:
 - **Leave-Specific Documentation.** In addition to the documentation listed above, to take Paid Sick Leave for this reason, the employee must provide only the name of the health care provider who advised the employee to self-quarantine due to concerns related to COVID-19. Importantly, the employer cannot require the employee to provide a doctor’s note or other documentation of the health care provider’s advice. In other words, the employer has to take the employee’s word for it.
 - **Advice/Belief of Healthcare Provider.** The healthcare provider must base his/her advice on a belief that the employee:
 - Has or may have COVID-19; OR
 - Is “particularly vulnerable to COVID-19.”

However, as noted above, if an employee tells the employer something like, “Dr. No, my healthcare provider, has advised me to self-quarantine due to COVID-19,” the employer cannot ask for a note from the healthcare provider or other documentation of what the healthcare provider actually advised.

- **Intermittent Use.** This type of leave cannot be taken intermittently unless the employee is teleworking and the employer agrees to allow intermittent use.
- **Paid Sick Leave for Seeking Medical Diagnosis for COVID-19.** Under the Act, 80 hours of Paid Sick Leave is available to any eligible employee who is experiencing COVID-19 symptoms and is seeking a medical diagnosis. The regulations provide that:
 - **Leave-Specific Documentation.** Other than the documentation listed above, the regulations do not require any additional information to be provided by the employee in order to take Paid Sick Leave for this purpose. Importantly, the employer cannot require the employee to provide evidence that he/she saw a healthcare provider. The employer has to take the employee's word for it.
 - **Symptoms.** The symptoms are fever, dry cough, shortness of breath, or any other COVID-19 symptoms identified by the CDC.
 - **Limitation on Use.** This type of leave is "limited to time the Employee is unable to work because the Employee is taking affirmative steps to obtain a medical diagnosis, such as making, waiting for, or attending an appointment for a test for COVID-19."
 - **Intermittent Use.** This type of leave cannot be taken intermittently unless the employee is teleworking and the employer agrees to allow intermittent use.
- **Paid Sick Leave to Care for an Individual.** Under the Act, up to 80 hours of Paid Sick Leave is available to any eligible employee who is caring for an "individual" subject to a quarantine or isolation order or is self-quarantined upon the advice of a health care provider.
 - **Leave-Specific Documentation.** In addition to the documentation listed above, to take Paid Sick Leave for this reason, the employee must provide, as applicable, only (i) the name of the government entity that issued the order to which the individual is subject or (ii) the name of the health care provider who advised the individual to self-quarantine due to concerns related to COVID-19.
 - **Definition of "Individual."** The regulations limit an "individual" to an employee's immediate family member, someone who regularly resides in the employee's home, or a "similar relationship that creates an expectation that the Employee would care for the person if he or she were quarantined or self-quarantined." The regulations make it clear that this "does not include persons with whom the Employee has no personal relationship."

- **Definition of Quarantine or Isolation Order.** The definition of “quarantine or isolation order” discussed above applies to this type of leave.
- **Advice/Belief of Healthcare Provider.** The advice of the individual’s health care provider must be based on the same belief as discussed above.
- **Intermittent Use.** This type of leave cannot be taken intermittently unless the employee is teleworking and the employer agrees to allow intermittent use.
- **Amount of Paid Sick Leave.**
 - **Full-Time Employees.**
 - Employees who are regularly scheduled to work at least 40 hours per week (“full-time employees”) are entitled to 80 hours of Paid Sick Leave.
 - An employee who does not have a regular work schedule is considered a “full-time employee” if he/she was scheduled to work (including any leave) for at least 40 hours per workweek during the 6-month period ending on the date when the Employee begins taking Paid Sick Leave or, if shorter than 6 months, the employee’s period of employment.
 - **Part-Time Employees.**
 - Employees who are regularly scheduled to work less than 40 hours per week (“part-time employees”) receive a pro-rated amount of Paid Sick Leave that is equal to the number of hours that the employee is normally scheduled to work over two workweeks.
 - An employee who does not have a regular work schedule and who is not a full-time employee using the test above is entitled to the number of hours of Paid Sick Leave equal to 14 times the average number of hours that the employee was scheduled to work each calendar day (including any leave) over the 6-month period ending on the date when the Employee begins taking Paid Sick Leave. To apply this rule, we think that to calculate the average number of hours, you need to divide the scheduled hours during the 6-month period by the number of calendar days during the 6-month period, not by the number of calendar days the employee was scheduled to work.

- If the employee has worked less than 6 months, the number of leave hours will be equal to 14 times the number of hours the employer and employee agreed, at the time of hire, the employee would work on average each calendar day.
 - If there is no such agreement, then the employee is entitled to the number of leave hours that are equal to 14 times the average number of hours per calendar day that the employee was scheduled to work (including leave hours) during the entire period of employment. To apply this rule, we think that to calculate the average number of hours, you need to divide the scheduled hours during the entire period of employment by the number of calendar days during the entire period of employment, not by the number of calendar days the employee was scheduled to work.
- **Exclusion of Health Care Providers.** An employer can exempt “health care providers” from taking leave under the Act. The regulations expand the definition of “health care provider” to include:
 - Anyone employed at the following institutions: a doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity.
 - Anyone employed at any permanent or temporary institution, facility, location or site where medical services are provided that are similar to the institutions listed above.
 - Anyone employed by an entity that contracts with any of the institutions listed above to provide services or to maintain the operation of the facility where that individual’s services support the operation of the facility.
 - Any one employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.
 - **Exclusion of Emergency Responders.** An employer can exempt “emergency responders” from taking leave under the Act. The regulations define “emergency responders” to include:

- Anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19.
- Military or national guard, law enforcement officers, correctional institution personnel, fire fighters, EMS personnel, physicians, nurses, public health personnel, EMT's, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency.
- Individuals who work for facilities employing the individuals listed above and whose work is necessary to maintain the operation of the facility.
- **Small Businesses are Exempt from Childcare Leave.** The regulations provide that an employer with fewer than 50 employees does not have to provide Childcare Leave (either as Paid Sick Leave or as Expanded FMLA Leave) to an employee if “an authorized officer of the business has determined” at least one the following:
 - The Childcare Leave requested by the employee(s) would result in the business's expenses and financial obligations exceeding available business revenues and cause the business to cease operating at a minimal capacity; OR
 - The absence of the employee(s) requesting Childcare Leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; OR
 - There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee(s) requesting Childcare Leave, and such labor or services are needed for the business to operate at a minimal capacity.

The exemption can be used for one or more employees. To elect this exemption, the employer must document that a determination has been made pursuant to the criteria outlined above and should retain such documentation in its files (but should not send the documentation to the DOL). It is important to note that the regulations do not provide an exemption for small businesses for any other type of Paid Sick Leave.

Click below for links to DOL Guidance on the Act

- [Temporary Regulations](#)
- [Poster](#)
- [Poster FAQs](#)
- [Act FAQs](#)
- [Field Assistance Bulletin No. 2020-1](#)

Click below for links to Previous COVID-19 Employment Law and Employee Benefit Alerts

- [The CARES Act and Retirement Plans: Coronavirus-Related Distributions, Plan Loans, and RMDs](#)
- [DOL Issues Guidance on New Paid Leave Laws](#)
- [More Employee Benefit Coronavirus Issues to Address](#)
- [Coronavirus Legislation - New Rules for FMLA and Paid Sick Leave](#)

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.

Employee Benefits

[Eric Namee](#)

[Steven Smith](#)

[Brad Schlozman](#)

[Ruhe Rutter](#)

Employment Law

[Jim Spencer](#)

[Eric Barth](#)