Q: Does a joint venture constitute an employer with over 500 employees under the Families First Coronavirus Response Act ("FFCRA")?

A: Both the Emergency Paid Sick Leave Act and the Family Medical Leave Expansion Act under the FFCRA apply to only employers with less than 500 employees. Common questions are: (1) how to count employees for purposes of the FFCRA; and (2) when are separate entities considered a single employer for the purpose of counting employees under the FFCRA.

The Department of Labor issued preliminary guidance on March 25, 2020 in an attempt to answer some of the common questions in connection with the FFCRA. While the guidance provided does not specifically answer the question of whether the employees of joint ventures are considered together when counting employees for each entity, in combination with other factors discussed below, the guidance given is instructive. The following question and answer provided by the Department of Labor is particularly pertinent.

> ***As an employer, how do I know if my business is under the 500-employee threshold and therefore must provide paid sick leave or expanded family and medical leave?***
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> *You have fewer than 500 employees if, at the time your employee's leave is to be taken, you employ fewer than 500 full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. In making this determination, you should include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the jointly employed employees are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, are not considered employees for purposes of the 500-employee threshold.*
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> *Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided under the Emergency Paid Sick Leave Act and expanded family and medical leave must be provided under the Emergency Family and Medical Leave Expansion Act.*
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> *In general, two or more entities are separate employers unless they meet the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA). If two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act.*

Based on the above, an employer is covered if, at the time the leave is to be taken, the business employs fewer than 500 employees. It is important to note that for joint venture purposes separate entities are counted as one employer under the FFCRA if two or more entities are found to be "joint employers" under the Fair Labor Standards Act ("FLSA") or if two or more entities are an "integrated employer" under the Family Medical Leave Act ("FMLA"). If the entities meet either of those standards, all of the employees of each entity will be counted in determining employer coverage for purposes of the FFCRA.

When assessing whether a "joint employer" relationship exists under the FLSA, the following non-exhaustive list of relevant factors are considered: (1) the alleged employer's authority to hire and fire the relevant employees; (2) the alleged employer's authority to promulgate work rules and assignments and to set the employees' conditions of employment including compensation, benefits, work schedules, and the rate and method of payment; (3) the alleged employer's involvement in day-to-day employee supervision, including employee discipline; and (4) the alleged employer's actual control of employee records, such as payroll, insurance, or taxes.

In the integrated employer context, the criteria analyzed is whether several entities are properly seen as a single employer despite being nominally and technically distinct. In performing this analysis, the following considerations should be taken into account: (1) common management; (2) interrelation between operations; (3) centralized control of labor relations; and (4) degree of common ownership/financial control Emphasis should be placed on the need to examine economic realities as opposed to corporate formalities.

Based on the above, to determine whether a joint venture has to include each involved entity's employees when counting for FFCRA purposes, a factual examination of each element of both the "joint employer" and "integrated employer" tests must be conducted.

Until more formal guidance is provided by the Department of Labor, a cautious approach is appropriate, particularly if an entity in a joint venture does not normally employ 500 or more employees on its own.