

## Employment and Employee Benefit Provisions of the Families First Coronavirus Response Act (FFCRA), the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), and Government Agency Guidance

Event	Result
<p><b>Employee’s Child’s School / Child Care Provider Closed.</b></p> <p>An employee of an employer with fewer than 500 employees is unable to work or telework due to a need to care for his/her child under the age of 18 if the child’s school or place of care has been closed, or the childcare provider of the child is unavailable, due to the COVID-19 healthcare emergency.</p> <p><i>*See “Employee Has Worked Fewer than 30 Calendar Days,” below.</i></p>	<ul style="list-style-type: none"> <li>&gt; Effective April 1, 2020, the employee is entitled to up to 12 weeks of paid leave to care for the child at the rate of 2/3 of the employee’s regular hourly rate of pay as defined by the Fair Labor Standards Act (FLSA) up to a maximum of:                             <ul style="list-style-type: none"> <li>o \$200 per day, and</li> <li>o \$12,000 in aggregate.</li> </ul> </li> <li>&gt; Such paid leave is based on the hours the employee would otherwise be normally scheduled to work.</li> <li>&gt; Upon return to work, the employee must be returned to the same or equivalent position unless (1) the employer had fewer than 25 employees, and (2) the position the employee held when leave commenced no longer exists due to economic conditions or other changes in the operating conditions of the employer that affect employment due to the public health emergency during the leave if the employer has made reasonable efforts to restore the employee to an equivalent position (pay, benefits, and other terms of employment) that the employee held. If such reasonable efforts fail, the employee must be placed on a recall list that lasts for 12 months from the earliest to occur of (1) the date the public health emergency concludes, or (2) the date that is 12 weeks after the date the employee’s leave commences.</li> <li>&gt; Employer may claim a tax credit for the FFCRA paid leave provided to employees on or after April 1, 2020. <i>See “Employer Intends to Claim the FFCRA Leave Tax Credit,” below.</i></li> </ul>

Event	Result
<p><b>Employee Under Quarantine or Seeking Diagnosis.</b></p> <p>An employee of an employer with fewer than 500 employees who:</p> <ul style="list-style-type: none"> <li>&gt; is subject to a federal, state, or local quarantine or isolation order related to COVID-19;</li> <li>&gt; has been advised by a healthcare provider to self-quarantine due to COVID-19; or</li> <li>&gt; is experiencing COVID-19 symptoms and is seeking a medical diagnosis.</li> </ul>	<ul style="list-style-type: none"> <li>&gt; Effective April 1, 2020, the employee is entitled to paid leave at 100% of the employee’s regular rate of pay for the number of hours the employee would otherwise be normally scheduled to work up to a maximum of:                             <ul style="list-style-type: none"> <li>o for full-time employees (40 hours per week), 80 hours; and</li> <li>o for part-time employees, a number of hours equal to the number of hours the employee works on average over a two-week period.</li> </ul> </li> </ul> <p>The paid leave is capped at \$511 per day up to an aggregate of \$5,110 per affected employee.</p> <ul style="list-style-type: none"> <li>&gt; Employer may claim a tax credit for the FFCRA paid leave provided to employees on or after April 1, 2020. See “<i>Employer Intends to Claim the FFCRA Leave Tax Credit,</i>” below.</li> </ul>
<p><b>Employee Caring for Individual under Quarantine.</b></p> <p>An employee of an employer with fewer than 500 employees who is caring for an individual who is under a government quarantine order or healthcare provider self-quarantine order.</p>	<ul style="list-style-type: none"> <li>&gt; Effective April 1, 2020, the employee is entitled to paid leave at 2/3 of the employee’s regular rate of pay for the number of hours the employee would otherwise be normally scheduled to work up to a maximum of:                             <ul style="list-style-type: none"> <li>o for full-time employees, 80 hours; and</li> <li>o for part-time employees, a number of hours equal to the number of hours the employee works on average over a two-week period.</li> </ul> </li> </ul> <p>The paid leave is capped at \$200 per day up to an aggregate of \$2,000 per affected employee.</p> <ul style="list-style-type: none"> <li>&gt; Employer may claim a tax credit for the FFCRA paid leave provided to employees on or after April 1, 2020. See “<i>Employer Intends to Claim the FFCRA Leave Tax Credit,</i>” below.</li> </ul>

Event	Result
<p><b>Employer Intends to Claim the FFCRA Leave Tax Credit.</b></p>	<ul style="list-style-type: none"> <li>&gt; Employers who pay FFCRA-required sick leave or child care leave may retain the amount of payroll taxes equal to the amount of the required sick and child care leave paid on or after April 1, 2020, rather than deposit them with the IRS with the quarterly Form 941 payroll tax return.</li> <li>&gt; Federal income taxes and the employee and employer portions of Social Security and Medicare taxes will be available for retention by employers.</li> <li>&gt; If payroll taxes are insufficient to cover the paid leave under the FFCRA, employers may request accelerated payment of the excess amount from the IRS. The IRS expects to process such requests within two weeks.</li> <li>&gt; Tax credits are not available for paid leave in excess of FFCRA requirements.</li> <li>&gt; Tax credits are not available for paid leave attributable to any period before April 1, 2020.</li> </ul>
<p><b>Employee has non-FFCRA Paid Time Off (PTO) Available.</b></p>	<ul style="list-style-type: none"> <li>&gt; An employer with fewer than 500 employees may not require an employee to use otherwise available PTO before utilizing FFCRA leave.</li> <li>&gt; The employee may choose to use PTO first. PTO voluntarily used by an employee does not run concurrently with FFCRA leave. The full amount of FFCRA leave remains available after the employee uses PTO.</li> <li>&gt; Employer and employee may agree to allow the employee who is receiving 2/3 pay FFCRA paid leave to use PTO to cover the remaining 1/3 of pay.</li> </ul>

Event	Result
<p><b>Employee Wishes to Take Expanded Family and Medical Leave and/or Emergency Paid Sick Leave Intermittently.</b></p>	<ul style="list-style-type: none"> <li>&gt; <b>Expanded FMLA Leave</b> <ul style="list-style-type: none"> <li>○ An employer may allow an employee to take the expanded FMLA Leave intermittently</li> <li>○ <b>Example:</b> a teleworking employee who works from 1:00 to 2:30, takes leave from 2:30 to 4:00, and then returns to teleworking.</li> <li>○ <b>Example:</b> an employee who reports to a worksite takes leave on Mondays, Wednesday, and Fridays.</li> </ul> </li> <li>&gt; <b>Emergency Paid Sick Leave</b> <ul style="list-style-type: none"> <li>○ <b>Telework:</b> An employer may allow an employee who teleworks to take intermittent Emergency Sick Pay Leave.</li> <li>○ <b>Working at Worksite:</b> <ul style="list-style-type: none"> <li>▪ Unless an employee is teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments. It cannot be taken intermittently if the leave is being taken for a qualifying reason other than the care of a child whose school and/or day care provider is closed / unavailable.</li> <li>▪ Once an employee begins taking Emergency Paid Sick Leave for one or more of such qualifying reasons, the employee must continue to take paid sick leave each day until the employee either (1) exhausts the paid sick leave, or (2) no longer has a qualifying reason for taking Emergency Paid Sick Leave.</li> <li>▪ Consistent with Expanded FMLA Leave, an employer may agree to allow an employee to take Emergency Paid Sick Leave intermittently, even if the employee is not teleworking.</li> </ul> </li> </ul> </li> </ul>

Event	Result
<p><b>Employee Who Takes Emergency Paid Sick Leave No Longer Has a Qualifying Reason for Such Leave Before the Leave is Exhausted.</b></p>	<ul style="list-style-type: none"> <li>&gt; The employee may take any remaining Emergency Paid Sick Leave at any time before December 31, 2020, for a qualifying reason.</li> </ul>
<p><b>Employee has Worked Fewer than 30 Calendar Days.</b></p>	<ul style="list-style-type: none"> <li>&gt; An employee who has worked fewer than 30 calendar days (or has been on an employer’s payroll for fewer than 30 days) immediately prior to the day the employee’s leave would begin is not eligible for the expanded FMLA leave under the FFCRA:                             <ul style="list-style-type: none"> <li>○ Employee would be entitled to the Emergency Sick Pay under the FFCRA of 2/3 of the employee’s rate of pay for up to 80 hours for full-time employees, or two weeks for part-time employees if the employee is unable to work due to a child’s school or child care provider closing or being unavailable.</li> </ul> </li> <li>&gt; <b>Rehired Employees:</b> An employee who was laid off not earlier than March 1, 2020, had worked for the employer for at least 30 of the last 60 calendar days before the layoff, and is rehired is treated as having worked at least 30 calendar days for purposes of the FFCRA expanded FMLA leave.</li> </ul>
<p><b>Employee has taken non-FFCRA Expanded FMLA Leave.</b></p>	<ul style="list-style-type: none"> <li>&gt; An employee’s maximum FMLA leave during a 12-month period is 12 weeks. FFCRA Expanded FMLA leave is reduced by the employee’s other FMLA leave.</li> <li>&gt; The FFCRA 80 hours / two weeks of Emergency Sick Paid Leave is not reduced by FMLA leave.</li> </ul>
<p><b>Employer Employs 500 or more Employees.</b></p>	<ul style="list-style-type: none"> <li>&gt; The employee is not entitled to paid leave under the FFCRA.</li> <li>&gt; The employer may voluntarily provide paid leave, but the FFCRA tax credit is not available.</li> <li>&gt; All employees of FLSA “joint employers” and of FMLA “integrated employers” are aggregated for purposes of the 500-employee threshold.</li> </ul>

Event	Result
<b>Employer Provides FFCRA-type Leave Before April 1, 2020.</b>	<ul style="list-style-type: none"> <li>&gt; Leave provided before April 1, 2020, is not eligible for the FFCRA tax credits.</li> </ul>
<b>Employee is Furloughed.</b>	<ul style="list-style-type: none"> <li>&gt; The FFCRA leave requirements do not apply.</li> <li>&gt; Employer should check employee benefit plan documents to determine employees' continued eligibility for group health plan benefits. If the employer uses the look-back measurement method of identifying "full-time employees" for purposes of the Affordable Care Act, employees who satisfied the look-back test will remain eligible for group health plan benefits. If employees become ineligible for health, dental, an/or vision coverage, COBRA continuation coverage (or state law "mini-COBRA") rights will apply.</li> <li>&gt; Employee may apply for unemployment insurance benefits.</li> </ul>
<b>Employee is Laid Off.</b>	<ul style="list-style-type: none"> <li>&gt; The FFCRA leave requirements do not apply.</li> <li>&gt; The employee may be entitled to COBRA continuation coverage (or state "mini-COBRA").</li> <li>&gt; Employee may apply for unemployment insurance benefits.</li> </ul>
<b>Employee Seeks Leave Solely Due to COVID-19 Symptoms or Concerns.</b>	<ul style="list-style-type: none"> <li>&gt; Absent a government or health-care provider quarantine or isolation order, an employee is not entitled to FFCRA paid leave, except to seek a diagnosis.</li> </ul>

Event	Result
<p><b>Employee is Able to Telework.</b></p>	<ul style="list-style-type: none"> <li>&gt; FFCRA paid leave is not available to an employee who is able to telework.</li> <li>&gt; Employer may encourage or require employees to telework but must not single out employees either to telework or continue to report to work on a basis prohibited by Equal Employment Opportunity laws.</li> <li>&gt; Employers must pay employees their regular rate of pay or salary for telework.</li> <li>&gt; Minimum wage requirements apply to telework.</li> <li>&gt; There are no Occupational Safety and Health Administration regulations regarding telework in home offices.</li> <li>&gt; Employers who are required to keep records of work-related injuries and illnesses will continue to be responsible for keeping such records on injuries and illnesses occurring in a home office.</li> </ul>
<p><b>Employer's Worksite is Closed.</b></p> <p><i>*See "Government Shutdown of the Employer," on page 8.</i></p>	<ul style="list-style-type: none"> <li>&gt; FFCRA leave requirements do not apply once a worksite is closed.</li> <li>&gt; Employee may apply for unemployment insurance benefits.</li> </ul>
<p><b>Employee's Hours of Employment are Reduced.</b></p>	<ul style="list-style-type: none"> <li>&gt; FFCRA paid leave may not be used for the hours the employee is no longer scheduled to work.</li> </ul>

Event	Result
<p><b>Government Shutdown of the Employer</b></p> <p><u>or</u></p> <p><b>Decline in the Employer's Gross Receipts of 50% Compared to the Same Quarter in 2019</b></p>	<ul style="list-style-type: none"> <li>&gt; An employer whose operations are fully or partially suspended due to a government order limiting commerce, travel or group meetings due to COVID-19 or who suffer a decline in gross receipts of more than 50% when compared to the same quarter in the prior year is eligible for a tax credit for 50% of the "qualified wages" (of up to \$10,000 per employee) paid to employees between March 2, 2020, and December 31, 2020.</li> <li>&gt; For employers with more than 100 full-time employees, qualified wages are wages paid to employees who do not work due to the COVID-19 circumstances.</li> <li>&gt; For employers with 100 or fewer employees, "qualified wages" are wages paid to all employees.</li> <li>&gt; Employers receiving CARES Act small business interruption loans are not eligible for the employee retention tax credit.</li> </ul>

Event	Result
<p><b>Unemployment Benefits – An Individual Who Traditionally Is Not Eligible for Unemployment Benefits (Independent Contractors, Gig Workers, and Self-Employed) Certifies that he or she:</b></p> <ul style="list-style-type: none"> <li>&gt; <b>Is unable to work due to an event that would qualify for FFCRA paid leave;</b></li> <li>&gt; <b>Is unable to work because the employee cannot reach his/her place of work due to a COVID-19 quarantine (including a new hire who was scheduled to commence work);</b></li> <li>&gt; <b>Has become the breadwinner because the head of the household died from COVID-19;</b></li> <li>&gt; <b>Is unable to work because his or her place of business closed due to COVID-19; and/or</b></li> <li>&gt; <b>Has to quit his or her job because of COVID-19.</b></li> </ul>	<ul style="list-style-type: none"> <li>&gt; The CARES Act extends to such individuals who are not eligible for traditional regular compensation and extended benefits under state and federal law, up to 39 weeks of COVID-19 Federal Pandemic Unemployment Compensation benefits.</li> <li>&gt; Eligible individuals receive \$600 per week in Federal Pandemic Unemployment Compensation in addition to the regular weekly unemployment benefit under state law.</li> <li>&gt; Eligible individuals receiving FFCRA paid COVID-19 leave are not eligible for the Federal Pandemic Unemployment Compensation benefits.</li> </ul>

EVENT	Result
<b>Unemployment Benefit – Traditional Employees</b>	<ul style="list-style-type: none"><li data-bbox="785 318 1906 448">&gt; The CARES Act permits traditional employees who are laid off, terminated, furloughed, or who had a substantial reduction in their working hours to receive traditional state unemployment compensation up to 39 weeks of COVID-19 Federal Pandemic Unemployment Compensation benefits.</li><li data-bbox="785 483 1906 581">&gt; Eligible individuals receive \$600 per week in Federal Pandemic Unemployment Compensation in addition to the regular weekly unemployment benefit under state law.</li><li data-bbox="785 617 1906 680">&gt; Eligible individuals receiving FFCRA paid COVID-19 leave are not eligible for the Federal Pandemic Unemployment Compensation benefits.</li></ul>

Event	Result
<p><b>Employer Maintains a Qualified Retirement Plan</b></p>	<ul style="list-style-type: none"> <li>&gt; <b>Coronavirus-Related Distributions.</b> Participant may take “coronavirus-related distributions” of up to \$100,000 per year from his or her account in any tax qualified retirement plan without the imposition of the excise tax applicable to early distributions, <i>i.e.</i>, the 10% early withdrawal penalty. In addition, such distributions will be includable in an individual’s gross income ratably over a three-year period. Individuals may repay such distributions to a retirement plan within three years of receiving the distribution. A “coronavirus-related distribution” is a distribution made on or after January 1, 2020, and before December 31, 2020, to an individual:                     <ul style="list-style-type: none"> <li>○ who is diagnosed with the virus SARS-CoV-2 or with COVID-19 by a CDC-approved test;</li> <li>○ whose spouse or dependent is so diagnosed;</li> <li>○ who experiences adverse financial consequences due to quarantine, furlough, lay off or reduced work hours due to SARS-CoV-2 or COVID-19;</li> <li>○ who experiences adverse financial consequences for being absent from work due to a lack of child care because of SARS-CoV-2 or COVID-19; or,</li> <li>○ who satisfies other factors as determined by the Secretary of the Treasury.</li> </ul> </li>   <li>&gt; <b>Increase in Plan Loans.</b> The CARES Act increased the maximum amount of qualified plan loans to the lesser of \$100,000 and 100% of a participant’s vested account balance. Such loans are available during the 180-day period beginning on the date of enactment of the CARES Act. The due date for loan repayments due through the end of 2020 must be delayed for one year, and repayments must be appropriately adjusted to reflect such delay and any interest accruing during such delay.</li>   <li>&gt; <b>Required Minimum Distribution Waiver.</b> The CARES Act provides for a temporary waiver of the required minimum distribution (RMD) rules for tax qualified retirement plans and IRAs. The waiver applies to any distributions that are required to be made during the 2020 calendar year (other than such distributions having been made before January 1, 2020).</li> </ul>

Event	Result
<p><b>Employer Maintains a Qualified Retirement Plan - <i>continued</i></b></p>	<ul style="list-style-type: none"> <li>&gt; <b>Defined Benefit Pension Plans.</b> <ul style="list-style-type: none"> <li>○ The due date for any defined benefit pension plan required minimum contribution under section 430 of the Internal Revenue Code (Code) that would otherwise be due in 2020 is delayed until January 1, 2021. Such contributions are increased by interest accruing between the original due date and the payment date.</li> <li>○ For purposes of Code section 436, plan sponsors are allowed to treat the plan's adjusted funding target attainment percentage (AFTAP) for the last plan year ending before January 1, 2020, as the AFTAP for plan years that include calendar year 2020.</li> </ul> </li> <li>&gt; <b>Plan Amendments.</b> Plans or annuity contracts must be amended for the RMD waiver and the coronavirus-related distributions and/or the increase in plan loans if permitted by the plan or IRA on or before the last day of the first plan year beginning on or after January 1, 2022, or such later date as the Secretary of the Treasury provides, or two years after such date for governmental plans.</li> </ul>

Event	Result
<p><b>Employer Maintains a Group Health Plan</b></p>	<ul style="list-style-type: none"> <li>&gt; <b>Diagnostic Test Coverage with No Cost-Sharing.</b> Group health plans must cover the following items without any cost-sharing (deductibles, copayments, and coinsurance) or medical management, such as prior authorization:                             <ul style="list-style-type: none"> <li>○ An <i>in vitro</i> diagnostic test for the detection of SARS-CoV-2 or the virus that causes COVID-19 that                                     <ul style="list-style-type: none"> <li>▪ is approved, cleared or authorized under the Federal Food, Drug, and Cosmetic Act;</li> <li>▪ the developer has requested emergency use authorization under the Federal Food, Drug, and Cosmetic Act (unless and until such request is denied);</li> <li>▪ is developed in and authorized by a State that has notified the Secretary of Health and Human Services of its intention to review COVID-19 tests;</li> <li>▪ is another test approved by the Secretary of Health and Human Services; and</li> </ul> </li> <li>○ Items and services furnished to an individual by a health care provider to determine the need for and resulting in an order for or administration of, an approved <i>in vitro</i> diagnostic product.</li> </ul> </li> <li>&gt; <b>Qualifying Coronavirus Preventive Services.</b> Group health plans must cover “qualifying coronavirus preventive services.” The term “qualifying coronavirus preventive services” means:                             <ul style="list-style-type: none"> <li>○ An evidence-based item or service that has an “A” or “B” rating in the current United States Preventive Services Task Force recommendation; or</li> <li>○ An immunization recommended by the Advisory Committee on Immunization Practices of the Centers for Disease Control with respect to the individual.</li> </ul> </li> </ul>

Event	Result
<b>Employer Maintains a Group Health Plan - continued</b>	<i>Such mandated coverage of preventive services is required as of the 15<sup>th</sup> business day following the date on which the applicable recommendation is made.</i>
<b>Employer Provides Student Loan Assistance to Employees</b>	<ul style="list-style-type: none"> <li>&gt; The CARES Act amends the Code to exclude from employees' gross income an employer's payment, whether to the employee or to a lender, of principal or interest on any qualified education loan.</li> </ul>

## LABOR, EMPLOYMENT & IMMIGRATION



**David C. Burton**

Labor, Employment & Immigration  
757.473.5354  
dburton@williamsmullen.com



**Laura D. Windsor**

Labor, Employment & Immigration  
804.420.6466  
lwindsor@williamsmullen.com



**Michael C. Lord**

Labor, Employment & Immigration  
919.981.4093  
mlord@williamsmullen.com

## EMPLOYEE BENEFITS & EXECUTIVE COMPENSATION



**Brydon M. DeWitt**

Employee Benefits & Executive Compensation  
804.420.6917  
bdewitt@williamsmullen.com



**Marc Purintun**

Employee Benefits & Executive Compensation  
804.420.6310  
mpurintun@williamsmullen.com