



HUNTON
ANDREWS KURTH



HUMAN RESOURCES AND LEGAL CONSIDERATIONS DURING COVID-19



About



and Presenters:

The Greater Richmond Bar Foundation (GRBF) is a nonprofit with a mission to increase access to justice through the mobilizing, training, and connecting of pro bono attorneys to clients in need. GRBF manages the **Pro Bono Clearinghouse** which connects nonprofits to a virtual law firm of over 350 attorneys for pro bono assistance in discrete transactional issues. www.grbf.org

- **Ryan Glasgow** is a partner at **Hunton Andrews Kurth LLP** and is a member of the firm's labor and employment team. Ryan represents employers and executives in all facets of labor and employment law, including wage and hour compliance and litigation; labor-management relations; discrimination and leave laws; and other day to day advice and counseling.
- **Reilly Moore** is an associate at **Hunton Andrews Kurth LLP** and is a member of the firm's labor and employment team. Reilly counsels employers on all aspects of labor and employment law and litigates labor and employment cases in state and federal courts throughout the country.
- **Marc Purintun** is the chair of **Williams Mullen's** Employee Benefits and Executive Compensation Practice. His practice focuses on the design and implementation of all types of employee benefit programs, including qualified and non-qualified retirement plans, incentive plans, as well as a variety of welfare benefit arrangements including health, disability, cafeteria plans, flexible spending arrangements, retiree welfare benefit plans, severance plans and other employee benefit plans.
- **Brydon DeWitt** is a partner at **Williams Mullen** whose practice focuses on all areas of employee benefits law, including qualified pension plans, welfare plans, Affordable Care Act compliance, HIPAA health information privacy and security, stock-based compensation and benefits issues arising in mergers and acquisitions. His experience includes advising clients with respect to ERISA, tax and securities law aspects of qualified retirement plans; providing advice regarding the HIPAA health information privacy standards and designing comprehensive HIPAA privacy policies, business associate agreements, plan amendments, forms and guides; and advising clients on COBRA continuation coverage issues regarding group health plans.

WEBINAR TOPICS



OSHA – 5 minutes



ADA – 5 minutes



Families First – 15 minutes



CARES Act – 10 minutes



Layoffs/Furloughs – 5 minutes



Salary Adjustments – 5 minutes



WARN Act – 5 minutes

Providing a Safe Workplace

OSHA General Duty Clause

- Provide workplace free from recognized hazards
- Enhanced cleaning, sanitizing procedures
- Work from home, social distancing or staggered shifts

Employee Tests Positive

- Notify public health department
- Prepare notice to other employees likely in contact
 - ADA: DO NOT RELEASE NAME/IDENTITY OF SICK EMPLOYEE
- Follow CDC return to work guidelines

Employee with Symptoms

- Encourage sick employees to stay home
- If symptoms consistent with COVID-19, do not return to work until 7 days symptom-free

Americans with Disabilities Act Compliance

Employee privacy

- Applies to positive COVID-19 tests, high-risk medical conditions
- Disclose only on need-to-know basis

Potential reasonable accommodation issues

Employee Temperature Testing

- Not advised unless local health instructs it
- Qualifies as an ADA medical test
- Keep results as confidential as possible
- Use medical professional or trained supervisor to conduct tests

FFCRA Expanded Family and Medical Leave Act / Sick Leave

Employee's Child's School / Child Care Provider Closed

- Employer employs fewer than 500 employees
- Employee has worked at least 30 days for the employer
- Employee is unable to work or telework due to a need to care for his/her child under the age of 18 because 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.
- 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:
 - \$200 per day and
 - \$10,000 in aggregate.
- Such paid leave is based on the hours the employee would otherwise be normally scheduled to work.

FFCRA Expanded Family and Medical Leave Act / Sick Leave

Employee Under Quarantine or Seeking Diagnosis

- An employee of an employer with fewer than 500 employees:
 - is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
 - has been advised by a healthcare provider to self-quarantine due to COVID-19.
- 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:
 - For full-time employees (40 hours per week), 80 hours
 - For part-time employees, a number of hours equal to the number of hours the employee works on average over a two-week period
- Paid leave is capped at \$511 per day up to an aggregate of \$5,110 per employee.

FFCRA Expanded Family and Medical Leave Act / Sick Leave

Employee Caring for Individual under Quarantine

- > The employee of an employer with fewer than 500 employees is caring for an individual who is under a government quarantine order or healthcare provider self-quarantine order
- > 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:
 - For full-time employees, 80 hours
 - For part-time employees, a number of hours equal to the number of hours the employee works on average over a two-week period
- Paid leave is capped at \$200 per day up to an aggregate of \$2,000 per employee.

FFCRA Expanded Family and Medical Leave Act / Sick Leave

Employer Intends to Claim the FFCRA Leave Tax Credit

- > 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.
- > Federal income taxes and the employee and employer portions of Social Security and Medicare taxes will be available for retention by employers.
- > If payroll taxes are insufficient to cover the paid leave under the Act, employers may request accelerated payment of the excess amount from the IRS. The IRS expects to process such requests within two weeks.
- > Tax credits are not available for paid leave in excess of FFCRA requirements or for paid leave attributable to period before April 1, 2020.

FFCRA Expanded Family and Medical Leave Act / Sick Leave Exempt Employers

- **Employers with fewer than 50 employees may be exempt from the FFCRA school / childcare closure leave requirements.**
- An authorized officer of the small employer must determine that:
 - The provision of paid sick or expanded FMLA leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
 - The absence of the employee or employees requesting paid sick or expanded FMLA leave would entail a substantial risk to the financial health or operational capabilities of the small 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 or employees requesting paid sick or expanded FMLA leave, and these labor or services are needed for the small business to operate at a minimal capacity.

FFCRA Expanded Family and Medical Leave Act / Sick Leave Q&A

Employee has non-FFCRA Paid Time Off (PTO) Available

- An employer with fewer than 500 employees may not require an employee to use otherwise available PTO before utilizing FFCRA leave.
- 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.
- 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.

FFCRA Expanded Family and Medical Leave Act / Sick Leave Q&A

Intermittent Leave

- **Expanded FMLA Leave**
 - An employer may allow an employee to take the expanded FMLA Leave intermittently
- **Emergency Paid Sick Leave**
 - **Telework:** An employer may allow an employee who teleworks to take intermittent Emergency Sick Pay Leave.
 - **Working at Worksite:**
 - 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.
 - 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.
 - Consistent with Expanded FMLA Leave, an employer may agree to allow an employee to take Emergency Sick Paid Leave intermittently, even if the employee is not teleworking.

FFCRA Expanded Family and Medical Leave Act / Sick Leave Q&A

Employee has Worked Fewer than 30 Calendar Days

- 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 be is not eligible for the expanded FMLA leave under the FFCRA:
 - 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.
- **Rehired Employees:** 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.

FFCRA Expanded Family and Medical Leave Act / Sick Leave Q&A

Employee has taken non-FFCRA Expanded FMLA Leave

- > 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.
- > The FFCRA 80 hours / two weeks of Emergency Sick Pay Leave is not reduced by FMLA leave.

FFCRA Expanded Family and Medical Leave Act / Sick Leave Q&A

Employer Employs 500 or more Employees

- The employee is not entitled to paid leave under the FFCRA.
- The employer may voluntarily provide paid leave, but the FFCRA tax credit is not available.
- All employees of FLSA “joint employers” and of FMLA “integrated employers” are aggregated for purposes of the 500-employee threshold

FFCRA Expanded Family and Medical Leave Act / Sick Leave Q&A

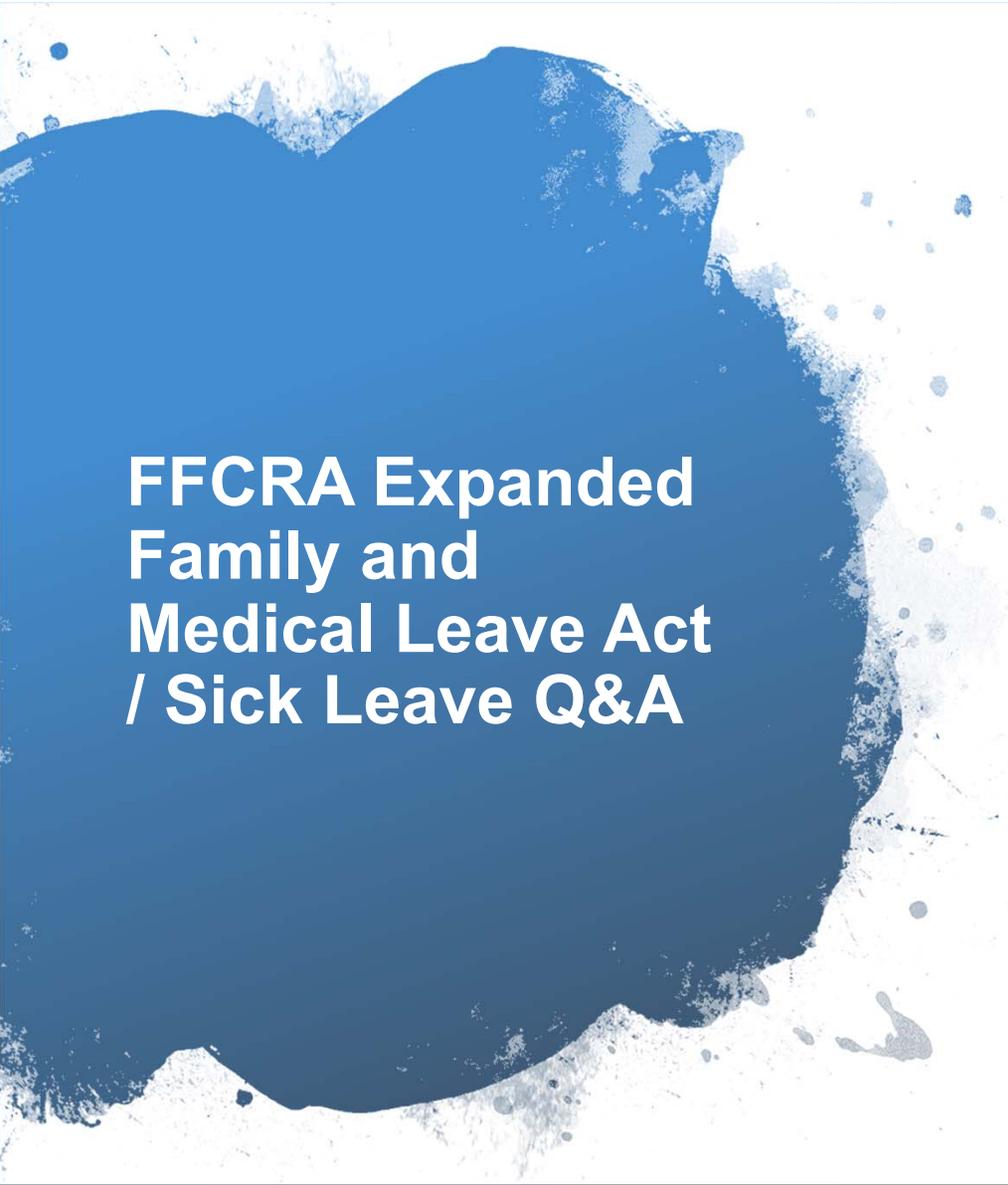
Employee is Furloughed

- The FFCRA leave requirements do not apply.
- Employer should check employee benefit plan documents to determine employees' continued eligibility for 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

FFCRA Expanded Family and Medical Leave Act / Sick Leave Q&A

Employee is Laid Off

- The FFCRA leave requirements do not apply.
- The employee may be entitled to COBRA continuation coverage (or state “mini-COBRA”)
- Employee may apply for unemployment insurance benefits



FFCRA Expanded Family and Medical Leave Act / Sick Leave Q&A

Employee Seeks Leave Solely Due to COVID-19 Symptoms or Concerns

- > 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.

**FFCRA
Expanded
Family and
Medical Leave
Act / Sick
Leave Q&A**

Employee is able to Telework

- > FFCRA paid leave is not available to an employee who is able to telework.
- > 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.
- > Employers must pay employees their regular rate of pay or salary for telework.
- > Minimum wage requirements apply to telework.
- > There are no Occupational Safety and Health Administration regulations regarding telework in home offices.
- > Employers who are required to keep records of work-related injuries and illness will continue to be responsible for keeping such records on injuries and illnesses occurring in a home office



FFCRA Expanded Family and Medical Leave Act / Sick Leave Q&A

Employer's Worksite is Closed

- > FFCRA leave requirements do not apply once a worksite is closed.
- > Employee may apply for unemployment insurance benefits



FFCRA
Expanded
Family and
Medical Leave
Act / Sick Leave
Q&A

Employee's Hours of Employment are Reduced

- > FFCRA paid leave may not be used for the hours the employee is no longer scheduled to work.

CARES Act - Employee Retention Credit

Government Shutdown of the Employer or Decline in the Employer's Gross Receipts of 50% Compared to the Same Quarter in 2019

- > 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.
- > 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.
- > For employers with 100 or fewer employees, "qualified wages" are wages paid to all employees.
- > Employers receiving CARES Act small business interruption loans are not eligible for the employee retention tax credit.

CARES Act - Expanded Unemployment Benefits

Events qualifying an individual for expanded Unemployment Benefits

- > Is unable to work due to an event that would qualify for FFCRA paid leave;**
- > 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);**
- > Has become the breadwinner because the head of the household died from COVID-19;**
- > Is unable to work because his or her place of business closed due to COVID-19;**
- > Has to quit his or her job because of COVID-19**

CARES Act - Expanded Unemployment Benefits, *continued*

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.

- **Eligible individuals receive \$600 per week in Federal Pandemic Unemployment Compensation in addition to the regular weekly unemployment benefit under state law**
- **Eligible individuals receiving FFCRA paid COVID-19 leave are not eligible for the Federal Pandemic Unemployment Compensation benefits**

CARES Act - Employer Retirement Plans

- > **Coronavirus-Related Distributions.**
- > Participants 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.e.*, 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:
 - Who is diagnosed with the virus SARS-CoV-2 or with COVID-19 by a CDC-approved test;
 - Whose spouse or dependent is so diagnosed;
 - Who experiences adverse financial consequences due to quarantine, furlough, lay off or reduced work hours due to SARS-CoV-2 or COVID-19;
 - 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,
 - Who satisfies other factors as determined by the Secretary of the Treasury.

CARES Act - Employer Retirement Plans, *continued*

- > **Increase in Plan Loans.** 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.
- > **Required Minimum Distribution Waiver.** 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).

CARES Act - Employer Retirement Plans - *continued*

> Defined Benefit Pension Plans.

- The due date for any defined benefit pension plan required minimum contribution that would otherwise be due in 2020 is delayed until January 1, 2021. Such contributions must be increased by interest accruing between the original due date and the payment date.

CARES Act - Employer Maintains a Group Health Plan

- > **Diagnostic Test Coverage with No Cost-Sharing.** Group health plans must cover the following items without any cost-sharing (deductibles, copayments, and coinsurance) or medical management, such as prior authorization:
 - An *in vitro* diagnostic test for the detection of SARS-CoV-2 or the virus that causes COVID-19 that
 - is approved, cleared or authorized under the Federal Food, Drug, and Cosmetic Act;
 - the developer has requested emergency use authorization under the Federal Food, Drug, and Cosmetic Act (unless and until such request is denied);
 - 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;
 - is another test approved by the Secretary of Health and Human Services; and
 - 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 *in vitro* diagnostic product.
- > **Qualifying Coronavirus Preventive Services.** Group health plans must cover “qualifying coronavirus preventive services.” The term “qualifying coronavirus preventive services” means:
 - An evidence-based item or service that has an “A” or “B” rating in the current United States Preventive Services Task Force recommendation; or
 - An immunization recommended by the Advisory Committee on Immunization Practices of the Centers for Disease Control with respect to the individual.

Such mandated coverage of preventive services is required as of the 15th business day following the date on which the applicable recommendation is made.

CARES Act - Employer Provides Student Loan Assistance to Employees

- > The CARES Act amends the Code to exclude from an employee's gross income an employer's payment, whether to the employee or to a lender, of principal or interest on any qualified education loan.

Workforce Reductions: Layoff v. Furlough

Furlough – Temporary, non-duty status

- Limited hours or zero hour schedules
- Employee retains benefits
- Must pay for any time worked
 - Exempt employees – any work = full week of pay
- Employee still eligible for unemployment (maybe partial)

Lay off – Full separation from employment

- Might have to pay out accrued, unused PTO depending terms of PTO policy
- Formal re-hiring after crisis ends
- Full unemployment eligibility

Must implement layoffs and/or furlough in non-discriminatory and non-retaliatory way.

Workforce Reductions: Pay Reductions

Must be prospective – i.e., employee must be notified of the reduction before they perform the work covered by the reduction.

Salaried, Exempt Employees:

- Salary cannot be reduced mid-workweek.
- Reduced salary must stay at or above \$684 per week.
- Reduction must be due to bona fide justification – i.e., economic downturn; loss in business; etc.
- Avoid week by week adjustments to salary – i.e., reduction needs to be “indefinite” until bona fide justification no longer present.

Workforce Reductions: WARN Act



Employers with 100 or more employees covered.



Requires 60 days' advance notice prior to mass layoff or plant closing resulting in 50 or more employment losses at a single site of employment.



"Employment
loss"

Termination.

Layoff lasting 6 months.

Reduction of pay by 50%
or more for 6 months.



Potential Exception to Notice:
Unforeseeable business circumstances



Additional Resources



Department of Labor Guidelines:

<https://www.dol.gov/agencies/whd/pandemic>

Greater Richmond Bar Foundation's Pro Bono Clearinghouse:

<https://www.grbf.org/request-legal-assistance-nonprofits/>

