



CARES Act - Congress' Third COVID-19 Bill and What it Means for Employers

By: David C. Burton, Brydon M. DeWitt, Marc Purintun & Anna K. Derewenda

03.26.2020

The ?Coronavirus Aid, Relief, and Economic Security Act? (CARES Act) has substantial implications and it modifies the **Families First Coronavirus Response Act** (FFCRA) passed on March 18. The bill, which provides an economic stimulus of approximately two trillion dollars, addresses the various issues arising out of employee benefit programs in the time of COVID-19, provides additional unemployment benefits for employees who have been furloughed, have suffered a reduction of hours, or who have been laid off due to the COVID-19 crisis and sets up an emergency loan program under the Small Business Administration for, among others, private employers with fewer than 500 employees.

Amendments to FFCRA Paid Leave Provisions

The CARES Act amends Section 110(b)(2)(B)(ii) of FFCRA to make clear that an employer shall not be required to provide more than \$200 per day and \$10,000 in the aggregate for **each employee** who has taken paid leave under the FMLA to care for a child under 18 who is at home because school has been cancelled or because their normal child care provider is unable to work because of the public healthcare emergency.

The emergency paid leave provisions of FFCRA are amended to reflect that the payment caps are for each employee, not for the entire organization. Specifically, Section 5102 of FFCRA is amended to provide that an employer will not be required to pay **for each employee** more than either:

1. \$511 per day or \$5,110 in the aggregate, when the employee takes leave because of the government quarantine or isolation order, when an employee is advised by a health care provider to self-quarantine due to concerns related to COVID-19, or when the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; or
2. \$200 per day or \$2,000 in the aggregate, when the employee must take leave to care for any individual who is subject to a government quarantine or isolation order, or for a person who has been ordered by a health care provider to quarantine because of COVID-19, or when the employee must stay home to care for any child under 18 if the child?s school has been

closed or the childcare provider is unable to provide the childcare due to the public healthcare emergency.

These limitations will also apply if an employee must take leave for substantially similar conditions to COVID-19 as specified by the Secretary of Health and Human Services in consultation with the Secretary of Labor and the Secretary of the Treasury. The amendment also provides that the requirement to make these payments will expire at the earlier of either (i) when the employer has paid the employee under the act for 80 hours of leave, or (ii) the employee has returned to work after taking paid leave.

The CARES Act also amended the FFCRA to provide that, if an employee has previously worked for an employer for at least 30 calendar days, is laid off on or after March 30, 2020, and later returns to work, the employee will not have an additional 30-calendar-day service period before being eligible for the paid leave benefits if a qualifying event occurs after that employee returns to work.

Finally, the CARES Act amends the FFCRA to provide that, if an employer makes leave payments in anticipation of the effective date of the FFCRA and withholds the payroll taxes as permitted under the bill, there shall be no tax penalties.

Enhanced Unemployment Provisions

The CARES Act extends up to 39 weeks of COVID-19 Pandemic Unemployment Compensation benefits to those employees, including those who are self-employed, who are not eligible for traditional regular compensation or extended benefits under state and federal law if the employee self-certifies that he or she is able to work (including teleworking) and has been unable to do so:

1. For any of the reasons set forth in FFCRA;
2. The employee is unable to reach the place of employment because of a quarantine imposed as a direct result of a COVID-19 public health emergency;
3. The employee was scheduled to commence employment and no longer has a job or cannot get to the job because of a COVID-19 public health emergency;
4. The employee has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19;
5. The employee's place of business has closed as a direct result of the COVID-19 public health emergency;
6. The employee has to quit his or her job as a direct result of COVID-19; or
7. The employee meets any other criteria set by the Secretary of Health and Human Services.

The amount of benefits that an eligible employee can receive under the CARES Act in weekly unemployment will equal the weekly benefit amount the employee could receive under his or her respective state unemployment compensation law, plus Federal Pandemic Unemployment Compensation of \$600. An otherwise eligible employee cannot receive these payments during the period that such employee is receiving paid sick leave or other paid leave benefits from an employer.

Employees can seek such benefits for any week of unemployment or partial unemployment beginning on January 27, 2020 and ending or before December 31, 2020. However, the Federal benefit of \$600 will expire on July 31, 2020.

Direct Payments to Individuals

The CARES Act directs payments of \$1,200 to individuals who earn \$75,000 or less per year in adjusted gross income (AGI) and \$2,400 to married couples who earn \$150,000 or less per year in AGI. There will also be payments of \$500 for each child of such taxpayers. These payments will also apply to individuals on a sliding scale for those earning more than the AGI set forth above, capping out if an individual earns more than \$99,000 or a couple whose combined income is more than \$198,000.

Group Health Plan Coverage Mandates

The CARES Act amends FFCRA to expand the *in vitro* diagnostic tests that must be covered by group health plans. Under the CARES Act and FFCRA, 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; or
 - 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.

In addition, the CARES Act requires group health plans to 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.

Employee Compensation Limits with Loans to Air Carriers and Other Businesses

The CARES Act provides loans and loan guarantees to air carriers and other eligible businesses that

have incurred COVID-19-related losses that jeopardize their businesses. Such loans are not available unless an eligible employer agrees that, during the period beginning on the date on which the loan agreement is executed and ending on the date that is one year after the date on which the loan or loan guarantee is no longer outstanding:

- No officer or employee whose total compensation exceeded \$425,000 in calendar year 2019 (other than an employee whose compensation is determined through an existing collective bargaining agreement entered into prior to March 1, 2020) will receive (i) compensation in excess of that officer's or employee's 2019 total compensation; or (ii) severance compensation in excess of two times that officer's or employee's 2019 total compensation; and
- No officer or employee of the eligible business whose total compensation exceeded \$3,000,000 in calendar year 2019 may receive during any 12 consecutive months of such period, total compensation in excess of the sum of (i) \$3,000,000 and (ii) fifty percent (50%) of the excess over \$3,000,000 of the total compensation received by the officer or employee from the eligible business in calendar year 2019.

Employee Retention Credit

The CARES Act provides a retention credit for eligible employers equal to 50% of wages paid to employees between March 12, 2020 and December 31, 2020, up to \$10,000 per employee. Eligible employers are those (i) whose operations are fully or partially suspended due to orders from an appropriate governmental authority limiting commerce, travel or group meetings (for commercial, social, religious or other purposes) due to COVID-19, or (ii) who suffer a decline in gross receipts of more than 50% when compared to the same quarter in the prior year. Eligible employers cannot claim retention credits if they are receiving CARES Act loans described in the ***Paycheck Protection Program Loans*** section of this alert.

The retention credit is based on "qualified wages" paid to the employees of the eligible employer. For eligible employers with more than 100 full-time employees, qualified wages are wages paid to employees for work not in connection to services provided due to the COVID-19 circumstances that cause the employer to be an eligible employer. For eligible employers with no more than 100 full-time employees, all employee wages are qualified wages. The retention credit does not include wages for which the eligible employer receives a credit pursuant to the sick and FMLA leave provisions of FFCRA.

Delayed Payment of Employer Portion of Social Security Taxes

The CARES Act delays the due dates for depositing the employer portion of Social Security taxes, *i.e.*, 6.2% of wages paid by the employer. Fifty percent (50%) of the such taxes due from the enactment of the CARES Act through the end of this year are due on December 31, 2021. The remainder of such taxes are due no later than December 31, 2022. The delayed due dates are not available to employers that receive certain loan and indebtedness forgiveness under the CARES Act.

Retirement Plan Distributions and Loans

An individual can take "coronavirus-related distributions" of up to \$100,000 per year from his or her account in any tax qualified retirement plan and individual retirement account (IRA) 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 or to an IRA 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.

The CARES Act also increases 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.

The CARES Act also 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).

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.

Delay in Defined Benefit Pension Plan Minimum Required Contributions

The CARES Act delays 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 until January 1, 2021. Such contributions are increased by interest accruing between the original due date and the payment date. Additionally, 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 which include calendar year 2020.

Employer Payment of Student Loans

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.

Emergency Family and Medical Leave for Rehired Employees

The FFCRA expanded the Family and Medical Leave Act (FMLA) to require employers with 500 or fewer employees to provide paid leave to employees who are unable to work or telework due to a need to care for a child whose school or place of care has closed or whose childcare provider is unavailable due to the COVID-19 emergency. Under FFCRA, to be eligible for such leave, an employee must have been employed by the employer for at least 30 calendar days. The CARES Act amends the FFCRA to extend the expanded FMLA leave to 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 was rehired by the employer.

Paycheck Protection Program Loans

The CARES Act provides that any business concern (including sole proprietors, independent contractors and eligible self-employed individuals), nonprofit section 501(c)(3) organizations, veterans organizations and Tribal business concerns that generally employ fewer than 500 employees to be eligible to receive emergency loans pursuant to section 7(a) of the Small Business Act (SBA). The amount of money available for these loans will be \$350 billion.

The loans for an employer are capped at the lesser of (i) two and a half (2.5) times the average total monthly payments the loan applicant has made for payroll costs in the one-year period before the date the loan is made plus the outstanding amount of certain loans made under section 7(b)(2) of the SBA after January 31, 2020, or (ii) \$10,000,000.

If an employer receives the emergency loan, the loan proceeds, in addition to the permissible uses under Section 7(a) of the SBA, may be used for:

- Payroll costs (not including any compensation paid to an individual in excess of \$100,000);
- Costs related to the continuation of group healthcare benefits during periods of sick, medical or family leave and insurance premiums;
- Employee salaries, commissions or similar compensations;
- Payments of interest on mortgage payments;
- Rent (including rent under a lease agreement);
- Utilities; and
- Interest on any other debt obligations that were incurred before February 15, 2020.

To the extent loans are taken, an employer will have to certify that the funds will be used to retain

workers and maintain payroll or make payments. There are also provisions that provide for loan forgiveness in an amount equal to an employer's payroll costs (not including any compensation paid to an individual in excess of \$100,000), interest payments on mortgages, rent payments and utility payments that were made during the eight-week period beginning on the date of the origination of a covered loan. To the extent that an employer lays off employees or reduces salaries or wages by more than 25%, there is a corresponding reduction in the loan forgiveness based on a formula set forth in the CARES Act.

For more information about the SBA's Disaster Loans reference Williams Mullen's recent alert,

SBA Provides Emergency Disaster Loans for Small Businesses

Please note: This alert contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel.

Please click here for additional legal updates from Williams Mullen regarding COVID-19.

Related People

- David C. Burton ? 757.473.5354 ? dburton@williamsmullen.com
- Brydon M. DeWitt ? 804.420.6917 ? bdewitt@williamsmullen.com
- Anna K. Derewenda ? 804.420.6094 ? aderewenda@williamsmullen.com
- Marc Purintun ? 804.420.6310 ? mpurintun@williamsmullen.com

Related Services

- Labor, Employment & Immigration
- Employee Benefits & Executive Compensation
- Tax Law
- Financial Services