

Hospice Insights: The Law and Beyond



Episode 8: Labor and Employment Trends – COVID-19 Edition: FFCRA Insights for Health Providers

April 10, 2020

Speaker	Statement
Meg Pekarske	<p>Hello! Welcome to Hospice Insights: The Law and Beyond, where we connect you to what matters in the ever-changing world of hospice and palliative care. In today’s special COVID-19 edition of the Labor and Employment Trends series, Meg talks with colleague Tom O’Day about the Families First Coronavirus Response Act (FFCRA). As one of Husch Blackwell’s healthcare-focused employment attorneys, Tom is uniquely situated to break down the FFCRA with an eye toward healthcare providers of all kinds, including hospices.</p> <p>So welcome, Tom O’Day. I’m so glad you could join the podcast today.</p>
Tom O’Day	<p>Thank you. Really appreciate the opportunity.</p>
Meg Pekarske	<p>So Tom, you came over to Husch Blackwell about the same time I did and I’ve been trying to rope you into doing a podcast on our Labor and Employment Trends for a while, but since a lot of our listeners might not know who you are, can you explain a little bit of your background and what you bring to our team?</p>
Tom O’Day	<p>Sure. So for about 15 years now, I’ve been a management-side labor and employment attorney. Worked in the healthcare space for the last five or six years. Probably about 80 percent of my work now is with healthcare employers, really managing through every aspect of human relations. It can be anything from day-to-day advising about “how do we handle Family and Medical Leave Act (FMLA) requests, accommodation requests and managing through litigation matters that do come up” and, really more than anything, negotiating through disputes with employees</p>



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	or former employees. And then finally an equal third of the work I do is working through contracts. So it might be employment agreements, non-compete agreements, other incentive compensation agreements for employees, just to ensure that we have the best personnel available for our healthcare clients.
Meg Pekarske	Great. And now, like everyone else, your life has been taken over by COVID-19 and labor and employment lawyers have been, I think, similar to healthcare lawyers, really trying to digest some really large changes that have come down the pike pretty quickly. And so the one I wanted to focus on today, which I understand there is no fancy acronym other than saying: FFCRA. So here we're talking about the Families First Coronavirus Response Act. But I want to focus – and we may do other podcasts in the future – but I want to focus on this Act in particular and break it down because my understanding, Tom, is this had an April 1 st effective date. Is that right?
Tom O'Day	Correct.
Meg Pekarske	And so it goes all the way through the end of this year, 2020. Is that right?
Tom O'Day	Correct. The benefits available, both the paid sick leave and expanded family medical leave, are available until the end of this calendar year, 2020.
Meg Pekarske	And so I think it's relevant even though we're having this discussion after April 1 st , because some of the things that we're going to get into are an employer may make certain decisions right now about what they want to do in terms of the employees under the Act, but potentially they would want to revisit that later down the road. So I think it's still really important to understand how the law works in action. So let's start general here and then we can drill down. So what is the FFCRA?
Tom O'Day	Right. The FFCRA is really – it's the federal government's attempt to balance the need to support employers, as well as employees, through this very unique time in our country and in the world. The federal government has taken a number of steps, both with the FFCRA and another piece of legislation at the federal level called the CARES Act to support employers and individual employees during these difficult times. The FFCRA, in large part, provides two safety nets to employees who have unexpected needs to be out of work for this period of time. The first set of paid leave has to do with paid sick leave. There's a number of



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different – six different – reasons why an employee may be entitled to take that leave under the FFCRA.

And then the second higher-level bucket of paid leave that new legislation provides for is expanded family and medical leave for purposes of childcare needs that are the result of the coronavirus pandemic.

And employers, along with employees, have opportunities under this legislation to try and maintain some level of income for the employees, but also maintain the level of operations necessary during this time.

Meg Pekarske:

And so given that you focus your practice, as do I, on healthcare providers, I wanted to talk about, you know, how the law uniquely applies to healthcare providers. And I think one question we have gotten from clients is “who is a healthcare provider?” Because I think when people are reading the law, they’re thinking of themselves as an employer as a healthcare provider, but I think as the law is written, it’s “healthcare provider,” that term is used vis a vis employees, not necessarily the employer. So are you an employer of healthcare providers.

And so let’s talk about who is a healthcare provider under the Act? So I’m an employer. And then how do I determine whether or not I have employees who are healthcare providers and therefore eligible to exempt from these expanded leave and, I guess, provisions of this Act. So who is a healthcare provider, Tom?

Tom O’Day

Sure. And a little context for this, because it’s interesting and important. So when the law was first passed, the definition of healthcare provider was intended, and at the time, was very narrow. It was specific to physicians, RNs, podiatrists, chiropractors, nurse practitioners and a very limited set of professionals in the healthcare space that is applicable in other types of legislation. Since the law was passed, the Department of Labor has issued guidance documents that are very helpful and very beneficial for employers and employees to use, as well as we now have interim regulations, which are effective final regulations that define the different terms. The regulations have taken a very broad definition of healthcare provider.

Meg Pekarske

So you’re saying when the Act was passed, “healthcare provider” was more narrowly defined to include just certain types of healthcare professionals, right?

Tom O’Day

Correct. And those healthcare professionals were the healthcare professionals that were traditionally identified in the Family and Medical



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Leave Act: physicians, nurse practitioners, chiropractors, podiatrists, registered nurses. When the regulations were issued and some of the guidance was issued from the Department of Labor, they very, very broadly defined that term “healthcare provider.” They defined it as anyone employed at any doctor’s office, hospital, healthcare center, clinic, nursing facility, retirement facility, home healthcare provider or similar institution. And the fact that they defined it to include anyone who was employed at any of those kinds of healthcare entities really expanded the possibility for a lot of our clients to take that exemption and apply it to some or all of their employees.

Meg Pekarske

That’s really helpful, Tom. And I think that what you said is important and that’s where I want to go next. So it sounds like it’s not an all-or-nothing approach. So just because you are an employer – maybe before we even go down the road of can you choose or do you want to choose to exempt a certain personnel you have – let’s talk about the healthcare providers that this Act or the employers that this Act applies to and those that it doesn’t. Because while I think that most listeners are employers who will be covered by this, I do think that it’s probably important from a technical standpoint for us to talk about, that this law doesn’t apply to every single employer out there. So who does it apply to, Tom?

Tom O’Day

So the law applies to individual entities that employ 500 or less employees. And for purposes of aggregating different related entities: so if there’s a sister company, a parent company with a subsidiary, it takes a broad approach and follows some of the rules with the Family and Medical Leave Act and the Fair Labor Standards Act as to how you count multiple sister and parent companies together.

For the most part, it’s 500 or less employees. That includes part-time employees, regardless of full-time equivalent. So if you’re an organization with 499 part-time employees and one full-time employee, you would be covered by the law and those part-time employees count toward that number.

Meg Pekarske

So if you’re an employee of a larger employer – so let’s say a hospital, who is likely going to have more than 500 employees – so they don’t have to worry about this or, I guess, how, when you’re bigger than 500 employees, how do you approach things like this?

Tom O’Day

Right. And it really comes down to an employee relations kind of issue. The employees will be able to recognize that distinction of a 500 or less employee entity. But a lot of our healthcare clients that are over 500 are implementing their own policies. They’re not necessarily required to do so under federal law, but they are drafting those policies to be consistent



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	<p>with federal law, I'd say. Reserving discretion on the part of the employer to change the policy as needed while still providing employees with the opportunity for these paid sick leave opportunities in particular that are related to COVID, either quarantines or COVID diagnoses or leave necessitated to care for an individual who has a COVID diagnosis.</p> <p>The childcare exception, or the reason for taking paid leave, is something that larger employees over 500 are struggling to manage, because it is under the federal legislation pretty broad in opportunities for employees to take that leave. Employers with 500 or more employees are struggling as to whether or not to allow that breadth of leave available for their employees, as well.</p>
Meg Pekarske	<p>Okay. And then if the Act – because you're larger and have more than 500 employees – the monetary commitments that the government made in some of these areas, then you're a larger employer and you're not going to be eligible for those either?</p>
Tom O'Day	<p>Correct. So an important part of the FFCRA is the idea that employers will get a tax credit, a refundable tax credit, equal to 100 percent of the time, the paid leave that these employees take. That tax credit is not available to employers with 500 or more employees.</p>
Meg Pekarske	<p>Got it. So I'm a healthcare provider. I have less than 500 employees. This Act applies to me and I am someone who provides healthcare services, so based on the revised guidance, I could choose to exempt some of my employees and so as we're talking, it's not an all or nothing thing. I can choose to exempt some of my employees from the expanded leave or I could say everyone's eligible for it. So right, Tom? I mean, it's not that you have to say everyone is out or everyone is in.</p>
Tom O'Day	<p>Correct. And the Department of Labor recognized that question and some of their guidance documents made very clear that employers of healthcare providers can make case-by-case decisions about whether or not they allow an employee to use the paid sick leave or the expanded family medical leave under the FFCRA. It is a case-by-case determination if the employer wants to go that route, or they can make a blanket decision that no employee of the organization will be entitled to the leave under that law.</p>
Megan Pekarske	<p>Okay. So if you have, let's say, a receptionist – and it sounds like when we say you're making certain decisions, probably the safest course is to do it based on perhaps job classification as opposed to an individual circumstance?</p>



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Tom O'Day	Right. You would still want to make those decisions on a case-by-case basis in non-discriminatory manner as much as you can. Certainly don't take into consideration things like protected characteristics like religion or color or race. But, in addition, in order to look most fair, you would want to likely make any case-by-case decisions by the job category, unless there's some extenuating circumstance.
Megan Pekarske	Okay. So again, I have my employer hat on and then saying okay, this law applies to me. I may choose to exempt some of my employees. I guess as you've worked through with, I'm sure, many, many clients now, I guess what are you seeing that employers use in deciding whether to exempt employees at all, and then if they're choosing to exempt, who they choose to exempt. How do employers – because I'm sure people look at it differently, and I'm seeing among hospice clients that people have taken different approaches. But what have you seen, Tom?
Tom O'Day	Right. And I think that the way that employers are making these decisions is driven by the policy behind the exemption. So it's important for a healthcare employer to really look more than anything to the legitimate business reasons why they would not or would be able to allow an employee to take this paid time off. And when they make a decision on a case-by-case basis or a job classification basis, and it's driven by business need, then that's the best way to exercise and act on this exemption.
Meg Pekarske	So in what you've been seeing, have people who've chosen to exempt, it's not a blanket exemption. They're doing it perhaps more on job classification or job duties or categories?
Tom O'Day	I'd say a lot of the organizations, it's a job category or job duties driven decision. In smaller organizations where there may be less defined job responsibilities or individuals have more responsibilities than maybe a narrow sliver of a job, that may be part of a bigger organization, I have seen some of the smaller clients – a lot of the physician groups – are enacting blanket exemptions and saying that we're in a position as an organization where we're just not going to allow people to take this time. Although I will say for the paid sick leave purposes, if an employee is exposed to COVID, has been diagnosed with COVID or needs to care for an individual with COVID, employers there are not usually going to exercise their exemption. They don't want those employees who may be able to distribute the virus to be in the workplace. But with respect to the childcare obligations on both the paid sick leave and the expanded FMLA, there are some smaller organizations that are saying we just can't allow all of our employees to take this time off and for that reason,



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Meg Pekarske	<p>they're exercising the exemption.</p> <p>Right. That's helpful, Tom. And I think – I wanted to turn our attention now to the two different components of the law. So you were talking about the paid sick leave benefit and I wanted to break that down a little bit because you mentioned some of the reasons that someone could say I want to take this paid sick leave. But can you explain that a little bit more and then we can talk about the other benefit of the law.</p>
Tom O'Day	<p>So the reasons why an employee may be able to take paid leave for paid sick leave purposes are six different categories, or six different buckets. The first is the employee can take paid leave if the employee themselves is subject to a state or other federal or local quarantine or isolation order. And with respect to this in particular, the Department of Labor has made clear that means an employee-specific quarantine or isolation. So an order from the state to close non-essential businesses does not necessarily trigger an employee's right to this paid sick leave under that Subsection 1.</p> <p>The second reason why an employee can obtain the paid sick leave is because they have been advised by a healthcare provider to self-quarantine due to concerns related to COVID. That includes some type of communication from an employer – or from a healthcare provider – that indicates the employee has a need to self-quarantine, either because they themselves have been exposed or because – and the Department of Labor made clear – an employee could claim that they are particularly vulnerable to getting COVID and because of that, the healthcare provider can recommend that they self-quarantine. So that's the second reason for the paid sick leave.</p> <p>The third is that the employee is experiencing symptoms of COVID and seeking a medical diagnosis. And, you know, the time for testing and testing availability certainly is varied across the country, I think. But to the extent that an employee needs that time to seek diagnosis and is experiencing symptoms, they have the ability to take paid leave.</p> <p>The first three are specifically targeted toward needs of the employee themselves. The fourth reason for taking paid leave has to do with the ability for the employee to care for an individual who is subject to quarantine, or has been advised by a healthcare provider to self-quarantine. So they are caring for someone else.</p>
Meg Pekarske	<p>The fourth reason, caring for someone with COVID, is there a familial relationship or other type of relationship that you have to have with that person you are caretaking, or could it be your neighbor who you have no</p>



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	familial relationship with?
Tom O’Day	Yeah, that’s a good question. So there is for that fourth reason no requirement that there be some kind of family relationship. The Department of Labor has indicated that it does need – they do need to have some kind of relationship with the individual and that the individual doesn’t have any other ability to obtain that kind of care.
Meg Pekarske	Okay. So then you’re moving on to reason 5, which involves caring for a child?
Tom O’Day	The fifth reason related to the need to take leave because the school or place of care for – and this is specific to a son or daughter – has been closed. And that’s another reason why an employee may take that paid sick leave. The Department of Labor made clear that that one is only specific to a son or daughter.
Meg Pekarske	Okay.
Tom O’Day	And then the sixth reason – and I haven’t seen yet any guidance on this – the sixth is a catch-all where the law says that an employee can take paid leave if they’ve got any other substantially similar condition that’s specified by the secretary of the Federal Health and Human Services (HHS) agency. And I haven’t seen that HHS has issued any kind of guidance on what other substantially similar conditions might be, but that’s something that is available, as well.
	So those, again, six different categories of paid sick leave that an employee who is covered by the law, who is not exempted, may be able to take advantage of.
Meg Pekarske	And so I’ve always appreciated that labor and employment is a hard area and nuanced, but just trying to parse all of this out I think is challenging, Tom. So in terms of these six categories, can people take a different approach? You were talking about with categories 1, 2 and 3, which is I, the individual, need leave because of my individual circumstances versus the caretaking one. Even if you were saying I want people exempted. I don’t want a sick person in my workplace, I guess. How do you operationalize these things? So I said I wanted to exempt. Can I just say, oh, but I’m not going to exempt for these three reasons, can I start mixing and matching here?
Tom O’Day	You certainly can. And for employers who have the ability to use that exemption for healthcare providers, you certainly can pick and choose among these different reasons. And, in a way, the government has recognized the difference between numbers 1 through 3, which are tied to



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the employee themselves, and reasons under 4, 5 and 6 which are the need to care for someone else or this catch-all substantially similar condition. Under the law, the federal government has indicated that pay for reasons 1 through 3, those that are tied to the individual employee, are paid out at regular salary with a cap of \$511 per day. For reasons 4, 5 and 6, the federal government has treated those differently themselves by saying that that paid leave, and the credit that you obtain for that paid leave, is capped at \$200 per day. So I think it is valid for employers, especially employers who are over 500 employees or employers who are exercising that healthcare provider exemption, to say we're going to treat employees who are either under quarantine because of an order or a healthcare advisement or who are experiencing symptoms of COVID and have COVID, we're going to allow those employees to take leave. We are not going to allow to care for others.

Meg Pekarske

In terms of – and I'm glad you covered the amounts that are paid – and so there is some reimbursement from the government. And so you, the employer, are continuing to make these payments to the employee. So from the employee's perspective, they're getting their regular paycheck up to these limits. And we are going to post a flowchart that walks through this in detail and has these numbers in there. But so from the employee's perspective, does their paycheck continue to come and you, the employer, have to fund that paycheck, but then there is some back-end assistance?

Tom O'Day

Yeah, that's exactly right. As the employees have the ability to continue receiving that money on the front end. Employers have been concerned about cash flow more than anything and how do we continue to pay these employees who aren't here providing services to us. As a means of addressing that in other legislation, the federal government has now allowed employers to postpone or put off their payment of some of the payroll taxes for a two-year period. So they've got to pay half of what is normally due by the end of this calendar year, and then the remaining half at the end of calendar year 2021. So by providing employers with some tax relief, the thought is the federal government is giving employers a little bit more cash flow to fund the salaries and wages that are paid to these employees right now.

Meg Pekarske

And so do you have to represent to the government anything about what you're doing with these policies in order to get that? I mean, how does the government know that you funded this and what not?

Tom O'Day

So we're just starting to see from the IRS – we're starting to see guidance around the documentation that an employer should keep with respect to making these payments. It includes things like making sure that there's a



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statement from the employee that they have been advised by a healthcare provider to self-quarantine. It may include documentation from the provider themselves that the individual employee needs to self-quarantine.

For purposes of the childcare paid sick leave and this expanded family and medical leave, as well, there's more guidance from the IRS that indicates an employer should obtain a statement from the employee that they can't telework or provide other remote services and that there are not other options available for childcare. There's been a fair amount of activity around what does that mean for kids who are maybe 14, 15, 16, 17 years old, who may be more self-sufficient and in a position to allow a person, an employer – or an employee, to work from home, in a telecommuting kind of role. And although the IRS has opened a door for employers to push back a little bit, I think it's probably tough from an employee relations standpoint to push back on an employee who says I really do need to take this leave to be at home with my kids.

Meg Pekarske

And I guess as we're moving to a conclusion here, I wanted to talk about – and we've brought it up several times – but the childcare leave benefit and again, we're going to be posting a flowchart which has a lot of boxes of yes and nos and I found it really helpful as I'm trying to learn the law and not being a labor and employment lawyer. But can you explain briefly how this childcare leave benefit works?

Tom O'Day

So this is the expanded family and medical leave's provision. It's important to recognize – and one of the questions we got early on from employers was, which employees are eligible for this? Under this expanded family and medical leave under the FFCRA, an employee only has to be working for 30 calendar days in order to be entitled to the right to take this leave. So the leave itself is for the need to care for a son or daughter – and this, again, is limited to that son or daughter, not any other individual – if the school or childcare provider is closed because of COVID. And the leave itself is for a total of a 12-week period. The 12-week period does count against the regular family and medical leave allotment that an employee may be entitled to. And the ability of the employee to take that leave is, again, for healthcare providers, something that they can determine on a case-by-case basis.

Meg Pekarske

And then there's similar – oh, sorry.

Tom O'Day

No, but I was just going to mention that with respect to the – another difference from family and medical leave. Whereas regular family and medical leave is generally unpaid time off, for the expanded family and medical leave, after the first 10 days of that 12-week period, an employee



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	is entitled to pay at a rate not less than two-thirds of their regular rate of pay, capped at \$200 per day.
Meg Pekarske	How do you keep all of these details in your head, Tom? There's a lot!
Tom O'Day	There is a fair amount.
Meg Pekarske	It is. And that's why I think these tools that we will post with the podcast notes I think will be really helpful as a resource. Because there are a lot of considerations. And I guess as we close out here, there's one other area that I wanted to talk about because as you and I have been working on advising clients, things that have come up are both furlough and obviously related to that is unemployment compensation. And when you and I were just having a conversation with a client yesterday about their census was going down and did it make sense to furlough certain individuals. While not the focus of today's conversation, there is additional unemployment compensation that's available. And so can you talk about how that plays into the mix and what you see employers doing there?
Tom O'Day	Yeah. So the federal government has really taken extraordinary steps to provide a safety net for employees who lose their jobs. An employee who, for some COVID-related reason is out of work, and work is not available for them, has the ability to get not only their regular state unemployment insurance payment – so that might be a weekly payment of, for instance, \$400. But under federal legislation that was passed with some fanfare, they get an additional \$600 per week on top of whatever their state unemployment amount is. Whereas the state unemployment amount is usually a pro-rated amount, depending on how much an employee earned in the prior 12 months, the federal \$600 is a flat, set amount. So regardless of how much you make, you are going to get at least \$600 per week of unemployment insurance. And that is effectively the equivalent of a \$15 per hour benefit. We see a lot of employers take into consideration the idea that if they furlough employees, if they put them on, you know, a 30-day furlough, where's there is no work available for them – they're still employees; they're still on payroll; they're still getting benefits, but they're not being paid their salary, some employees are actually better off being on unemployment because of the financial safety net that the federal government has provided for them. So it's worth employers taking that into account with respect to work force planning as we move through these next couple week or months.
Meg Pekarske	Well, I think that it is very clear to me that there are some pitfalls here and it is important for folks to probably brain out how they want to approach these things with someone like yourself who can sort of



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navigate the law. Because I guess the closing thought is, you know, how are people going to get help here. Things that were jumping to my mind is I don't have great documentation about what I did and why and that there could be – if I'm eligible to exempt and I choose to only exempt certain employees and not others, that someone could say that's discriminatory. But, I mean, those were things that were just jumping to my mind.

Tom O'Day

More than anything, getting through the next couple weeks or months is going to be about employee relations. And less than the technical, legal advice, I think it's important for employers to keep in mind how they are communicating with employees about all of these different opportunities available to them, about some of the safety net provisions that were passed by the federal government and to the extent that state governments are taking action. I think employees are inundated with data and information, some of it inaccurate, some of it may be even misleading and some of it accurate. And it would benefit employers to take the time to collate that information. To make experts available for employees in order for employees to feel like they can go to a resource that they can trust with respect to questions about things like personal protective equipment and if I wear my own, you know, handmade mask in the workplace, is that something that helps. I think the more employers can make resources available to employees, the more employers can communicate with employees and the more employers can make sure the employees feel like they're taken care of, I think is important.

Meg Pekarske

This has been incredibly helpful and you suggested a lot of complex things in a very short period of time and I think our listeners will find this very helpful and obviously, you know, this is sort of the starting point of how to work through these issues and having someone that can walk you through some special situations that you do have I think can be really helpful. So, Tom, I think our listeners will find this very helpful and we're going to post some related tools that can be used in combination with listening to this podcast that hopefully can help you make good business decisions that make sense for your employees.

So thanks, Tom. And we look forward to having you on another podcast, maybe not COVID-related, even though COVID has taken over our podcast series as of late. But again, really appreciate your time and I enjoyed our conversation.

Tom O'Day

Great. Thanks again!

Meg Pekarske

Well, that's it for today's date of "Hospice Insights: The Law and Beyond." Thank you for joining the conversation. To subscribe to our



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Until next time, may the wind be at your back.

END OF RECORDING.

