



BULLETIN #136/2020 DECEMBER 9, 2020

GOV. BAKER ROLLS BACK RE-OPENING STANDARDS WITH REDUCED CAPACITY LIMITS

ENFORCEMENT OF NEW RIGHT TO REPAIR LAW DELAYED

REMINDER – EMPLOYMENT LAW WEBINAR, FRIDAY, DEC. 11, 9 A.M. – 2
P.M.

Gov. Baker Rolls Back Statewide Opening Standards with Reduced Capacity Limits

Yesterday Gov. Charlie Baker announced new state restrictions for businesses and other activities as Coronavirus infections, hospitalizations, and deaths have surged recently in Massachusetts. Under the governor's new order, the state is rolling back to Phase 3, Step 1 standards for businesses and gatherings but with reduced capacity limits for several industry sectors.

In reviewing the new order in conjunction with other orders affecting dealership retail activities, please note the following:

- On June 8 dealership showrooms re-opened under Phase Two, Step 1 of the governor's re-opening plan. At that time, showrooms were limited to 40% capacity of the building's maximum permitted occupancy; if there is no stated permitted occupancy limit for the building, no enclosed space within the building could exceed occupancy of 8 persons per 1,000 square feet.
- In early November, when the governor announced Phase Three, Step 1 of the re-opening plan, this capacity limit was increased for retail locations to 50% of the building's maximum capacity limit or 10 persons per 1,000 square feet if no permitted occupancy limit.
- **Yesterday's announcement, will affect retail locations beginning Sunday, December 13, by reducing the capacity limit back to 40% or 8 persons per 1,000 square feet if no permitted limit.**
- **All social distancing, masking rules, and hygiene protocols in effect since June must be followed in retail locations.**

Here is a recap of the governor's announcement yesterday, courtesy of *State House News Service*.

"Case Surge Prompts Baker to Dial Back Reopening"

Capacity limits will be lowered across an array of businesses, some indoor recreation venues will again close, and rules around mask-wearing and dining out will be tightened starting Sunday, December 13, as Massachusetts rolls back its economic reopening in response to what Gov. Charlie Baker characterized as "disturbing" COVID-19 trends



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Yesterday Baker announced that the state will [move back a step](#) in his phased reopening plan -- from step two of Phase 3 to step one. Not every municipality had advanced to step two, but in those that had, indoor performance venues and "high-contact" recreational facilities like those involving laser tag, trampolines or roller-skating will be required to close.

The rollback comes a day after the Department of Public Health ordered hospitals to begin [limiting elective inpatient procedures](#) starting Friday, and as a second field hospital, like the one operating in Worcester, is being set up in Lowell.

"The rate Massachusetts residents are getting infected and the rate at which they are needing medical care, if all continues to move at this pace, is simply not sustainable over time, and our health care system will be put at risk," Baker said.

Baker said the new measures are aimed at preventing infection and viral spread, especially in indoor settings, reducing mobility and fostering "stronger mask compliance, more social distancing, and limits on the time spent with people outside of your immediate household."

The move will lower maximum capacity levels from 50 percent to 40 percent for houses of worship, offices, libraries and businesses including retail shops, health clubs, museums, arcades, golf facilities and movie theaters.

The cap on attendance at outdoor gatherings at event venues will be lowered from 100 to 50 people, and venues hosting [outdoor gatherings](#) with more than 25 people will be required to notify their local board of health in advance.

The Baker administration's reopening model, which launched in May, includes four phases, and a transition to the fourth is dependent on a vaccine. The first step of Phase 3 -- when movie theaters, fitness centers, museums and more were allowed to reopen -- began on July 6, when there were 603 COVID-19 patients in hospitals and the rolling average positive test rate was below 2 percent.

Municipalities, except for those deemed at the highest risk of COVID-19 spread, were allowed to proceed to the second step, involving indoor performance venues, recreational activities and retail-store fitting rooms, began on Oct. 5. At that time, the positivity rate stood at 1.1 percent and 473 COVID-19 patients were hospitalized.

As of Monday, the average positivity rate was 5.46 percent and 1,516 COVID-19 patients were hospitalized, and most available beds across the state's hospital systems -- 65 percent in intensive care units and 77 percent of non-ICU beds -- were occupied.

"The new infections and hospitalizations are showing disturbing trends," Baker said. "Once again, our health care workers and our health care system are being put at risk as the case count continues to rise. The days of most people doing most of the right things are probably not enough, but we're asking everyone to join us and step up their vigilance



every day, in every setting -- work, home, school, everywhere."

Mask rules are also being tightened at offices and gyms. Masks will be required at all times in gyms -- under [earlier standards](#), masks were not required for customers "engaging in strenuous fitness activity" when a 14-foot distance could be maintained -- and office workers will need to wear masks unless they are alone in their own workspace.

The administration is encouraging, but not mandating, that employers continue allowing employees to work remotely when possible and that people dine out only with members of their household.

For restaurants, new guidance will require diners to wear masks at all times when not eating or drinking, lower the maximum table size from 10 people to six, set a 90-minute time limit on tables and prohibit musical performances. Malls also must close their food court seating.

Baker relayed an anecdote he said was intended to drive home the risks around socializing with people from different households.

He said he heard from a friend who had been planning, with her husband, to join another couple for dinner and the restaurant was unable to seat their party outdoors. Baker said when his friends declined to take an indoor table and passed on the gathering, the other couple "gave them a lot of what-for about why they were being so silly with respect to how they were dealing with this issue, and then five days later they both tested positive for COVID."

Baker said his friend "heeded the guidance from us and others that said you really shouldn't be spending a lot of time indoors with people you don't spend time with, live with, on a regular basis."

"We're social people. We miss our friends," he said. "We get it. It's true for all of us, and there's no question that some of the decisions we're making today that will become effective this weekend will create hardship and difficulty for many small businesses and their families, which is why these decisions are hard."

Rep. Mike Connolly, a Cambridge Democrat who has been critical of the administration's approach to reopening, called Baker's actions "disappointing" in a [Twitter thread](#) that said the state needs "science-based polices that impose physical distance AND provide \$\$\$ relief."

Connolly said he was "shocked this was the extent of the announcement."

"Why not say, then, that the rule is you can only go out to eat with people in your own household," Connolly, who thinks indoor dining should be fully shut down, said in a message to the News Service. "That would at least have some logic to it."

The state's casinos opened in the first step of Phase 3, so the rollback will not force them to close.



Massachusetts Democratic Party Chair Gus Bickford, in a statement, noted that Baker was allowing casinos to stay open while curbing elective inpatient procedures and described the restrictions the governor did impose as "extremely modest" and the product of mounting public pressure.

"No matter the issue, Baker only acts when pressured," Bickford said. "It's not leadership; it's negligence."

The Massachusetts Health and Hospital Association offered its support for the rollback.

"We are again seeing the direct and powerful effect that community transmission of COVID-19 has on the strength of our healthcare system, and we have arrived at a point where these stronger limitations on indoor gatherings are essential for preventing our hospitals from being overwhelmed," Steve Walsh, the association's president and CEO, said. "The actions of every resident have very real consequences on the ability of our caregivers to keep up with demand."

Enforcement of New Right to Repair Data Law Delayed

Christmas came early yesterday for the automotive industry – and our member franchised dealers.

Yesterday Massachusetts Attorney General announced her office will not enforce the state's new Right to Repair law until after a federal court rules on claims from the manufacturers challenging it in a trial expected to take place in 2021.

On November 3, Massachusetts voters overwhelmingly approved Question 1, an initiative petition that made significant changes to the state's current Right to Repair law, MGLA Chapter 93K. Under the state constitution, the new law takes effect on December 18, 2020.

The law expands consumer and repair shop access to vehicle data. The law also requires dealers to provide customers a notice, drafted by the AG, detailing vehicles' telematics. The AG will not be creating the notice nor enforcing the notice requirement until the legal challenges are resolved. As we have written previously, a dealer could lose his or her franchise license issued by a municipality if the dealership violates the notice requirement. An egregious requirement on its own, we will be petitioning the Legislature next session to change this requirement, if the overall law survives the legal challenges.

As we have written previously, the Alliance for Automotive Innovation, which represents the vehicle manufacturers doing business in the U.S., filed suit on November 20 against Massachusetts AG Maura Healey, who is charged with enforcing the law's provisions, claiming that the law is unconstitutional and is also pre-empted by other federal laws that the factories must comply with across the country. Subsequent to the lawsuit filing, the Alliance last week filed a motion for a preliminary injunction to prevent enforcement of the law.



In response to the AG's stipulation not to enforce the law until the federal trial is complete or the issues resolved, the Alliance pledged to conditionally withdraw its filing for injunctive relief.

Here is a story, courtesy of *Automotive News*, on the latest development in the right to repair saga.

“Alliance Wins Delay on Revised Mass. ‘Right to Repair’ Law”

Massachusetts Attorney General Maura Healey said on Monday that her office will not enforce the state's revised "right to repair" law until after the federal court rules on claims challenging the legislation, according to a recent court filing.

The action comes after the Alliance for Automotive Innovation last week asked a U.S. district court for a temporary order barring enforcement of the recently passed ballot measure in Massachusetts that expands access to data related to vehicle maintenance and repair.

In response to the attorney general, the alliance has conditionally withdrawn its request.

A trial is expected to take place in 2021 unless the claims are dismissed. The law is scheduled to go into effect by Dec. 18, according to the attorney general's court filing.

The updated right-to-repair law requires automakers to equip vehicles that use telematics — which collect and wirelessly transmit information such as crash notifications and remote diagnostics — with a standardized open-access data platform that is accessible to vehicle owners or third parties such as repair shops starting with the 2022 model year.

The alliance — which represents General Motors, Ford, Toyota, Volkswagen and other automakers — first filed a federal lawsuit Nov. 20 in U.S. District Court for the District of Massachusetts, arguing that the law is "unenforceable because it is unconstitutional" and conflicts with federal laws.

The group also alleges the revised law poses cybersecurity and vehicle safety risks and that the short timeline sets an "impossible task" for compliance.

Robert O'Koniewski, executive vice president of the Massachusetts State Automobile Dealers

Association, said the group is grateful to the attorney general "for holding off enforcement of a notice requirement that dealers are required to provide to customers on a law that the factories cannot comply with by next week or probably even by next year."

"There is no reason for any franchised dealer to have his or her license to do business in jeopardy due to a legal standard that other third parties cannot comply with," he said in an emailed statement to *Automotive News*. "Further, we look forward to watching the legal process play out as the parties and the federal court attempt to resolve the meaning of this ill-contemplated and poorly drafted statute by next July."



**COMPLIMENTARY WEBINAR - LABOR & EMPLOYMENT LAW UPDATES -
FRIDAY, DECEMBER 11, 9:00 A.M.-2:00 P.M.**

MSADA associate member Murtha Cullina, a law firm with offices in Massachusetts, Connecticut, and New York, will conduct a webinar to update attendees on various labor and employment law issues.

Webinar Session – Friday, December 11, 9:00 a.m. – 2:00 p.m.

Topics include:

- COVID issues in employee benefits
- Managing employees in a remote work environment
- Remote Work: cyber challenges
- Ownership of employee-generated IP in the time of COVID-19 and remote work
- Immigration Law, Policy and Post-Election Update

Click [here](#) to register for the December 11 webinar.

There is no cost to participate. Registration is required, however.

For more information, please contact: Andrea Race at (860) 240-6156
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If you have any questions regarding this bulletin, please contact Robert O'Koniewski, Esq., MSADA Executive Vice President, by e-mail at rokoniewski@msada.org, or Peter Brennan, Esq., MSADA staff attorney, by e-mail at pbrennan@msada.org, or either by phone at (617) 451-1051.