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GOV. BAKER OUTLINES COVID-19 VACCINATION PLANS

SJC REJECTS CHALLENGE TO BAKER'S AUTHORITY IN PANDEMIC

DOC PREP FEES AND FACTORY SALES INCENTIVE PROGRAMS

Baker Outlines State Plan to Vaccinate for COVID-19; Massive Effort Scheduled to Unfold Over Many Months

[Courtesy *State House News Service*]

The Baker administration plans to distribute 300,000 COVID-19 vaccines over the next three months to Massachusetts residents and workers who face the highest risks for the virus, starting its immunization rollout by focusing on health care workers, long-term care facilities, first responders, and congregate care settings.

In one of the most optimistic signs yet that relief from the gruesome pandemic is on the way, state officials charted a clear course this week to make the long-awaited vaccine widely available, pending approval of its emergency use by the Food and Drug Administration.

The [three-phase plan](#) is scheduled to roar into action this month with the first 60,000 doses set to arrive by Dec. 15. About 300,000 doses, including both Moderna- and Pfizer-manufactured vaccines, should arrive by the end of the month.

By the spring, millions more doses should land in Massachusetts, and the general public could start accessing immunization free of charge as soon as mid-April.

The first phase will make vaccines available to those critical to keeping the health care system running and others who are most at risk for COVID-19. It will start with health care workers involved in pandemic response.

"Clinical and non-clinical health care workers doing direct care and COVID-facing care are at the highest risk for COVID-19 exposure due to what they do every day," Gov. Charlie Baker said at a press conference held about nine months after the pandemic ramped up in Massachusetts.

"Providing this group with the vaccine first will protect them from exposure and ensure that they can continue to provide health care to others safely."

Through the rest of the phase, doses will then become available to long-term care residents and staff, first responders, workers and residents at congregate care settings such as shelters and correctional facilities, home-based health care workers and those in the health



shelters and correctional facilities, home-based health care workers and those in the health field who are not involved in COVID care.

In phase two, aimed to begin around mid-February and make more than 1.9 million doses available, adults with two or more comorbidities that create risks for COVID-19 complications would be first in line, followed by workers in fields such as transit, K-12 and early childhood education, sanitation, and grocery stores, then adults 65 years old and older and individuals with just one comorbidity.

The third and final phase, when the vaccine would become available to everyone else in Massachusetts who falls outside those groups, is targeted for the spring. Baker said the "approximate goal" is April.

All but two hospitals in Massachusetts will receive vaccines from the first shipment, according to Health and Human Services Secretary Marylou Sudders, whether directly from the manufacturers, from the state Department of Public Health, or from other hospitals.

Facilities that get doses directly from Pfizer are already equipped with the necessary "ultra-cold freezer storage" to keep vaccines at -70 degrees Celsius, Sudders said.

They will not be the only sites where residents can access the vaccine, though: as the state builds up its infrastructure and receives more doses, many different health care locations will be equipped to conduct vaccinations.

Crucially, vaccines will be offered for free with no out-of-pocket charges or copayments from insurers.

"When available, all health care institutions, including our hospitals, community health centers and private medical offices will have access to the COVID-19 vaccine for their patients," Sudders said. "Many medical professionals can administer the vaccines: doctors, nurses, dentists, other licensed clinicians, pharmacists, pharmacy interns, pharmacy techs, paramedics and certified medical assistants under supervision."

Those living or working in long-term care facilities will not need to travel. Under a federal partnership with CVS and Walgreens, representatives from the pharmacies will go to all long-term care locations to vaccinate staff and residents on-site.

The long-term care industry has been devastated by the pandemic, with nearly two-thirds of the more than 11,000 COVID deaths in Massachusetts occurring in facilities.

Members of the advisory group that developed the plan centered equity as a focus of the effort, acknowledging that the virus has wrought disproportionate damage on communities of color and on lower-income areas.

During the distribution's second phase, a 20 percent vaccine allocation will go to communities with high social vulnerability and more potent COVID-19 impacts.

"This was complex and difficult work," said Rev. Liz Walker of the Roxbury Presbyterian



Church, a member of the advisory group. "Everybody rolled up their sleeves, put in the time and did what was necessary. Communities of color and at-risk populations will be prioritized throughout this process in order to preserve life and prevent serious complications from COVID-related illnesses."

Tim Foley, executive vice president of the 1199 SEIU union that represents tens of thousands of health care workers, said the plan to prioritize those on the front lines of pandemic response is "the right call."

"It is imperative that the healthcare and home care workers who have been the heroes of this healthcare crisis be given the protection they need to continue working safely in all care settings," Foley said in a statement. "Access to COVID-19 testing and vaccination of workers helps to protect patients, and the communities they live in."

With Wednesday's announcement of a plan and timeline, hope is more prominently on the horizon. But officials cautioned repeatedly against easing up prematurely.

Both the Moderna and Pfizer vaccines -- the two that appear most likely to get imminent federal authorization, according to Baker -- require two doses three to four weeks apart.

Dr. Paul Biddinger, director of Massachusetts General Hospital's Center for Disaster Medicine and the head of the advisory group, said it could take six weeks after vaccination for an individual to achieve immunity.

Even if all of the outstanding variables such as authorizations and supply chains fall into places, Biddinger said it could take six to nine months to "reach a good chunk of the country" with vaccines.

Those who receive a vaccine should continue to follow the now-familiar COVID precautions such as wearing face masks in public, he said.

"What we know about vaccines is that they dramatically lower your risk of needing hospitalization or dying. They protect you," he said. "What we don't know is whether they completely prevent you from getting a low-level infection or transmitting the illness."

"In other words, I could be vaccinated, but I can have a cold, maybe so small I don't notice, but that means I put others around me at risk," Biddinger continued. "Until we get to high enough levels of vaccination, we need to be following the same guidance all together. I can't take my mask off because I've been vaccinated."

Biddinger also stressed that those who have had COVID already -- a group in Massachusetts that includes more than 240,000 people -- should not shy away from a vaccine.

Under current U.S. Centers for Disease Control guidance, anyone who has had a confirmed COVID case should wait three months before receiving a vaccine, he said, but those with infections older than that can still gain from the vaccine's protections.

American Civil Liberties Union of Massachusetts Executive Director Carol Rose praised



the Baker administration's plan for emphasizing equity, particularly because it ensures inmates in correctional facilities -- where several major outbreaks have occurred -- will be included in the first phase.

"Making vaccines available to incarcerated people is an important step toward containing COVID-19 inside and outside of these facilities and providing constitutionally mandated medical care, but Governor Baker and other leaders should also act now to reduce incarceration levels and increase testing so that more people are alive to receive the vaccine when it becomes available," Rose said in a statement.

For more information on the vaccine process, click on [Vaccine FAQ](#).

SJC Rejects Challenge to Baker's Authority in Pandemic; Rules Governor Acting within Civil Defense Act Powers

[Courtesy *State House News Service*]

Gov. Charlie Baker's extensive, executive order-fueled pandemic response is justifiable under state law and did not violate the constitutional rights of businesses and organizations affected by mandatory shutdowns, the state's highest court ruled yesterday.

Six months after the New Civil Liberties Alliance sued Massachusetts on behalf of business owners and religious institutions, the Supreme Judicial Court [upheld](#) the Baker administration's emergency actions, concluding that the governor acted within the emergency powers afforded to governors under a 1950 law.

The consequential decision allows the state's COVID-19 strategy to continue along its current trajectory, avoiding a sudden and dramatic shift in how leaders approach the public health emergency amid rapid transmission of the highly infectious virus and dwindling hospital capacity.

Justices included a key caveat, though, that their ruling does not give blanket authorization for future health emergencies and that the governor's response might need to be curtailed once the COVID outlook improves.

"I think we've tried pretty hard to be balanced and to be as reasonable and fair as we could be in this very difficult time and very difficult circumstances and I appreciate the SJC's decision with respect to those issues," Baker said in the wake of the decision.

Representatives from NCLA and the Massachusetts Fiscal Alliance, which supported the lawsuit, told reporters Thursday that they are exploring the possibility of appealing portions of the case to the U.S. Supreme Court.

"Massachusetts has now shepherded the liberty-loving principles of the American Revolution from cradle to grave," NCLA Senior Litigation Counsel Michael DeGrandis, who argued the case before the SJC, said in a statement. "John Adams must be spinning in his tomb at the news that the colony that he and his fellow patriots fought so hard to liberate from arbitrary royal decrees, and establish as a republic grounded in a government



of laws and the consent of the governed, has become what Adams feared most."

They had [argued](#) that Baker improperly based his litany of orders on powers granted under the Civil Defense Act, a 1950 state law that outlines gubernatorial emergency powers in crisis situations such as wars and natural disasters.

The CDA does not explicitly name pandemics, and that prompted Baker opponents to argue that he overstepped his limits. Instead, the plaintiffs said, local boards of health should have taken the lead on COVID response under the Public Health Act that tasks them with disease control.

In the court's view, however, the global pandemic falls clearly into the "other natural causes" category in the Civil Defense Act and creates an emergency of such a scale that it "cannot be addressed solely at the local level."

"It is clear from the language of both acts that the Legislature could not have intended the PHA, and therefore primarily local boards of health, to be exclusively responsible for addressing a public health crisis such as COVID-19, a pandemic that has killed over one million people globally and over 10,000 people in Massachusetts," Justice Elspeth Cypher wrote in the court's decision.

The health crisis also spawned a national recession. Millions of workers are jobless, and many businesses do not anticipate surviving a long winter unless they receive financial support.

However, the court ruled that Baker's forced business shutdowns and phased reopening plans do not violate constitutional due process or free assembly rights.

Decisions on what and how organizations could operate were widely applicable, not targeting individual businesses or groups, justices said. The orders also did not outright ban religious gatherings, but instead subjected them to the same gathering limits as secular institutions.

Some employers face a "larger burden," the court said, but justices concluded that does not make the restrictions arbitrary.

"The Governor is not, as the plaintiffs argue, 'donn[ing] the mantle and crown' to pick winners and losers; he is making difficult decisions about which types of businesses are 'essential' to provide people with the services needed to live and which types of businesses are more conducive to spreading COVID-19, and basing his emergency orders on those determinations," Cypher wrote.

Baker's response also did not interfere with the Legislature's role in guiding the state through a crisis, according to the court. His orders stemmed from legislative authority granted under the Civil Defense Act, and the court noted that lawmakers have not exercised their authority under that law to make the act or any part of it inoperative through the adoption of a joint resolution.



Justices pointed to several COVID response bills the House and Senate passed, including a moratorium on most evictions and foreclosures, approval for expanded take-out and delivery food and drink, and an overhaul of voting procedures.

"Therefore, not only have the emergency orders not precluded the Legislature from exercising its full authority to pass laws, but the Legislature also has at its disposal a way to curb the Governor's powers under the CDA, should it desire to do so, and it has not done so," they said.

Asked whether lawmakers are interested in codifying some of the pandemic restrictions that so far have been doled out through executive order, DeGrandis replied that Massachusetts does not have "a critical mass of legislators willing to take the political risk" of passing unpopular laws.

While the court ruled that Baker has stayed within the proper lanes so far, justices stressed that the COVID-19 pandemic is a unique situation. Future health emergencies might not qualify the same way under the Civil Defense Act.

Judges did not outline a clear timeframe, but hinted that eventual improvement in the public health landscape might require Baker to scale back the emergency response.

"Although we hold that the COVID-19 pandemic falls within the CDA, we do not hold that all public health emergencies necessarily will fall within the CDA, nor do we hold that when the public health data regarding COVID-19 demonstrates stable improvement, the threshold will not be crossed where it no longer constitutes an emergency under the CDA," they wrote.

That language did not give plaintiffs any optimism. DeGrandis said he does not understand the court's rationale.

"I still think this is pretty open-ended," he said. "It's pretty easy for the next governor to declare a state of emergency with almost any health emergency, and that gives me great concern for Massachusetts."

Ten local businesses and organizations, including churches, salons and a boxing facility, sued Baker in June with the help of the New Civil Liberties Alliance, a national non-profit that describes itself as fighting the "unconstitutional administrative state."

Governors in other states have also faced challenges to their legal authority during the COVID pandemic.

In Michigan, the state's top court ruled that Gov. Gretchen Whitmer did not have authority to redeclare a state of emergency without legislative authorization to extend an earlier declaration beyond the 28 days allowable under Michigan law.

SJC justices drew a clear contrast with that case, noting that Massachusetts law does not set an explicit timeframe on states of emergency and that the CDA provides "substantially more detail and guidance to the Governor than the Emergency Powers of the Governor Act provided the Michigan Governor."



Five out of the six justices in the SJC's Thursday ruling -- Cypher, Kimberly Budd, Frank Gaziano, David Lowy and Scott Kafker -- were all appointed by Baker.

The sixth justice who heard oral arguments and participated in the decision, Barbara Lenk, had been the last member of the court not hand-picked by Baker before she hit the mandatory retirement age of 70 this month.

All seven justices now on the court, including new members Dalila Wendlandt and Serge Georges, are Baker appointees.

FYI: Doc Prep Fees and Factory Sales Incentive Programs

Your Association over the last several months has been receiving reports from some of our GM dealers that the factory is penalizing them for charging their standard document preparation fee ("Doc Fee") in connection with certain formula-based incentive programs.

Your Association and our outside counsel have addressed this issue previously with GM and Ford, as we believe it is unlawful for the factories to require a lower Doc Fee for certain classes of customers. Ford stopped the practice entirely after the Association's request to do so, while GM stopped assessing penalties in connection with at least one of its formula pricing programs -- "GM Employee Pricing for Everyone Program" -- but not others. GM continues to assess penalties with regard to formula-based pricing programs for sales to GM employees and GM suppliers. GM's initial tact is to back-charge the entire amount of the incentive (\$2500-4,000) for each vehicle sold to GM employees and GM suppliers where the Doc Fee charged by the dealer exceeds the maximum fee that GM permits under its program (usually \$75.00).

As we have addressed in detail in previous communications to our member dealers, Massachusetts law requires that an individual dealer must charge the same Doc Fee to all customers without deviation. The law does not set or cap the amount of the Doc Fee a dealership may charge, so there is variation in the amount of the Doc Fee charged by competing dealers. However, the Doc Fee must directly reflect the actual administrative costs incurred in processing paperwork associated with a sale. The fee is allowed for cost recovery; it is not intended to be a "profit-making" component of the vehicle purchase. The dealer must make sure that any Doc Fee charged to a customer has some reasonable relationship to the actual costs the dealer incurs in preparing the necessary documents for the customers, except for titling and preparation of finance-related documents. Cost recovery consists of passing on to the customer the costs incurred in doing the following: for example, preparing a P&S, an appraisal document, odometer statements, insurance verifications, etc.; storing or archiving documents; and personnel and computer costs associated with these tasks.

Given that this issue has resurfaced with GM, please be aware as other manufacturers may also attempt to restrict the amount of the Doc Fee that can be charged to customers in connection with any incentive programs or otherwise. If such an attempt occurs, please let us know at rokoniewski@msada.org and provide copies of any factory program materials that attempt to restrict Doc Fees.



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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.