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_CORONAVIRUS UPDATE #74

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[This bulletin supplements our previous bulletins #11 and #16 through #87 on this subject matter. These bulletins are intended to be cumulative so we can avoid repeating the same information.]

EEOC Warns Against Age Discrimination and Other Workplace Concerns During Back-To-Business Push

[From MSADA associate member Fisher Phillips LLP]

In its latest round of updates to a series of COVID-19 Frequently Asked Questions, the Equal Employment Opportunity Commission just warned employers they cannot prevent older workers from returning to work even if they want to protect such workers from the effects of COVID-19. The updates also provide additional guidance regarding ADA reasonable accommodations, preventing workplace harassment in a remote work environment, and addressing other workplace discrimination concerns. What do employers need to know about this latest agency guidance?

EEOC Calls Out Age-Related Discriminatory Practices

The latest round of updates to its FAQs saw the EEOC specifically identify age discrimination as a cause for concern given the current state of affairs. The agency acknowledged that public health authorities have identified those age 65 and over as being at higher risk for a severe case of COVID-19 if they contract the virus. However, because the Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating against those 40 and older, the law prohibits you from involuntarily excluding an individual from the workplace based on their being 65 or older – “even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19”



of severe illness from COVID-19.”

The EEOC also discussed the concept of providing flexibility to older workers and the legal considerations to keep in mind. Unlike the Americans with Disabilities Act (ADA), the ADEA doesn’t include a right to reasonable accommodation for older workers due to age.

However, the guidance notes that you are free under federal law to provide flexibility to workers age 65 and older even if it results in younger workers ages 40 to 64 being treated less favorably based on age in comparison. Make sure to check with your legal counsel before taking any steps that would result in such a situation, however, because there may be nuances under state or local law that need to be taken into consideration.

Further, the EEOC notes that workers age 65 and older also may have medical conditions that would separately bring them under the protection of the ADA. If this is the case, you should keep in mind that these workers may request reasonable accommodation for their disability as opposed to their age, and that you should run through your typical interactive process with them.

For further discussion on this topic, you can refer to our recent alert: “NBA Commissioner’s Comments On Older Coaches Is A Lesson To All Employers Returning To Work.”

Agency Also Confirms Limits of Accommodation Obligations

In other updated portions of the FAQ guidance, the EEOC confirmed that workers are not entitled to an ADA reasonable accommodation simply to avoid exposing a vulnerable family member to a potential case of COVID-19. “Although the ADA prohibits discrimination based on association with an individual with a disability,” the agency said, “that protection is limited to disparate treatment or harassment.” It confirmed that the federal disability rights statute does not require you to accommodate an employee without a disability based on any disability-related needs of a family member or anyone else.

However, employers are certainly permitted to provide such flexibilities if they choose to do so, the agency said. For example, you can allow an employee without a disability to work remotely to protect a family member of theirs who has a disability from potential COVID-19 exposure. You should be careful when doing so, however. Not only does the EEOC warn employers not to engage in disparate treatment on a protected basis when offering such flexibilities, you need to consider whether doing so could require you to offer remote work as an ADA reasonable accommodation to that employees or others similarly situated at some point in the future.

The EEOC also noted that employers may provide information to employees about requesting disability accommodations before employers announce a date for a return to the workplace, so long as they provide it to all employees. The notice may include a list of all medical conditions identified by the CDC that may place people at higher risk of serious illness if they contract COVID-19, provide instructions on whom the employees should contact, and suggest that the employer is willing to consider requests for employees who



have those conditions on a case-by-case basis.

The EEOC noted that requests for accommodation may also come in the form of requests for alternative screening methods upon entering the workplace. As always, you should ensure that the individuals receiving the requests for accommodation understand how to handle them in compliance with applicable nondiscrimination laws.

EEOC Reminds Employers about Workplace Harassment in Remote Work Era

The updated guidance also sends a stern warning to employers that illegal harassment is still a viable concern even if your workforce is mostly working on a remote basis. “Harassment may occur using electronic communication tools – regardless of whether employees are in the workplace, teleworking, or on leave,” the agency said. The EEOC reminded employers that your employees are prohibited by law from harassing other employees through emails, calls, video platforms, or chat communications.

The agency recommends that you should ensure your managers understand how to recognize harassment and know how to quickly identify and resolve potential problems. For example, the agency said that if one of your managers learns that a teleworking employee is sending harassing emails to another worker, they should take the same actions it would take if the employee was in the workplace. You may also choose to send a reminder to your entire workforce noting your harassment prohibitions, reminding them that harassment will not be tolerated, and inviting anyone who experiences workplace harassment to report it to management.

EEOC Includes Special Word about Harassment against Asian Employees

The EEOC went out of its way to address how you should respond to “pandemic-related harassment” against employees who are or are perceived to be Asian. The agency recommends that you should be particularly alert at this time to demeaning, derogatory, or hostile remarks directed to employees who are or are perceived to be of Chinese or other Asian national origin, including about the coronavirus or its origins.

Other Workplace Discrimination Considerations

The latest round of updates from the EEOC also covered topics that may find their way to your workplace during these unprecedented times. Specifically:

- **Caregivers/Family Responsibility:** You are permitted to provide flexibilities to workers who are juggling work responsibilities and parenting during this time of school closures and distance learning (such as telework, modified schedules, or other benefits), but need to make sure you are not treating employees differently based on sex or other EEO-protected characteristics. “For example,” the EEOC says, “female employees cannot be given more favorable treatment than male employees because of a gender-based assumption about who may have caretaking responsibilities for children.”
- **Pregnancy:** Just as with older workers, you may not involuntarily exclude an employee from the workplace due to pregnancy. “Even if motivated by benevolent concern,” the EEOC says, “an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough. You



may also have an obligation to accommodate a pregnant worker under the ADA (if a pregnancy-related medical condition arises) or through the Pregnancy Discrimination Act (which requires you to treat women affected by pregnancy and childbirth the same as others who are similar in their ability or inability to work, which may entitle them to job modifications including telework, changes to work schedules or assignments, and leave).

HHS Sec. Azar Says Future Shutdowns Will be Locally Led - Baker: Cautious Re-Opening Best Defense Against Second Outbreak

[Courtesy *State House News Service*]

U.S. Health and Human Services Secretary Alex Azar, on a visit to a Boston hospital today, said he did not believe the fight against COVID-19 would require future economic shutdowns at the national level.

Azar joined Gov. Charlie Baker to tour operations at Beth Israel Deaconess Medical Center, where he discussed vaccine development efforts and the federal government's overall approach to the pandemic.

Baker said Beth Israel's work toward a vaccine with Johnson & Johnson "provides a significant amount of optimism to all of us who are looking for both treatments and vaccines as a big part of how we -- not only here in Massachusetts but around the country and across the globe -- deal with COVID-19 as we go forward."

Azar said the federal government has set an "ambitious goal" of having 300 million doses of a vaccine ready by early next year. The effort will involve harnessing both the federal government's resources and the private sector, along with "pulling the inefficiency out" of drug development timelines, he said.

"We're going to have many shots on goal, but there's of course no guarantee with science," Azar said.

There are about 60 counties in the country considered COVID-19 hotspots right now, Azar said, most of which "involve fairly discernible causes" like living or working environments including nursing homes, prisons or meat-packing facilities.

Like many other states, Massachusetts is in the midst of a gradual attempt to reopen the economy after shutting down most aspects of public life earlier this spring in hopes of mitigating the spread of the coronavirus. Each state is crafting its own approach to reopening, and Baker said he's heard criticism "that ours so far is too slow and too fast."

Baker said the idea behind a phased-in reopening "was so that we would have the ability to continue to check" public health data and to "make sure that if something did happen we would be in a place to address it."

"There's no question in my mind that a cautious and careful reopening based on data is ultimately our best way to ensure that we don't end up creating a second outbreak," the governor said.



Azar said it's still too early to tell what impacts that state reopening measures, the Memorial Day holiday weekend, and the recent string of large protests against racism and police brutality have had on the spread of the virus. He encouraged demonstrators to cover their faces and practice social distancing and said he wanted "to emphasize that peaceful protesting is a vital part of our American democracy and we've got to support that and defend that."

If there is a future significant outbreak, Azar said the federal government believes "that we have the tools now to avoid these types of shutdowns again in the future, certainly on a national level."

"There could be isolated communities that will face outbreaks that need to take some forms of community mitigation steps in the future," he said. "That'll be locally led, state-supervised, we'll provide support at the federal level."

The federal government is envisioning a "six-part approach" to addressing COVID-19, Azar said -- looking for early indicators of people experiencing symptoms; testing those people as well as populations that face higher risk; executing the "traditional blocking and tackling of public health" to contain, isolate and treat identified cases; making sure health system capacity and supplies remain adequate; developing therapeutics for treatment; and developing vaccines.

Baker has discussed challenges Massachusetts officials have faced in trying to secure personal protective equipment, including instances where they have been outbid by the federal government, and has touted efforts to build up a local supply chain.

Azar said President Donald Trump wants to build up a "next generation strategic national stockpile focused on having 100 percent of the products needed for a pandemic."

He reiterated Trump's intention to leave the World Health Organization "absent change," saying the WHO "can take steps to demonstrate its independence from China, its commitment to reform, its commitment to ensuring accountability in terms of transparency [and] investigation of the original causes and origins of the outbreak."

The novel coronavirus that causes the respiratory disease was first detected in the city of Wuhan in China's Hubei province late last year.

Azar said the U.S. did not have a system for "standing up testing of a novel pathogen" and suggested that China had been "concealing" information about the virus.

"This was a truly unprecedented circumstance, a novel Coronavirus like this, a highly transmissible but very severe disorder that spread, now we know -- no thanks to the Chinese for concealing it -- asymptomatic transmission that makes this a particularly perplexing and dangerous virus to be dealing with," he said. "We had to build a completely new testing system in this country."

Mass. House: Senate Failed to Fund \$300 Mil Road Bill - Speaker DeLeo: "We Took the Tough Vote"



Both the House and Senate have now taken initial votes boosting the amount of state funding available for local road and bridge repairs, but House leaders are concerned that their counterparts left untouched a package of tax and fee increases that could help cover the extra \$100 million per year.

The Senate [approved legislation](#) yesterday directing \$300 million to the Chapter 90 maintenance program and creating a new MBTA Board of Directors, but top Senate Democrats opted to pull those two narrow topics out of larger bills the House approved three months ago and have not indicated a plan for addressing the broader transportation revenue or borrowing questions.

With the country in the depths of a recession and the state facing a grim economic outlook and wondering how to balance a budget with revenues falling, House Speaker Robert DeLeo and one of his top deputies today questioned how they could afford to increase transportation spending without a related revenue injection.

"We did a bill in March, obviously, and we increased Chapter 90 at that point in time, but we had a way to pay for it," said Rep. Aaron Michlewitz, chair of the House Ways and Means Committee. "We had mechanisms to pay for it. We're in the midst of dealing with potentially \$6 to \$8 billion dollars in a shortfall of revenue for (fiscal year) 2021, so it's a little perplexing to figure out how we're going to be doing that and raising Chapter 90 without using the revenue sources that have been put out there by the House."

"Times have changed," Michlewitz added, and "the Chapter 90 discussion should have changed as well."

In March, the House [approved](#) a range of tax and fee increases, including a 5-cent hike to the state's gasoline tax and a 9-cent increase to the diesel tax, that bill authors estimated could bring in more than half a billion dollars per year.

One day later, they passed legislation authorizing \$18 billion in longer-term borrowing for transportation projects, including language that would increase annual funding for the Chapter 90 program -- a step municipalities have long implored Beacon Hill to take -- from \$200 million to \$300 million.

The gas tax increase would be the first in Massachusetts since lawmakers approved a controversial law in 2013 raising the tax 3 cents per gallon. At the time, the new law included language indexing the gas tax to inflation, but voters repealed that section in a referendum the following year.

"I don't think we can take a year off in terms of paying attention to this issue," DeLeo said Friday. "Most importantly, as part of the House bill, we had a mechanism, we took the tough vote, in terms of making sure there was financing to back up exactly what we did."

The House's votes came about one week before Gov. Charlie Baker declared a state of emergency and Beacon Hill's attention shifted almost entirely to pandemic response. In the months since then, Senate officials have not revealed their plans for the proposed



revenue or for the remainder of the \$18 billion bond bill.

In April, Senate President Karen Spilka [said](#) she is "not certain that now is the time to be talking about taxes."

She touted the Senate's new bill during a Friday interview as a key step on two time-sensitive elements, given that cities and towns look for approval of Chapter 90 funding to help plan construction seasons and that the existing Fiscal and Management Control board expires on June 30.

"We recognize that as cities and towns are beginning to start moving forward, Chapter 90, helping them fix their roads and bridges is always an important rite of spring and summer, and we need to get that to our communities," Spilka said.

Asked if the state could afford the \$300 million allocation without new revenues, Spilka said, "I think we're able to do it."

"I think particularly with the weather being so beautiful right now, now is the time that cities and towns need the money to do the road work, the bridge work, and hopefully that increase, the \$100 million, will help all of our cities and towns," she said.

It is also unclear how the two branches will reconcile their divergent approaches to the future of MBTA governance.

The House's tax bill (H 4508) would have added two seats to the five-member FMCB, one for the city of Boston and the other for a different municipal official from the T's coverage area, while extending the board three to five more years.

The Senate version (S 2746) creates a new, seven-seat MBTA Board of Directors, which would include the transportation secretary as an ex officio member and allow the MBTA Advisory Board group representing cities and towns to appoint a member.

DeLeo flagged those differences on Friday as another concern that will need resolution, doubling down on his support for the House's proposal.

If the branches and Baker do not reach an agreement, oversight of the MBTA will revert to the Department of Transportation Board of Directors when the FMCB dissolves.

Spilka said she hopes the Legislature can reach an agreement on MBTA governance by that June 30 deadline, and added that the Senate included the provision in its Chapter 90 bill "because we realize it needs to get done by the end of the month."

The MBTA has been racked by budget difficulties and service problems in recent years and the transit authority faces an uncertain future due to plummeting ridership during the pandemic and uncertainty about when and how many riders will return to the system.

ARB Webinar on PPP Loan Law Changes – Tuesday, June 16, 2:00 p.m.



The accountant firm Albin Randall & Bennett, an MSADA associate member, will conduct a webinar on the new changes to the Paycheck Protection Program loan law – the [Paycheck Protection Program Flexibility Act of 2020](#) – on Tuesday, June 16, at 2:00 p.m. ET. Click [here](#) to register for the webinar.

NOTE: ARB is actively working to incorporate the new law changes into its [PPP Loan Forgiveness Workbook](#). As with the original version, the updated workbook will be a useful planning tool to do "if, then" analysis regarding your headcount and payroll costs.

NADA Dealership Lifeline Webinars for Next Week

NADA will conduct the following webinars next week:

- **Wednesday, June 17, 1pm-2pm ET:** [Build a Post Pandemic Dealership Using Simple Tech](#). Kimoby's Julie Blackburn and Anastasia Gileva will discuss how text messaging can help dealerships mitigate the impact that the pandemic has had on their businesses and identify new ways to protect their bottom lines.
- **Thursday, June 18, 1pm-2pm ET:** [The Modern F&I Office](#). Jason Swiech of CDK Global will explain how modern retailing strategies are extending to F&I and how to ensure workflows—and revenue—remain stable with changing customer behaviors.

Recordings of [all webinars in NADA's Lifeline Series](#) are available to NADA and ATD members 24/7, free of charge. Click [here](#).

NADA COVID-19 Resources for Dealers

NADA has produced a tremendous amount of resources to help dealers and their operations during the Coronavirus pandemic. A prolific source of information has been the NADA regulatory affairs team, by way of guidance, analysis, interpretation and explanation. The regulatory affairs group has recently worked with the NADA public affairs team to reorganize all of the regulatory compliance materials on the NADA Coronavirus Hub. The trove of materials is now organized by “Information” and by “Key Documents.” Hot links lead you to every individual item/resource. The site and the links will be updated continuously. Bookmark the address, and click on the links as you need them for the latest versions of everything, such as CARES Act, SBA, PPP, Tax Relief, and more. Please check it out here: <https://www.nada.org/coronavirus/regulatory/>.

Daily Massachusetts COVID-19 Tracker

The state’s COVID-19 Dashboard with up-to-the-date data can be found [here](#).

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