

NEWS BULLETIN

Maine Automobile Dealers Association

180 Civic Center Drive P. O. Box 2667 Augusta, Maine 04338-2667 DIAL 623-3882
e-mail:info@maineautodealers.com FAX 623-2318

2017-13

DISTRIBUTION

- General Manager
- Office Manager
- Parts Manager
- Sales Manager
- Service Manager

LEGISLATURE NEARS FINAL DAY

The Maine state government shutdown has come and gone, a brief three days over a long holiday weekend. A two-year state budget has been passed which eliminates the 3% income tax surcharge passed by referendum last November while at the same time providing additional money for education. BUT... the Legislature has not yet completed its work for 2017.

Next week Maine's 151 State Representatives and 35 State Senators will once again gather in Augusta. There are many Legislative Documents (LDs) which await final action, potential bond issues which could be sent to Maine's voters on November ballots, and possible studies on subjects such as highway funding and universal health care. Most of the LDs sit on the appropriations table, having been passed by multiple House and Senate votes but having a financial impact on the state budget due to a new or changing program or service. Legislators must determine how much money they have available from projected revenues after the state budget is fully funded, then decide whether or not to use any available money on the LDs awaiting final action. It will be an interesting time at the State House.

Legislators reviewed over 1600 LDs, with at least as many proposed amendments. Some passed and will become law, many others were "killed", and a number have been carried over until the 2018 session. MADA will provide a comprehensive summary after the Legislature finally adjourns its 2017 session, and the effective date of enacted LDs becomes known, likely mid-October.

MADA 2017 ANNUAL MEETING – CONVENTION

Your Association's annual meeting and convention was held under mostly sunny skies during June 21-24 at the Harborside Hotel-Spa-Marina in Bar Harbor. Over 200 dealers, dealership personnel, associate members, guests and family members participated in the various educational, recreational and social aspects of our visit to Bar Harbor. The annual meeting and educational workshops (see below) included 74 attendees, the golf outing at Kebo Valley Golf Club included 51 players, and varying numbers enjoyed Acadia National Park and the multiple attractions on Mt. Desert Island.

Mark Silk, the Chief Deputy in the Bureau of Motor Vehicles (BMV) Office of Dealer Licensing and Investigations, spoke and answered questions at one workshop. Mark's topics included title processing issues, dealer wrecker plates, the new dealer plate issuance currently underway as dealership licenses renew, transportation of vehicles to and from auctions, and the problems with dealership ability to timely obtain titles from lienholders after trade-in and loan payoff. All of these topics will be included in discussions between BMV and MADA, as well as other affected parties, that will occur this Fall. These discussion topics will be thoroughly reviewed at MADA's regional meetings later this year.

Glenn Mercer was another presenter in Bar Harbor. Mr. Mercer is the author of an NADA – commissioned research project on the future look and operations of the franchised dealership. Among other points in Mr. Mercer's informative and entertaining 90 minutes was his view that dealerships in all geographic areas will continue to be important to customers, even though manufacturers will exert more control over dealership operations. Service facilities close to customer base, increased use of ride services in metropolitan areas, electric and autonomous vehicle growth in certain areas, the impact of Chinese manufacturing, international trade agreements – these topics and more were addressed. MADA will provide

dealers with additional material generated for NADA and its member dealerships by Mr. Mercer in the near future.

Your Association event in Bar Harbor was a success – good participation, informative educational sessions, enjoyable socialization, and varied recreation combined with hearty food and excellent hospitality. MADA thanks all who attended, with a special “Thank You” to the companies and organizations which co-sponsored various events (see next bulletin).

EMPLOYEE OR INDEPENDENT CONTRACTOR? KNOW THE RULES

The IRS and Maine’s Department of Labor as well as Workers Compensation Board encourage all businesses and business owners to know the rules when it comes to classifying a worker as an employee or an independent contractor. An employer must withhold income taxes and pay Social Security, Medicare taxes as well as federal and state unemployment taxes on wages paid to an employee. Employers normally do not have to withhold or pay any taxes on payments to independent contractors.

This issue is all about the direction and control of the individual(s) by the employing unit. IRS rules and Maine law provide criteria which guide employers in the determination of independent contractor status. Here are two key points for small business owners to keep in mind when it comes to classifying workers:

1. Control. The relationship between a worker and a business is important. If the business controls what work is accomplished and directs how it is done, it exerts behavioral control. If the business directs or controls financial and certain relevant aspects of a worker’s job, it exercises financial control. Control includes:

- The extent of the worker’s investment in the facilities or tools used in performing services;
- The extent to which the worker makes his or her services available to the relevant market;
- How the business pays the workers; and
- The extent to which the worker can realize a profit or incur a loss.

2. Relationship. How the employer and worker perceive their relationship is also important for determining worker status. Key topics to think about include:

- Written contracts describing the relationship the parties intended to create;
- Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation or sick pay;
- The permanency of the relationship;
- The extent to which services performed by the worker are a key aspect of the regular business of the company; and
- The extent to which the worker has unreimbursed business expenses.

Generally speaking, dealerships cannot consider persons who perform dealer swaps as independent contractors.

The IRS can help employers determine the status of their workers by using form [Form SS-8](#), Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding. IRS [Publication 15-A](#), Employer’s Supplemental Tax Guide, is also an excellent resource.

MEMBERSHIP GOLF TOURNEY – SEPTEMBER 7

The 2017 MADA Membership Golf Tournament will be held on Thursday, September 7, at the Martindale Country Club in Auburn. This year marks the 26th year that Maine’s franchised new car and truck dealers and their guests will enjoy an afternoon of golf and camaraderie on a premier Maine golf course. Mark your calendar today – additional information coming in early August.

NEWS BULLETIN

Maine Automobile Dealers Association

180 Civic Center Drive P. O. Box 2667 Augusta, Maine 04338-2667 DIAL 623-3882
e-mail:info@maineautodealers.com FAX 623-2318

2017-15

OSHA DELAYS INJURY AND ILLNESS ELECTRONIC REPORTING DATE

The Occupational Safety and Health Administration (OSHA) is delaying the July deadline by which certain dealerships would have been required to electronically file their 2016 employee workplace injury and illness records. Dealerships which may in the future be required to report electronically by filing Form 300A or equivalent include:

- Commercial truck dealerships with 20 to 249 employees at a single “establishment”. “Establishment” is defined by OSHA as a single location where business is conducted or where services or industrial operations are performed.
- Light duty vehicle and commercial truck dealerships **with 250 or more** employees at a single “establishment”.

Note that light-duty dealerships with **fewer than 250** employees at a single “establishment” are required to record workplace injuries and illnesses, but are not required to submit Form 300A to OSHA.

Until a new deadline is announced, which new date may be December 1, covered dealerships should **not** file any Form 300As. OSHA may also be considering the possibility of doing away with the electronic reporting mandate altogether. For more information on existing federal injury and illness recordkeeping and reporting mandates, visit [NADA's injury and illness recordkeeping page](#). Additional information will be provided when OSHA completes its new rulemaking. For now, all dealerships with more than 10 employees should have completed the OSHA 300 log for 2016, posted the OSHA 300A summary from February 1 through April 30, then filed these forms in your records. OSHA requires that these records be retained for five (5) years following the year to which they pertain.

AVOID SCAMS AND CYBER ATTACKS

At the direction of Acting Chairman Maureen Ohlhausen, the Federal Trade Commission has launched a new website – ftc.gov/SmallBusiness – with articles, videos and other information aimed at helping small business owners avoid scams and protect their computers and networks from cyber attacks and other threats.

EMPLOYMENT APPLICATION RECORD RETENTION

Good business practices would suggest that you not only retain certain hiring records for the required time period, but that you also shred them at the conclusion of that period in order to protect against theft and data breaches. Hiring records include not only employment applications and resumes, but also selection testing (employment tests, drug tests) and investigations (reference checks, background or credit checks).

MADA is often asked if dealerships really are required to retain hiring records from people that are not hired or even considered. The short answer is **YES**. Best practices suggest that hiring records of people not hired should be retained for three years. It's also best practice to shred those records at the conclusion of those three years. This is true regardless of whether the records were generated in response to an advertisement or were unsolicited.

There are federal laws that require employers to keep hiring records for one or two years depending on the situation. Delay in processing claims, complaints, and lawsuits make it a good idea to retain records for some reasonable period beyond the statutory retention deadline. Very often lawsuits and complaints are filed on the very last possible day, after which it may take weeks or even months to get the notice to the employer. Here are the key federal laws that apply to retention of hiring records:

The Civil Rights Act of 1964 requires that you retain hiring records for one year from the date of the hiring decision (i.e. the date the position was filled).

The Age Discrimination in Employment Act requires that you retain hiring records for one year. However, if you are aware that the applicant is over age 40, you must retain the records for two years. (Don't forget that you are prohibited from **inquiring** about the applicant's age).

The Americans with Disabilities Act (ADA) requires that you retain unsolicited hiring records for one year and solicited hiring records for two years. (The ADA does not address how to determine what is solicited and what is unsolicited.)

Things get really complicated if you are a federal contractor. The requirement for businesses that contract with the federal government is two years beyond the review of the records for any position for which the applicant is considered.

MINIMUM WAGE PAY PLAN COMPLIANCE OBLIGATIONS

In another state, a group of commission salespeople sued their dealership group on grounds that the amount of compensation paid was at times below the applicable minimum wage. The salespeople prevailed on their original claims, and because a court recently certified the case as a class action, the dealership group is now exposed to liability for all its current and former salespeople who were treated similarly – a potentially costly result.

While allegations of wrongdoing in the case were much broader – plaintiffs also claimed the dealership group made unlawful deductions from sales commissions – the case serves as a reminder to MADA's member dealerships that failure to design and enforce salesperson pay plans in a manner consistent with requirements of minimum wage laws and the Fair Labor Standards Act (FLSA) can have serious consequences.

There are several considerations dealerships should keep in mind when designing and enforcing salesperson pay plans. Two points warrant repetition. **First, all commission salespeople must be paid wages in each pay period that at least equal the minimum wage, which in Maine is currently \$9.00 per hour or \$360 for a forty-hour workweek.** If your dealership pays commission in each pay period (rather than monthly), that means when commissions plus base do not reach that minimum wage obligation, the dealership must make up any difference for that pay period. **Second, at the end of a settlement period (whether weekly, bi-weekly, monthly) the result is final. Commission earnings are balanced against draws or previously paid amounts; comparison is made to minimum wage obligations; any additional earnings above previous payments are paid.** Negative results cannot be carried forward into the next settlement period.

Taking care to ensure your dealership complies with these legal requirements will help avoid the headaches and financial liabilities the out-of-state dealership group has faced thus far and likely will face in the future as well. MADA will provide additional information on pay plan obligations, and the changes coming for January 1, 2018, at Personnel Issues workshops in the Fall.