

# NEWS BULLETIN

## Maine Automobile Dealers Association

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## COMING CHANGE TO EMPLOYMENT APPLICATIONS

L.D. 1167, "An Act Relating to Fair Chance in Employment", becomes law on October 18, 2021. Maine joins a growing number of states in adopting a "ban-the-box" law that restricts employers' ability to ask job applicants about their criminal history. Proposed federal legislation would create a compliance deadline for private-sector employers to remove questions requiring job candidates to disclose criminal history from employment applications. The purpose of these laws is to provide job applicants who have criminal records a better chance at competing for employment opportunities. Maine previously had no restrictions that prevented private employers from asking questions about a job applicant's criminal background.

MADA is currently working on a sample employment application which addresses issues in the new law. We will distribute it to dealers in September, and discuss exceptions in the law.

Maine's new law prohibits employers from: (1) requesting an applicant's criminal history on an initial employment application; (2) stating on the application or in an advertisement that a person with a criminal history cannot apply or will not be considered for a position. Criminal history is defined in the statute to include information regarding summonses and arrests, detentions, bail, criminal charges and indictments, convictions or dispositions, warrants, and pardons. An employer may, however, ask about an applicant's criminal history during an interview or once the applicant has been deemed qualified for the position. If an employer asks about an applicant's criminal history, the applicant must be permitted to explain the circumstances surrounding any convictions, including post-conviction rehabilitation.

## GUIDANCE REGARDING COVID-19 VACCINATION POLICIES

Both the EEOC and the Maine Human Rights Commission (MHRC) have issued guidance clarifying that employers can require their employees to obtain vaccinations as a condition for entering a workplace.

The Commission released published guidance online for entities that are covered by MHRC oversight regarding COVID-19 issues. Attached is that guidance. On page 3 of the attachment is the Commission's stated position on vaccination requirements by employers. An exception to the vaccination requirement would apply to employees with a religion-based reason for refusing to get vaccinated or an employee with a valid medical reason for not being able to get vaccinated. In both cases, an employer is obligated to explore whether a reasonable accommodation exists that would enable the employee to still perform their job safely. The EEOC has stated that those accommodations for unvaccinated employees could include:

1. wearing a mask
2. working at a social distance from co-workers
3. working a modified shift
4. getting tested for COVID-19 periodically
5. being allowed to work remotely

Finally, an employer can ask its employees to prove that they have gotten the vaccine.

## LEGISLATIVE SESSION RESULTS

The first article in this News Bulletin reviewed one new law the Legislature enacted and the Governor signed. There are many others, some that affect dealers and their business – some that do not. MADA is currently reviewing the final language of these new laws, and will be explaining any that impact dealership operations. Due to the unique “Stop and Go” of this year’s Legislative sessions, not all changes take effect on the same date. You will be receiving information on new laws, and amendments to existing laws, over the next two months. We will send you written summaries, and we currently plan to address these in-person at our 2021 Annual Meeting and workshop sessions during the October 6 event at the Augusta Civic Center (more detail and registration information will be sent in early September).

## LAS VEGAS HOSTS 2022 NADA SHOW

The NADA Convention Show returns live and in-person to Las Vegas in March of next year. Each dealership will be receiving registration information in September. Below are some notes on various aspects of the 2022 event.

- NADA states that 2022 is going to be the most innovative NADA Show in history, with a huge reception at the brand new Allegiant Stadium and vendor exposition in the brand new hall of the Las Vegas Convention Center.
- While some have called for changing course and again producing a digital show, NADA is moving forward to have a safe and responsible in-person show. NADA will of course carefully follow safety guidance and guidelines for any event.
- The Show will have:
  - More than 20 franchise meetings with all major manufacturers;
  - More than 60 workshops covering digital to service to sales innovations;
  - More than 500 exhibitors demonstrating cutting-edge products and services to make dealerships more effective and efficient;
  - Leading speakers will address current business and political issues at our Main Stage.

Bottom line, NADA is preparing a safe and responsible NADA Show that no dealers should miss.

## MASKS and VACCINATIONS

The recent surge in COVID-19 illness has generated an increasing number of questions to your Association office. Generally speaking, the questions are: Do we have to put masks on again? and Can we require our employees to be vaccinated?

Again generally speaking, the answers are NO and YES. A dealership can develop its own policies in these areas. Neither mask-wearing nor vaccinations is currently mandated by government for your business. If you independently decide to adopt policies for your organization, please bear in mind that the policies must be non-discriminatory and must allow for the same exceptions as stated in the previous article (religion and certain medical conditions).

With respect to masks—social distancing rules coming from government, in our opinion it is likely to occur in September or early October, so dust off your plexiglass partitions and such, and review the previously issued Maine rules of dealership operations. MADA is not aware of a definitive re-imposition, but if the illness curve does not recede, we believe there will be government rules.

## Covid 19 Issues

### Some Discrimination Basics

[PSA: Covid19 and Discrimination \(https://www.youtube.com/watch?v=tl7M2lpDEms\)](https://www.youtube.com/watch?v=tl7M2lpDEms) (video)

[COVID-19 and Discrimination | Maine Human Rights Act | Maine Human Rights Commission \(COVID-19%20and%20Discrimination%20|%20Maine%20Human%20Rights%20Act%20|%20Maine%20Human%20Rights%20Commission\)](#) (video)

The Maine Human Rights Act ("MHRA") says that a person cannot be treated differently (worse, really) because of their membership in what the law says is a "protected class"; these are innate characteristics a person generally does not choose about themselves.

The MHRA is the state law that works together with federal anti-discrimination laws like the Americans with Disabilities Act ("ADA"), Title VII of the Civil Rights Act, Fair Housing Act, and Age Discrimination in Employment Act. The Commission does not enforce those federal laws, but the MHRA has been determined to be substantially equivalent to them, and the Commission has partnership agreements to work with the federal agencies that enforce those laws.

**What is a protected class under the MHRA** varies somewhat depending on what area of jurisdiction we are discussing; the MHRA areas of jurisdiction are employment, housing, places of public accommodation ("PA"), education, and extension of credit. When we are discussing all areas of jurisdiction here – meaning a general discussion that applies to employers, PAs, and providers of housing and education - we will refer to "a covered entity" to mean any of those.

There are similar legal theories that apply to most of these areas of jurisdiction.

#### When can a person bring a claim?

- A person in a protected class must have been subjected to "adverse treatment" related to their protected class membership to establish a discrimination claim. The treatment must occur because of the person's protected class, not just to a person in a protected class. There must be a cause-and-effect relationship – the adverse treatment happened because of the race, color, sex, etc. This applies even if the person is not actually in the protected class but is perceived to be in the protected class. Also, a person who experienced adverse treatment because of their relationship with someone in a protected class, the person still has a claim.
- The adverse treatment must be material – something that matters and impacts the person's opportunity to enjoy the covered entity as others do. Not every incident equals unlawful discrimination – it must be significant enough to impact the "terms and conditions" of the employment, housing, public accommodation, education, etc.
- A person has 300 days from when discrimination occurred to bring a complaint to the Commission.

#### Reasonable accommodations – means what?

- A covered entity is allowed to have policies and practices related to COVID-19.
- A person in an MHRA-protected class is allowed to ask a covered entity to make an exception in how a policy or rule applies if it is necessary because of their protected class and they cannot get the benefits of the covered entity without the reasonable accommodation. This tends to occur most often related to disabilities, but the same theory applies to accommodations sought related to national origin (limited English proficiency), religion, sexual orientation, age, and other protected classes.
- The policy exception (a "reasonable accommodation") sought must be (a) related to the person's protected class (b) necessary to allow them to enjoy the covered entity's terms and conditions as others do, and (c) reasonable.
- A covered entity is not required to offer a reasonable accommodation until a person requests one.
- Once a person requests a reasonable accommodation, a covered entity must consider the request. Whenever possible, the covered entity should engage in an interactive dialogue with the requester about the reasonable accommodation request, though how and where this dialogue occurs may be different depending on the circumstances.
- The covered entity is allowed to ask the requester for more information if it is necessary for the covered entity to consider the request, but there are limits on how and when and what is sought.
  - In employment, information cannot be sought until after a person is hired, and can only be sought then if it is job-related and consistent with business necessity.
  - The covered entity cannot be unnecessarily intrusive about information sought, but can ask if the person is requesting a reasonable accommodation under the MHRA, and how the reasonable accommodation sought is related to the person's protected class membership.
- The covered entity may consider whether granting the request would pose an "undue burden" or "undue hardship" on it., meaning financial or administrative hardship.
- The covered entity may also consider whether granting the request would pose a "direct threat", or a significant risk of substantial harm of the individual or others that cannot be eliminated or reduced by reasonable accommodation.
- A covered entity is not required to provide the exact reasonable accommodation requested (though they should give deference to the expertise and preference of the person requesting it) if they offer another equally effective accommodation.

#### Types of Claims that Can Arise Related to COVID-19

##### National Origin

- Discrimination based on national origin - or perceived national origin - has been an issue of concern related to COVID-19 since the pandemic began, mostly due to the virus's possible origin from China. People of Asian descent (or who are believed to be from Asia, even if they/their families have been in this country for years or decades) have been subjected to harassment and adverse treatment related to COVID-19. The same is true if adverse action is due to an assumption that the person is infected because of their proximity to other Asian people who are more likely to be infected.
- This also could look like adverse action and/or treatment toward someone who was from a country experiencing significant outbreaks, just based on the assumption that the person was likely to be infected.
- A person's national origin also may come up as an issue if the person with limited English proficiency seeks a reasonable accommodation related to COVID-19 from a covered entity, like translated or interpreted instructions or written materials.

## **Disability**

- Discrimination related to disability can mean being treated less than equally or worse because of a disability, a perceived disability, a record of disability, or the disability of a person's household/family member (by "association").
- Disability discrimination may happen because a person has a disability that makes them more susceptible to getting COVID-19.
  - This could look like a covered entity making an adverse decision about someone based on their perceived susceptibility to COVID-19 due to underlying disability (or perceived disability). Some examples might include not allowing a person with a disability like diabetes or cancer to take advantage of opportunities because of their perceived risk of contracting COVID-19 (or cost of possible liability), or selecting people for opportunities and considering who is believed to have underlying disabilities while making the selection decision.
  - Another issue we are seeing a lot of is people asking for reasonable accommodations from a covered entity because of their disability. Some examples of this include asking: to work from home as an accommodation for being required to return to work on site; for dedicated office space with a door as opposed to a cubicle; to be excused from masking requirements.
- Disability discrimination also may happen because of a person's "association" with a person who has a disability, like a family or household member. This might give rise to a housing discrimination claim, because all members of the household are affected by the housing, but may not give rise to an employment discrimination claim, because an employer generally is not required to accommodate an employee's household member.
- Is COVID-19 itself a disability?
  - Unfortunately, there is not a simple yes or no answer, and it may depend on each individual person's case. The definition of a "disability" under the MHRA has many facets, and can be seen here: <http://legislature.maine.gov/statutes/5/title5sec4553-A.html>
  - If a person has COVID-19 with mild symptoms and feels fine after a few days or weeks, the answer might be that it is not a disability. If a person is extremely ill and hospitalized, the answer might be yes. Agencies like the Commission around the country and courts will be asked this question for years to come. This also might include adverse action and/or treatment after someone contracted COVID-19; that could involve analysis of whether COVID-19 and/or related conditions are or could be perceived as a "disability".

## **Sex**

In employment or housing, a person who is seeking an opportunity could be subjected to sex-based harassment in the form of demands for sexual favors in exchange for being able to access a job or housing opportunity.

- In housing, there are many reports about people who cannot pay rent being subjected to sexual harassment in the form of "if you cannot pay rent let's find another way to make it up". This is unlawful.
- In employment, there is growing awareness that women (who statistically appear to be bearing the majority of caregiving responsibilities for children in distance learning due to the pandemic) are being impacted negatively because of their caregiving responsibilities in the form of lost opportunities, discharge, wages, etc.

## **Age**

- Age is an MHRA protected class for employment, but not for housing or PAs.
- An employer should not consider age when making employment decisions, even if the intention is to protect the employee (or an employee's household member) from an increased risk of contracting COVID-19. Employees are entitled to be treated equally by the employer.
- An employee might seek reasonable accommodations to a policy or assignment due to their own age-related risk for contracting COVID-19. While an employee may seek a reasonable accommodation in order to protect a household member who is older from risk of COVID-19, generally an employer is not required to consider its employee's household member's risk of contracting COVID-19.

## **Race**

Statistics have shown COVID-19 having alarmingly high, exceedingly disparate impact on people in Maine who are members of communities of color (for example, African-American/Black, indigenous, LatinX). There may be a number of explanations for this: a disproportionate number of people of color holding low-wage, "essential", or front-line jobs and not able to work from home; high rates of underlying health conditions exacerbated by endemic discrimination in food, health, economic, and other systems; disproportionate rates of incarceration; distrust of health care providers due to historic mistreatment of persons of color; and others. We have not seen claims of MHRA race discrimination related to COVID-19 yet, but likely will.

## **Maine Whistleblowers' Protection Act**

The Maine Whistleblowers' Protection Act ("WPA") applies only in employment.

- The WPA makes it unlawful for an employer to retaliate against an employee for complaints/reporting of unsafe or unlawful activity related to work; this includes deviation from the standard of care in health/care settings. The employee must have a good faith belief in illegal/unsafe activity and must report it to the employer so as to give the employer a chance to address the situation (except in certain specific circumstances).

- We have received many complaints about employees' having raised safety concerns about personal protective equipment ("PPE") or the lack thereof, and we expect to receive a lot more.

### **How can employers determine who has COVID-19 and who doesn't?**

The U.S. Equal Employment Opportunity Commission, which enforces several anti-discrimination laws for larger employers (15+ or 20+ employees), has put out extremely good and detailed information and guidelines for employers:

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>). Generally, the MHRA and federal anti-discrimination laws enforced by EEOC are parallel, so much of EEOC's guidance will be applicable here in Maine. Even so, the MHRC does not specifically adopt the EEOC's answers, as there are slight difference between the MHRA and federal anti-discrimination laws that affect employer options.

### **Masking Requirements**

The MHRA (which the Commission enforces) and the ADA (which the Commission does not enforce) are substantially similar in how they apply in these situations.

### **Can PAs – those services and places open to the public – require patrons to wear a face mask/covering?**

- As discussed above, a covered entity can have a policy requiring patrons to wear a face mask. In fact, this is now required under Executive Orders issued by the Office of the Governor.
- As the pandemic as worn on and worsened, succeeding Executive Orders have made it clear that the owners and operators of PAs have to do more than just have a policy requiring face masks – the PAs have to enforce the requirement, in order to keep other patrons and the employees who work at the PA safe from the COVID-19 airborne virus.
- A PA does not violate disability discrimination laws by requiring patrons to wear a face mask to enter the premises.

### **What happens if a person in, or seeking to enter, a PA is not wearing a mask? It depends on their reason.**

- If a person is asked to put on a mask, and says that they prefer not to wear a mask, or it is their right to not wear a mask, the PA may decline to allow the person to enter the store and may decline to serve the person at all. There is no disability discrimination issue present.
- If a person says that they cannot wear a face mask because of a disability, or it is apparent that a disability prevents them from wearing a mask (for example, because they are wearing an oxygen tank/mask), the PA must continue the discussion. Whenever possible, the discussion should occur way from other patrons.

### **Do disability laws mean that PAs cannot enforce mask requirements? NO.**

- As noted above, a person with a disability may seek a reasonable accommodation to allow them to enjoy the PA's goods and services, like entering a PA without a face mask. As also noted above, the PA may refuse the requested accommodation if granting it would be a direct threat to public.
- The key issue is whether a request to enter a PA without a mask is reasonable. Based on currently known science regarding COVID-19, it appears that this would pose a direct threat to the health and safety of others. While the individual may say they don't have COVID-19 symptoms, currently understood science regarding COVID-19 indicates that many people who are asymptomatic actually are infected and infectious, and a danger to others.
- Given our current understanding of how COVID-19 is spread, a PA may decline to allow a person without a face mask or covering to enter its physical premises because of the direct threat of spreading COVID-19 even if the person has or says they have a disability. In successive Executive Orders from Maine's Governor, particularly on issued on December 11/2020, that is now required.

### **What does a PA have to do if a person cannot enter the premises because their disability prevents them wearing a face mask?**

- The PA must still ensure that a person who cannot wear a face mask because of a disability can receive the PA's goods or services by providing reasonable accommodations other than entering the premises without a mask.
- As we have seen throughout the pandemic, public accommodations have become quite creative in offering services via telephone, website, video or delivery, curbside pickup, telehealth, personal shoppers, or other options that allow the person to get the goods/services they need without entering into the PA's physical premises and placing others at risk of COVID-19.

### **What about Vaccines?**

**The above discrimination issues will not disappear once vaccines are available, as these vaccines will not eradicate COVID-19 itself but simply will make it less prevalent and easily contagious.**

- Many people will choose not get vaccinated for personal or philosophical reasons.
- Some people may get only one out of two required shots for complete vaccination.
- **Covered entities may condition their services/entry to premises on all getting vaccinated. This can occur in employment, education, housing, and PAs, and could theoretically exclude:**
  - **A person with a disability that prevents them from getting vaccinated;**
  - **A person whose religious beliefs prohibit vaccinations or medical treatment; or**
  - **A person whose national origin and related limited English proficiency makes getting vaccination difficult or inaccessible.;**
  - **It is also possible to envision a person whose age or disability renders them low on the priority list for vaccination objecting to being excluded from a covered entity because they cannot get a vaccination.**

## Commission Processing

### Is the Maine Human Rights Commission open? Yes!

- If you already filed an intake or complaint with our agency, rest assured that it is still being processed and/or investigated. The Commission continues conducting interviews, conferences, mediations, and hearings, all by phone and/or video conferencing.
- If you want to ask about a new complaint, we do receive and process new intakes and/or complaints every day. If you think you have been discriminated or retaliated against, please go to our website (<https://www.maine.gov/mhrc/file>) to start an online Intake Questionnaire, or feel free to call (207-624-6290) or email us ([info@mhrc.maine.gov](mailto:info@mhrc.maine.gov)) for further assistance.
- The Commission still holds monthly public hearings to discuss the agency's activity and to make determinations in contested hearings in which an investigator's report was issued; the meetings are held on Zoom, a videoconference application. Parties to a contested case (and their counsel) are able to participate in the public hearing by phone or video. Members of the public and people involved in a case on a Consent Agenda can watch a livestream of the Zoom meeting on YouTube.
- Our office is currently closed to the public, and we are not yet sure when we will be able to allow visitors to our office. We do have some staff in the office every day (socially distanced, with masks and a lot of hand sanitizer) to receive and process US mail, items left in our drop box, and deliveries, and processing physical files as needed. Most staffers can work from home and are doing so, with sporadic trips to the office as needed. We are not answering our phone line, but we are checking and returning voice messages several times per day. All staffers can access and return emails.
- The Commission does accept filings/submissions by e-mail but only if the following conditions are met by whoever is filing by email: (1) indicate on the filing how they are submitting it (email, US Mail, fax, hand-delivery, combination of methods) so we know what to expect; (2) check with the other party/ies to ensure they can receive an electronic filing (some people don't have email/computers or access to them now); and
- (3) send a copy of the filing to the other party in the format they require with a copy to Executive Director Amy Sneirson ([amy.sneirson@mhrc.maine.gov](mailto:amy.sneirson@mhrc.maine.gov)). We do not accept submissions emailed to us that require us to do file-sharing, or use proprietary database/electronic data management systems. You also can use our drop box, in our lobby, for physical filings.

### Has the pandemic changed any of the timelines that apply to the MHRA or Commission? No, and yes.

The most important timelines – that a person has 300 days from when discrimination occurred (or the person learned of the discrimination) to file a complaint with the Commission, and that the Commission has two years from the date a complaint is filed to complete investigation (but 100 days to complete housing investigations) – have not changed. They are in the MHRA itself. Other deadlines – like how long a party has to file documents with the Commission – may be more flexible. The Commission's longstanding practice of "no extensions!" has understandably changed during the pandemic.

### If my case ended – by a Commission decision, or an administrative dismissal – are courts available for me to file a court action in the time allowed under the MHRA? Yes.

Maine's state courts have been closed or had limited access at various times of the pandemic, but currently they are opening up more and more to the public, as are Maine federal courts. You can find out more about Maine court availability at <https://www.courts.maine.gov/covid19.shtml> and federal court availability at <https://www.med.uscourts.gov/>.

## Other Resources

If you do not see an answer to your question here, please try consulting additional information from the U.S. Equal Employment Opportunity Commission ("EEOC"), the Department of Housing and Urban Development ("HUD"), the U.S. Department of Justice ("DOJ"), the Office of the Maine Governor, the Office of the Maine Centers for Disease Control ("CDC"), or the Office of the Maine Attorney General.

EEOC: <https://www.eeoc.gov/coronavirus>

HUD: <https://www.hud.gov/coronavirus>

ADA and Face Mask Policies - Southeast ADA Center and Burton Blatt Institute at Syracuse

University <https://www.adasoutheast.org/ada/publications/legal/ada-and-face-mask-policies.php> (<https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.adasoutheast.org%2Fada%2Fpublications%2Flegal%2Fada-and-face-mask-policies.php&data=02%7C01%7CEric.Dibner%40Maine.gov%7Ceb57d3676d2845ed062a08d81919ce29%7C413fa8ab207d4b629bcdea1a8f2f864e%7C0>)

No Mask, No Service? ADA Considerations for Business Owners Requiring Face Masks in Retail Stores- National Law Review

<https://www.natlawreview.com/article/no-mask-no-service-ada-considerations-business-owners-requiring-face-masks-retail> (<https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.natlawreview.com%2Farticle%2Fno-mask-no-service-ada-considerations-business-owners-requiring-face-masks-retail&data=02%7C01%7CEric.Dibner%40Maine.gov%7Ceb57d3676d2845ed062a08d81919ce29%7C413fa8ab207d4b629bcdea1a8f2f864e%7C0%7C0>)

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