

Memo

Date: March 26, 2020

To: Foley Hoag Clients

From: Tad Heuer

Regarding: Key Federal and State COVID-19 Developments as of March 26, 2020

OVERVIEW

This memorandum provides a summary of certain key federal and state COVID-19 developments of potential relevance to non-health-related Massachusetts state and local agencies as of **noon on March 26, 2020**. As legislative and regulatory decisions are being taken rapidly, this memorandum should be taken as current only through that time.

KEY FEDERAL LEGISLATION AND AGENCY ACTIONS

New or Updated Actions

- **Federal Financial Stimulus / Pending.** On the evening of March 25, the Senate passed 96-0 compromise federal stimulus legislation, as a substitute for the prior text of the proposed “Coronavirus Aid, Relief, and Economic Security Act” (CARES Act), S. 3548. The bill moves to the House where it is expected to be taken up and voted upon on Friday.

The bill is approximately 900 pages long, and covers the entirety of the American economy. Among other provisions, the bill would extend unemployment benefits and apply to all workers, and would provide \$1,200 as an “advance refund” tax credit to each individual taxpayer who has an adjusted gross income of up to \$75,000 (plus a credit to those taxpayers of \$500 per child). The bill would also create a **\$500 billion** loan fund for “eligible businesses, States, and municipalities”, with regulations for applications to be promulgated within ten days after enactment.

According to a summary from the Senate Committee on Appropriations issued on the morning of March 25, state and local governments would be eligible for **\$150 billion** to support their local health systems. Among other things, the bill also includes **\$30 billion** in emergency education funding (including \$13.5 billion in formula grants to states for elementary and secondary education and a \$3 billion education fund for governors), **\$25 billion** in emergency transit funding, a **\$45 billion** Disaster Relief

Fund to provide financial assistance to governments and nonprofits providing critical services, and **\$850 million** for Byrne Justice Assistance Grant (JAG) programs for state and local police departments (including personal protective equipment). The bill also includes **\$1.4 billion** for National Guard deployments, **\$400 million** in state election preparation grants, **\$900 million** in LIHEAP assistance funds, **\$1 billion** in project-based rental assistance, and **\$5 billion** for Community Services Block Grants.

Previous Actions

- **H.R. 6074 – 8.3 Billion Emergency Funding / Passed.** The first federal bill to address the coronavirus outbreak was H.R. 6074, which was signed into law on March 6 and provided \$8.3 billion in emergency funding to certain federal agencies.
- **H.R. 6201 – Medical Leave and Food Assistance / Passed.** The second federal bill was signed into law on March 18, the “Families First Coronavirus Response Act,” H.R. 6201. Of potential relevance to state and local agencies, the law amends the federal Family and Medical Leave Act (FMLA) to temporarily require employers to provide FMLA leave of up to 12 weeks through December 31, 2020 to an employee who is “unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.” The first 10 days of leave can be unpaid, after which leave would be paid, and in an amount not less than 2/3 of the employee’s regular pay rate and not to exceed \$200/day or \$10,000 in aggregate.

Other provisions of H.R. 6201 with potential relevance to state and local agencies allow for certain waivers to requirements for school meals, suspend the work requirements for the Supplemental Nutrition Assistance Program (SNAP), and allow states to request waivers to provide certain emergency SNAP benefits.

- **CISA Guidance on “Essential Critical Infrastructure Workers.”** On March 19, the U.S. DHS Cybersecurity & Infrastructure Security Agency (CISA) released guidance to assist government agencies at the federal, state, and local levels in identifying “essential critical infrastructure workers” for purposes of COVID-19.
- **U.S. Small Business Administration.** On March 18, the SBA approved the Massachusetts disaster declaration, making small businesses, private non-profit organizations of any size, small agricultural cooperatives and small aquaculture enterprises that have been financially impacted as a direct result of the Coronavirus (COVID-19) since Jan. 31, 2020, eligible for Economic Injury Disaster Loans of up to \$2 million to help meet financial obligations and operating expenses which could have been met had the disaster not occurred.
- **Housing and Urban Development.** On March 18, HUD announced an immediate foreclosure and eviction moratorium for single-family homeowners with FHA-insured mortgages for the next 60 days.

- **Federal Transit Administration.** The FTA stated on March 18 that it is “taking steps to make more resources available to local transit authorities to fund cleaning efforts and other measures to reduce the spread of COVID-19.” In particular, the FTA noted that its Emergency Relief Program (49 USC § 5324) allows transit agencies in states where a state of emergency has been declared (and the Department concurs) to “use their urban and rural transit formula funding to pay up to 80 percent of the cost of activities aimed at containing Covid-19,” including “performing enhanced cleaning and sanitizing of trains, buses, stations, bus shelters [and] providing personal protective equipment as appropriate.” FTA also noted that “Local transit agencies can also request other relief from Federal requirements by making a request through the Federal Transit Administration’s Emergency Relief Docket.”

KEY STATE LEGISLATION AND ORDERS

Emergency orders from the Office of the Governor are listed at <https://www.mass.gov/info-details/covid-19-state-of-emergency>. Directives and Guidance from executive agencies are listed at <https://www.mass.gov/info-details/covid-19-guidance-and-directives>.

New or Updated Actions

- **Essential Services / Municipal Construction Moratoriums.** On the specific issue of whether the Governor’s Essential Services Order supersedes municipal construction moratoriums, the Governor’s Chief Legal Counsel issued a clarification letter on March 25 stating that all construction projects may continue operations with allowance for social distancing protocols. The letter expressly states that “[l]ocal policies, regulations, or directives that provide otherwise are in direct conflict with the Order and should be withdrawn.”
- **Essential Services / Clarifications.** The FAQ clarifying the classification of certain specific services is being continually updated and should be consulted together with the list of essential services appended to the March 23 Order.
- **DHCD Rental Assistance Order.** On March 25, the Department of Housing & Community Development issued emergency provisional measures suspending federal rental assistance terminations (except in cases of criminal activity), automatically extending the current 60-day voucher search term by 30 days, to 90 days, and clarifying that any temporary income from stimulus legislation would be excluded from income for purposes of rent calculation. DHCD is also urging private landlords to suspend all non-emergency evictions.
- **MassDEP Public Drinking Water Guidance.** On March 25, MassDEP published updated Guidance on the operation of public drinking water systems, including on issues pertaining to bacteria testing, inspections, repairs, safety, staffing, and licensure.

- **Plastic Bag Bans Order.** On March 25, the Commissioner of Public Health issued an Order allowing all grocery stores and pharmacies to use single-use plastic bags, regardless of any municipal ordinances or regulations prohibiting their use, until the State of Emergency is lifted.

Pending Legislation

- **Municipal Education, Revenue, and Permitting Legislation.** On March 24, the Governor filed House 4586 to address a number of pressing municipal issues.
 - **Permitting.** The bill would toll the time in which municipal or regional *permitting entities* must act upon filed permit applications (thereby eliminating constructive approval of applications that are not acted upon within an established time period), and would also toll the time within which *permit recipients* must act upon received permits in order to avoid lapse. To the extent state or local agencies are seeking such permits, such extensions may apply. The bill also allows permit applications to be filed electronically.
 - **Tax.** The bill allows municipalities to waive late-payment penalties for Q4 tax bills, due May 1, and extend the deadline for property tax exemptions and deferrals from April 1 to June 1.
 - **Alcohol.** The bill would allow restaurants and bars licensed to sell alcohol on-premises to offer beer and wine for takeout and delivery.
 - **Retired Municipal Employees.** The bill would lift the limit on the number of hours and compensation a municipal retiree can earn by returning to work for the municipality during the state of emergency.
- **Local Budget and Town Meeting Legislation.** House 4580 (previously House 4572) was proposed by the Governor to address town governance matters, including authorizing delays in Town Meetings until June 30. *The new version (House 4580) also includes a permitting tolling provision, which will need to be reconciled with the proposed permitting tolling language in House Docket 4974.* It is possible that where municipal FY2021 contributions to state services need to be passed by a Town Meeting as budget items, such approvals could be either delayed or carried over month-to-month at FY2020 levels starting on July 1, 2020 until new town budgets can be passed. Similarly, to the extent any state or local agency projects require local grants of easements or other rights in land that can only be granted by Town Meeting, these may be delayed.
- **First Responder Duty Time and Overtime Legislation.** Senate 2602 is pending before the Public Safety Committee. It would establish a presumption that all public safety officials — including police and other first responders — with COVID-19 symptoms requiring hospitalization or self-quarantine shall have their condition be presumed to be work-related, and thus their time for hospitalization or quarantine be

considered duty time and not required to use sick or other leave time to cover their absence. Senate Docket 2886 proposes a grant program to provide “funding for cities and towns for the overtime costs of municipal police officers, municipal law enforcement personnel with arrest powers, municipal personnel with authority to enforce public health regulations, members of the fire department, and emergency medical technicians during the COVID-19 state of emergency.”

Previous Actions

- **Essential Employees and Bricks-and-Mortar Shutdown Order.** On March 23, the Governor ordered all bricks-and-mortar operations to cease operations until April 7 unless their employees were engaged in essential services, as defined by the Order. Businesses or employees not deemed essential are encouraged to continue operation remotely. The Order does permit limited central office staff assisting in coordinating remote operations to continue to report to bricks-and-mortar establishments. The Order can be enforced through civil and criminal penalties, including court injunctions. The Order also expressly supersedes any contrary municipal order. An FAQ clarifying the classification of certain specific services is being continually updated and should be consulted together with the list of essential services.
- **Assembly Restrictions.** On March 23, the Department of Public Health issued an order restricting gatherings in confined areas (indoor or outdoor) to no more than ten individuals, with certain express exceptions for transit locations, food stores, banks, pharmacies, and health care services. This order can be enforced through civil and criminal penalties.
- **Local Elections Legislation.** On March 23, the Governor signed legislation authorizing municipalities to postpone any municipal election until May 30. Any incumbent whose term would have expired due to an election intended to be held sooner shall continue to serve until a successor is elected and qualified. It also allows for any voter to vote in such an election by mail.
- **Intrastate Waste and Recycling Collection Order.** Announced on March 23, the Governor issued an order on March 20 providing relief from state and federal requirements that govern the hours of service allowed for commercial vehicle operators involved in waste and recycling transportation and collection. The Order remains in effect until April 12.
- **National Guard Activation Order.** On March 19, the Governor activated 2,000 National Guard members, tasked with “supporting requests from state agencies for equipment, logistics, warehousing, and related duties.” Local cities, towns, and state agencies should submit requests for support through the Massachusetts Emergency Management Agency.
- **Open Meeting Law Order.** The Governor issued an order suspending certain provisions of the Open Meeting Law on March 12. This Order allows government

bodies subject to the law to meet using remote participation, without presence of the chair or a quorum in a physical location at a specified meeting location. If the public body has a specific requirement in law that there be active, real-time public participation in the meeting, any alternative means of public access must provide for such participation. State and local agencies are entitled to utilize the provisions of this Order with respect to any meetings of public bodies to which the Open Meeting Law applies.

- **Judiciary / Litigation.** The Supreme Judicial Court has issued orders postponing all trials (other than those ongoing) until April 6, requiring all matters to be filed electronically except in exigent circumstances, and closed courthouses for all but emergency matters (with proceedings requiring judicial involvement to be conducted by videoconference or telephone). In particular, the SJC’s March 17 Order expressly tolls all statutes of limitations and deadlines that would otherwise expire before April 21, 2020 to be extended to that date (unless otherwise ordered by one of the trial court departments). Thus, any filings required in ongoing matters, any obligations to respond to pleadings or pursuant to other court rules (such as depositions or interrogatories), as well as any appeals of decisions rendered, would not need to be acted upon until April 21.
- **Professional Licensure Order.** On March 18, the Governor signed an emergency order extending all occupational or professional licenses of individuals that are in good standing and that would otherwise be up for renewal during the COVID-19 emergency for 90 days after the end of the public health emergency.
- **State Civil Defense Act (Chapter 639 of the Acts of 1950).** The Governor’s legislative authority to proclaim a state of emergency includes a number of broad powers. Although some of the specific provisions below have not been invoked with respect to the current state of emergency, their existence may be of particular interest to state and local agencies:
 - As to public procurement, the Act authorizes the Governor to act to “regulat[e] the manner and method of purchasing or contracting for supplies, equipment or other property or personal or other services, and of contracting for or carrying out public works, for the commonwealth or any of its agencies or political subdivisions, including therein housing authorities.”
 - As to licenses and permits, the Act authorizes the Governor to establish “[v]ariance of the terms and conditions of licenses, permits or certificates of registration issued by the commonwealth or any of its agencies or political subdivisions.”
 - Of interest to public transit providers, the Act specifically authorizes the Governor to exercise “any and all authority over persons and property necessary or expedient for meeting said state of emergency” including over “[t]ransportation or travel on Sundays or week-days by aircraft, watercraft,

vehicle or otherwise, including the use of registration plates, signs or markers thereon.”

- Of interest to municipalities with municipal light plants, the Act authorizes the Governor to have authority relative to “[m]aintenance, extension or interconnection of services of public utility or public-service companies, including public utility services owned or operated by the commonwealth or any political subdivision thereof.”
- With respect to schools, the Governor has authority over “[v]ocational or other educational facilities supported in whole or in part by public funds, in order to extend the benefits or availability thereof.”
- The Governor also has authority with respect to “public records and the inspection thereof.”