



The Latest COVID-19 Employment Questions & Answers for Automotive Dealers

By Jonathan Crotty, *Parker Poe Adams & Bernstein LLP*

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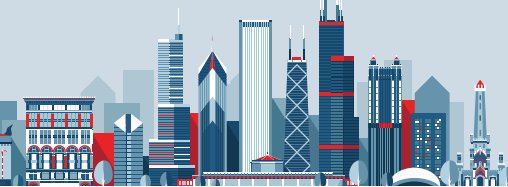
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2021 NADC Fall Conference

October 24 - 26, 2021

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The Ritz-Carlton, Chicago



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As COVID-19 restrictions ease, we have been hearing from automotive dealers and other clients with a variety of questions about what this stage of the pandemic means their workforces. The bottom line is that many dealers are heading back toward more normal operations, and by being aware of certain tips and traps, you can do so while minimizing legal risks. Below are a few of the most recent questions we have fielded. You can find additional insights from us [here](#).

“What Is the EEOC’s Latest Guidance to Employers on COVID-19?”

The federal Equal Employment Opportunity Commission updated its COVID-19 “Technical Assistance Questions and Answers” for employers on May 28 to provide additional guidance on vaccination policies. While the update does not contain any major departures from prior EEOC positions, it does address some questions recently raised by employers.

The Q&A reaffirms employer’s ability to require the COVID-19 vaccine as a condition of employment. Employees with objections to the vaccine based on disability or religious-related reasons are entitled to

reasonable accommodation. The EEOC says that mandatory vaccination policies could have a disparate impact against protected groups unable to access the vaccines, but the guidance does not provide details or state that this is currently an agency concern. Employers not mandating vaccines may provide incentives to employees to obtain their shots and request documentation confirming their vaccination status.

In its previous guidance, the EEOC said that disability discrimination rules mean that employers may only provide nominal incentives to employees to obtain the vaccines, but it did not explain what this term means. The new guidance does not provide specifics but does say that “very large incentives” could act as a coercive measure. Gift cards under \$100, paid time-off, and similar incentives should not meet this threshold.

The Q&A provides extensive guidance on how to accommodate employees who cannot get vaccinated because of a disability. The EEOC does not address whether employees with a disability who decline vaccinations for reasons unrelated to their medical condition are entitled to continuing accommodations such as

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remote work based on their concerns over contracting COVID-19 in the workplace.

The EEOC will likely continue to amend its guidance as more employees return to work and employers look to scale back COVID-19 safety measures.

“Can We Tell Employees They Can Stop Wearing Masks at Work?”

According to the most recent guidance from the Centers for Disease Control and Prevention (CDC), fully vaccinated people (meaning those who are two weeks past their last shot) can end mask and social distancing requirements. The CDC says that for now, unvaccinated people (including those who have recovered from COVID-19) should continue wearing masks and observing social distancing.

We would advise employers to follow the CDC guidance, meaning that fully vaccinated employees no longer need (although they could continue to choose) to wear masks at work. Unvaccinated employees should continue to wear masks at work until the guidance changes. Some employers are asking employees for proof of vaccination, while others are using the honor system. Dealerships can also advise customers who are fully vaccinated that they can enter the premises without the need for a mask, while asking unvaccinated visitors to continue to follow mask requirements.

“Can We Face Liability If an Employee Gets COVID-19 and Passes It to Family?”

A new wave of lawsuits is attempting to impose legal liability on companies whose alleged negligence resulted in an employee becoming infected with the COVID-19 virus and then passing the illness to a household member who became seriously ill or died. The lawsuits claim that the company knew or should have known that its infection control procedures posed a risk to people other than their own employees.

In one reported case attempting to use this theory, a federal district court in California dismissed a lawsuit brought by the wife of a construction worker against her husband’s employer, claiming that the company had a legal duty to keep her safe from infection. The court dismissed the suit on multiple grounds, including statutory workers’ compensation preemption of the claim, as well as the lack of any legal duty of the company to its employees’ relatives.

More recently, a Southwest Airlines flight attendant filed a wrongful death lawsuit against her employer in federal court in Maryland, alleging that her husband died following her becoming infected with COVID-19 in a training session during which COVID-19 precautions were ignored. Southwest has moved to dismiss the claim on the basis that it had no legal duty of care towards the employee’s husband.

A number of states have enacted legislation to bar coronavirus-related liability lawsuits. Even in states that have no such law, the plaintiffs in these cases appear to have an uphill battle in convincing courts to impose legal liability for injuries to third parties based on alleged lack of COVID-19 infection control procedures. Regardless,

absent additional legislation intended to curb these claims, plaintiffs’ lawyers are likely to continue testing these legal theories in various federal and state courts.

“How Do Laws Against Vaccine Passports Impact Our Rights as Employers?”

A new Florida law restricting businesses from asking customers about COVID-19 vaccination status or denying goods or services on this basis has made headlines nationwide. Similar “anti-vaccine passport” laws have been passed or are close to passage in Texas, Alabama, and other states. Employers with operations in these states have asked whether these laws limit their ability to ask employees about their vaccination status or create different workplace policies for vaccinated and unvaccinated employees.

To date, these new state laws do not restrict employers’ rights to make decisions based on employee vaccination status. The laws’ terms are limited to customer access and interaction and do not apply to employment policies. In other words, employers may continue to ask employees whether they have been vaccinated, allow vaccinated employees to forego masks in compliance with CDC and state standards, and even condition continuing employment on proving that they have received the COVID-19 vaccine.



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Of course, some states may try to impose restrictions on workplace vaccination policies. Absent federal legislation or regulations that preempt these state laws, companies with operations in multiple states should continue to monitor how these legislative efforts affect their customer and employee policies.

“Can We Charge Higher Health Insurance Premiums for Unvaccinated Employees?”

A client recently asked whether it can begin charging higher group health insurance premiums to employees who have declined the COVID-19 vaccination. The premium difference would be an approach similar to that already imposed by many plans for employees who use tobacco products. Presumably, it potentially would be justified by the additional costs of hospitalization and related expenses associated with treatment of unvaccinated plan participants for COVID-19 related illness.

After giving the question some thought, our response to the client was that there is currently no clear legal roadmap for charging the higher premiums. First, HIPAA non-discrimination and wellness plan rules – along with EEOC wellness plan regulations – are somewhat in a state of flux, and higher premium charges potentially could be a prohibited penalty against non-vaccinated participants. Additional state law restrictions against group medical plan premiums may also limit employers’ ability to charge unvaccinated participants more.

Even if these hurdles can be overcome, how would plan sponsors determine the premium difference? Unlike tobacco use, there may not be available actuarial data that determines the actual difference in cost to the plan between vaccinated and unvaccinated participants. Also, charging higher group health plan premiums to employees or other plan participants who medically cannot be vaccinated may constitute disability discrimination under the Americans with Disabilities Act.

While the idea of charging higher premiums may appear to be an effective incentive to encourage unvaccinated employees to get their shots, employers should not take this step until legal concerns over this practice are resolved.

Final Note

The federal and state guidance on the issues described above continues to evolve. Employers must continue to monitor announcements and guidance from the EEOC, the Centers for Disease Control and Prevention (CDC), and the Occupational Safety and Health Administration (OSHA), as there are outstanding questions each agency is working to address. ■

About the Author

Jonathan Crotty has been a successful counselor and problem solver for automotive dealers and other large and small employers for more than 30 years. He heads Parker Poe’s Employment & Benefits Practice Group and represents employers in all aspects of the employment relationship, from hiring to discharge. He can be reached at jonathancrotty@parkerpoe.com.

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President's Message



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As we transition from this pandemic-caused shutdown, I hope everyone's outlook and situation is more positive. I wish to thank all the participants at our virtual 2021 Annual Member Conference. With the help of wonderful sponsors and speakers, the National Association of Dealer Counsel ("NADC") was able to put on another successful conference. We thank you for the robust attendance and for the positive feedback from our follow-up surveys. The conference was a success by all measures. Even more exciting, we are working towards returning to an in-person conference in Chicago this Fall. The Planning Committee is currently working on the Fall Conference and is reviewing and choosing timely topics. Many thanks for all the proposals. I look forward to the return to our gatherings and seeing everyone. I recently had the opportunity to participate in the West Virginia's Annual Dealer Convention, and it was energizing for everyone to be back together. I fully expect the same feelings this Fall.

As we move forward in 2021, I reflect on how the NADC and its members have risen to the occasion over the past fifteen years to protect the dealer body. Unfortunately, serious challenges lie ahead, but again the NADC will rise to face the challenges and assist dealers. I wish to identify on some of these challenges that will allow the NADC to show its tremendous support, and more importantly, its invaluable worth, to the dealer.

There is an obvious attack on the franchise model. Our clients are facing manufacturer direct sales from not only Tesla but from a multitude of start-ups. In addition to these new manufacturers, even the long-standing traditional manufacturers are attempting to control every aspect of the retail experience. Their approach is obviously

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more subtle, but nonetheless, an attempt to control the dealer's retail relationship with dealership customers and to engage in direct sales.

Dealers also face a drastic change in one of their more significant revenue streams, the long-standing model of "holdback," to an incentive based "program" relying upon unreliable customer satisfaction, sales, and service surveys, and the imposition of unreasonable facility requirements.

From a public-relations perspective, Dealers are unfairly tarnished that they oppose the sale of electric vehicles. As we all well know, this is a complete falsehood. Dealers are in the business of selling motor vehicles whether they be internal combustion engines or electric. Dealers want to sell cars. Electric vehicle manufacturers have created this false narrative as a means to challenge the franchise system. While the National Automobile Dealer Association ("NADA") is working hard to change this false narrative, the National Association of Dealers Counsel ("NADC") can work with our clients, and help share the message that motor vehicle dealers are an integral part of the solution to make electrical vehicles widely available to the mass-market and to allow electric vehicles to be sustained through local service, and the all-important; charging stations. Nothing can replace the dealer relationship with, and its support of, the local community.

Further, it does not take a crystal ball to know that the Biden administration is going to be more aggressive towards motor vehicle dealers. Administration officials have already made negative statements that dealer margin needs to be eliminated, as well as its attack on voluntary protection products. Now is the time to help our dealers with their efforts to be compliant with selling voluntary protection



NADC Member Announcements

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products and to demonstrate the tremendous benefits that consumers receive from obtaining financing through motor vehicle dealers. Of course, the watch phrase, at least, through this Biden administration time frame, is compliance, compliance, and compliance. Without true proactive compliance efforts by our motor vehicle dealers, I fear that we are simply creating an environment which would allow government to continue its efforts to over regulate and stifle the tremendous economic engine that motor vehicle dealers provide to our country.

I appreciate you all greatly aware of challenges, you deal with them every day, as do I, but this is a time for the NADC to show its legal strength and ability once more. The NADC has the knowledge, expertise, and experience to assist the motor vehicle dealer body to overcome these attacks on the franchise system. Through our sharing of knowledge at conferences, the writing of articles for *Defender*, the list-serv, and working committees, we can provide the needed and required support.

Finally, I would be remiss if I did not express my continuing sincere appreciation to the Executive Committee, the Board of Directors, and AMS representatives, Erin Murphy and Jennifer Polo-Sherk, for their wonderful and hard work for this Association. I have no doubt that as we move forward that there will be a renewed energy to face these challenges, and to continue to grow and strengthen the NADC. ■



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Is Agency Selling the Future for “Dealerships”?

By Gordon Wisbach, Jr., *GW Marketing Services*

As more and more brands allow for online sales, the agency model may be coming for dealers' heads. Two years ago if you had told us that the future of car dealerships was in trouble, we wouldn't have believed you. While online vehicle purchases were on the rise, the vast majority of people were still buying cars the “old fashioned” way. Pre-pandemic, less than 2 percent of vehicles were purchased online. In contrast, nearly 30 percent of new car sales happened online in 2020.

A bill has been introduced in Vermont (S.47), and a similar bill (SB127) was also introduced in Connecticut in early April that would allow for direct-to-consumer sales, bypassing dealers. This legislation comes from pushes by brands like Tesla and Rivian. There have been numerous attacks like this on our franchise system in Connecticut over the last three to four years.

Additionally, in Massachusetts the Attorney General is simply ignoring the statute stating that a manufacturer cannot own a dealership, and NO ONE is doing anything about it. Our hope is the MSADA will lobby to have the statute changed to allow them to have standing to sue in order to protect Massachusetts dealers! If these onerous attacks on the dealer body are allowed, they would allow “non-franchised zero emissions motor vehicle manufacturers” to

become registered dealers within these states, thus allowing them to circumvent our very successful franchise system.

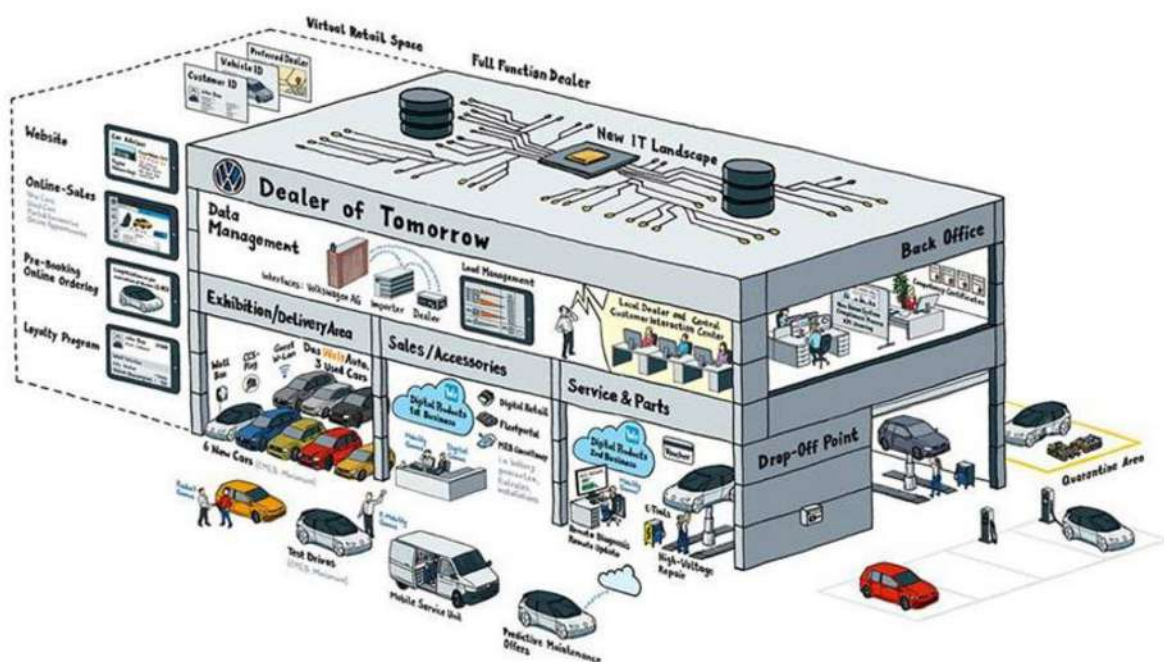
Legislation like this cuts out dealers and paves the way for more dealership closures down the line. In the next fifteen years almost all vehicles will be ZEV, meaning all carmakers could take advantage of current and looming direct-to-consumer laws.

There are currently twelve states, including Massachusetts (because the AG ignores existing statutes) which give Tesla and companies like it free reign for sales. Eight others allow limited sales, but only ten remain that ban it all together.

But does that mean dealerships will go away? Some argue that dealers will be a thing of the past someday, claiming that internet sales will overtake the traditional dealer experience.

For now, dealers who embrace the shift to digital will remain competitive in this changing market. Allowing consumers to complete their car purchases 100 percent online can keep your dealership profitable in the years ahead.

But what about long-term? Will OEMs go completely digital, shifting dealers from direct sales to an agency model? In North America Tesla, Chrysler and Ford are already offering inventory choice,



financing, and vehicle delivery through their websites. For now Ford dealers can control their pricing to some extent through this online shopping tool. In addition Volvo has announced it will sell EV models using the agency model in the US.

In Europe consumers can purchase 100 percent online through the OEMs' websites. Hyundai, Mercedes, Ford, and BMW are among them.

Around the world Volkswagen recently made its dealers into agents for the brand's all-electric ID models. It will not be surprising to see more of this moving forward. Consumers want to know what to expect, especially when it comes to price, but taking away that negotiation aspect of the car-buying process could also affect sales negatively. If nothing else, OEMs will always need service stations. In theory there would be some happy medium for all of it.

Volkswagen suggests this future dealership, which is what the brand is working toward. It would allow for test-drives, vehicle delivery, and service. Giant sales departments are replaced with data management centers and expanded customer service and business development departments. The modern dealer would utilize the bricks-and-clicks agency model, remaining incredibly profitable and in charge of its own revenue.

Dealerships are still vital to the car-buying experience. They connect consumers to the brand. They facilitate a level of customer service that people are unable to get in a chat window or on the phone. A fully digital experience removes the personal touch and overall personality of a brand.

Some sort of agency model is likely in the future of all dealerships, at least for new and CPO vehicles. But if brands go with something like the goal of VW, then it could help dealers stay in charge of their businesses and, ultimately, their profits. It will likely be some time though before we see these very long-term visions become a reality. ■

Gordon Wisbach, Jr. is the founder of GW Marketing Services, an auto dealership brokerage and consulting firm located in the Boston Metropolitan area.

Gordon has brokered hundreds of transactions and performed hundreds of appraisals throughout the past 40+ years. He has the highest client loyalty and best reputation in the region. Besides brokering and appraising dealerships, Gordon also offers market consolidation support, litigation support as an expert witness and consulting with dealers on exit strategies. You can learn more at gwmarketingservices.com, or you can contact Gordon at gordon@gwmarketingservices.com or 508-395-2500.



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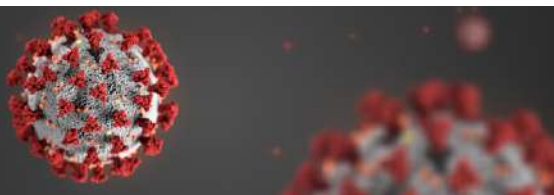
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Jami Farris, Editor
jamifarris@parkerpoe.com

Michael Charapp, Assistant Editor
mike.charapp@cwattorneys.com

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