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Unfair and Deceptive Business Practices – Business-to-Business Claims
An Introduction to Causes of Action

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This is the seventh article in a series on the circumstances that can give rise to a civil lawsuit. Earlier articles in the series can be found on Fletcher Tilton's website under ARTICLES.

A QUICK REVIEW OF CHAPTER 93A

In the most recent installment of this series, we discussed the Massachusetts Consumer Protection Act, which is codified at Massachusetts General Laws Chapter 93A. Chapter 93A makes it unlawful for a business engaged in commerce in the Commonwealth to commit unfair or deceptive business acts or practices, and grants Massachusetts individuals and businesses a private cause of action to seek damages for such conduct. Last time, we looked at the requirements for claims by consumers under Section 9 of Chapter 93A. In this installment, we focus on business-to-business claims under Section 11.

DISTINGUISHING BUSINESS CLAIMS FROM CONSUMER CLAIMS

A plaintiff claimant must proceed under Section 11 if the plaintiff is an individual or business that was acting in a business context, and the defendant's objectionable conduct occurred in relation to the plaintiff's business activity. Put another way, Section 11 applies to claims by business entities that have been subjected to unfair or deceptive conduct by other businesses.

Unlike claims by consumers under Section 9, a plaintiff under Section 11 does not need to send a 93A demand letter setting forth his or her claims as a prerequisite to filing suit. As a practical matter, there is nothing to prevent a Section 11 plaintiff from sending a "courtesy" 93A demand letter, and in the author's opinion this is the better practice, particularly where it is not always clear whether the defendant's objectionable conduct occurred in the consumer context or in the business-to-business context.

Although the law is not perfectly clear on this point, plaintiffs asserting a Section 11 business-to-business claim under Chapter 93A will likely be held to a higher standard in establishing unfair or deceptive conduct. The justification relied upon for this higher standard has been the concept that conduct that might be unfair if practiced upon a simple consumer would not be unfair and indeed might be common practice between two businesses. Simply put, a plaintiff seeking relief under Section 11 must demonstrate that the defendant's conduct was unfair or deceptive when considering the business context in which the conduct occurred. For example, it is well established that a simple breach of contract will not support a separate cause of action for violation of Chapter 93A, but a breach committed for a nefarious purpose — such as an intentional breach to force undue concessions from the non-breaching party — will support a claim under Chapter 93A.

Beyond this higher standard, the plaintiff's burden under Section 11 is the same as the one for a plaintiff under Section 9. The plaintiff must prove (1) that the defendant engaged in an unfair or deceptive act or practice; (2) that the plaintiff suffered a loss of money or property; and (3) a causal connection between the plaintiff's loss and the defendant's unfair or deceptive act or practice.

DAMAGES UNDER SECTION 11

Similar to a consumer claim under Section 9, a defendant that is found liable under Section 11 may be responsible for the plaintiff's reasonable attorney's fees. Section 11 defendants may also be liable for double or treble damages if the plaintiff can establish that the defendant intentionally engaged in the unfair or deceptive conduct.

As discussed in the previous installment of this series, upon receipt of a 93A demand letter, a defendant under Section 9 has an opportunity to avoid multiple damages by responding to the claimant with a reasonable offer of settlement within 30 days. A defendant under Section 11 may not receive a 93A demand letter, but he or she is still afforded an opportunity to avoid multiple damages and attorneys' fees under the statute.

Under Section 11, a defendant may tender a reasonable offer of settlement at the time of answering the complaint. Similar to Section 9, if the tender of the settlement is rejected, and if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the plaintiff, then the court will not award multiple damages and attorneys' fees.

CONCLUSION

Entire treatises have been devoted to the law of Chapter 93A, so these last two articles have only been intended to provide the reader with a very general overview. Suffice it to say that businesses engaged in trade or commerce in Massachusetts should be familiar with the basic principles surrounding this cause of action and should engage competent counsel in either pursuing or responding to claims under Chapter 93A. FT

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New OSHA COVID Vaccination Rules for Employers Halted by Court

by Joseph T. Bartulis, Jr., Esq. | 508-459-8214 | jbartulis@fletchertilton.com

On November 4, 2021, the Occupational Safety and Health Administration (OSHA) released its regulations requiring employers with 100 or more employees ("Covered Employers") to ensure that all employees are either fully vaccinated, or provide a negative COVID-19 test result on a weekly basis. On November 6th the Fifth Circuit Court of Appeals halted the implementation of this regulation while it decides the enforceability of this new rule. In the meantime, employers who meet the definition of "Covered Employer," are left wondering what might be expected of them, when and if the courts allow OSHA to proceed with the implementation of this new rule. This article will highlight a few of the more frequent questions related to the proposed regulations. It will then detail the protocols for handling religious accommodation requests.

"COVERED EMPLOYERS" — EMPLOYERS WITH 100 OR MORE EMPLOYEES

Under the regulation, the calculation of 100 or more employees is based on the total number of employees a company has companywide, regardless of whether they all work in one place or in multiple locations. Also, the regulations require employers to include temporary employees, seasonal employees, and minors in the count.

GENERAL REQUIREMENTS FOR EMPLOYEES

There are two ways for a "covered employer" to comply with the proposed regulations. They can require employees, who do not qualify for a medical or religious exemption, to be fully vaccinated. Alternatively, they can allow employees who choose not to be vaccinated, for whatever reason, to undergo weekly COVID-19 testing and provide the results to the employer.

The required policy must contain a provision that all employees must be fully vaccinated or that they must be tested no less often than once per week.

COMPLIANCE DEADLINES

Under the new regulations, employees who work for a "covered employer" must either be fully vaccinated no later than January 4, 2022, or they must be tested every week from that day forward. "Fully vaccinated," per the regulation, only occurs after two weeks following receipt of the second dose (in the case of the two-dose vaccination protocols — Pfizer or Moderna — or two weeks after receipt of the single-dose Johnson & Johnson vaccine). In order to prove employees were duly vaccinated, "covered employers" must receive from their employee proof of the vaccination via either the COVID-19 vaccination record card or other approved forms of proof referenced in the regulations, provided those alternative approved forms of proof provide evidence of the name of the vaccine administered, the dates on which the dose(s) were administered, where they were administered, and by whom.

"COVERED EMPLOYERS" MUST HAVE A WRITTEN COVID-19 VACCINE POLICY

The required policy must contain a provision that all employees must be fully vaccinated (unless they are covered by medical or religious accommodations) or that they must be tested no less often than once per week. The policy must detail the process for employees to seek accommodations, and it must also contain language about paid time off for testing and for recovery for any side effects due to receipt of the vaccine. Finally, the policy should also detail what happens to employees that are unwilling to comply with the vaccination/testing programs — e.g., drawdown of paid leave, unpaid leave, termination, etc.

VACCINE TIME PAY

Under OSHA's new regulations, employers are required to provide employees up to four hours of paid time off to receive each inoculation (not including booster shots) as well as a reasonable period of paid sick time due to any side effects from receipt of the vaccinations. There is also language in the regulations that allows employees to have a reasonable amount of additional time off if the four-hour periods are not enough, though the additional time would not need to be paid. The four-hour periods of paid time off to get the vaccinations apply to cover only actual hours lost during regular working hours. The language does not require that employees get paid for any period of time if they get vaccinated on their own, off-duty hours. While employees may not be required to use any of their paid sick time to cover the work time hours they need off to get vaccinated, the regulations do allow an employer to draw down an employee's paid sick time (if he or she has any) to recover from any side effects related to their receipt of the vaccine. Do keep in mind, however, that under the Massachusetts Emergency Paid Sick Leave Act, employees may have access to paid qualified leave as well.

KEY ELEMENTS OF THE TESTING PROTOCOLS

Employees who are unvaccinated must undergo a weekly COVID-19 test and must provide a copy of the negative test to the employer no less frequently than every seven days. If an employee does not work on-site every week, he or she must undergo a test within seven days of his or her return to the office and must produce evidence of the negative result to the employer upon his or her return to work. While the regulations provide many different testing options, self-administered tests are prohibited. Additionally, effective December 5, 2021, all unvaccinated employees must begin wearing a mask while indoors at the workplace and while riding in a vehicle with one or more coworkers. As with the vaccination itself, an employee who cannot wear a mask due a medical condition for which he or she needs an accommodation or who cannot wear a mask for religious reasons may ask for an accommodation to be relieved of the mask mandate.

POSITIVE TESTS

Employees who test positive for COVID-19 must be removed from the workplace and may not return to work until they have received a negative test result and have met the Centers for Disease Control's return-to-work factors enumerated in its "Isolation Guidance." Negative and positive test results, just like vaccination cards, must be maintained in separate medical files and not in an employee's regular personnel file.

REPORTING REQUIREMENTS

OSHA requires all employers to notify it within eight hours of learning an employee has died due to COVID-19 or within twenty-four hours of hospitalization.

FINES FOR NONCOMPLIANCE

Employers that do not comply with the OSHA regulations (assuming they actually go into effect) will face potentially hefty fines of up to $13,653 per violation and of over $100,000 for intentional, knowing noncompliance.

HANDLING REQUESTS FOR EXEMPTIONS TO COVID-19 VACCINATION MANDATES

As noted above, OSHA's vaccination mandate includes both a medical and religious exemption. Given the number of businesses that may need to comply with the vaccination mandates, (should they go into effect), more employers than ever will be faced with employees asking to be excused from the vaccination mandate by requesting a religious exemption or a medical exemption. The remainder of this article will provide guidance to employers that receive exemption requests.

STEPS

The first thing that all "covered employers" must do (assuming the regulation is cleared for implementation) is to notify their employees of the need to be vaccinated and of the logistics regarding getting the vaccine, of the consequences for noncompliance, and of the two possible exemptions — namely, a medical exemption or a religious exemption — of which employees may avail themselves if they believe they should be exempt from complying with the mandate. Employers should designate the person within the organization to whom all requests and information about the exemptions should be directed and submitted.

KEY ELEMENTS OF THE RELIGIOUS EXEMPTION

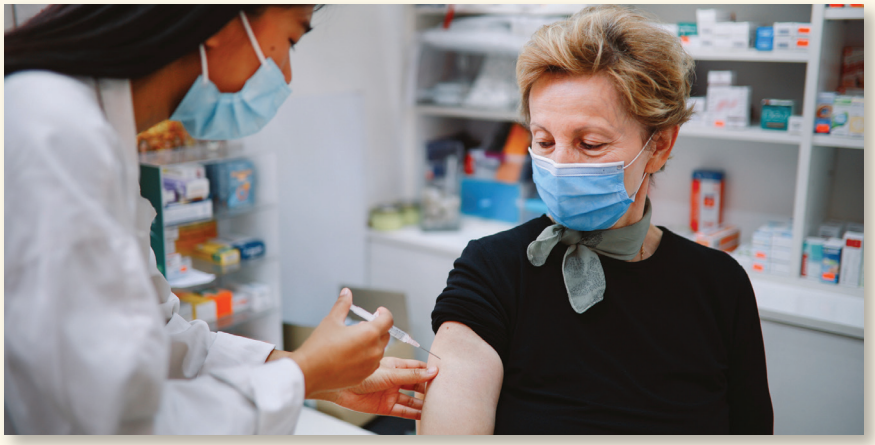
Pursuant to the Equal Employment Opportunity Commission (EEOC) guidance on requesting religious exemptions, there is no specific language an employee must use when requesting a religious exemption. Rather, all he or she must do is notify the person designated by the employer to receive exemption requests that he or she has a sincerely held religious belief that conflicts with the receipt of the COVID-19 vaccine.

RECEIPT OF THE RELIGIOUS EXEMPTION REQUEST

Upon receipt of the religious exemption request, if an employer has any reason to seek further information or to question the nature of the sincerely held religious belief, it may make further inquiry of the employee.

ANALYSIS OF THE REQUEST

While employers will often give deference to an employee who seeks a religious exemption, EEOC guidelines allow employers to make limited, sufficiently narrow inquiries seeking supporting information to further establish the existence and nature of the religious belief and how it conflicts with the employee's receipt of the vaccine. Most questions tend to focus on either the religious nature of the conflict or the sincerity of an employee's beliefs. An employee is obligated to respond to an employer's reasonable request for additional information and must do so in a timely manner. If an employee neglects to respond to the employer's request, he or she may be precluded from later challenging the employer's denial of a religious exemption. Similarly, employers may not disregard or ignore employees' sincerely held religious beliefs merely because they are unknown or unfamiliar to the employer. That said, sincerely held religious beliefs do not cover objections that are not actually religious but are instead personal, political, or social objections to the vaccine.



The difficulty for employers will be differentiating between an employee's sincerely held religious belief and other nonreligious reasons for objecting to the vaccine.

GRANT OR DENY THE RELIGIOUS EXEMPTION REQUEST

If an employer determines that the employee has not established the existence of a sincerely held religious belief that prevents him or her from being inoculated with the COVID-19 vaccine, the employer will notify the employee that the exemption request has been denied. The employee must then comply with the vaccine mandate or face the employer's consequences for not being vaccinated.

If an employer determines that the employee has established the existence of a sincerely held religious belief that prevents him or her from receiving the COVID-19 vaccine, the issue then becomes what the accommodation granted should be and whether such accommodation is reasonable under the circumstances.

As a general rule, an accommodation, if granted, is supposed to enable the employee to perform the essential functions of his or her job.

MOST COMMON ACCOMMODATIONS

The most common accommodations include allowing the employee to work remotely, if possible; allowing the employee to work on-site during different hours when fewer or no other employees are on-site; allowing the employee to work in a different area of the building or worksite; or allowing him or her to submit to COVID-19 testing at regular intervals. There are other possible accommodations. The determination regarding whether an accommodation request is or is not unreasonable is made by the employer, and it is the employer's prerogative to determine which of the possible reasonable accommodations to grant to an employee.

As a general rule, an accommodation, if granted, is supposed to enable the employee to perform the essential functions of his or her job. Where the accommodation would require the employer to relieve an employee of performing some or several of his or her essential functions of the job, those requests are often per se unreasonable, since the employee, even with the accommodation, would not actually be performing the essential functions of the job.

UNDUE HARDSHIP

Employers that believe it would create an undue hardship to grant employees a religious accommodation exemption from having to be vaccinated may deny an accommodation request. As to what constitutes an undue hardship, courts have found that accommodations that may likely jeopardize that employee's or other employees' safety at the workplace have been found to create an undue hardship.

REEVALUATE THE CONTINUING NEED FOR THE EXEMPTION REQUEST

Assuming an accommodation request has been granted due to a sincerely held religious belief, the employer may reevaluate the continuing need for the accommodation request if it begins to create an unreasonable hardship on the employer or if the underlying need for the accommodation no longer exists. FT

Purchase and Sale of Real Estate - Part One
An Introduction to Causes of Action

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This is the eighth article in a series on the circumstances that can give rise to a civil lawsuit. Earlier articles in the series can be found on Fletcher Tilton's website under ARTICLES.

INTRODUCTION

Agreements for the purchase and sale of real estate are governed by the same general contract principles that apply to any binding agreement between two or more parties. Nevertheless, there are certain legal issues that often arise in the purchase and sale of real estate which can make such conveyances somewhat more complicated than other types of transactions.

First, it is common that parties to such a real estate conveyance will make and accept written offers to purchase (OTP) setting forth the key terms of the transaction, before a detailed formal purchase and sale agreement (P&S) is signed.

Second, all real property is considered unique in the eyes of the law. Under a contract for the sale of goods, if one party fails to deliver the agreed upon goods at the time and for the price agreed upon, the other party's remedy is typically to sue for breach of contract and seek the damages he has suffered as a result of the other party's breach. Because of the unique nature of real estate, a purchaser may sue a seller that has breached the terms of the parties' agreement and seek specific performance - that is, the purchaser may ask a court to order the seller to perform his obligations and to convey to the purchaser the agreed-upon parcel of real estate for the agreed-upon purchase price.

The first consideration relates to the creation of a binding and enforceable contractual agreement. The second relates to the parties' remedies upon breach. In this installment, we will consider creation of the contractual agreement; and in a later installment we will discuss breach and remedies.

CREATING A BINDING CONTRACT FOR THE SALE OF REAL ESTATE

To be binding and enforceable, a contract for the conveyance of land must be in writing, must set forth the material terms of the conveyance, and must be agreed to with the mutual intention that it is a binding agreement.

An OTP executed by both parties may satisfy all of these criteria, even if the OTP contemplates that the parties will execute a formal P&S agreement before some later date. The question that often arises when a deal falls apart after the execution of an OTP, but before the execution of a P&S, is whether the parties intended to be bound by the OTP itself or only by the subsequent formal P&S. The answer to this question depends on the intention of the parties.

Once the parties have executed a formal P&S, there is rarely any question as to whether a binding and enforceable contract has been created.

In order to determine the parties' intent, a court will look to the express language included in the OTP and the parties' course of conduct. If the parties have left open key terms relating to the transaction, this suggests that the parties did not intend to be bound by the OTP. On the other hand, if the parties have agreed to all material terms - e.g. deposit, price, contingencies, closing date - then the court may determine that the later execution of a standard form P&S is only a formality that creates a polished memorandum of an already binding contract.

The parties may of course express their intentions in the OTP, and this is indeed the best practice. If the parties wish to create a binding agreement, the OTP should state as much and include all key terms of the transaction. Similarly, if the parties do not wish to be bound by an OTP, they should state that a binding agreement will not be created unless and until the parties have executed a formal P&S setting forth all terms.

Once the parties have executed a formal P&S, there is rarely any question as to whether a binding and enforceable contract has been created.

CONCLUSION

Offers to purchase real estate must be carefully considered, as they may give rise to substantial and legally enforceable obligations upon acceptance by the seller. Once a binding and enforceable contract has been created, both parties can seek redress for breach of the agreement. In the next installment, we will consider the breach of such agreements and the remedies available to both buyer and seller. **FT**

ATTORNEY SPOTLIGHT

Michael E. Brangwynne is an associate attorney in the firm's Boston office. His practice is focused on complex commercial and tort litigation. Mr. Brangwynne regularly represents businesses and individuals in disputes arising in the construction, real estate development, leasing and zoning contexts. Additionally, Mr. Brangwynne has extensive experience handling matters in the areas of personal injury, medical malpractice, and wrongful death litigation. Mr. Brangwynne has also represented numerous clients involved in trust and estate disputes in the probate courts of Massachusetts. He works primarily in the Boston office.

FIRM NEWS

FLETCHER TILTON PC WELCOMES THREE NEW ATTORNEYS TO THE FIRM

Jessica M. Bailot is an Associate in the firm's Trust and Estate Department. Her practice focuses on all aspects of estate and trust planning, as well as trust and estate administration. Jessica works primarily from our Worcester office and can be reached at jbailot@fletchertilton.com.

Tricia L. Koss is an Officer of the firm and focuses her practice on transactional matters consisting primarily of Corporate Acquisitions, Commercial Finance and Real Estate law. She has represented buyers and sellers of businesses, as well has having represented sellers, lenders, borrowers and purchasers in a variety of loan and real estate transactions consisting of both residential and commercial transactions. Tricia works primarily from our Worcester office and can be reached at tkoss@fletchertilton.com.

Philip L. Tizzano is an Associate in the firm's Trust and Estate Department. His practice focuses on all aspects of estate planning, including the areas of elder law, special needs planning, and estate and trust administration. Philip works primarily from our Worcester office and can be reached at ptizzano@fletchertilton.com

FLETCHER TILTON CELEBRATES IT'S 200TH ANNIVERSARY

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200 YEARS 1822-2022

Fletcher Tilton PC takes great pride in announcing that it will celebrate its 200th anniversary in 2022. With roots dating back to 1822, our firm is among the longest continuing legal practices in the nation. For two centuries Fletcher Tilton has been one of the region's premier law firms as we continue to meet the needs and challenges that face our clients.

Today, our firm employs more than 100 professionals, including nearly 50 attorneys, and exceptional paralegal and support staffs. We provide legal counsel in 40 specialized areas of practice from our Massachusetts and Rhode Island locations.

Further anniversary details will be announced in the upcoming months.

SIX FLETCHER TILTON ATTORNEYS RECOGNIZED IN BEST LAWYERS® 2022

We are pleased to announce that six Fletcher Tilton attorneys have been recognized by Best Lawyers®, listed in The Best Lawyers in America® issue for 2022.

Congratulations to the following attorneys recognized for their high caliber of legal service (pictured left to right):

Richard C. Barry, Jr. - Trusts and Estates
Mark L. Donahue - Real Estate Law
Dennis F. Gorman - Tax Law and Trusts & Estates
Frederick M. Misilo, Jr. - Elder Law
Phillips S. Davis - Corporate Law
Anthony J. Salvidio, II - Commercial Finance Law

In addition, Best Lawyers has recognized Mark Donahue, Dennis Gorman, and Phillips Davis as 2022 **"Lawyer of the Year."** Congratulations to all!

UPCOMING WEBINARS

Estate Planning with attorney Michael Lahti

Tuesday, January 18, 2022 | 10:00-11:30 a.m. | Live Webinar
Tuesday, February 8, 2022 | 10:00-11:30 a.m. | Live Webinar
Tuesday, March 1, 2022 | 10:00-11:30 a.m. | Live Webinar
Tuesday, March 22, 2022 | 10:00-11:30 a.m. | Live Webinar
Tuesday, April 12, 2022 | 10:00-11:30 a.m. | Live Webinar

For details and registration, visit FletcherTilton.com/seminars