

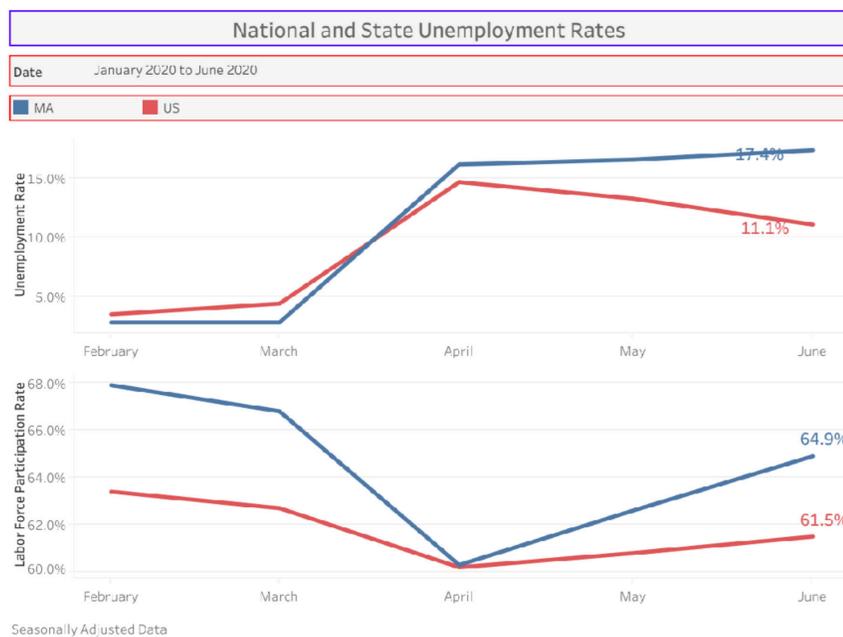
# Labor & Employment

Meryum Khan & Tallulah Knopp

## I. Understanding the Hazard

“Work is always in play because everything touches work.”<sup>1</sup> One of the first and most immediate impacts of the pandemic was the physical removal of many workers from the workplace beginning in March 2020. While some employers were able to seamlessly transition their workforce to a remote operation, many industries had no viable way to keep workers employed remotely. For those workers and employers, the pandemic exacerbated and amplified challenges that workers’ rights advocates have known about for years. With more questions than answers available about the virus quickly spreading through communities across the Commonwealth, employers sent thousands of workers home indefinitely. In the span of a few short weeks, the landscape of “work” in Massachusetts dramatically changed, and will undoubtedly continue to change in the years to come.

The Bureau of Labor Statistics estimates that between June 2019 and June 2020, Massachusetts lost 529,800 jobs.<sup>2</sup> Between March and April 2020, the unemployment rate in Massachusetts increased by more than 12% as more and more workers lost their jobs.



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The sharp increase in unemployment meant not only that Massachusetts residents were out of work, but that, across industries and employers of all sizes, the pandemic had an immediate and significant impact on the workforce. That impact has continued to sweep across the landscape of work over a number of months; first, as Massachusetts grappled with a statewide lockdown that shut down many businesses, and later as employers began

<sup>1</sup> Interview with Samia Kirmani, Principal, Jackson Lewis P.C. (July 31, 2020).

<sup>2</sup> Exec. Off. of Lab. and Workforce Dev., *Mass. Unemployment and Job Estimates for June 2020*, (July 20, 2020), <https://www.mass.gov/news/massachusetts-unemployment-and-job-estimates-for-june-2020#:~:text=The%20June%20estimates%20show%203%2C033%2C600,May%20estimate%20of%2016.6%20percent.>

<sup>3</sup> Dep't of Unemployment Assist., Econ. Rsch., *Nat. and State Unemployment Rates*, (Aug. 21, 2020), [https://public.tableau.com/profile/maeconomicresearch/#!/vizhome/NationalandStateUnemploymentRates/FrontPageRates.](https://public.tableau.com/profile/maeconomicresearch/#!/vizhome/NationalandStateUnemploymentRates/FrontPageRates)

to reopen and ask workers to return to the workplace. While the pandemic is novel, some of the issues it has brought to light are not. The new and trending discourse around topics like worker safety, “essential” work and government support has been part of the conversation among advocates for decades. “COVID has laid bare all of our pathetic policies.”<sup>4</sup>

## II. The Unemployment Crisis

For workers who were terminated, furloughed or laid off unexpectedly in March and April 2020, the Department of Unemployment Assistance (DUA) was one of the first places to turn. The long-strained Department experienced a flood of new claims as a result of the massive and immediate pandemic-related job loss. A record 181,062 people filed unemployment claims for the week ending March 28.<sup>5</sup> Just two weeks prior, 7,449 people submitted claims.<sup>6</sup>

Since 2013, the DUA has required claimants to use an entirely online system to apply for Unemployment Insurance (UI) benefits.<sup>7</sup> The online platform is not mobile friendly and must be used on a desktop or laptop computer. This systemically disadvantages the multitude of claimants whose only mode of internet access is through a smartphone. Not surprisingly, the majority of these workers come from low-wage industries where remote work is not possible and the need to access the system is the greatest. Similarly, like most other effects of the pandemic, the communities most negatively impacted have disproportionately been low-income populations and people of color.

The unfriendly system suffers from technological glitches when it comes to basic functions, including determining a worker’s monetary eligibility. The system determines monetary eligibility through an online database into which claimants input information about their former job. If a claimant enters their previous employer’s name incorrectly by inadvertently missing an apostrophe or comma, the DUA’s system automatically denies the claim.<sup>8</sup> Flaws in the system were a problem well before the pandemic hit and worker advocates have been pleading with DUA to address the tech problems for years. Like a lot of social safety nets that were already poorly functioning, COVID-19 exposed the flaws of DUA to a much wider audience. “The pandemic amplified all the problems with the UI system.”<sup>9</sup> When a worker claimant had a question about filing for UI or needed to check on the status of their claim, they often could not get through to a DUA representative over the phone. Workers began calling other state agencies in an attempt to get some assistance. Eventually, the DUA responded to the need by creating a call center and staffing it with 2,000 agency workers.

As it has in other historical moments of economic recession, the federal government expanded and extended benefit programs including state-administered unemployment. By way of the CARES Act, Congress temporarily extended the benefit period, increased the benefit amount, and expanded benefit eligibility to independent contractors and gig workers. All three of these changes have the potential to leave a lasting positive impact on UI and protections for workers generally, but especially inspiring are the latter two. While there has been discussion on a national level about whether temporary enhanced unemployment benefits during a worldwide pandemic constitute a disincentive to return to work, advocates maintain that the conversation simply highlights the need for higher wages across the country.<sup>10</sup> The expansion of unemployment benefits to 1099 or gig workers sparked a

4 Interview with Monica Halas, Lead Attorney, Greater Boston Legal Services, (Aug. 11, 2020).

5 Chris Lisinski, *New Unemployment Claims Set Second Straight Weekly Record in Massachusetts*, WGBH, (April 2, 2020), <https://www.wgbh.org/news/local-news/2020/04/02/unemployment-claims-in-massachusetts-make-dramatic-jump-again>.

6 *Id.*

7 Halas, *supra* note 93.

8 *Id.*

9 *Id.*

10 Editorial Board, *No, unemployment benefits do not discourage work*, Boston Globe. (June 29, 2020) <https://www.boston->

recognition among the general public of the complete lack of social safety net available to these workers. Halas says uniformity and national standards are needed. Hopefully, this awareness and momentum will outlast the pandemic.

The temporary closure of businesses created confusion for employers as well.<sup>11</sup> Employers had to make quick decisions about whether to keep employees on payroll, conduct layoffs, furloughs or come up with a remote work plan. Later, questions shifted towards how and when to bring workers back safely and, more recently, whether employers could take advantage of certain work share programs where appropriate. Each of these areas comes with a series of questions that must be answered and difficult decisions that had to be made. As of the publication of this paper, Massachusetts has not fully reopened all businesses and many employers remain somewhere between shut down and fully functional, with no return to pre-pandemic normalcy in sight. As Massachusetts and other states slowly begin rolling out vaccination programs in late 2020, it is possible employers and employees will see a glimmer of pre-pandemic normalcy return in 2021.

### III. Lack of Federal Action/Assistance

One glaring problem that was immediately apparent was the lack of guidance from the federal government and lack of enforcement on a federal and state level. The federal government has not provided sufficient leadership, guidance or resources to employers or workers during this crisis.<sup>12</sup> As COVID-19 began to spread in mid-March there was no guidance from the CDC to help employers navigate the quickly changing landscape of the workplace. Positive cases of COVID-19 increased day by day in Massachusetts, making employees and workers nervous about their safety, their businesses, and the future of the employment relationship. Employers had unanswered questions about what to do and how to do it, and the questions haven't stopped since.<sup>13</sup>

Under the Department of Labor, the Occupational Health and Safety Administration (OSHA) is responsible for ensuring safe and healthy working conditions through setting and enforcing standards. However, since the beginning of the pandemic in the United States, OSHA has not undertaken any significant investigations or conducted any meaningful enforcement. Since the beginning of the pandemic, the agency has only issued one citation to a single company for a record-keeping violation.<sup>14</sup> OSHA's inaction is not the only problem. A lack of even basic guidance from the agency has left individual states to set their own health and safety standards. In turn, states like Massachusetts have punted enforcement to local boards of health that may be understaffed and unprepared to handle new and evolving health and safety standards.<sup>15</sup> Without a uniform state-wide (or, arguably, nationwide) approach, municipalities in Massachusetts have had to make determinations about how to enforce the standards and are left to oversee themselves. Massachusetts businesses are crawling through the various stages of them reopening with no real accountability for violations. Municipalities have issued low-level fines to some employers for some violations of the reopening guidelines, but there is no statewide enforcement initiative to ensure businesses reopen safely.

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[globe.com/2020/07/29/opinion/no-unemployment-benefits-do-not-discourage-work/](https://www.globe.com/2020/07/29/opinion/no-unemployment-benefits-do-not-discourage-work/)

<sup>11</sup> Kirmani, *supra* note 90.

<sup>12</sup> Interview with Jodi Sugerman-Brozan, Exec. Dir., Mass. Coal. for Occup. Safety and Health (July 21, 2020).

<sup>13</sup> Sugerman-Brozan, *supra* note 100.

<sup>14</sup> Andrew Stettner et al., *Fighting for the Right to a Safe Return to Work during the COVID-19 Pandemic*, Century Found. (July 29, 2020), <https://tcf.org/content/report/fighting-right-safe-return-work-covid-19-pandemic/?agreed=1>.

<sup>15</sup> Sugerman-Brozan, *supra* note 100.

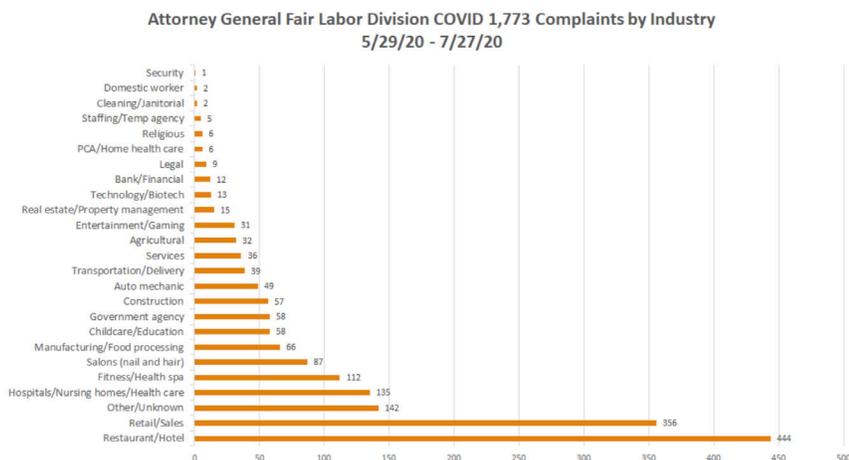
## IV. Returning To Work?

As the weeks turned into months and the number of positive COVID-19 cases began to decrease, employers and workers began to envision, and plan for, a return to the physical workplace. Long-standing issues like little job security, limited access to sick time, and weak protections against retaliation by employers became amplified as workers braced for a return to work in the midst of an ongoing pandemic.

### A. Workplace Health and Safety

On May 18<sup>th</sup>, Governor Baker announced his administration's four-phase Reopening Massachusetts Plan. The plan placed a set of mandatory workplace safety standards on businesses generally and included sector-specific protocols and best practices. The minimum mandatory safety standards that all businesses must satisfy in reopening cover the following four categories: (1) social distancing, (2) hygiene protocols, (3) staffing and operations, and (4) cleaning and disinfecting. Essentially, for a business to reopen, they are required to complete a COVID-19 control plan, hang a "Compliance Attestation Poster" and post a notice which elaborates on the four areas listed above. To ensure compliance with these uniform standards, there is a self-certification requirement. In other words: we know that businesses are following the rules, because they say they are. If that gives you pause, you are in good company.

Sugerman-Brozan says this is not enough, emphasizing that the Administration's Reopening Advisory Board did not include any employee representatives, union officials or worker's rights advocates.<sup>16</sup> Her organization issued failing grades to Governor Baker's plan citing significant concern around aerosol transmission as the dominant spread of the virus and criticizing the Administration's plan on placing too much emphasis on large droplets and surfaces. In collaboration with the Health Tech Committee, MassCOSH has created their own heightened recommendations for workplace safety standards.



(Chart compiled by MassCOSH with public data from the Massachusetts Attorney General's Office)

With little recourse available to them from the federal government, workers began filing complaints about workplace health and safety with various state and local agencies. Complaints to local boards of health, the Attorney General's Fair Labor Division, and the Department of Public Health about lack of social distancing, insufficient cleaning protocols, sick employees being forced to work and businesses remaining open in violation of reopening guidance soared. If there ever was a moment for worker organization around health and safety issues, it

<sup>16</sup> *Reopening Advisory Board*, Comm. of Mass. <https://www.mass.gov/orgs/reopening-advisory-board> (last visited Aug. 25, 2020).

is now. The pandemic has exposed vulnerabilities that advocates and workers have been dealing with for decades. At this moment, there is an increase in public discourse about health and safety measures in the workplace and the importance of protecting workers and revisiting which workers and services Massachusetts considers “essential” in the future.

## **B. Insufficient Leave Policies**

The statewide mandatory closing of schools in mid-March placed a huge burden on working parents who overnight had to manage both a health crisis and a childcare crisis. In addition, the general prevailing wisdom to stay home when sick became more important than ever to control the spread of the virus, but for workers who lacked paid leave time, that was not always an option. In these two different contexts, the insufficient levels of leave time available for one’s own health or to care for a family member was put on full display. This became especially true for workers in many service industries where teleworking is impossible.

Relatively quickly, the federal government passed the Families First Coronavirus Relief Act (FFCRA). This Act provided 80 hours of paid leave to employees who were unable to work either due to their own health, a family member’s health, or because their child’s school or care center was closed.<sup>17</sup> While these are vital protections for workers, many members of the workforce were left out. The FFCRA only applies to companies with less than 500 employees, leaving out giant employers like Amazon and Whole Foods. Moreover, like most other employment protections, these benefits do not extend to gig workers and others classified as independent contractors. While the public relied on delivery apps and drivers as necessary to get through quarantines and work from home schedules, the fact that these workers were excluded from any real pandemic-related protections is especially troubling.

Massachusetts employees have a right to accrue sick leave, and this leave must be paid if an employer has eleven or more employees.<sup>18</sup> However, this benefit does not extend to workers who are independent contractors or gig economy workers. Now, what was previously a worker protection concern has very quickly morphed into a public health concern that impacts more than just the most economically vulnerable in society.<sup>19</sup> For the first time in any meaningful way, a lack of childcare options has been acknowledged as an impediment to work. The nature of the pandemic meant that even economically stable families could not escape the impact of school and child care closures. This presents a unique opportunity for further action, especially where an issue that disproportionately impacts women has been given attention and public support.

## **C. Collective Bargaining**

Workers’ advocacy groups note that the impacts of the pandemic on employment have highlighted the importance of unions and collective bargaining. For example, Stop & Shop grocery store workers received a 10% increase in their compensation categorized as “hazard pay.” Importantly, this additional benefit was not the proactive step of a generous employer, but the direct result of negotiations between the employer and the union representing the employees. Generally, non-unionized workers classified strictly as “at-will employees” do not have access to these types of safety nets or the opportunity to collectively work with employers for better pay and workplace protections. Essential workers who are not part of unions are speaking up to ask their employers for protections being granted to their unionized counterparts. As workers see the power of collective bargaining play out in real time during a real crisis, the resulting momentum could fuel a shift in the future of organized labor.

This is not to suggest that collective bargaining can resolve all employment-related hazards. Sugerman-Brozan says that, for example, MassCOSH has been working to address air quality issues in public schools for more than

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<sup>17</sup> Beyond the two week period, an additional 10 weeks of leave is available for employees who continue to lack a viable childcare option. While this leave is also paid, it is at two-thirds the employee’s salary.

<sup>18</sup> Mass. Gen. Laws. ch. 149, §148C.

<sup>19</sup> Brief for Petitioner, Healey v. Uber, no. 2084-cv-01519 BLS1 (Mass. App. Div. filed July 14, 2020), <https://www.mass.gov/doc/ride-sharing-complaint/download>.

20 years. As teachers, parents and school administrators braced for a return to public schools in the fall of 2020, they finally began engaging in a meaningful discussion about aerosol transmission of COVID-19 and the connection to air quality in indoor buildings. These questions are now at the forefront of conversations as school districts navigate school reopening.

#### **D. Economic Concerns for Employers**

Throughout the rapidly changing duration of the pandemic, employers have been concerned and confused. There is much to be learned about the virus and the novelty of the situation makes it hard to be sure employers are following the most up-to-date law as it will be interpreted in an ever-changing situation. Erring on the side of caution and being over-generous and protective of their employees is the best course of action. This means engaging in a good faith interactive process when an employee asks for a reasonable accommodation. It means making the wait to get into the building and onto the elevator compensable time for hourly employees. It also means ensuring that systems are in place for decisions that are not legally mandated so that no single supervisor has too much discretion, which can lead to disparate impacts for different groups of workers.

It is expensive for employers to on-board and train new workers, so most want to keep their existing workers in the workforce.<sup>20</sup> Whether it's modernizing office technology, learning to do more with less employees or finding different revenue streams, the pandemic has forced many employers to change and adapt quicker than they ever thought possible. For some employers, the pandemic has provided an opportunity to change their work culture.<sup>21</sup> This moment has fostered increased cooperation and pragmatism among employers who have been forced to explore how work can be reimagined--for the better--going forward.

#### **V. Conclusion**

“Workers are the economy.”<sup>22</sup> A healthy economy requires a healthy workforce. The public health crisis brought on by COVID-19 has not created new vulnerabilities, but it has placed a spotlight on the lack of adequate protections that exist for workers. The current crisis is a universal one, felt by all workers and employers. This widespread impact offers a unique moment to capitalize on the attention to health, safety, practicality and comfort in the workplace. It is imperative that the safety nets being created for this moment remain in place and are used to springboard further momentum towards a safer and happier workplace.

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<sup>20</sup> Kirmani, supra at 90.

<sup>21</sup> Jon Chesto, *Many workers will never go back post-coronavirus*, Boston Globe (June 17, 2020), <https://www.bostonglobe.com/2020/06/17/nation/many-workers-will-never-go-back-office-post-coronavirus/>.

<sup>22</sup> Darlene Lombos, Exec. Secretary-Treasurer, Greater Boston Labor Council, City of Boston Panel at Mayor's Office of Workforce Development Discussion: Worker Safety (August 11, 2020).