487 Mass. 1104

(This disposition is referenced
in the North Eastern Reporter.)

Supreme Judicial Court of Massachusetts.

EMERALD HOME CARE, INC.

v.

**DEPARTMENT OF
UNEMPLOYMENT ASSISTANCE**

April 15, 2021

Reported below: 99 Mass. App. Ct. 151 (2021).

Opinion

Appellate review denied.

Mme. Chief Justice Budd did not participate.

20-P-188 Appeals Court

EMERALD HOME CARE, INC. vs. DEPARTMENT OF UNEMPLOYMENT ASSISTANCE.

No. 20-P-188.

Middlesex. November 12, 2020. – February 2, 2021.

Present: Green, C.J., Desmond, & Lemire, JJ.

Massachusetts Medical Assistance Program. Due Process of Law, Notice, Hearing. Constitutional Law, Freedom of speech and press, Federal preemption. Federal Preemption.

Civil action commenced in the Superior Court Department on June 8, 2018.

The case was heard by Michael D. Ricciuti, J., on motions for judgment on the pleadings.

Arthur R. Cormier for the plaintiff.

Andrew J. Haile, Assistant Attorney General, for the defendant.

DESMOND, J. In 2017, the Massachusetts Legislature enacted a two-year program, known as the

Employer Medical Assistance Contribution Supplement (EMAC Supplement or program), whereby Massachusetts employers with six or more employees were required to pay a contribution for their employees who received publicly subsidized health insurance during that period. See G. L. c. 149, § 189A.[1] On April 11, 2018, Emerald Home Care, Inc. (Emerald), was notified that it was liable for a contribution for twenty-eight employees under the EMAC Supplement.[2] Emerald filed an appeal of this liability determination with the Department of Unemployment Assistance (DUA), arguing that the EMAC Supplement was unconstitutional. The appeal was dismissed for "fail[ure] to cite cognizable grounds for a hearing," and Emerald sought judicial review in the Superior Court. On cross motions for judgment on the pleadings, a judge of the Superior Court entered judgment for DUA. We affirm.

Background. The EMAC Supplement went into effect on January 1, 2018, and was administered until its end date on December 31, 2019. G. L. c. 149, § 189A. Under the program, Massachusetts employers with six or more employees were required to pay a quarterly

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[1] The statute was repealed effective December 31, 2019, by St. 2017, c. 63, § 10.

[2] Throughout its brief, Emerald refers to the quarterly contribution as a tax on employers. We, however, use the language included in the EMAC Supplement statute and regulations and refer to the amount assessed to employers as the liability determination, and the payment made as a contribution. See G. L. c. 149, § 189A; 430 Code Mass. Regs. §§ 21.00 (2018). In the end, the language used to describe the payment makes no difference to the analysis of this case.

contribution for each of their employees who received publicly subsidized health insurance for at least fifty-six days. See G. L. c. 149, § 189A; 430 Code Mass. Regs. § 21.03 (2018). DUA was tasked with promulgating regulations to implement the EMAC Supplement, as well as the collection of the contributions from Massachusetts employers. G. L. c. 149, 189A.

To calculate the amount owed by each employer, DUA obtained a list of individuals who received publicly subsidized health insurance from the Executive Office of Health and Human Resources, which administers MassHealth, and the Commonwealth Health Insurance Connector Authority, which provides access to subsidized health insurance plans from private carriers. See G. L. c. 149, § 189A (a); 430 Code Mass. Regs. §§ 21.02, 21.03 (2018). Information about individuals who receive publicly subsidized health insurance is protected by Federal and State law.[3] Accordingly, DUA was required by law to keep such information confidential, and it enacted EMAC Supplement regulations to do so. See 430 Code Mass. Regs. § 21.10 (2018).

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[3] See 42 U.S.C. § 1396a(a)(7)(A)(i) (requiring State medical assistance plan to provide "safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with . . . the administration of the plan"); G. L. c. 118E, § 49 ("The use or disclosure of information concerning applicants and recipients shall be limited to purposes directly connected with the administration of the medical assistance programs . . . and the names of applicants and recipients shall not be published").

The regulations provide that DUA must protect the confidentiality of the information about the individuals with publicly subsidized health insurance, including the names and Social Security numbers of those individuals, and that Massachusetts employers could receive this information only for the purpose "of reviewing and/or appealing" their liability under the EMAC Supplement. 430 Code Mass. Regs. § 21.10(2)(b). In order to receive the list of employees, employers were required to agree to maintain the confidentiality of that information. Id.

On April 11, 2018, DUA sent notice to Emerald that its EMAC Supplement liability for the first quarter of 2018 was $6,117.13 for twenty-eight employees. The notice explained how the liability amount was calculated, and informed Emerald of its right to request a hearing to appeal the determination within ten days of receipt of the notice. Pursuant to the regulations regarding confidentiality, the notice did not include the list of the relevant employees, but notified Emerald that it could obtain the list of the employees' names "by logging on to" the DUA website.

When Emerald accessed its account on the DUA website, it was prompted to sign a privacy certification (certification) before it could access the list of employees. In accordance with the regulations, the certification stated, inter alia, (1) that the employer was requesting the information for the purpose of "review[ing] and/or appeal[ing] its" liability under the EMAC Supplement, (2) that the employer would maintain the confidentiality of the information and

would not disclose the "information except as necessary to review and/or appeal the amount of" its liability, and (3) that the employer would not use or disclose the "information to disparage or retaliate against any employee or other individual to whom it pertains."

Emerald refused to sign the certification and agree to the conditions enumerated, and was thus not provided with the list of employees. Emerald filed an appeal with DUA, arguing that the EMAC Supplement was unconstitutional because it failed to provide an employer with the names of the employees, and would not do so unless the employer agreed to maintain the confidentiality of the employees' names and Social Security numbers. DUA dismissed the appeal because it "fail[ed] to cite cognizable ground for a hearing" under G. L. c. 149, § 189A. Emerald sought judicial review in the Superior Court, arguing that the EMAC Supplement violated its rights to due process and free speech and was preempted by Federal law. DUA and Emerald filed cross motions for judgment on the pleadings. Following a hearing, a judge of the Superior Court denied Emerald's motion and granted DUA's motion for judgment on the pleadings.

Discussion. 1. Due process claim. Emerald argues that DUA's failure to provide it with an unconditioned right to the names of its employees who received publicly subsidized health insurance, while requiring Emerald to pay a contribution for those employees, violated due process. We disagree.

"The fundamental requirement of due process is notice and the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Gillespie v. Northampton, 460 Mass. 148, 156 (2011), quoting Matter of Angela, 445 Mass. 55, 62 (2005). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Mathews v. Eldridge, 424 U.S. 319, 334 (1976), quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

The requisite notice need only "be of such nature as reasonably to convey the required information." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Here, the notice provided to Emerald by DUA informed it of the amount of its EMAC Supplement liability, the general reasoning for the EMAC Supplement, the number of employees that the liability determination was based on, and the manner in which Emerald could obtain the names of those employees. It also notified Emerald that it had the right to request a hearing within ten days to appeal the liability determination and the manner in which to do so, and that the determination would be final if Emerald did not request the hearing. The letter further provided that a request for a hearing must raise grounds cognizable under G. L. c. 149, § 189A, and included examples of such grounds.[4] This notice

[4] Some examples of grounds cognizable under G. L. c. 149, § 189A, include (1) that the employer did not have six or more employees, (2) that the employer's employees were independent contractors, (3) that the employer's reported employees' wages were not for unemployment insurance purposes, and (4) that the

was sufficient to furnish Emerald with the necessary information and afford it the "opportunity to present [its] objections." Mullane, supra.

Emerald did request a hearing to present its objections, and was informed that it had the right to testify, be represented by counsel, introduce evidence, and present witnesses at the hearing. When Emerald's request for a hearing was dismissed because it failed to cite any of the cognizable grounds, Emerald had the opportunity to and did seek judicial review. These procedures were more than sufficient to provide Emerald with notice of its EMAC Supplement liability, the basis for that liability, and a meaningful opportunity to be heard to challenge that liability.

Emerald nevertheless argues that the procedure set out in the EMAC Supplement and followed by DUA is violative of due process because the government may not impose conditions or limitations on the right to a meaningful opportunity to be heard, and by requiring Emerald to sign the privacy certification before providing access to the list of employees, DUA did just that. The claim is without merit. This assertion does not accurately characterize the procedure followed by DUA, nor do we find support for this proposition in the law.

To begin with, Emerald was not required to sign the certification and access the list of names prior to receiving a hearing. DUA merely permits employers to

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employees had "not been on qualifying health care for a continuous period of [fifty-six] days."

gain access to this information, if they so choose, as long as the employers agree to protect its confidentiality. Thus, the conditions contained in the privacy certification are not conditions requisite to Emerald's opportunity to be heard, but rather are conditions on Emerald's ability to access additional information that may be useful to it at a hearing. In any event, Emerald was provided full opportunity to obtain information it might need to participate fully and meaningfully in a hearing, and the conditions imposed by DUA on Emerald's access to that information do not derogate in any way from Emerald's ability to use the information in formulating its prosecution of its rights at the hearing. Contrary to Emerald's contentions, due process does not mandate DUA to unconditionally turn over any and all information that would be helpful to Emerald at a hearing. See LaPointe v. License Bd. of Worcester, 389 Mass. 454, 458 (1983).

Further, due process is "not a technical conception with a fixed content" as Emerald seems to suggest. Commonwealth v. Torres, 441 Mass. 499, 502 (2004), quoting Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961). The mandates of due process vary with context, see Torres, supra, and due regard must be afforded to the "practicalities and peculiarities" of a particular case, Mullane, 339 U.S. at 314. We are satisfied that, in the context of this case, the fundamental requirements of due process were met, despite the conditions imposed by DUA on the

release of the information concerning the employees who received publicly subsidized health insurance.[5]

2. Free speech claim. Emerald further argues that conditioning its right to obtain the list of employees on Emerald's agreement not to disclose this information, for any purpose other than reviewing or appealing its EMAC Supplement liability, is a violation of the First Amendment to the United States Constitution. It argues that the First Amendment provides the right to speak freely about the identity of the employees for whom it has been assessed a fee. However, the freedom to speak "does not comprehend the right to speak on any subject at any time." Seattle

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[5] Emerald also suggests that Speiser v. Randall, 357 U.S. 513 (1958), supports its position that the procedure followed by DUA violated due process. We are not convinced. In Speiser, the United States Supreme Court found that a State tax program violated due process because it placed the burden on taxpayers to show that they qualified for a specific tax exemption, and as part of that burden, the taxpayers had to show that they did not advocate for the overthrow of the government. See id. at 516517, 528-529. The Court found that, in such a case, due process mandates the State to bear the burden of justifying the suppression of speech. Id. at 528-529. Here, we have quite a different scenario. The EMAC Supplement does not place any burden on Emerald, or other Massachusetts employers, to show that they will suppress their speech as a requirement to receiving notice of its EMAC Supplement liability or a hearing to challenge that liability. It further does not require Emerald to show that it will not advocate or protest against the EMAC Supplement; DUA merely requires Emerald to agree not to disclose its employees' names and Social Security numbers, and the fact that they receive publicly subsidized health insurance, as a prerequisite to receiving this private information. The concerns present in Speiser are not present in this case.

Times Co. v. Rhinehart, 467 U.S. 20, 31 (1984), quoting American Communications Ass'n v. Douds, 339 U.S. 382, 394-395 (1950).

The names and Social Security numbers of those who receive publicly subsidized health insurance is private government information held by DUA and is not public record. See G. L. c. 149, § 189A (e). The First Amendment does not provide a general "right of access to government information or sources of information within the government's control," Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978) (plurality opinion), and thus Emerald had no First Amendment right to access this information.[6]

While the government may not impose restrictions on the access to and dissemination of information in "private hands," Sorrell v. IMS Health Inc., 564 U.S. 552, 568 (2011), "[t]his is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses." Los

[6] While the United States Supreme Court has recognized that the First Amendment provides a qualified right of access to certain criminal judicial proceedings, see Press-Enterprise Co. v. Superior Court of Cal., County of Riverside, 478 U.S. 1, 10 (1986); Globe Newspaper Co. v. Superior Court of Norfolk County, 457 U.S. 596, 602 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980), and the lower courts have extended this right to various records relating to such criminal proceedings, see Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 505 (1st Cir. 1989); Globe Newspaper Co. v. Fenton, 819 F. Supp. 89, 91 (D. Mass. 1993), this right has not been extended to other types of documents. See In re Boston Herald, Inc., 321 F.3d 174, 183, 188-189 (1st Cir. 2003) (citing cases rejecting First Amendment right of access to other government documents).

Angeles Police Dep't v. United Reporting Publ. Corp., 528 U.S. 32, 40 (1999) (United Reporting). Rather, this case, like United Reporting, concerns the restriction of access to government information based on certain conditions.[7] Here, DUA offers to provide this information to employers to assist them in reviewing, and potentially appealing, their EMAC Supplement liability, but on the condition that the private government information will be used for that purpose alone and not disseminated for other reasons.

In Seattle Times Co., a similar restriction was found not to offend the First Amendment. The restriction imposed in that case prohibited the dissemination of information obtained through the discovery process, unless such dissemination was for the purpose of preparing and trying the case. See Seattle Times Co., 467 U.S. at 32. The Court considered that the litigants gained access to the information they wished to disseminate only through the court-ordered discovery process (a process created by the Legislature), that the litigants had no First Amendment right of access to that information, and that information gained through

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[7] In United Reporting, 528 U.S. at 34-35, a California statute required persons requesting an arrestee's address to agree not to use the information to sell a product or service as a condition to receiving the requested address. The Court held that the statute could not be facially attacked under the First Amendment, but specifically noted that the statute was "nothing more than a governmental denial of access to information in its possession." Id. at 40.

the discovery process was not traditionally accessible to the public. Id. at 32-33.

Similarly here, the information Emerald wishes to disseminate can be accessed only through the process created by the EMAC Supplement (a program created by the Legislature), Emerald has no First Amendment right to this information, and this information is not public record. With this backdrop, we apply the same standard used in Seattle Times Co., and ask "whether the 'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression' and whether 'the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.' "[8] Seattle Times

[8] We reject Emerald's argument that the privacy certification amounts to a content-based restriction, subject to strict scrutiny, under AIDS Action Comm. of Mass., Inc. v. Massachusetts Bay Transp. Auth., 42 F.3d 1, 8 (1st Cir. 1994) ("a regulation which permits an idea to be expressed but disallows the use of certain words in expressing that idea is content-based"). While the certification requires Emerald to agree not to disclose the names and Social Security numbers of its employees as a condition to receiving this information, it does not restrict Emerald from using this information to review, assess, or appeal its EMAC Supplement liability. The certification is better characterized as a limitation on the manner in which the names and Social Security numbers may be utilized, and not a total restriction on the disclosure. As such, we believe this case to be more analogous to Seattle Times Co., which permitted the dissemination of the information within the context of trying and preparing the case, but limited the disclosure elsewhere. See Seattle Times Co., 467 U.S. at 27.

Co., 467 U.S. at 32, quoting Procunier v. Martinez, 416 U.S. 396, 413 (1974).

We believe that the practice of using the privacy certification, a procedure implemented to satisfy the privacy mandates of G. L. c. 149, § 189A, and 430 Code Mass. Regs. § 21.10, furthers the government's substantial interest in maintaining the confidentiality of private health care information of Massachusetts citizens. Indeed, both Massachusetts and Federal law require such safeguards to be implemented to protect the confidentiality of this type of information. See note 3, supra. Further, the restrictions on the use of this information are no greater than necessary to protect the information's confidentiality. Although Emerald does not have free reign to disclose the names and Social Security numbers of its employees with publicly subsidized health insurance, it is free to use and disclose this information to the extent necessary to review or appeal its EMAC Supplement liability. Emerald further may openly criticize the EMAC Supplement as a program, it may use pseudonyms or characteristics to describe the individual employees if it chooses to, and if Emerald were to receive this information from a source other than DUA, the privacy certification would not govern its dissemination. See Seattle Times Co., 467 U.S. at 37. In sum, we discern no free speech violation.

3. Preemption. Lastly, Emerald argues that the EMAC Supplement is in conflict with Federal law and

is therefore preempted by the supremacy clause.[9] Federal law provides that a "State plan for medical assistance must . . . provide . . . safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with . . . the administration of the plan." 42 U.S.C. § 1396a(a)(7)(A)(i). Emerald contends that the EMAC Supplement fails to accord with Federal law because it discloses information about individuals who receive publicly subsidized insurance to a wide range of Massachusetts employers who have no role in the administration of such health insurance plans. We, however, fail to see the conflict.

The EMAC Supplement undoubtedly implements safeguards to restrict the use and disclosure of information about employees who receive publicly subsidized health insurance. As discussed at length above, no Massachusetts employer can access this type of information without first signing the privacy certification and agreeing to maintain the information's confidentiality. Once an employer gains access to the information, the employer is not authorized to use or

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[9] DUA asserts that this claim should be rejected because the supremacy clause does not create a private cause of action. See Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 324-326 (2015). While we acknowledge that the supremacy clause does not create a cause of action, Emerald did not file suit to enforce a Federal law over a State law. Rather, it sought judicial review of its EMAC Supplement liability determination, pursuant to G. L. c. 30A, § 14(7), which permits a court to set aside an agency decision that is "[i]n violation of constitutional provisions" or "[biased upon an error of law." We therefore address the merits of this claim.

disclose the information, except for the limited purpose of reviewing or appealing the EMAC Supplement liability determination. This permitted disclosure is directly connected with administering the publicly subsidized health insurance plans in Massachusetts because, once all appellate rights have been exhausted by an employer and the liability determination has been finalized, the EMAC Supplement contributions are used to fund these health insurance plans.[10] See 42 U.S.C. § 1396a(a)(7)(A)(i). Accordingly, because the EMAC Supplement does not conflict with Federal law, but rather is consistent with 42 U.S.C. § 1396a(a)(7)(A)(i), Emerald's preemption claim must fail.

Judgment affirmed.

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[10] The EMAC Supplement was created to temporarily offset the growing costs of publicly subsidized health insurance in the Commonwealth while more permanent measures were being considered by the Legislature. See Department of Unemployment Assistance, Unemployment Insurance (UI) for Employers, Guide to employer contributions to DUA, Learn about the Employer Medical Assistance Contribution (EMAC) Supplement, http://www.mass.gov/info-details/learn-about-the-employer-medical-assistancecontribution-supplement [https://perma.cc/B9KH-UF8J], for a detailed explanation of the EMAC Supplement and the context from which it was born.

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 20-P-188

EMERALD HOME CARE, INC.

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vs.

DEPARTMENT OF
UNEMPLOYMENT ASSISTANCE.

Pending in the Superior

Court for the County of Middlesex

Ordered, that the following entry be made on the docket:

Judgment affirmed.

By the Court,

/s/ Joseph F. Stanton, Clerk
Date February 2, 2021

From: SJCCommClerk@sjc.state.ma.us
To: Art Cormier
Subject: DAR-27362 - Notice: DAR denied
Date: Friday, May 15, 2020 4:00:52 PM

Supreme Judicial Court for the Commonwealth of Massachusetts

RE: No. DAR-27362

EMERALD HOME CARE, INC.
vs.
DEPARTMENT OF UNEMPLOYMENT ASSISTANCE

Middlesex Superior Court No. 1881CV01670
A.C. No. 2020-P-0188

NOTICE OF DENIAL OF APPLICATION FOR DIRECT APPELLATE REVIEW

Please take note that on May 15, 2020, the application for direct appellate review was denied. (Budd, J., recused)

Francis V. Kenneally, Clerk

Dated: May 15, 2020

To:
Arthur Raymond Cormier, Esquire
Andrew John Haile, A.A.G.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. **SUPERIOR COURT**
CIVIL ACTION
NO. 18-1670

EMERALD HOME CARE, INC.

v.

DEPARTMENT OF
UNEMPLOYMENT ASSISTANCE

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

Plaintiff Emerald Home Care, Inc. ("Emerald") claims that a statute and related regulation, G. L. c. 149, §189A and 430 CMR 21.10 respectively, pursuant to which the Defendant Department of Unemployment Assistance ("DUA") assesses and collects what is known as the Employer Medical Assistance Contribution Supplement, or "EMAC Supplement," are unconstitutional. Specifically, Emerald claims the statute and regulation violate Emerald's rights to due process (Counts I, II and V) and free speech (Count III and V). Emerald also claims both are preempted by federal law (Count IV). Emerald thus seeks, among other things, a ruling that statute and regulation are unconstitutional

and an order that the EMAC Supplements Emerald has paid be returned to it.[1]

Presently before the Court are Emerald's motion for judgment on the pleadings and DUA's cross-motion for judgment on the pleadings.

For the reasons discussed below and in light of the arguments made by counsel, the Court **DENIES** Emerald's motion and **ALLOWS** DUA's motion.

BACKGROUND

In 2017, the Massachusetts legislature enacted a two-year program under which fees were assessed on employers whose employees used publicly-subsidized health insurance, either through the state Medicaid program, known as MassHealth, or the Massachusetts Health Connector (the "Connector"). See G.L. c. 149, §§189-189A. The program, known as the Employer Medical Assistance Contribution Supplement, or "EMAC Supplement," program, went into effect on January 1, 2018 and is to run through December 31, 2019. See G.L. c. 149, §189A. The program applies to all employers in Massachusetts who employ six or more employees, see G.L. c. 149, § 189(a), and requires such employers to pay a quarterly fee, the EMAC Supplement, for each of their employees who received publicly-subsidized health insurance coverage for at least

[1] To the extent Emerald seeks relief for any other party, that claim is rejected. No such request was brought before DUA or was framed in the complaint. It is thus not properly before this Court.

56 days and who earned at least $500 during that quarter. See 430 CMR § 21.03(2). Supplements are calculated by multiplying the first $15,000 in wages of each qualifying employee by five percent. See G. L. c. 149, §§189A(a), (b).

The EMAC Supplement statute assigns DUA the task of collecting the EMAC Supplement. See G. L. c. 189A(a). DUA uses much the same infrastructure that exists to assess and collect unemployment insurance ("UI") from employers. Under the UI scheme, DUA receives quarterly wage reports from employers, calculates the employer's unemployment contribution, and then assesses a fee which goes to the UI Trust Fund. See G.L. c. 151A, § 14; Administrative Record ("AR") 2-3 (sample wage report). The EMAC Supplement scheme functions similarly. The process of assessing an EMAC Supplement begins when DUA receives an electronic file from the Executive Office of Health and Human Services ("EOHHS"), which administers MassHealth, or from the Connector, which provides access to subsidized health insurance plans from private carriers. See G.L. c. 149, §189A(a). That file contains a list of individuals who received publicly-subsidized health insurance for at least 56 days during the previous quarter. DUA's online system, known as UI Online, then matches that information against the quarterly wage filings and calculates employer liability for the EMAC Supplement using the formula outlined above.

Data collected under the EMAC Supplement statute is not a public record, see G. L. c. §189A(e), and information about individual employees who receive

publicly-subsidized health insurance – known as "member information" – is confidential pursuant to federal and state law and an Inter-agency Service Agreement between DUA and EOHHS. Under federal law, "[a] State plan for medical assistance must . . . provide . . . safeguards which restrict use or disclosure of information concerning applicants and recipients to purposes directly connected with . . . the administration of the plan[.]" 42 U.S.C. §1396a(a)(7)(A)(i);[2] see also 42 C.F.R. §431.301 ("A State plan must provide, under a State statute that imposes legal sanctions, safeguards meeting the requirements of this subpart that restrict the use or disclosure of information concerning applicants and beneficiaries to purposes directly connected with the administration of the plan"); 42 C.F.R. §431.305 ("The [state] agency must have criteria that govern the types of information about applicants and beneficiaries that are safeguarded . . . This information must include at least . . . [n]ames and addresses [and] . . . Social Security Numbers"); 42 C.F.R. §431.304 (a), (b) (requiring a state agency to "publicize provisions governing the confidential nature of information about applicants and beneficiaries, including the legal sanctions imposed for improper disclosure

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[2] Those purposes are defined in federal regulations as:

(a) Establishing eligibility;

(b) Determining the amount of medical assistance;

(c) Providing services for beneficiaries; and

(d) Conducting or assisting an investigation, prosecution, or civil or criminal proceeding related to the administration of the plan.

42 C.F.R. § 431.302.

and use" and "provide copies of these provisions to applicants and beneficiaries and to other persons and agencies to whom information is disclosed"). Release of such information must also be tightly controlled under federal requirements. See 42 C.F.R. §431.306(a), (c), (e) (requiring state agencies to establish criteria specifying the conditions for release and use of information about applicants and beneficiaries, prohibiting the agency from publishing names of applicants or beneficiaries, and establishing policies that "must apply to all requests for information from outside sources, including governmental bodies, the courts, or law enforcement officials"). State law imposes similar restrictions. See G.L. c. 118E §49 ("The use or disclosure of information concerning [MassHealth] applicants and recipients shall be limited to purposes directly connected with the administration of the medical assistance programs established under this chapter and the names of applicants and recipients shall not be published"). In addition, the Massachusetts Fair Information Practices Act (FIPA) restricts the unauthorized disclosure of most personal information, including protected health information. See G.L. c. 66A, §2 (requiring agencies that "maintain[] personal data" to prohibit "any other agency or individual . . . [from] hav[ing] access to personal data unless such access is authorized by statute or regulations").

DUA enacted its own EMAC Supplement regulation. See 430 CMR §21.00, et. seq. That regulation permits DUA to obtain member information from

MassHealth and the Connector, but requires DUA to maintain its confidentiality:

(1) Disclosure of Member Information to Administer the EMAC Supplement. The MassHealth Agency and the Connector shall provide DUA with such information as DUA determines necessary to determine liability for the EMAC Supplement and otherwise administer M.G.L. c. 149, §189A including, without limitation, information pertaining to MassHealth and ConnectorCare beneficiaries (Member Information), at such times and in such manner as agreed by the MassHealth Agency, the Connector and DUA. The Member Information determined necessary by DUA for such purposes and the related terms and conditions upon which Member Information provided to DUA shall be documented in an Interdepartmental Service Agreement among DUA, the MassHealth Agency and the Connector (ISA).

(2) Confidentiality.

(a) DUA shall protect the confidentiality of Member Information provided by the MassHealth Agency and the Connector pursuant to 430 CMR 21.10(1), in accordance with its obligations under applicable privacy and security laws and regulations including, without limitation, M.G.L. c. 66A and M.G.L. c. 118E, §49, and any additional terms and conditions as the MassHealth Agency and the Connector may reasonably require to comply with

their respective legal obligations, as set forth in the IS

(b) DUA may provide an employer, that it determines is liable for the EMAC Supplement under M.G.L. c. 149, §189A, with access to Member Information for purposes of reviewing and/or appealing such liability. Access shall be provided in accordance with procedures established by DUA. Any employer that receives Member Information shall be required to maintain the confidentiality, of such Information in accordance with M.G.L. c. 118, §49, and any other legal obligation to which the employer is subject, and shall limit its use and disclosure of such information as necessary to review and/or appeal the amount of the employer's liability.

(c) Without limiting the generality of the foregoing, no employer shall use or disclose Member Information to disparage or retaliate against any employee or other individual to whom it pertains. Prior to the receipt of Member Information, employers shall be required to sign a written acknowledgment of their obligations to maintain the confidentiality of such Information, in such form and pursuant to such procedures established by DUA.

430 CMR 21.10.

To ensure compliance with the law and its own regulation, DUA requires employers to agree not to use or disclose their employees' member information except as necessary to review and/or appeal the EMAC Supplement through a certification ("the Certification"). The Certification provides:

> The undersigned hereby certifies to being (1) an authorized representative of the Employer; and (2) duly authorized to execute this EMAC Supplement Certification on behalf of the Employer. On behalf of the Employer, the undersigned further agrees:
>
> > 1. The Employer has requested information regarding its Qualifying Employees from DUA ("Qualifying Employee Information") to review and/or appeal its assessed EMAC Supplement liability.
> >
> > 2. Qualifying Employee Information is confidential and, consistent with M.G.L. 118 §49 and [430 CMR 21.10], the Employer and its authorized representative is required to maintain the confidentiality of any Qualifying Employee Information received from DUA (including any copies) derivatives or extracts of such Information), in accordance with M.G.L. 118 §49 and any other legal obligation to which the Employer is subject, and shall not use or disclose such Information except as necessary to review and/or appeal the amount

> of the Employer's EMAC Supplement liability. These confidentiality obligations also bind any representative of the Employer.
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> 3. The Employer and any authorized representative shall limit access to Qualifying Employee Information to those employees, contractors and agents who reasonably need such Information to review or appeal the Employer's assessed EMAC Supplement liability.
>
> 4. The Employer and any authorized representative shall require any contractor or agent receiving Qualifying Employee Information to agree in writing to the same or more stringent limitations on the use and disclosure of Qualifying Employee Information.

Once the employer indicates its agreement to the Certification, it may access the list of it employees who received publicly-subsidized insurance along with the last four digits of their social security numbers. See AR, 22-23.

If the employer wishes to challenge an issue that is cognizable under the EMAC Supplement statute, G.L. c. 149, §189A, it has ten days from the receipt of the EMAC Supplement determination to file an appeal with DUA, which leads to a hearing before a DUA hearing officer. See G.L. c. 149, §189A(c). A party aggrieved

by the hearing officer's decision may appeal to Superior Court. See G.L. c. 149, §189A(c).

Emerald is a home health care company based in Lexington. Through a notice dated April 11, 2018 and entitled "Employer Medical Assistance Contribution (EMAC) Supplement Determination," DUA informed Emerald that DUA "has determined that for quarter 1 and year 2018 you are liable under G.L. c. 149, §189A for the EMAC Supplement in the amount of $6,117.13 for 28 employees." The notice explained the general rationale for the EMAC Supplement. DUA also informed Emerald that "[t]his determination will become final unless you request a hearing within ten days from the date on which you received the determination." AR 6.

Emerald requested information about its employees concerning whom the EMAC Supplement was determined, but refused to sign a Certification. Because that was the case, DUA did not provide any information identifying the 28 employees or the wages attributable to each of them pursuant to 430 CMR 21.10(2)(c).

On April 20, 2018, Emerald filed an appeal with DUA stating that "the EMAC Supplement is unconstitutional" in that it violated due process clause because it imposed "burdens and restrictions on taxpayers who want to find out information concerning how they are being taxed," and violated Emerald's "free speech rights." AR 8.

On May 9, 2018, DUA issued a Notice of Dismissal, informing Emerald that its appeal was dismissed

because Emerald "failed to cite cognizable grounds for a hearing under G.L. c. 149, §189A" and did not raise a "cognizable issue." AR 24.

Plaintiff commenced this action for judicial review of the DUA's actions on June 8, 2018 under G.L. c. 149, §189A, and 30A, § 14(7), bringing claims for violations of due process and free speech rights as well as claiming preemption by federal law.[3]

DISCUSSION

The Court may set aside a state agency's decision only on the grounds enumerated in G.L. c. 30A, §14. See Howard Johnson Co. v. Alcoholic Beverages Control Comm'n, 24 Mass. App. Ct. 487, 490 (1987). The Court thus reviews the decision to determine whether it was not supported by substantial evidence, was arbitrary or capricious, or was based on an error of law. G.L. c. 30A, § 14(7); see also, e.g., The Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 228 (2010). A moving party bears a heavy burden of establishing that an agency's decision is invalid. See Merisme v. Board of Appeals on Motor Vehicle Policies and Bonds, 27 Mass. App. Ct. 470, 474 (1989); Mass. Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 263-64 (2001).

---

[3] During the pendency of this suit, the DUA has continued to assess Emerald with EMAC Supplements on a quarterly basis, and Plaintiff has continued to pay those assessments. For the full calendar year of 2018, Plaintiff was assessed and paid $22,013.69 in EMAC Supplements.

Emerald's concedes the legal reality – that the restrictions DUA places on member information are required by federal and state law. As a result, it is not disputed that DUA's refusal to provide Emerald access to member information without the Certification is in compliance with relevant law, not in conflict with it, and that DUA would be in violation of federal and state law if it released member information without constraint. In order to prevail, then, Emerald must show that DUA's insistence on the Certification to provide Emerald with the member information it claims it needs violates Emerald's due process or First Amendment rights or is preempted by federal law. It has failed to support any of these claims.

A. Due Process Claim

Emerald does not claim that the notice it received is itself a violation of due process. It advised Emerald of the EMAC Supplement calculation ($6,117.13), the number of employees on which it was based (28), and the general reasoning behind it, and provided Emerald with a ten day period within which to request a hearing. Instead, Emerald argues that the Certification is unconstitutional because it imposes improper "burdens and restrictions on taxpayers who want to find out information concerning how they are being taxed." Emerald baldly asserts in its memorandum before this Court that "being provided adequate information so that any hearing is meaningful is a right, and thus being a right, that right is not conditional or subject to limitations imposed by the government. Due process is

due. Period." This claim is overstated and thus erroneous.

The law does not support Emerald's absolutist position, and Emerald concedes it can find no case supporting its view. The closest Emerald could come is Speiser v. Randall, 357 U.S. 513 (1958), which is not helpful to it. In Speiser, applicants for a tax exemption were required to swear an oath not to overthrow the U.S. government, which the Supreme Court held infringed on their First Amendment rights. But that case concerned the "discriminatory denial of a tax exemption for engaging in speech." Id. at 518. Emerald was not denied access to member information as a penalty for its speech; indeed, as noted below, its speech, whatever its content, was irrelevant to whether it could get access to confidential member information held by the government without signing the Certification. Cf. Sorrell v. IMS Health Inc., 564 U.S. 552, 563-64 (2011) (state law improperly imposed content-based restrictions on dissemination of information because access turned on the would-be purchaser's intended use of the data).

Conditioning Emerald's access to member information by requiring it to comply with confidentiality restrictions does not violate Emerald's due process rights. "Due process requires, at minimum, an opportunity to be heard 'at a meaningful time and in a meaningful manner.' " Brantley v. Hampden Div. of Prob. & Family Court Dep't, 457 Mass. 172, 187 (2010) (citations omitted). Due process is a fact-specific and flexible concept that "calls for such procedural protections

as the particular situation demands." Commonwealth v. Torres, 441 Mass. 499, 502 (2004), quoting Mathews v. Eldridge, 424 U.S. 319, 334 (1976) and Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Reasonable limitations on due process rights are appropriate, as they are with other important constitutional rights. Even First Amendment rights are subject to reasonable time, place and manner restrictions. See, e.g., Commonwealth v. Bohmer, 374 Mass. 368, 374 (1978) ("The free speech clause of the First Amendment protects expressive speech or conduct from governmental regulation. This protection is not however, absolute, since 'reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests, and are permitted' ").

In this case, Emerald can obtain full access to the data it claims it needs but to do so, it must respect the confidentiality that extends to the records it seeks, which are based on well-established privacy rights held by the members whose data is at issue. These restrictions are more than reasonable. Emerald's due process rights have thus not been unconstitutionally infringed by DUA or the regime governing the confidentiality of member information.

B. Free Speech Claim

Emerald argues that violates its free speech rights under the federal and state constitutions by limiting its ability to discuss, complain about, or advocate about EMAC Supplements using the confidential member

information. For several reasons, this claim is also meritless.

First, Emerald's argument that the restrictions would prevent it from making use of member information for purposes other than those sanctioned under the statute and regulations – e.g., to make legislative appeals to change the law – are not properly before this Court. This dispute concerns Emerald's access to this data to contest DUA's determination; Emerald did not seek this data under any other mechanism or for any other purpose. DUA's determination challenged here is solely based on the statutes under which Emerald sought access to member information.

Second, Emerald's claim that the 430 CMR 21.10(2)(c) restricts Emerald's use of member information it has received from other sources is also in error. That section only concerns member information, which is defined as information "[t]he MassHealth Agency and the Connector shall provide DUA . . . as DUA determines necessary to determine liability for the EMAC Supplement and otherwise administer M.G.L. c. 149, §189A including, without limitation, information pertaining to MassHealth and Connector-Care beneficiaries." It does not extend to information obtained by Emerald from other sources. While such information may be protected from disclosure under other authorities, it is not necessarily subject to these.

Third, Emerald's claim that the Certification imposes content-based restriction on its speech is mistaken, as noted above. "Government regulation of

speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. . . . 'content based' [means] . . . regulation of speech [that] . . . draws distinctions based on the message a speaker conveys . . . [such as] defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys." Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2227 (2015). The Certification imposes no content-based restriction on Emerald's speech – it does not restrict Emerald's speech based on what it wants to say about the EMAC Supplements, it simply limits how Emerald says it by prohibiting disclosure of member information regardless of the substance of Emerald's message.

Fourth, reasonable limits on First Amendment rights are proper generally, and are so here. As noted above, reasonable time, place and manner restrictions apply to First Amendment speech, see, e.g., Bohmer, 374 Mass. at 374, and the government has the authority and the obligation to impose reasonable conditions on access and use of private information it possesses. See, e.g., Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978) ("The public importance of conditions in penal facilities and the media's role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes. This Court has never intimated a First Amendment guarantee of a

right of access to all sources of information within government control").[4]

The privacy interests of the members whose information is at risk in this case are substantial. In light of them, the restrictions imposed here on Emerald's use of such information are reasonable. Were Emerald's view correct, it could obtain member's social security numbers, income and health status and post that information on the internet or otherwise expose it for public inspection. Nothing under the First Amendment – or the Due Process Clause, for that matter – gives Emerald the right to sacrifice its employees' privacy in this manner.

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[4] See also Los Angeles Police Dep't v. United Reporting Pub. Corp., 528 U.S. 32, 40-41 (1999) (facial challenge to state law conditioning) public access to arrestees' addresses—that the person requesting an address declare that the request is being made for one of five prescribed purposes, and that the requester also declare that the address will not be used directly or indirectly to sell a product or service – failed; "[t]his is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses. The California statute in question merely requires that if respondent wishes to obtain the addresses of arrestees it must qualify under the statute to do so. Respondent did not attempt to qualify and was therefore denied access to the addresses. For purposes of assessing the propriety of a facial invalidation, what we have before us is nothing more than a governmental denial of access to information in its possession. California could decide not to give out arrestee information at all without violating the First Amendment").

C. Federal Preemption Claim

Emerald concedes that federal law requires a plan like MassHealth to provide 'safeguards which restrict the use of disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the plan," 42 U.S.C. §1396a(a)(7)(A)(i), but claims that DUA's regulation, 430 CMR 21.10, violates this requirement because it permits disclosure of member information "to a wide range of employers who have no role in the administration of MassHealth." This argument is erroneous. The Supremacy Clause does not provide Emerald with a cause of action. See Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1383 (2015) ("the Supremacy Clause is not the 'source of any federal rights,' . . . and certainly does not create a cause of action"). Even leaving that aside, the regulation permits disclosures of member information pursuant to the Certification to employers for purposes of "determin[ing] liability for the EMAC Supplement and otherwise administer M.G.L. c. 149, §189A." which are purposes directly connected with administering MassHealth.

ORDER

For the foregoing reasons, Emerald's motion for judgment on the pleadings is **DENIED** and DUA's motion for judgment on the pleadings is **ALLOWED.**

SO ORDERED.

/s/ Michael D. Ricciuti
MICHAEL D. RICCIUTI
Associate Justice of the
Superior Court

DATED: August 29, 2019

JUDGMENT	**Trial Court of Massachusetts** [SEAL] **The Superior Court**
DOCKET NUMBER 1881CV01670	Michael A. Sullivan, Clerk of Court Middlesex County
CASE NAME Emerald Home Care, Inc. vs. Department of Unemployment Assistance	COURT NAME & ADDRESS Middlesex County Superior Court – Woburn 200 Trade Center Woburn, MA 01801
This action came before the Court, Hon. Michael D Ricciuti, presiding, and upon consideration thereof, It is ORDERED and ADJUDGED: that Emerald's motion for judgment on the pleadings is DENIED and DUA's motion for judgment on the pleadings is ALLOWED. SO ORDERED.	
DATE JUDGMENT ENTERED 08/29/2019	CLERK OF COURTS/ASST. CLERK X /s/ [Illegible]

[SEAL] THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND
WORKFORCE DEVELOPMENT
DEPARTMENT OF UNEMPLOYMENT ASSISTANCE

[Stamp]
139755467

Cormier, Arthur
2ND FLOOR
5 MILITIA DRIVE
Lexington, MA 02421

EMAC Supplement
Hearings Department
Charles F. Hurley Building
19 Staniford Street
2nd Floor
Boston, MA 02114
Ph: (617) 626-5975
July 17, 2018

NOTICE OF DISMISSAL FOR FAILURE TO CITE COGNIZABLE GROUND FOR A HEARING

[Stamp]

EMPLOYER [APPELLANT]:
HOME INSTEAD SENIOR CARE
5 MILITIA DRIVE
2nd Floor
LEXINGTON, MA 02421

EAN #: [redacted]

Issue **ID#:** 0026 1301 40-02

The party appealing the Director's determination failed to cite cognizable grounds for a hearing under G.L. c. 149, § I 89A.

The request for hearing form you submitted indicates: "any hearing will be limited to the issues cognizable under the EMAC Supplement statute, G.L. c. 149,

§ 189A raised in this request." Your request did not raise a cognizable issue. Therefore, your appeal is dismissed.

This dismissal becomes final unless you file an appeal in superior court within thirty calendar days of receipt of this dismissal notice. Appeals to superior court must be made in accordance with M.G.L. c. 30A, § 14.

If you have concerns regarding your employee(s) eligibility for subsidized coverage, please complete the EMAC Employee Information Form which can be found on www.mass.gov/EMACAPPEALS. If the information provided results in a determination that an employee was enrolled in qualifying employer sponsored insurance or was not eligible for subsidized benefits a credit will be issued to your account.

To avoid interest accrual, please submit payment in full.

[SEAL] THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR
AND WORKFORCE DEVELOPMENT
DEPARTMENT OF
UNEMPLOYMENT ASSISTANCE

[STAMP]
134367003

Charles D. Baker GOVERNOR	Rosalin Acosta SECRETARY
Karyn E. Polito LT. GOVERNOR	Richard A. Jeffers DIRECTOR

PayPLUS LLC
Attn: Jennifer Russell
10830 Old Mill Road
Ste 102
Omaha, NE 68154

EAN: [redacted]
April 11, 2018

Employer Medical Assistance Contribution (EMAC) Supplement Determination

The Department of Unemployment Assistance EMAC Supplement unit has matched wage records against records maintained by the Department of Health and Human Services, and has determined that for quarter 1 and year 2018 you are liable under G.L. c. 149, § 189A for the EMAC Supplement in the amount of $6,117.13 for 28 employees.

Employer liability is determined as follows:

(1) Conditions under Which the Employer Becomes Subject to the Employer Medical Assistance Contribution Supplement.

(a) Beginning with the first calendar quarter of 2018, any employer who employs six or more employees in any quarter is subject to the EMAC Supplement for each such quarter.

(b) An employer's number of employees in a calendar quarter is calculated by dividing the sum of the employer's three monthly employment levels for the quarter by three. An employer's employment level for each month of the quarter is the number of employees who worked or received wages for any part of the pay period that includes the 12th of the month as reportable to DUA, pursuant to G.L. c. 151A, § 14P.

(2) Liability for Employer Medical Assistance Contribution Supplement.

An employer subject to the EMAC Supplement for a quarter is liable for payment of the EMAC Supplement applicable to that quarter if one or more of its employees received health insurance coverage either through the MassHealth agency or through ConnectorCare for a continuous period of at least fifty-six days; provided, however, that an employer shall not be liable for the EMAC Supplement in a quarter for any of its employees who in that quarter have health insurance coverage through the MassHealth agency either on the basis of permanent and total disability as defined

under Title XVI of the Social Security Act or under applicable state laws or as a secondary payer because such employees are enrolled in employer-sponsored insurance. You may obtain information regarding the identity of the individuals who have received coverage as described above or by logging on to your UI Online account or by calling 617-626-5975.

[SEAL] THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND
WORKFORCE DEVELOPMENT
DEPARTMENT OF UNEMPLOYMENT ASSISTANCE

[Stamp]
134366998

EMAC Supplement
Hearings Department
Charles F. Hurley Building
19 Staniford Street
2nd Floor
Boston, MA 02114

EMAC Supplement
Hearings Department
Charles F. Hurley Building
19 Staniford Street
2nd Floor
Boston, MA 02114
Ph: (617) 626-5975

EAN: [redacted]
April 11, 2018

Request For Hearing

This determination will become final unless you request a hearing within **ten days** from the date on which you received the determination. You may request a hearing though your UI Online account, or by completing the information below and mailing this form to:

EMAC Supplement Hearings Department
Charles F. Hurley Building
19 Staniford Street
2nd Floor
Boston, MA 02114

A hearing will relate solely to the determination for which the hearing request is made. Any determination

you wish to dispute must be the subject of a separate request for a hearing.

I hereby request a hearing with regard to the EMAC Supplement Determination for quarter 1 and year 2018.

Employer Name: _____
Employer Address: _____
Signed by: _____
Title: _____
Organization (Employer or Authorized Agent): _____
Date: _____

Any hearing will be limited to the issues cognizable under the EMAC Supplement statute, G.L. c. 149, § 189A raised in this request.

Please circle the reason for the appeal. If the reason is Other, please explain:

- Employer does not have 6 or more employees
- "Employee(s)" are independent contractor(s)
- Reported employee wages are not for UI purposes
- Employee(s) have not been on qualifying health care for a continuous period of 56 days
- Other: _____

_____

[SEAL] THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND
WORKFORCE DEVELOPMENT
DEPARTMENT OF UNEMPLOYMENT ASSISTANCE

[Stamp]
139755467

April 23, 2018

Appeal Submitted on:
4/20/2018
Time Submitted: 9:26 PM

Employer Information

Employer Account Number: [redacted]
Employer Name: HOME INSTEAD SENIOR CARE

Contact Information

Name of individual filing appeal:	Arthur Connier
Job title of individual filing appeal:	President
Name of contact person for hearing:	Arthur Connier
Job Title of contact person for hearing:	President
Telephone number of contact person:	(781) 402-0060

Reason for Appeal

Please describe the reason for this appeal:	The EMAC Supplement is unconstitutional. The State cannot impose a tax without giving sufficient notice of the basis of the tax, including how the tax was calculated.

Here the State refuses to reveal the details of how the tax was assessed without the employer first agreeing to the EMAC Supplement Employer Certification. The obligations imposed on the employer referenced in such certification unconstitutionally impose burdens and penalties on an employer who wants to know the basis for a tax determination, something that constitutionally should be provided as a matter of course. In addition, the obligations referenced in the EMAC Supplement Employer Certification infringe, among other things, upon the employer's constitutional rights, including the employer's free speech rights, by imposing confidentiality obligations on the employer.

Hearing Details

Are you represented by an attorney or other representative in this appeal?:	Yes
Will you present witnesses?:	No
Will you need an interpreter?:	No
What is your hearing preference?:	Telephone
If your preference is telephone, enter your hearing contact number:	(781) 402-0060

Additional Representation

Attorney/ Representa-tive's Name	Firm Name	Address Line 1	Address Line 2	City	State	Zip	Telephone Number	Telephone Extension
Arthur Cormier	Emerald Home Care, Inc.	5 Militia Drive	2nd Floor	Lexington	MA	02421	(781) 402-0060	

I confirm that the information above is correct.

MIDDLESEX COUNTY	Middlesex County Superior Court Civil Action No. 18-1670
Emerald Home Care, Inc. Plaintiff, v. Department of Unemployment Assistance, Defendant.	COMPLAINT FOR JUDICIAL REVIEW OF AGENCY DECISION (Filed June 8, 2018)

Introduction

Plaintiff brings this Complaint for Judicial Review of Agency Decision seeking a review of the decision of the Department of Unemployment Assistance to dismiss a timely appeal of Plaintiff. In its appeal, Plaintiff challenged the constitutionality of the EMAC Supplement (defined below) as assessed and administered by Defendant. Defendant dismissed the appeal, apparently determining that it was not within its jurisdiction to hear constitutional challenges. Plaintiff hereby asks this Court, which clearly does have jurisdiction, to determine the substance of the matter.

Parties and Jurisdiction

1. The Plaintiff, Emerald Home Care, Inc. ("Plaintiff"), is a Massachusetts corporation having a principal place of business at 5 Militia Drive, Second Floor, Lexington, Middlesex County, Massachusetts 02190.

2. The Defendant is the Massachusetts Department of Unemployment Assistance ("Defendant").

3. This Court has jurisdiction over this matter pursuant to M.G.L. c. 30A, § 14(7) and c. 149, § 189A.

Background

4. An Act Further Regulating Employer Contributions to Health Care was passed by the Massachusetts legislature and signed into law in August 2017 (the "Act"). See M.G.L. c. 149, § 189A.

5. Among other things, the law temporarily changes the existing employer medical assistance contribution and creates a temporary supplemental contribution for employers with employees covered under MassHealth or subsidized coverage through the ConnectorCare program.

6. This supplemental contribution is known as the Employer Medical Assistance Contribution Supplement (the "EMAC Supplement").

7. The EMAC Supplement applies to employers with more than five employees in Massachusetts, whose non-disabled employees obtain health insurance either from MassHealth (excluding employees with MassHealth coverage as a secondary payer) or subsidized coverage through the Massachusetts ConnectorCare program. The non-disabled employee must be enrolled in MassHealth (excluding employees with MassHealth coverage as a secondary payer) or subsidized coverage through the Massachusetts

ConnectorCare program for more than eight weeks during the quarter. The contribution paid by the employer is 5% of annual wages for each non-disabled employee, up to the annual wage cap of $15,000, for a maximum of $750 per affected employee per year. The contribution does not apply to employees who earn less than $500 in wages per quarter.

8. The EMAC Supplements began accruing on January 1, 2018.

9. Defendant is charged by the Act with, among other things, assessing the EMAC Supplements.

9. Via a document dated April 11, 2018 and entitled "Employer Medical Assistance Contribution (EMAC) Supplement Determination," Defendant informed Plaintiff that Defendant "has determined that for quarter 1 and year 2018 you are liable under G.L. c. 149, § 189A for the EMAC Supplement in the amount of $6,117.13 for 28 employees." Defendant also informed Plaintiff that "[t]his determination will become final unless you request a hearing within ten days from the date on which you received the determination."

10. Defendant did not provide any information identifying the 28 employees or the wages attributable to each of them, thereby making it impossible for Plaintiff to determine how the EMAC Supplement was calculated and whether that calculation was accurate.

11. Consistent with regulations promulgated by Defendant, see 430 CMR 21.10, Defendant refuses to provide such information to Plaintiff about how the

EMAC Supplement was calculated unless Plaintiff signs the following certification (the "Certification"):

> *The undersigned hereby certifies to being (1) an authorized representative of the Employer; and (2) duly authorized to execute this EMAC Supplement Certification on behalf of the Employer. On behalf of the Employer, the undersigned further agrees:*
>
> > *1. The Employer has requested information regarding its Qualifying Employees from DUA ("Qualifying Employee Information") to review and/or appeal its assessed EMAC Supplement liability.*
> >
> > *2. Qualifying Employee Information is confidential and, consistent with M.G.L. 118 § 49 and [430 CMR 21.10], the Employer and its authorized representative is required to maintain the confidentiality of any Qualifying Employee Information received from DUA (including any copies, derivatives or extracts of such Information), in accordance with MGL 118 § 49 and any other legal obligation to which the Employer is subject, and shall not use or disclose such Information except as necessary to review and/or appeal the amount of the Employer's EMAC Supplement liability. These confidentiality obligations also bind any representative of the Employer.*
> >
> > *3. Neither the Employer nor its authorized representative shall use or disclose Qualifying Employee Information to disparage or retaliate against any employee or other individual to whom it pertains.*

> *4. The Employer and any authorized representative shall limit access to Qualifying Employee Information to those employees, contractors and agents who reasonably need such Information to review or appeal the Employer's assessed EMAC Supplement liability.*
>
> *5. The Employer and any authorized representative shall require any contractor or agent receiving Qualifying Employee Information to agree in writing to the same or more stringent limitations on the use and disclosure of Qualifying Employee Information.*

12. Plaintiff did not sign the Certification and thus was not provided and still has not been provided any information concerning how its EMAC Supplement was calculated.

13. On April 20, 2018, Plaintiff filed an appeal of its EMAC Supplement, objecting to, among other things, the lack of due process in not providing adequate notice of how the EMAC Supplement was calculated, the constitutional impropriety of imposing burdens and restrictions on taxpayers who want to find out information concerning how they are being taxed, and the particular constitutional impropriety of violating taxpayers' First Amendment rights by limiting their ability to discuss, complain about, advocate for or otherwise engage in the political process about a tax imposed on them.

14. Via a document dated May 9, 2018 and entitled "Notice of Dismissal for Failure to Cite Cognizable Ground for a Hearing," Defendant dismissed

Plaintiff's appeal without a hearing, apparently believing it did not have jurisdiction to hear constitutional objections.

Count I

15. Plaintiff realleges and incorporates herein by reference the allegations of paragraph 1 through paragraph 14 above.

16. Requiring a taxpayer, such as Plaintiff, to sign a coerced agreement, such as the Certification, as a condition precedent to being given adequate notice of the nature of a tax, such as the EMAC Supplement, violates both the United States Constitution and the Massachusetts Constitution, including with respect to due process principles thereunder.

Count II

17. Plaintiff realleges and incorporates herein by reference the allegations of paragraph 1 through paragraph 16 above.

18. The regulations promulgated by Defendant, see 430 CMR 21.10, impose the burdens and restrictions contained in the Certification on Plaintiff, regardless of whether Plaintiff signs the Certification or not.

19. Imposing burdens and restrictions, such as those contained in the Certification and in 430 CMR 21.10, on taxpayers who inquire or otherwise find out why they are being taxed violates both the United States

Constitution and the Massachusetts Constitution, including with respect to due process principles thereunder.

Count III

20. Plaintiff realleges and incorporates herein by reference the allegations of paragraph 1 through paragraph 19 above.

21. Imposing confidentiality restrictions, such as those contained in the Certification and in 430 CMR 21.10, on taxpayers, and where those restrictions involuntarily limit taxpayers' ability to discuss, complain about, advocate for or otherwise engage in the political process concerning an imposed tax, violates both the United States Constitution and the Massachusetts Constitution, including with respect to free speech principles thereunder.

Count IV

22. Plaintiff realleges and incorporates herein by reference the allegations of paragraph 1 through paragraph 21 above.

23. The EMAC Supplement conflicts with and/or undermines the Affordable Care Act and therefore is void under the doctrine of preemption.

Count V

24. Plaintiff realleges and incorporates herein by reference the allegations of paragraph 1 through paragraph 23 above.

25. Defendant was not authorized constitutionally or pursuant to any statute to promulgate the burdens and restrictions contained in the Certification and in 430 CMR 21.10, and therefore such burdens and restrictions are void.

Prayers for Relief

WHEREFORE, the Plaintiff, Emerald Home Care, Inc., requests that this Court:

A. Hear the substance of this matter since Defendant believes it is outside of its jurisdiction to do so;

B. Enter a Judgement determining that the EMAC Supplement is unconstitutional, no amounts are due thereunder, and ordering Defendant to promptly return to Plaintiff any and all EMAC Supplement payments already paid;

C. Alternatively, enter a Judgement declaring the burdens and restrictions contained in the Certification and in 430 CMR 21.10 unconstitutional and void, ordering Defendant to promptly make known to Plaintiff the identities of the employees and corresponding wages on which it is being taxed, and

reserving Plaintiff's rights to object thereto once that information is revealed; and

D. Enter whatever additional relief the Court deems appropriate.

Dated: June 8, 2018

EMERALD HOME CARE, INC.
By its attorney

/s/ Arthur R. Cormier

Arthur R. Cormier
5 Militia Drive, 2nd Floor
Lexington, MA 02421
781-402-0060
art.cormier@homeinstead.com
BBO# 645116

CONSTITUTIONAL PROVISIONS

Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

Amendment I (1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV (1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1396a. State plans for medical assistance

(a) Contents

A State plan for medical assistance must—

* * *

(7) provide—

(A) safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with—

(i) the administration of the plan;

* * *

Subpart F—Safeguarding Information on Applicants and Recipients

SOURCE: 44 FR 17934, Mar. 29, 1979, unless otherwise noted.

§ 431.300 Basis and purpose.

(a) Section 1902(a)(7) of the Act requires that a State plan must provide safeguards that restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the plan. This subpart specifies State plan requirements, the types of information to be safeguarded, the conditions for release of safeguarded information, and restrictions on the distribution of other information.

(b) Section 1137 of the Act, which requires agencies to exchange information in order to verify the income and eligibility of applicants and recipients (see § 435.940ff), requires State agencies to have adequate safeguards to assure that—

(1) Information exchanged by the State agencies is made available only to the extent necessary to assist in the valid administrative needs of the program receiving the information, and information received under section 6103(1) of the Internal Revenue Code of 1954 is exchanged only with agencies authorized to receive that information under that section of the Code; and

(2) The information is adequately stored and processed so that it is protected against unauthorized disclosure for other purposes.

[51 FR 7210, Feb. 28, 1986]

§ 431.301 State plan requirements.

A State plan must provide, under a State statute that imposes legal sanctions, safeguards meeting the requirements of this subpart that restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the plan.

§ 431.302 Purposes directly related to State plan administration.

Purposes directly related to plan administration include—

(a) Establishing eligibility;

(b) Determining the amount of medical assistance;

(c) Providing services for recipients; and

(d) Conducting or assisting an investigation, prosecution, or civil or criminal proceeding related to the administration of the plan.

§ 431.303 State authority for safeguarding information.

The Medicaid agency must have authority to implement and enforce the provisions specified in this subpart for safeguarding information about applicants and recipients.

§ 431.304 Publicizing safeguarding requirements.

(a) The agency must publicize provisions governing the confidential nature of information about applicants and recipients, including the legal sanctions imposed for improper disclosure and use.

(b) The agency must provide copies of these provisions to applicants and recipients and to other persons and agencies to whom information is disclosed.

§ 431.305 Types of information to be safeguarded.

(a) The agency must have criteria that govern the types of information about applicants and recipients that are safeguarded.

(b) This information must include at least—

(1) Names and addresses;

(2) Medical services provided;

(3) Social and economic conditions or circumstances;

(4) Agency evaluation of personal information;

(5) Medical data, including diagnosis and past history of disease or disability; and

(6) Any information received for verifying income eligibility and amount of medical assistance payments (see § 435.940ff). Income information received from SSA or the Internal Revenue Service must be safeguarded according to the requirements of the agency that furnished the data.

(7) Any information received in connection with the identification of legally liable third party resources under § 433.138 of this chapter.

[44 FR 17934, Mar. 29, 1979, as amended at 51 FR 7210, Feb. 28, 1986; 52 FR 5975, Feb. 27, 1987]

§ 431.306 Release of information.

(a) The agency must have criteria specifying the conditions for release and use of information about applicants and recipients.

(b) Access to information concerning applicants or recipients must be restricted to persons or agency representatives who are subject to standards of confidentiality that are comparable to those of the agency.

(c) The agency must not publish names of applicants or recipients.

(d) The agency must obtain permission from a family or individual, whenever possible, before

responding to a request for information from an outside source, unless the information is to be used to verify income, eligibility and the amount of medical assistance payment under section 1137 of this Act and H435.940 through 435.965 of this chapter.

If, because of an emergency situation, time does not permit obtaining consent before release, the agency must notify the family or individual immediately after supplying the information.

(e) The agency's policies must apply to all requests for information from outside sources, including governmental bodies, the courts, or law enforcement officials.

(f) If a court issues a subpoena for a case record or for any agency representative to testify concerning an applicant or recipient, the agency must inform the court of the applicable statutory provisions, policies, and regulations restricting disclosure of information.

(g) Before requesting information from, or releasing information to, other agencies to verify income, eligibility and the amount of assistance under H 435.940 through 435.965 of this chapter, the agency must execute data exchange agreements with those agencies, as specified in § 435.945(f).

(h) Before requesting information from, or releasing information to, other agencies to identify legally liable third party resources under § 433.138(d) of this chapter, the agency must execute data exchanges

agreements, as specified in § 433.138(h)(2) of this chapter.

[44 FR 17934, Mar. 29, 1979, as amended at 51 FR 7210, Feb. 28, 1986; 52 FR 5975, Feb. 27, 1987]

§ 431.307 Distribution of information materials.

(a) All materials distributed to applicants, recipients, or medical providers must—

(1) Directly relate to the administration of the Medicaid program;

(2) Have no political implications except to the extent required to implement the National Voter Registration Act of 1993 (NVRA) Pub. L. 103-931; for States that are exempt from the requirements of NVRA, voter registration may be a voluntary activity so long as the provisions of section 7(a)(5) of NVRA are observed;

(3) Contain the names only of individuals directly connected with the administration of the plan; and

(4) Identify those individuals only in their official capacity with the State or local agency.

(b) The agency must not distribute materials such as "holiday" greetings, general public announcements, partisan voting information and alien registration notices.

(c) The agency may distribute materials directly related to the health and welfare of applicants and recipients, such as announcements of free medical examinations, availability of surplus food, and consumer protection information.

(d) Under NVRA, the agency must distribute voter information and registration materials as specified in NVRA.

[44 FR 17934, Mar. 29, 1979, as amended at 61 FR 58143, Nov. 13, 1996]

* * *

HOUSE DOCKET, NO. 4132 FILED ON: 7/17/2017

HOUSE..... No. 3822

Sections 16, 17, 60 to 67, inclusive, 93, 110, 111, 122, 146, 147 and 150 contained in the engrossed Bill making appropriations for the fiscal year 2018(see House, No. 3800), which had been returned by His Excellency the Governor with recommendation of amendment (for message, see Attachment F of House, No. 3828). July 17, 2017.

The Commonwealth of Massachusetts

In the One Hundred and Ninetieth General Court
(2017-2018)

An Act further regulating employer contributions to health care.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to establish forthwith certain employer healthcare contributions, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 8A of chapter 23H of the General Laws, as appearing in the 2016 Official

Edition, is hereby amended by inserting after the word "system", in line 2, the following words:—, the contribution established under section 189A of chapter 149.

SECTION 2. Said section 8A of said chapter 23H is hereby further amended by striking out the words ", the contribution established under section 189A of chapter 149" inserted by section 1.

SECTION 3. Section 189 of chapter 149 of the General Laws, as appearing in the 2016 Official Edition, is hereby amended by striking out, in line 8, the figure ".34" and inserting in place thereof the following figure:- .51.

SECTION 4. Said section 189 of said chapter 149 is hereby further amended by striking out the figure ".51", inserted by section 3, and inserting in place thereof the following figure:- .34.

SECTION 5. Said section 189 of said chapter 149, as appearing in the 2016 Official Edition, is hereby further amended by striking out, in line 50, the figure ".12" and inserting in place thereof the following figure:- .18.

SECTION 6. Said section 189 of said chapter 149 is hereby further amended by striking out the figure ".18", inserted by section 5, and inserting in place thereof the following figure:- .12.

SECTION 7. Said section 189 of said chapter 149, as appearing in the 2016 Official Edition, is hereby further amended by striking out, in line 54, the

figure ".24" and inserting in place thereof the following figure:- .36.

SECTION 8. Said section 189 of said chapter 149 is hereby further amended by striking out the figure ".36", inserted by section 7, and inserting in place thereof the following figure:- .24.

SECTION 9. Said chapter 149 is hereby further amended by inserting after section 189 the following section:-

Section 189A. (a) Each employer, subject to sections 14, 14A and 14C of chapter 151A, except those who employ not more than 5 employees, shall pay a contribution for each employee who receives health insurance coverage through the division of medical assistance or subsidized insurance through the commonwealth health insurance connector authority. The contribution shall be computed by multiplying the wages the employer paid any such employee by 5 per cent. The department of unemployment assistance, in consultation with the division of medical assistance and the commonwealth health insurance connector authority, shall promulgate regulations to implement this subsection, which shall specify the number of days that an individual shall be required to receive such subsidized health care coverage to cause the assessment. The contribution shall be paid in a manner prescribed by the director of unemployment assistance.

(b) For the purposes of this section, "wages" shall mean the "unemployment insurance taxable wage base" as defined in paragraph (4) of subsection (a) of

section 14 of chapter 151A; provided, however that "wages" shall not include that part of remuneration which, after remuneration equal to the unemployment insurance taxable wage base with respect to employment with such employer has been paid to an individual during the calendar year, is paid to such individual during such year. For the purposes of this paragraph, "remuneration" shall include remuneration paid to an individual during the calendar year with respect to employment with a transferring employer as that term is used in subsection (n) of section 14 of said chapter 151A.

(c) An employer notified of a liability determination under this section may request a hearing on such determination. The request for a hearing shall be filed not more than 10 days after the receipt of the notice of the determination. If a hearing is requested, the employer shall have a reasonable opportunity for a fair hearing before an impartial hearing officer designated by the director of unemployment assistance. The hearing shall be conducted in accordance with subsection (b) of section 39 of chapter 151A. Following the hearing, an aggrieved party may appeal the decision to superior court.

(d)(1) Except where inconsistent with this section, the terms and conditions of chapter 151 A that are applicable to the payment and collection of contributions or payments in lieu of contributions shall apply to the same extent to the payment of and the collection of the contribution under this section; provided, however, that such contributions shall not be credited to

the employer's account or to the solvency account established under section 14, 14A or 14C of said chapter 151A.

(2) The director of unemployment assistance may share information with the commissioner of revenue to enforce and collect the contribution under this section. The commissioner of revenue may enforce and collect a debt certified by the director as owed under this section in the manner as a tax due and unpaid under chapter 62C; provided, however, that the procedures authorized in subsection (c) shall be the sole remedies for an employer to dispute a debt so certified and remedies otherwise available under said chapter 62C to dispute a tax assessment shall not be available. Notwithstanding any general or special law to the contrary, for the purposes of enforcement of this section the commissioner of revenue may disclose to the department of unemployment assistance any information referred to in chapter 62E or any information relating to the commissioner's collection activities under chapter 62C with regard to debts certified by the director.

(e) Data collected by the department of unemployment insurance, the department of revenue, the division of medical assistance and the commonwealth health insurance connector authority under this section shall not be a public record under clause Twenty-sixth of section 7 of chapter 4 or under chapter 66. The department of unemployment insurance, the department of revenue, the division of medical assistance and

the commonwealth health insurance connector authority may share information to implement this section.

SECTION 10. Section 189A of said chapter 149 is hereby repealed.

SECTION 11. Notwithstanding section 14 of chapter 151A of the General Laws, for calendar year 2018 the experience rate of an employer qualifying under subsection (b) of said section 14 of said chapter 151A shall be the rate which appears in the column designated "D" of paragraph (1) of subsection (i) of said section 14 of said chapter 151A and for calendar year 2019 the experience rate of an employer qualifying under said subsection (b) of said section 14 of said chapter 151A shall be the rate which appears in the column designated "E" of said paragraph (1) of said subsection (i) of said section 14 of said chapter 151 A.

The director of unemployment assistance may, notwithstanding any federal interest charges for necessary federal advances, pursue any necessary federal advances to ensure the lowest reasonable federal interest for any federal loans and nothing in this section shall contribute or allow for a reduction in benefits, including but not limited to, the amount or length of benefits, pursuant to chapter 151A.

SECTION 12. Notwithstanding any general or special law to the contrary, the comptroller shall count as revenue in fiscal year 2018 any increased contributions collected pursuant to sections 3, 5, 7, and 9 that are received by the commonwealth not later than August 31, 2018.

SECTION 13. Notwithstanding any general or special law to the contrary, the comptroller shall count as revenue in fiscal year 2019 any increased contributions collected pursuant to sections 3, 5, 7, and 9, that are received by the commonwealth between September 1, 2018 and August 31, 2019.

SECTION 14. Notwithstanding the repeal of section 189A of chapter 149 of the General Laws, the director of unemployment assistance may collect any outstanding contributions established pursuant to said section 189A of said chapter 149 obligations arising prior to January 1, 2020 and any such collection shall be conducted in accordance with the regulations promulgated by the department of unemployment assistance pursuant to said section 189A of said chapter 149. The director of unemployment assistance may share information with the commissioner of revenue to enforce and collect outstanding contributions. The commissioner of revenue may enforce and collect a debt certified by the director as owed under this section in the manner of a tax due and unpaid under chapter 62C of the General Laws; provided, however, that the remedies authorized by the regulations of the department of unemployment assistance shall be the sole remedies for an employer to dispute a debt so certified, and remedies otherwise available under said chapter 62C to dispute a tax assessment shall not be available. Notwithstanding any general or special law to the contrary, for the purposes of enforcement of this section the commissioner of revenue may disclose to the department of unemployment assistance any

information referred to in chapter 62E of the General Laws or any information relating to the commissioner's collection activities under said chapter 62C with regard to debts certified by the director.

SECTION 15. Subsections (a) and (b) of section 189A of chapter 149 of the General Laws shall take effect on January 1, 2018.

SECTION 16. Sections 2, 4, 6, Band 10 shall take effect on December 31, 2019.

SECTION 17. Section 54 of chapter 47 of the acts of 2017 shall take effect on September 30, 2022.

SECTION 18. This act shall take effect as of July 1, 2017.

Part I	ADMINISTRATION OF THE GOVERNMENT
Title XVII	PUBLIC WELFARE
Chapter 118E	DIVISION OF MEDICAL ASSISTANCE
Section 49	USE AND DISCLOSURE OF INFORMATION

Section 49. The use or disclosure of information concerning applicants and recipients shall be limited to purposes directly connected with the administration of the medical assistance programs established under this chapter and the names of applicants and recipients shall not be published.

430 CMR: DEPARTMENT OF UNEMPLOYMENT ASSISTANCE

430 CMR 21.00: EMPLOYER MEDICAL ASSISTANCE CONTRIBUTION SUPPLEMENT

* * *

21.02: General Definitions

Connector. The Commonwealth Health Insurance Connector Authority, established pursuant to M.G.L. c. 176Q, § 2.

ConnectorCare. A program of health insurance using state subsidies that is run by the Connector and provided to individuals with household incomes of less than 300% of the Federal Poverty Limit who meet the eligibility criteria set out at 956 CMR 12.03: *Definitions*.

DUA. The Department of Unemployment Assistance, established pursuant to M.G.L. c. 23, § 1.

DUA Director. The Director of the Department of Unemployment Assistance or the Director's designee.

DMA. The Division of Medical Assistance within the Executive Office of Health and Human Services.

Employee. For purposes of determining liability for the EMAC Supplement and for determining wages under 430 CMR 21.00, has the same meaning as is provided in M.G.L. c. 151A, § 1(h).

Employer. The same meaning as is provided in M.G.L. c. 151A, § 1(i).

Employing Unit. The same meaning as is provided in M.G.L. c. 151A, § 1(j).

Employment. The same meaning as is provided in M.G.L. c. 151A, § 1(k). The classes of employment exempt from coverage for purposes of paying the EMAC supplement are the same as set forth in M.G. L. c. 151A. Non-exempt service performed by an individual shall be deemed to be employment subject to M.G.L. c. 149, § 189A, unless and until it is shown to the satisfaction of the DUA Director that all of the provisions of M.G.L. c. 151A, § 2, have been established.

EMAC Supplement. The contribution provided for in M.G.L. c. 149, § 189A.

MassHealth Agency, or DMA. The Office of Medicaid within the Executive Office of Health and Human Services, the single state agency responsible for the administration of programs of medical assistance and medical benefits established pursuant to M.G.L. c. 6A, § 16, and c. 118E.

Remuneration. The same meaning as in M.G.L. c. 151A, and shall include remuneration paid to an individual during the calendar year with respect to employment with a transferring employer.

Wages. Remuneration paid by or on behalf of an employer to or for one of its employees up to the amount of the Unemployment Insurance Taxable Wage Base for each employee, as defined in M.G.L. c. 151A, §14(a)(4). For purposes of the EMAC Supplement, wages are deemed paid at the time that they are or should have been paid.

* * *

21.06: Appeals

(1) Administrative appeals from determinations of liability.

(a) Whenever the DUA Director issues a determination that an employing unit is liable for the EMAC Supplement or regarding the amount of such liability, the employing unit may request a hearing on such determination. The request for a hearing shall be filed not more than ten days after the employer's receipt of notice of the determination. The conduct of such hearing shall be in accordance with the procedures prescribed by M.G.L. c. 151A, § 39(b). The DUA Director will issue a written decision affirming, modifying, or revoking the initial determination.

(b) When a notice of a determination by the DUA Director is transmitted by means of an electronic communication, it shall be presumed received on the date it is sent, except that any notice transmitted after 5:00 P.M. or on a state or federal holiday, Saturday, or Sunday, shall be presumed received on the next business day. When notice of a determination is sent by regular mail, it shall be presumed received three days after it is mailed, except that if the third day falls on a state or federal holiday, Saturday, or Sunday, the notice shall be presumed received on the next business day. However the notice is transmitted, the presumption may be rebutted by substantial and credible evidence satisfactory to the DUA Director that the notice actually was received on an earlier or later date.

(c) A request shall be deemed filed on the postmark date if sent by regular mail and otherwise when actually received by DUA. A request received after 5:00 P.M. shall be deemed filed on the next business day.

(2) A party aggrieved by the DUA Director's decision, issued following the hearing described in 430 CMR 21.06(1), may appeal the decision to the superior court for the county:

(a) where the party resides or has its principal place of business within the commonwealth;

(b) where DUA has its principal office; or

(c) of Suffolk.

Such an action must be commenced within 30 days of the date such decision is received by the party.

* * *

21.10: Disclosure of Information to Administer EMAC; Confidentiality

(1) Disclosure of Member Information to Administer the EMAC Supplement. The MassHealth Agency and the Connector shall provide DUA with such information as DUA determines necessary to determine liability for the EMAC Supplement and otherwise administer M.G.L. c. 149, § 189A including, without limitation, information pertaining to MassHealth and ConnectorCare beneficiaries (Member Information), at such times and in such manner as agreed by the MassHealth Agency, the Connector and DUA. The Member Information determined necessary by DUA for such purposes and

the related terms and conditions upon which Member Information shall be provided to DUA shall be documented in an Interdepartmental Service Agreement among DUA, the MassHealth Agency and the Connector (ISA).

(2) Confidentiality.

(a) DUA shall protect the confidentiality of Member Information provided by the MassHealth Agency and the Connector pursuant to 430 CMR 21.10(1), in accordance with its obligations under applicable privacy and security laws and regulations including, without limitation, M.G.L. c. 66A and M.G.L. c. 118E, § 49, and any additional terms and conditions as the MassHealth Agency and the Connector may reasonably require to comply with their respective legal obligations, as set forth in the ISA.

(b) DUA may provide an employer that it determines is liable for the EMAC Supplement under M.G.L. c. 149, § 189A, with access to Member Information for purposes of reviewing and/or appealing such liability. Access shall be provided in accordance with procedures established by DUA. Any employer that receives Member Information shall be required to maintain the confidentiality of such Information in accordance with M.G.L. c. 118, § 49, and any other legal obligation to which the employer is subject, and shall limit its use and disclosure of such information as necessary to review and/or appeal the amount of the employer's liability.

(c) Without limiting the generality of the foregoing, no employer shall use or disclose Member Information to disparage or retaliate against any employee or other individual to whom it pertains. Prior to the receipt of Member Information, employers shall be required to sign a written acknowledgement of their obligations to maintain the confidentiality of such Information, in such form and pursuant to such procedures established by DUA.

REGULATORY AUTHORITY

430 CMR 21.00: M.G.L. c. 149, § 189A.

Employer Information

Employer Account Number: [redacted]

Employer Name: **Emerald Home Care, Inc.**

Data Privacy Authorization

EMAC Supplement Employer Certification

The Department of Unemployment Assistance ("DUA") has determined that [Emerald Home Care, Inc./the employer identified below] ("Employer") is liable for payment of the Employer Medical Assistance Contribution Supplement ("EMAC Supplement") pursuant to M.G.L. c. 149, § 189A and [430 CMR 21.00]. The amount of the Employer's liability is based on the number of its employees who received health insurance coverage through MassHealth or subsidized health care insurance through the Commonwealth Health Insurance Connector Authority (referred to as "ConnectorCare") during the applicable quarter in accordance with [430 CMR 21.00] ("Qualifying Employees").

The undersigned hereby certifies to being (1) an authorized representative of the Employer; and (2) duly authorized to execute this EMAC Supplement Certification on behalf of the Employer. On behalf of the Employer, the undersigned further agrees:

1. The Employer has requested information regarding its Qualifying Employees from DUA ("Qualifying Employee Information") to review and/or appeal its assessed EMAC Supplement liability.

2. Qualifying Employee Information is confidential and, consistent with M.G.L. 118E § 49 and [430 CMR 21.10], the Employer and its authorized representative is required to maintain the confidentiality of any Qualifying Employee Information received from DUA (including any copies, derivatives or extracts of such Information), in accordance with MGL 118E § 49 and any other legal obligation to which the Employer is subject, and shall not use or disclose such Information except as necessary to review and/or appeal the amount of the Employer's EMAC Supplement liability. These confidentiality obligations also bind any representative of the Employer.

3. Neither the Employer nor its authorized representative shall use or disclose Qualifying Employee Information to disparage or retaliate against any employee or other individual to whom it pertains.

4. The Employer and any authorized representative shall limit access to Qualifying Employee Information to those employees, contractors and agents who reasonably need such Information to review or appeal the Employer's assessed EMAC Supplement liability.

5. The Employer and any authorized representative shall require any contractor or agent receiving Qualifying Employee Information to agree in writing to the same or more stringent limitations on the use and disclosure of Qualifying Employee Information.

I have read and agree with the above: ○ Yes ○ No*

Note: If you check 'No' you cannot continue with this request.