

# INSIDE THE LAW

Spring 2020

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## THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

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On March 18th, 2020, President Trump signed into law the second piece of legislation to deal with the COVID-19 pandemic. The purpose of this update is to advise employers on the three main components of the March 18th legislation: Paid Sick Leave, Paid Family and Medical Leave, and tax credits for employers.

### ***Paid Sick Leave***

Effective April 1, 2020 employees of private sector employers with fewer than 500 employees are now entitled to the following sick leave under two possible scenarios. This leave is available to full-time and part-time employees alike, regardless of how long they have been employed by the employer. This new leave is completely separate from any paid sick leave to which an employee may be entitled to under his or her employer's sick leave plan or the Massachusetts Earned Sick Leave law.

#### **Scenario 1: Employee is sick or quarantined**

To qualify for these two weeks of paid leave, the employee must be unable to perform the essential functions of his or her job (at the office or remotely, e.g. at home) *and* is either subject to a federal, state, or local quarantine order, or has been directed by his or her health care provider to quarantine for coronavirus-related health concerns, or is suffering from coronavirus symptoms for which he or she is seeking medical attention and diagnosis. The employee will:

- Receive up to two weeks of paid leave – based on the employee's regularly scheduled hours worked each week (up to forty per week and eighty hours total).
- Be paid at one's regular rate of pay or \$511 per day, whichever is less.

#### **Scenario 2: Employee is caring for another**

On the other hand, if the employee cannot perform the essential functions of his or her job (at the office or remotely, e.g. home) *and* must be at home to care for a family member who was quarantined by his or her health care provider for coronavirus-related health concerns, or to care for a child under 18 (or an adult disabled child) whose school or daycare is closed due to the coronavirus, paid leave is still available but at a lower weekly rate. The employee will:

- Receive up to two weeks of paid leave – based on the employee's regularly scheduled hours worked each week (up to forty per week and eighty hours total).

- Be paid at one's regular rate of pay or a maximum of \$200 per day, whichever is less.

The federal law entitles employees to access this federal sick leave before they access any of their accrued sick or other paid leave time, and permits the employer to require that employees keep the employer apprised of their continued need for the leave. Federal paid sick leave time may not be carried over from one year into the next. Employers will be required to post a notice conspicuously informing employees about this leave entitlement. The U.S. Secretary of Labor will generate a model notice for employers to use.

Keep in mind that this new law and the recently passed Massachusetts Paid Family and Medical Leave are two separate pieces of legislation. The Massachusetts Paid Family and Medical Leave Act does not take effect until January 1, 2021.



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### ***Paid Family and Medical Leave***

Under this provision of the Families First Act, employees of private sector employers with fewer than 500 employees will also be able to take up to twelve weeks of FMLA job-protected leave to care for a child under 18 whose school or daycare is closed due to the coronavirus. Note that the FMLA's usual definitions of "covered employer" (one with 50 or more employees) and "covered employee" (one who has worked for the employer at least one year and who worked at least 1,250 hours during the prior year) are *not* being used under the Families First Act. Under the Families First Act, a "covered employer" is any private sector employer with fewer than 500 employees and a "covered employee" is any employee who has worked for the employer for thirty days or more.

### Pay elements

The first two weeks of leave may be unpaid under this law (though, those two weeks may be paid via the above discussed Paid Sick Leave legislation that was also passed). If the employee does not qualify for the federal paid sick leave to cover the first two weeks and he or she does not have access to federal paid sick leave detailed below, the employee may choose – and the employer may require – the employee to substitute any of his or her accrued paid leave time to cover this two-week period.

The employee may receive up to two-thirds of his or her regular daily pay, up to \$200 dollars per day and up to \$10,000 in total.

If an employee's regular weekly rate of pay fluctuates, the law directs employers to divide the total number of hours the employee was scheduled to work during the six months immediately prior to the leave period, and divide by 26 to arrive at his or her weekly rate.

While the legislation provides little guidance on this point, there is language in the legislation that gives the US Secretary of Labor the ability to exempt small businesses employing fewer than fifty employees from having to provide this leave when the Secretary determines that paying this leave time might affect the business' ability to continue existing.

### Job Protection

General rule: Employees who access federal paid family and medical leave must be returned to the job they held immediately preceding the leave or an equivalent position.

Exception: Employers with fewer than twenty-five employees need not return the employee his or her former position or its equivalent if the position has been

*Employees who access federal paid family and medical leave must be returned to the job they held immediately preceding the leave or an equivalent position.*



eliminated as a result of the coronavirus *and* the employer notifies the employee it intends to rehire the employee to his or her position or its equivalent if and when it becomes available in the twelve months from when the employee would have otherwise returned.

### **EMPLOYER TAX CREDITS**

Employers who pay employees for accessing one (or both) of the paid leaves discussed above, will receive payroll tax credits for up to one hundred percent of qualified employee wages paid by the employer. The tax credit will count towards the employer's portion of the Social Security payroll taxes. Additionally, the tax credit will be increased to include money the employer pays towards the employee's health insurance coverage while the employee is out on either of the above two federal leaves. The tax credit cannot exceed the employer's total payroll tax burden on all employee wages.

### **LAYOFFS/FURLOUGH/WORKSHARE**

Many Massachusetts employers are grappling with how to retain good talent and do the best they can by their valued employees while their business is either temporarily shut down or operating on a limited, scaled-back basis.

The three primary options are furloughs, layoffs, and the DUA's "Workshare" program. In each case employees can receive some or all of their unemployment compensation benefit. Under either a layoff or a furlough, employees will receive their entire unemployment benefit since they are not working for the applicable period. Under the Workshare program, employees will be working a reduced schedule (therefore, reduced wages); these reduced wages will be supplemented by some portion of their unemployment benefit. Under the Massachusetts Workshare program, an employee works for their employer for some period of the week and collects unemployment for the period of time they are not working. While there are mechanics to how a Workshare program and a furlough are implemented, readers may contact us for more information about these two approaches.

### **NEW UNEMPLOYMENT PROVISIONS**

Usually, for an employee in Massachusetts to be eligible to collect unemployment, he or she must first be out of work for at least one week (called the elimination period), and he or she must be actively looking for other employment and be ready and able to work if offered other employment. During this coronavirus pandemic, the US Department of Labor has directed states to loosen their requirements for the collection of unemployment benefits. In response, the Massachusetts Executive Office of Labor and Workforce Development and the Massachusetts Department of Unemployment Assistance (DUA) have jointly filed emergency regulations regarding how unemployment claims will be handled during the pandemic.

- First, the DUA is waiving the one-week elimination period so employees will be eligible to collect unemployment benefits beginning immediately upon being laid off or furloughed.
- Second, for workplaces that have shut down because of the coronavirus and the closure is anticipated to be four weeks or less, the employees will immediately be eligible to collect unemployment benefits without having to look for other employment during the closure--so long as the employee is willing and able to return to work when called upon to do so. If the employer concludes it will, or is required to be, shut down for up to an additional four weeks (eight total), the employees will be eligible to receive unemployment benefits for those additional weeks as well. It is anticipated that the DUA will extend this eight-week period as needed.
- Third, an employee who is subjected to a mandated quarantine imposed by a civil authority or a medical professional will be eligible to receive unemployment benefits during the quarantine period.
- Fourth, an employee who stops working because he or she was exposed to a reasonable risk of exposure or infection will also be eligible for unemployment benefits.
- Fifth, an employee who stops working because he or she needs to care for a family member and is either: (a) not allowed to return to work or (b) does not intend to return to work, will also be eligible for unemployment benefits.

As an assist to employers, the Commonwealth will also allow employers to request up to a 60-day extension to file their quarterly unemployment contributions. **FT**

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## STIMULUS BILL - TAX RELIEF FOR INDIVIDUALS AND BUSINESSES

By Michael P. Duffy, Esq.

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On March 27, 2020, President Trump signed into law H.R. 748, an 880-page stimulus bill (the “Stimulus Bill”) designed to counter the economic effects of COVID-19.

Below is a list of key changes the bill made to the Internal Revenue Code to provide relief for businesses and families.

### ENHANCED ACCESS TO RETIREMENT SAVINGS

One way many taxpayers will likely need to deal with a sudden loss of income is to tap retirement savings. For impacted taxpayers, the Stimulus Bill removes the 10% early withdrawal penalty on early withdrawals from retirement accounts of up to \$100,000. The distribution may be taken from an employer-sponsored retirement plan or an individual retirement account. An impacted taxpayer is an individual who is diagnosed with COVID-19, or whose spouse or dependent is diagnosed with COVID-19, or who has otherwise suffered adverse financial consequences as a result of being furloughed, laid off, or quarantined. A withdrawal by an impacted taxpayer at any point during the 2020 calendar year will qualify.

Suspending the 10% penalty for hardship distributions is not new, but the Stimulus Bill gives additional relief. Taxpayers receiving such distributions have the option of spreading the income recognized from the withdrawal over a three-year period instead of having to recognize the income all at once. The Stimulus Bill also lets taxpayers repay the withdrawal at any point within three years of receipt in order to avoid recognizing taxable income. Amounts repaid under this provision are treated instead as if they were trustee-to-trustee transfers or rollover contributions.

For seniors, the Stimulus Bill offers another form of relief. During the 2020 tax year, required minimum distributions from retirement accounts are suspended. The rationale behind offering this incentive was to give seniors a respite from having to withdraw funds at a time where market prices on investments are depressed.

Lastly, Congress has temporarily increased the amount that may be borrowed from a qualified employer-sponsored retirement plan to \$100,000, up from \$50,000. Loans may now be taken against the entire present value of the nonforfeitable balance in the account as well, rather than being restricted to one-half of the present value. In order to take advantage of these expanded retirement plan loan rules, taxpayers must borrow the money by September 23, 2020. For taxpayers who already have such loans outstanding, all payments due as of March 27, 2020 through December 31, 2020 are delayed for one year.

## RELAXATION OF NET OPERATING LOSS RULES AND OTHER BUSINESS ITEMS

The Stimulus Bill relaxes various deduction limitations that will permit businesses to deduct more expenses in 2020 and potentially carry losses back to earlier tax years in order to generate refund opportunities.

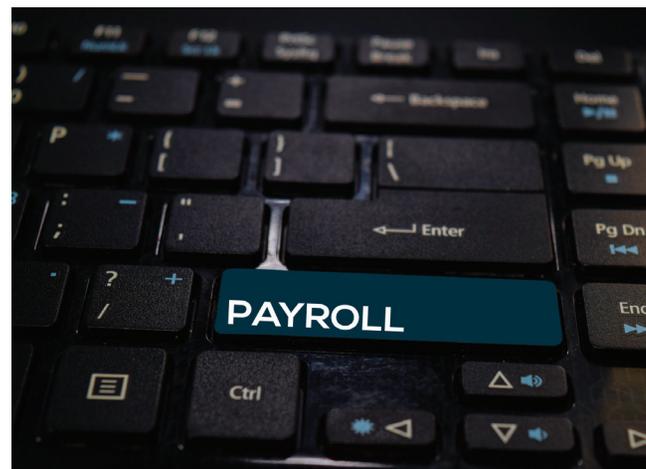
The largest opportunity for many businesses is in the relation of the net operating loss rules. A net operating loss is a loss in one tax year than can be used to offset positive net income in another tax year. After passage of the TCJA in 2017, taxpayers have only been able to carry such losses forward to offset income in future periods. The Stimulus Bill permits net operating losses recognized in 2018, 2019, and 2020 to be carried back up to five years to offset income. Although large losses for the 2020 tax year aren't available until after this year ends, the ability to turn net operating losses into refunds in earlier periods is a huge opportunity for businesses to generate more cash in 2021. The Stimulus Bill further removes other limitations on the percentage of net operating losses that may be used to offset income in the 2018 and 2019 tax years.

The Stimulus Bill loosens up the amount of interest expense that may be deducted. In the tax years 2019 and 2020, the deduction limit has been increased from 30% to 50% of an eligible business's adjusted taxable income.

## RETENTION CREDITS AND TEMPORARY FICA PAYMENT EXTENSION

The Stimulus Bill creates a new retention credit that employers can use to offset some of their payroll tax liability. In order to qualify for this credit, an employer must either have suffered a decline in gross receipts during a quarter in 2020 that represents a more than 50% decrease over the same calendar quarter in 2019, or had its operations fully or partially suspended during the same quarter because of government authority in response to COVID-19. This decline in business – and credit eligibility – lasts until the employer's gross receipts in a subsequent quarter are at or exceed 80% of the gross receipts relative to the same quarter in 2019.

The retention credit amount is equal to half the “qualified wages” that an employer pays to employees in an eligible quarter, up to a maximum of \$10,000 in qualified wages per employee in 2020. “Qualified wages” is a technical term in the statutory language, and what is included depends on whether the employer has 100 full-time employees or less. For smaller employers, qualified wages include all payments made to employees during the affected quarter or quarters, whereas for larger employers qualified wages include only wages paid to employees who are not performing services because of a COVID-19 emergency. The retention credit reduces the employer portion of Social Security taxes due for the quarter in which it is earned. To the extent the retention credit available exceeds the employer's Social Security payroll tax liability, the excess is refundable.



*It should be noted the retention credit is not available to employers that receive a loan under the Small Business Administration's Paycheck Protection Program.*

The Stimulus Bill provides employers with additional relief from the payment deadlines for the employer portion of federal Social Security and Medicare payroll taxes. From March 27, 2020 through December 31, 2020, the deadline to remit the payment of these payroll taxes to the IRS is postponed; half are now due on December 31, 2021, and the other half are due on December 31, 2022. With respect to the employer portion of Social Security and Medicare taxes incurred during the remainder of 2020, the Stimulus Bill treats employers as if they timely made all required deposits, assuming the tax is ultimately paid by the deferred due date. The extension of these payments also applies to the employer portion of Social Security and Medicare taxes assessed on a self-employed individual.

It should be noted the retention credit is not available to employers that receive a loan under the Small Business Administration's Paycheck Protection Program. The payment extension for the employer portion of payroll taxes is additionally not available to the extent an employer or self-employed individual both obtains a loan through the Paycheck Protection Program and receives any loan forgiveness under said program. Considering the Paycheck Protection Program is a major component of the total Stimulus Bill's aid for small businesses, employers should proceed cautiously to avoid any potential confusion concerning eligibility for overlapping benefits.

## ENHANCED CHARITABLE CONTRIBUTION DEDUCTION

The Stimulus Bill creates expanded opportunities for taxpayers to deduct contributions to charities in 2020. The first such change permits taxpayers claiming the standard deduction to deduct \$300 worth of contributions to certain charities as an “above-the-line” deduction. This is a break from the traditional rule that provides charitable contributions may only be deducted by a taxpayer claiming itemized deductions on his or her personal income tax return.

For taxpayers who are claiming itemized deductions on their personal income tax returns, the Stimulus Bill raises the adjusted gross income limit for the 2020 tax year to 100%. Normally, contributions made to a public charity may offset only 60% of the taxpayer's adjusted gross income for a given tax year. The Stimulus Bill provides that an individual taxpayer may offset all of his or her adjusted gross income by making charitable contributions of cash in 2020. Contributions in excess of this amount may still be carried forward for use in future tax years for up to five years.

Corporate taxpayers may now offset 25% of their income by making charitable contributions in 2020. This is an increase from the normal limit on charitable contributions a corporation may make in a single tax year, which is usually set at 10% of the corporation's total net income.

## CONCLUSION

For many folks, taxes might be the last thing on their mind right now. But it is important to note that the Internal Revenue Code touches many of the important pieces of the Stimulus Bill. If you have any questions on how your business might be affected by these changes, we would be happy to advise you. **FT**

## SURPRISE ATTACKS DISCOURAGED - DISCOVERY PRACTICE

By Michael E. Brangwynne, Esq.

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*This is the second installment in a series about the basics of the civil litigation process. If you are interested in reading the rest of the series, it is available on Fletcher Tilton's website under the Knowledge Library.*

This article is for those who are beyond the point of avoiding litigation and find themselves preparing to navigate the often-teacherous waters of a civil action.

## DISCOVERY GENERALLY

Certain examples from pop culture-- such as Mona Lisa DeVito being called as an 11th hour expert witness in the classic film *My Cousin Vinny*, and saving the day with her testimony about the availability of rear wheel positraction and the '64 Buick Skylark – might lead some to believe that surprise witnesses and trial by ambush remain acceptable practices in our courts of law. In the real world, by the time of trial, all parties to a civil dispute should know exactly what evidence they can expect the other parties to offer at trial. This is thanks to modern discovery practice.



*The two most common forms of written discovery are Interrogatories and Requests for the Production of Documents.*

As the United States Supreme Court has said, discovery and pre-trial procedures are in place to “make a trial less a game of blind man’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.” The basic premise of discovery is that the parties to a lawsuit must disclose to one another evidence that is relevant to the dispute, and that is not protected by a recognized privilege that would justify withholding the evidence. Permissible discovery takes several different forms.

## WRITTEN DISCOVERY

The two most common forms of written discovery are *Interrogatories* and *Requests for the Production of Documents*.

Interrogatories allow all parties to a civil lawsuit to serve on each other party questions that must be answered under oath. For example, if we consider a lawsuit by a property owner against a general contractor for defective work, the plaintiff-owner might include in his Interrogatories to the defendant-contractor a request that he describe in detail all work that he performed on the property, or list all subcontractors that he hired to assist with the agreed-upon work. The contractor will have the same opportunity to send the owner Interrogatories that must be answered under oath.

Requests for the Production of Documents are precisely what their name implies – requests by one party to another that he produce for inspection and copying any documents of a certain description in his possession, custody or control. For example, our contractor-defendant would likely request of the plaintiff-owner all photographs in his possession showing the allegedly defective work.

It is important to note that the term “document” has an extremely broad definition and does not just refer to pieces of paper. Indeed, a party will be required to produce emails, text messages, electronic files and even physical items for the other party to inspect. For this reason, it is common in a construction defect dispute for the parties to arrange for a site inspection that will provide an opportunity for all involved to inspect, document and photograph the condition of the property and the allegedly defective work.

Relevant documents can also be requested of individuals or entities that are not a party to the lawsuit by way of a subpoena.

## DEPOSITIONS

Once written discovery has been exchanged between the parties, it is typical for each party to a lawsuit to be *deposed*. In addition to the parties, individuals or entities that are not a party to the lawsuit can also be subpoenaed to appear for a deposition. The deponent must appear on an agreed-upon date, usually at the law office of the attorney requesting the deposition, to provide testimony, under oath, as to his knowledge of the facts relevant to the dispute. In addition to the parties' and the deponent's lawyers, a stenographer will be present to create a transcript of the deposition testimony for later use. This gives the parties the opportunity to hear live testimony from potential trial witnesses, weigh the witnesses' credibility and ask questions in follow-up to written discovery.

After written discovery and depositions are completed, the parties are nearing the completion of discovery and should have a strong understanding of each other's claims and evidence. Depending on the nature of the case, there may be one final category of evidence that must be investigated through the discovery process – and which brings us full circle to Ms. DeVito's testimony mentioned above: the parties must exchange information regarding their intended expert witnesses. **FT**



## FREDERICK M. MISILO, JR., ESQ. ELECTED PRESIDENT OF THE FIRM



At the firm's annual meeting, Attorney Fred Misilo was elected as President of the firm for a one-year term, a role he has served on previous occasions. Fred is Chair of the firm's Trust & Estate Department and his practice focuses on all aspects of estate planning, including the areas of elder law, special needs planning, estate administration, trusts and foundations, guardianship, and adult service advocacy. Mr. Misilo is a

member of the National Academy of Elder Law Attorneys and of the Academy of Special Needs Planners. He is admitted to practice in Massachusetts, Rhode Island and Florida.



## OPEN FOR BUSINESS IN A WHOLE NEW WAY

A message from our President, Frederick M. Misilo, Jr., Esq. "During this extraordinary time, please know that collectively, while we are physically separated, we remain connected through our commitment to you, our clients.

Across the firm, we have pivoted adroitly and effectively in responding to the current situation. From enhanced remote access, to effective work sharing, and increased video-conferencing, we remain available to meet your legal needs in a safe and suitable fashion.

We look forward to the day when we will be able to be present together in a post-pandemic environment. Until that time arrives, we are committed to working through this challenging time with all of you. We are confident that we will come through this experience stronger and more aligned than ever with our clients and colleagues."

## MICHAEL T. LAHTI, ESQ. ELECTED DIRECTOR OF THE FIRM



Fletcher Tilton is pleased to announce that Attorney Michael T. Lahti has been elected as a Director-Owner of the firm. Attorney Lahti joined Fletcher Tilton in 2017. "Michael brings extraordinary depth and expertise to our Trust and Estate Department ranging from sophisticated estate planning, elder law and special needs planning. Over the past three years, Michael has demonstrated extraordinary diligence,

accomplishment and commitment to client service which Fletcher Tilton values greatly," said Frederick M. Misilo, Jr., President of Fletcher Tilton and Chair of the Trust & Estate Department. In 2019, Lahti was appointed Chair of the Elder Law Practice Group. Prior to joining Fletcher Tilton, Lahti was an owner of the regional law firm, Lahti, Lahti & O'Neil of Providence and Cape Cod.

Lahti is a Certified Elder Law Attorney, a designation received from the National Elder Law Foundation. He is a member of the Massachusetts, Rhode Island and Florida Bars. He holds an LL.M. in Estate Planning from the University of Miami School of Law, a law degree from John Marshall School of Law where he also received a certificate in Estate Planning and Personal Financial Planning from the school's Graduate Tax Department.



## UPCOMING SEMINARS/WEBINARS\*

\* All seminars through June 30, 2020 will be offered as webinars. If it also becomes possible to hold them in a face-to-face setting, registrants will be given the option of attending via webinar or in-person.

### SPECIAL NEEDS & ELDER LAW PLANNING FOR CPAs & CFP® PROFESSIONALS - WEBINAR

**Speakers:** Frederick Misilo, Esq., Michael Lahti, Esq., & Theresa Varnet, Esq.

**Tuesday, May 12 :** 8:30-11:30 a.m.

Earn 3.0 CE Credits | \$75

### ESTATE PLANNING - WEBINAR – **Speaker:** Michael Lahti, Esq.

**Thursday, May 14:** 10 a.m. - 12:00 p.m.

**Tuesday, May 26:** 10 a.m. - 12:00 p.m.

### TAX PROCEDURE FOR CPAs – **Speaker:** Michael P. Duffy, Esq.

**Wednesday, May 27:** 8:30-11:30 a.m.

**Location\*:** Courtyard Marriott, Marlborough, MA

Earn 3.0 CE Credits | \$75

### SOPHISTICATED ESTATE PLANNING FOR CPAs, FINANCIAL ADVISORS, AND CFP PROFESSIONALS®

**Speakers:** Dennis Gorman, Esq., Dani Ruran, Esq., Michael Duffy, Esq., & Collin Weiss, Esq.

**Thursday, June 4:** 1:00-5:00 p.m.

**Location\*:** Beechwood Hotel, Worcester, MA

**Thursday, June 18:** 8:30 a.m.-12:30 p.m.

**Location\*:** Sheraton Hotel & Conference Center, Framingham, MA

Earn 4.0 CE Credits | \$100

**For details and to register for these seminars and others, visit [FletcherTilton.com/seminars-events](https://www.fletcherTilton.com/seminars-events).**

## SAVE THE DATE

### ESTATE PLANNING – **Speaker:** Michael Lahti, Esq.

**Tuesday, July 28:** 10 a.m. & 1 p.m.

**Location:** Crowne Plaza, Warwick, RI

**Tuesday, August 11:** 10 a.m. & 1 p.m.

**Location:** Colonel Blackinton Inn, Attleboro, MA

**Tuesday, September 1:** 10 a.m. & 1 p.m.

**Location:** The Lobster Pot, Bristol, RI

**Tuesday, September 22:** 10 a.m. & 1 p.m.

**Location:** Kirkbrae Country Club, Lincoln, RI

### ESTATE PLANNING FOR MASSACHUSETTS-FLORIDA SNOWBIRDS

**Speakers:** Frederick Misilo, Esq. & Michael Lahti, Esq.

**Tuesday, August 25:** 8:00 a.m.-11:30 a.m.

**Location:** Doubletree by Hilton, Hyannis, MA

### HOUSING & SUPPORTED DECISION-MAKING

**Speaker:** Frederick Misilo, Esq., Meredith Greene, Esq. & Theresa Varnet, Esq.

**Saturday, September 19:** - 8:00 a.m.-12:00 p.m.

**Location:** Courtyard Marriott, Marlborough, MA

### EMPLOYMENT LAW SEMINARS – **Speaker:** Joseph Bartulis, Esq.

**Wednesday, October 7:** 8:00-11:00 a.m.

**Location:** Sheraton Hotel & Conference Center, Framingham, MA

**Thursday, October 15:** 8:00-11:00 a.m.

**Location:** Cyprian Keyes Golf Club, Boylston, MA

### HOW TO ADMINISTER A SPECIAL NEEDS TRUST

**Speakers:** Frederick Misilo, Esq., Theresa Varnet, Esq. & Fletcher Tilton's Special Needs Practice Group

**Saturday, November 7:** 8:00 a.m.-1:30 p.m.

**Location:** Courtyard Marriott, Marlborough, MA

**For details and to register for these seminars and others, visit [FletcherTilton.com/seminars-events](https://www.fletcherTilton.com/seminars-events).**

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