

# Proactively Addressing COVID-19 in the Workplace – Part 2

March 24, 2020

Mark Berry, Bellevue

Betsy Carroll, Los Angeles

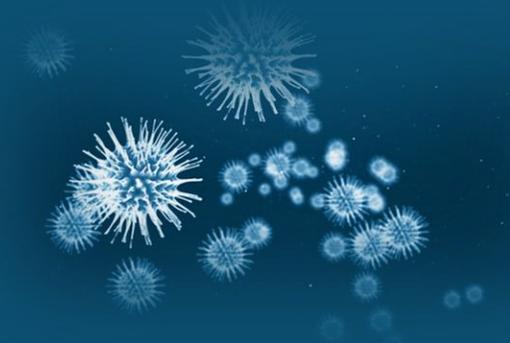
David Ernst, Portland

Michael Goettig, New York

Joseph Hoag, Seattle

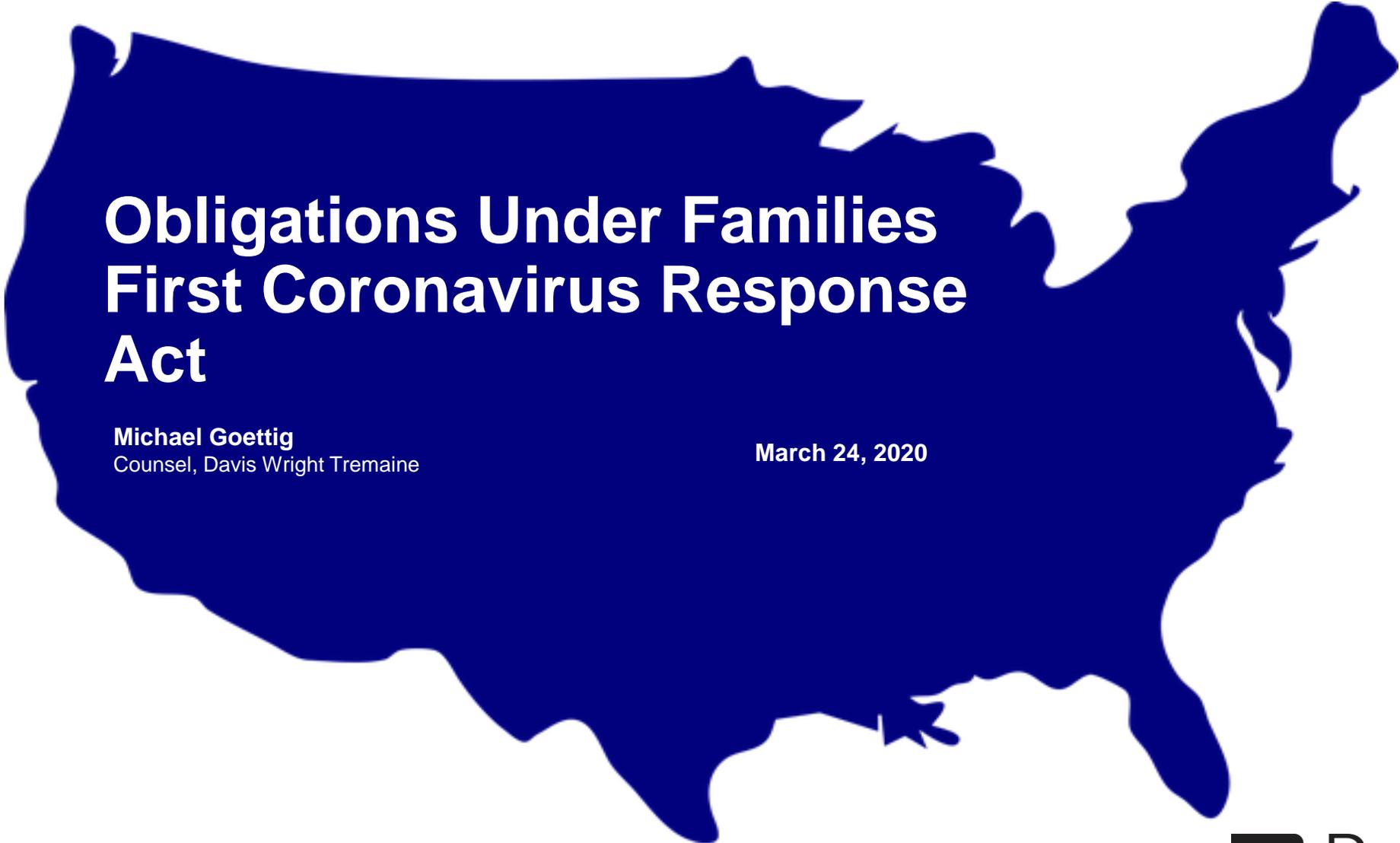
Lisa Peterson, Seattle

Rebecca Williams, Seattle



# Agenda/Overview

- Where We Have Been/The Latest Updates
- The Plan for Today
  - Federal Law Updates
  - Employee Screening
  - Landlord/Tenant Issues
  - Workforce Adjustments



# Obligations Under Families First Coronavirus Response Act

**Michael Goettig**  
Counsel, Davis Wright Tremaine

March 24, 2020

[EMPLOYMENTLAW.DWT.COM](http://EMPLOYMENTLAW.DWT.COM)



Davis Wright  
Tremaine LLP

# Updates - **Federal**

- **Families First Coronavirus Response Act**
  - Emergency Family and Medical Leave Expansion Act
  - Emergency Paid Sick Leave Act
  - Tax Credits for Paid Sick and Paid FMLA



# Updates – Families First Coronavirus Response Act



## ■ Emergency Family and Medical Leave Expansion Act

- Employers with fewer than 500 employees are required to extend this emergency family leave to any employee who has been employed for at least 30 calendar days
- Available to employees who are unable to work or telework if:
  - the need to care for a dependent child whose school or place of care has been closed; or
  - the child's usual compensated childcare provider is unavailable due to the public health emergency.
- First Ten Days Unpaid
  - An employee may elect to use accrued vacation, paid time off, or sick leave.
- After the unpaid leave period expires, employees compensated at the lower rate of:
  - 2/3 employee's regular rate of pay, or
  - \$200 per day.
  - Capped at \$10,000 in the aggregate (10 weeks of \$200/day).

# Updates – Families First Coronavirus Response Act

- **Are employees entitled to reinstatement?**
  - Yes. Leave taken under this provision is protected, meaning that an employee who uses this FMLA leave is entitled to reinstatement to the same or equivalent position, **unless**:
    - The employer has fewer than 25 employees;
    - The position held by the employee at the time the leave started no longer exists due to economic conditions or other operating conditions caused by the public health emergency;
    - The employer attempts to restore the employee to an equivalent position; **and**
    - The employer makes reasonable efforts to contact the employee if an equivalent position becomes available for one year following (a) the end of the public health emergency, or (b) 12 weeks after the leave commenced, whichever is earlier.

# Updates – Families First Coronavirus Response Act



## ▪ Emergency Paid Sick Leave Act

- Applies to all employees, regardless of duration of employment.
- Extends two weeks of paid sick leave (80 hours for full-time employees and a proportional amount for part-time employees depending upon their schedule):
  - 1) If the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
  - 2) If the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
  - 3) If the employee is experiencing symptoms of COVID-19 and seeking medical diagnosis;
  - 4) If the employee is caring for an individual who is subject to (1) or (2), above;
  - 5) If the employee is caring for a son or daughter due to a COVID-19-related school or care center closure;
  - 6) If the employee is experiencing a “substantially similar condition.”
- For reasons 1-3, compensation is the lesser of the employee’s regular rate of pay or \$511 per day (capped at \$5,110 in the aggregate). For reasons 4-6, compensation is at the lesser of 2/3 of the employee’s regular rate of pay or \$200 per day (capped at \$2,000 in the aggregate).
- Entitlement to paid sick time under the Act ceases beginning with the employee’s next scheduled work shift immediately following the termination of the need for sick time.

# Updates – Families First Coronavirus Response Act

- **Does this sick leave carry over from one year to the next?**
  - No. The paid sick time ceases beginning with the employee's next scheduled work shift immediately following the termination of their need for sick time.
- **Can I require employees to use other accrued paid time off first?**
  - No. Employers may not require employees to use other paid leave before using sick time for the above-listed purposes.

# Updates – Families First Coronavirus Response Act



- **Tax Credits for Paid Sick and Paid Family and Medical Leave**
  - Employers may claim a quarterly payroll tax credit for 100 percent of the amounts paid out under both sick leave and family leave provisions.
  - Employers should set up two new pay codes (one for sick leave and one for family leave) in their payroll systems to track the use of this time so that payroll processors and accountants can take the credit.

# Updates – Families First Coronavirus Response Act

- Within 15 days of the statute's March 18 date of enactment, the Secretary of Labor may issue guidelines exempting the following from the scope of the law:
  - Certain healthcare employees and first responders; and
  - Businesses with fewer than 50 employees if provision of leave to care for a child whose school or care center has closed would “jeopardize the viability of the business as a going concern”

# Updates – Families First Coronavirus Response Act

- DOL guidance: The Department will observe a **temporary period of non-enforcement for the first 30 days after the Act takes effect**, so long as the employer has acted reasonably and in **good faith** to comply with the Act. For purposes of this non-enforcement position, “good faith” exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the Department receives a written commitment from the employer to comply with the Act in the future.

# Updates – Families First Coronavirus Response Act



## ■ How to count to 500

- The emergency family leave’s definition of “employer” “shall be applied by substituting ‘fewer than 500 employees’ for [the FMLA’s definition of] ‘50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year’.”
- The emergency sick leave’s definition of “covered employer” is one that, “in the case of a private entity or individual, employs fewer than 500 employees.”
  - Joint Employer Test?
  - Parent-Subsidiary?
  - Tax Filer?
  - When?

# Employee Screening

- EEOC and CDC: screening for symptoms permitted at this time
- “Regular Health Checks”
  - Respiratory symptom screening
  - Temperature
- Proper procedures?
- Privacy concerns
  - ADA
  - State laws
  - HIPAA



# Landlord / Tenant Issues

- What should landlords be doing?
- What should tenants be doing?
- Does COVID-19 change the parties' obligations under their leases?
- Governmental orders impacting leases



# Some Governmental Orders Impacting Leases

- **Seattle:** 60 day hold on evictions of small businesses (less than 50 employees at one location) and nonprofits
- **Los Angeles:** moratorium on commercial evictions of tenants unable to pay rent due to circumstances related to the COVID-19 pandemic. Order will be in place until March 31, 2020, unless extended.
- **San Francisco:** moratorium on commercial eviction for businesses with a license to operate in San Francisco that have less than \$25 million in annual gross receipts. Order will be in effect for 30 days and can be extended by the Mayor for another 30 days.
- **Washington's Governor Inslee** declared a moratorium on all residential evictions for non-payment of rent or expiration of a month-to-month tenancy. This will likely stay in effect until the emergency declaration is lifted.
- **Oregon Supreme Court** issued an emergency declaration that effectively paused all eviction proceedings statewide.
- **Multnomah County** imposed a temporary moratorium on all residential evictions in which the tenant's failure to pay rent is due to wage loss from the pandemic.

# Seattle Is On the Leading Edge

- Seattle's emergency order requires all landlords to “endeavor to enter into a payment plan, or other workout agreement to assist a distressed small business or nonprofit in rent relief, including but not limited to the deferred payment of rent, discount to rent, or other strategies to address the economic disruption caused by the COVID-19 civil emergency.”
- More to come...



# Workforce Shifts

- Remote Work
  - Employees who cannot work remotely
  - Employees who also need to care for children/parents



# Workforce Shifts

- **When the Business Shuts Down**
  - Layoffs
  - Furloughs/Forced Leaves
  - Reduced Hours
- **Issues to Consider**
  - Options for Existing Paid Leave
  - Continued Health Insurance
  - Unemployment Benefits



# Thank you



**Mark Berry**

Partner, Seattle

[markberry@dwt.com](mailto:markberry@dwt.com)

P: 425.646.6142



**Betsy Carroll**

Partner, Los Angeles

[betsycarroll@dwt.com](mailto:betsycarroll@dwt.com)

P: 213.633.6827



**David Ernst**

Partner, Portland

[daveernst@dwt.com](mailto:daveernst@dwt.com)

P: 503.778.5385



**Michael Goettig**

Counsel, New York

[michaelgoettig@dwt.com](mailto:michaelgoettig@dwt.com)

P: 212.603.6498



**Joseph Hoag**

Counsel, Seattle

[josephhoag@dwt.com](mailto:josephhoag@dwt.com)

P: 206.757.8299



**Lisa Peterson**

Partner, Seattle

[lisapeterson@dwt.com](mailto:lisapeterson@dwt.com)

P: 206.757.8121



**Rebecca L. Williams**

Partner, Seattle

[beckywilliams@dwt.com](mailto:beckywilliams@dwt.com)

P: 206.757.8171

# Upcoming Webinar

## Considerations for Employers Facing a Potential Workforce Layoff

### Details

Thursday, March 26, 2020

12-1 p.m. PST / 3-4 p.m. EST

Please join us for our "Considerations for Employers Facing A Potential Workforce Layoff" webinar. This program will be a multi-speaker roundtable discussion on some of the immediate challenges employers face as COVID-19 developments have led some employers to consider layoffs of their workforce.

For additional details and to register, visit: <https://www.dwt.com/about/events/2020/03/employers-facing-a-potential-workforce-layoff>

# Resources

- Davis Wright Tremaine Resources: <https://www.dwt.com/COVID-19>
- National and International
  - CDC: <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
  - WHO: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public>
  - US Dept. of Labor – FLSA FAQs: <https://www.dol.gov/agencies/whd/flsa/pandemic>
  - US Dept. of Labor – FMLA FAQs: <https://www.dol.gov/agencies/whd/fmla/pandemic>
  - OSHA: <https://www.osha.gov/SLTC/covid-19/>
- Washington State
  - WA Dept. of Health: <https://www.doh.wa.gov/>
  - King County Dept. of Health: <https://www.kingcounty.gov/depts/health.aspx>
  - WA PFML: <https://paidleave.wa.gov/coronavirus/>
  - WA Employment Security Dept.: <https://esd.wa.gov/paid-family-medical-leave/employers>