



# Alaska's Reopening: Returning to the Workplace and Employment-Related Considerations

May 20, 2020



Davis Wright  
Tremain LLP

Gregory Fisher | Stuart Harris  
Elizabeth Hodes | Megan Vogel

# Plan for Today

- Mandates and Local Rules for Reopening Around the State
- Employee and Customer / Client Safety
- Wage and Hour Considerations
- High-Risk Employees
- Immigration Considerations
- Employee Benefits Considerations



# Mandates and Local Rules for Reopening Around the State



# Mandates and Local Rules for Reopening Around the State






- Governor Dunleavy's Health Mandates
- Municipalities
  - Anchorage: Emergency Order 09 (5/11/2020); Safety Criteria for Businesses to Reopen or Expand Operations (Phases 1 through 4)
  - City and Borough Legislation / Resolutions
- Tribes and Village Orders
- Local government responses in Alaska vary from zero local mandates to heavy oversight. Most local authorities are working to coordinate with Governor Dunleavy, but the extent of agreement/consistency varies.

# State of Alaska Status

- State of Alaska Re-opening Plan
  - <https://covid19.alaska.gov/wp-content/uploads/2020/05/05142020-Reopen-Alaska-Plan.pdf>
- We are currently in **Phase 2** (effective May 8, 2020)—50% capacity for most businesses, 25% for gyms, bars, libraries, and theaters
- Practice social distancing, use face masks, wash hands, encourage remote work, screen employees pre-shift

**Reopen Alaska Responsibly Plan** Alaska COVID-19  
Individual responsibility and independence



**Decisions about when to move between phases will depend on:**

**1. Epidemiology:** Tracking disease trends and burden (morbidity and mortality)

**2. Testing:** Monitoring overall testing volume and changes in the percent of positive tests at the community, regional, and statewide levels

**3. Public health capacity:** Monitoring cases and conducting contact investigation for confirmed cases

**4. Health care capacity:** Ensuring hospitals have adequate capacity and supplies to care for COVID-19 patients and other patients needing urgent care

Phase	Key Components	Protective Guidelines To Slow Transmission
<b>Phase I Implementation</b> April 24, 2020	<ul style="list-style-type: none"><li>• Most non-essential businesses reopen, with safeguards</li><li>• 25% capacity for most businesses, and allowances for outdoor services</li><li>• Small gatherings of fewer than 20 allowed, with social distancing</li><li>• Social distancing, table spacing, no waiting rooms</li><li>• Elective medical services available, with limitations</li><li>• Suspended visitation will continue at state residential institutions</li><li>• Bars and entertainment venues (i.e. theaters, bowling alleys, bingo parlors, gaming centers) remain closed</li><li>• Interstate and international travelers still required to quarantine for 14 days upon arrival in Alaska</li><li>• Schools remain closed to students through the end of the 2019-2020 school year</li></ul>	<ul style="list-style-type: none"><li>• <b>Continue social distancing.</b> Stay at least six feet away from non-household members. Keep your social circle as small as possible.</li><li>• <b>Cloth face coverings</b> are strongly encouraged in public and around non-household members.</li><li>• <b>Wash your hands frequently</b> and regularly clean frequently-touched objects and surfaces.</li><li>• <b>Minimize social interactions</b> while supporting businesses by ordering online, using pick-up, take-out and home delivery services and using cashless and receipt-less payment options.</li><li>• <b>Stay home and isolate yourself from others if you're sick.</b> If you have symptoms that could be COVID-19, contact a health care provider to get tested as soon as possible.</li><li>• <b>Individuals should consider their personal level of risk.</b> Alaskans 65 and older or anyone with underlying health conditions should continue to minimize their exposure to others</li></ul>

# Phase 3 Effective May 22

- Governor has announced entering Phase 3 on Friday morning May 22, 2020: <https://covid19.alaska.gov/wp-content/uploads/2020/05/05192020-Alaskas-Plan-Forward-Final.pdf>
- With few exceptions all businesses and services can open at 100% capacity. Various Health Mandates remain in effect (10, 13, 14, 15, 17, 18), including restrictions regarding interstate and intrastate travel.
- Phase 3 guidance still recommends 6-foot distancing, personal hygiene and cleaning/disinfecting measures, wearing face mask in public, self-monitoring of symptoms
- Official guidance will be available on May 21, 2020, and local restrictions will still apply.

# Other Locations?

Check each location for specific information

Important point: there is no one, standard, uniform “plan” in place in Alaska

Localities are implementing their own guidelines that may vary from the State’s Re-opening Plan

# Anchorage

- Anchorage in Phase 2 (effective May 11, 2020)
  - <https://covid-response-moa-muniorg.hub.arcgis.com/pages/roadmap-to-reopening>
- Plan includes business or industry-specific guidelines (retail, offices, non-critical businesses, dining, personal care, social and religious, art, bars, fitness and pools, and theaters)





# Consequences of Failure to Comply

**A violation of a State of Alaska COVID-19 Mandate may subject a business or organization to an order to cease operations and / or a civil fine of up to \$1,000 per violation.**

**In addition to the potential civil fines, the State has noted potential criminal prosecution for Reckless Endangerment pursuant to Alaska Statute 11.41.250.**

**Violations of municipal orders carry civil and criminal penalties.**

**Remember, any employee or customer complaint (OSHA, ADA, NLRA, etc.) will be evaluated with consideration of the context, which includes all of the local and federal rules and guidance.**

# Understand How to Classify Your Business

- Take the time to review and understand the orders and terminology that apply to your business – definitions have been modified/clarified over time:
  - Essential versus Non-Essential
  - Critical Infrastructure
  - Public-Facing versus Non-Public-Facing
  - Anchorage Municipal Orders use terminology Critical and Non-Critical – see FAQs
  - Industry-Specific Orders exist for almost every type of business at **BOTH** the State and Local level



# Governor Dunleavy's Health Mandates

Maintain consistent review of Health Mandates and updates

## Interstate and Intrastate Travel

- Health Mandate 18 (Supersedes Mandate 012, Attachment B, and Mandate 016-Attachment M)
- Travel off the road and marine highway system: All businesses, whether Essential Services/Critical Infrastructure or non-essential/non-critical, that have staff traveling between communities, must file a protective plan with [akcovidplans@ak-prepared.com](mailto:akcovidplans@ak-prepared.com).

# Mandated Mitigation Plans

Governor's  
Mandates require  
Mitigation Plans

- Prepare and regularly review your plan
- Train employees, supervisors, managers on your plan
- Posting requirements
- Disclosure requirements
- Some Plans are made publicly available (e.g., Processors operating in Bristol Bay)
- Prepare with the assumption a government agency will review

# Other Sources of Rules and Guidance

- CDC Guidance: : <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>
- OSHA and AKOSH Guidance: <https://www.osha.gov/SLTC/covid-19/> and <https://labor.alaska.gov/COVID-19.htm>
- EEOC Guidance (addressing ADA, ADEA, etc.): <https://www.eeoc.gov/coronavirus>
- USDOL guidance: <https://www.dol.gov/agencies/whd/pandemic>
- NLRA: Protected concerted activity





# Employee and Customer / Client Safety

# Employee and Customer / Client Safety

- Prepare for Re-opening
- Have a plan:
  - Social distancing (engineering controls, administrative controls, PPE)
  - Sanitization
  - Communication and Training
  - Health monitoring
  - Work-related travel



# Implementing Your Plan

- Review sources (although somewhat detailed, can be done in an hour)
- **Outline 5 key subject areas** and how to address each in your business or operations

Five Key Subject Areas  
Social Distancing, Sanitization,  
Communication & Training, Health  
Monitoring, Work-related Travel

# 1. Social Distancing

Consider the flow of work within work to identify points of contact with employees, vendors, suppliers, and customers (or patients and clients)

- **Engineering Controls**—Physical barriers, markings (tape) on floor, limiting access to high traffic areas, reconfigure workspaces
- **Administrative Controls**—Rotate shifts to limit number of employees, stagger lunch and rest breaks, limit meetings, use virtual meetings, encourage remote work where possible



## 2. Sanitization



Have offices and work spaces sanitized to CDC standards, especially high touch areas (doors, counters, restroom fixtures, phones, microwaves)

Have hand sanitizer at entry points with sanitizing wipes

PPE can include N95 ventilators, single-use nitrile gloves, eye protection, gowns

Face masks are not technically PPE, but recommended

For most businesses in most contexts, face masks, sanitizing, and social distancing will probably be sufficient



### 3. Communication and Training

- Use appropriate signs (stay home if sick, know symptoms, social distancing, handwashing and use of hand sanitizer, and PPE use)
- Encourage communication with management
- Keep employees informed about procedures and plans
- Consider one point of contact (health / safety committee chair, HR manager, another appropriate person) to handle communications
- Consider psychological impact of signage (too much can be counter-productive and too oppressive, and can depress mood)—a little levity can be effective



## 4. Health Monitoring

- Educate and encourage employees to self-monitor and report
- Supervisors should also monitor for displayed symptoms
- Entry policies (complete form acknowledging status) - use health screening checklist or screening form (maintain privacy/confidentiality)
- Use appropriate records to identify risks, potential exposure, and to record who has been in the office and when
- Temperature screenings? Check EEOC guidance.



## 5. Work-related Travel

- Local and Long Distance
- Look for ways to limit work-related travel
- Limit to necessary travel
- Consider use of self-quarantine if travel is necessary to high-risk areas (employees returning from high-risk areas)
- For local travel, establish no-contact delivery policies/procedures
- Explore ways to deliver goods or services through electronic/digital means



# Mitigation Response Plans

**Biggest issue:** How should an employer respond if an employee tests positive?

- <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
- Separate the employee (send home)
- Sanitize to CDC standards or, if not possible, close business for 72 hours
- FFCRA (Paid Sick Leave)
- Identify contacts in workplace, and monitor for symptoms
- Privacy
- Reporting obligations: workers' comp, OSHA (developing)

# Mitigation Response Plan (other points)

- CDC guidance includes industry-specific notes and considerations
- General goals--
  - Prevent and reduce transmission among employees
  - Maintain healthy business operations and work environment

**Key points:** consider restructuring workforce, review job essential functions, encourage remote working, conduct daily in-person health checks, use flexible leave, clean/disinfect, provide hand sanitizer/face masks, emphasize social distancing





# Wage and Hour Considerations

# Wage and Hour Considerations

- Too many wage and hour issues to address in a few minutes, but here are five of the most pressing issues:
  - Remote working for non-exempt employees
  - Employees in quarantine (is this time compensable?)
  - Reducing wages / salary
  - FFCRA Paid Sick Leave
  - FFCRA Expanded FMLA



# Remote working for non-exempt employees

- Remember that normal rules governing work time have not been suspended
- Establish appropriate ways to track and record time
- Have employees report time each day (email or text) and monitor
- Make sure non-exempt employees are not working overtime unless necessary
- Use pay period certifications for employees to confirm hours worked are accurate

# Employees in Quarantine

**Is this compensable time? Fact and context specific.**

Basic question: is the employee engaged to wait or waiting to be engaged?

Basic analysis: can the employee use the time for his or her personal benefit?

- There is no clear guidance from AkDOL or USDOL
- Consider: how remote is the quarantine?
- Consider: Paid Sick Leave to avoid problem
- Be careful! Confer with counsel and document for good faith exception

# Reducing Wages / Salary

- Many employers are now in the position of implementing furloughs, lay-offs, or reducing pay
- Reductions in wages / salary are normally fine (for some employees under contract you may need their agreement), but be sure and provide at least a pay period's notice (typically two weeks' notice for most employers)

*AS 23.05.160 (An employer shall notify an employee in writing at the time of hiring of the day and place of payment, and the rate of pay, and of any change with respect to these items on the payday before the time of change)*



# FFCRA Paid Sick Leave



- Pay differs depending upon reason for leave
- If under quarantine or experiencing symptoms, entitled to greater of your regular rate of pay, state minimum wage, federal minimum wage up to a maximum of \$511 day or \$5,110 for the two week (10 day) period
- If taking leave to care for another or for childcare, entitled to maximum of \$200 per day or \$2,000 for the two week (10 day) period

# FFCRA Expanded FMLA

- This does not provide an additional 12 weeks of FMLA
- Expanded FMLA only applies for childcare (cannot work or telework because school is closed or childcare provider is not available as a result of the pandemic)
- Employee entitled to first 2 weeks unpaid (assumption is employee will use Paid Sick Leave) and then 10 weeks at 2/3 regular rate to a maximum of \$200/day or \$10,000 total



# High-Risk Employees

# Who Is a “High-Risk” Employee?

- A high-risk worker is defined by the Centers for Disease Control and Prevention (CDC) and includes persons who are:

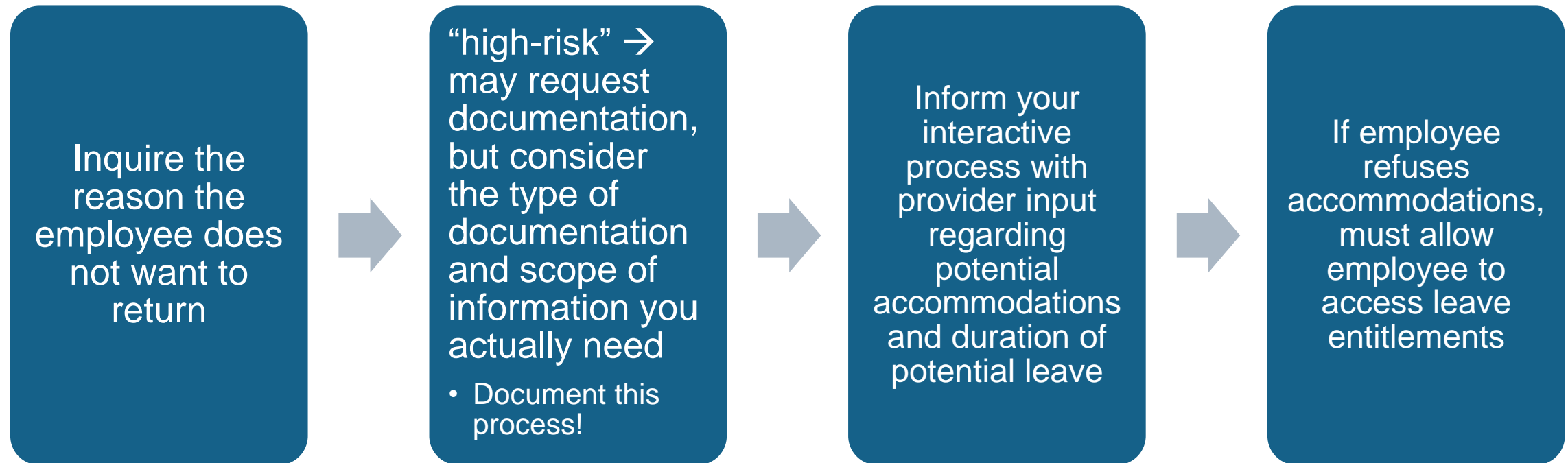
Of all ages with underlying medical conditions, particularly if not well controlled; and/or

65 years of age or older.

# High-Risk Employees Who Want to Return

- Cannot unilaterally bar “high-risk” workers
  - EEOC guidance: ADA requires interactive process
- If you know an employee is “high-risk” but (s)he does not request an accommodation, don’t assume (s)he cannot work or requires accommodation.
  - Document employer’s willingness to accommodate in general messaging to all employees; explain how to privately request accommodation.
- Determine whether a fitness for duty analysis may be appropriate based upon the information known to you.
  - “Direct Threat” - must show “the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation”

# High-Risk Employees that Do Not Want to Return to Work





# Requirements for Employers

- **Accommodations:** All employers (public or private) **must offer accommodations** to high-risk workers in order to protect them from exposure to COVID-19. This includes, but is not limited to, telework, alternative or remote locations, reassignment, and social distancing measures. Consider current and anticipated vacancies if reassignment is necessary.
- **Leave:** If alternative work arrangements are not feasible, the high-risk workers should be permitted to use any available leave (FFCRA, FMLA, PTO, unpaid administrative leave, etc.).
- **Non-Retaliation:** Guard against retaliation and adverse actions that could be perceived as retaliation against high-risk workers.
- [Employees may seek unemployment for any reduced work, but unemployment benefits are specific to individual circumstances.]



# Immigration Considerations

# Do You Need to Take Form I-9-related Action?



- Not required if individual is “continuing in their employment.” That is, they had a reasonable expectation of returning to work, even if you treated them as “terminated” in other contexts.
- Required if the individual was terminated.
  - New I-9 completed
- OR
- Section 3 Rehire completion, if rehire is within 3 years of when original Form I-9 was completed
- If a new Form I-9 is completed, retain the prior form according to the Form I-9 retention rule (“three years after date of hire or one year after termination, whichever is later”) and then shred it.
- **See:**
  - <https://www.uscis.gov/i-9-central/70-rules-continuing-employment-and-other-special-rules>
  - <https://www.uscis.gov/i-9-central/52-reverifying-or-updating-employment-authorization-rehired-employees>

# E-Verify Participation

- E-Verify is an Internet-based system that compares information entered by an employer from the Form I-9 with records available to the U.S. Department of Homeland Security and the Social Security Administration to confirm employment eligibility.
- E-Verify is a voluntary program and registration is relatively simple
- Consider whether you might wish to register before resuming operations



# E-Verify Cases and Re-hires

- New Form I-9 = E-Verify case
- Section 3 used for rehire = No E-Verify case if you previously checked them through E-Verify and they have:
  - No expired documents; OR
  - Expired passport, green card, or List B document; OR
  - Their expired List A or C document was updated in Section 3 at rehire.
- Section 3 may not be used for rehire if you previously did not run an E-Verify case for the individual or if you did and they did not check through as employment authorized. For such an individual, you must complete a new I-9 and run an E-Verify case.
- **See:** <https://www.e-verify.gov/e-verify-user-manual-20-initial-verification-21-form-i-9-and-e-verify/212-rehires>

# Flexible Requirements for Form I-9 Document Inspection for Certain Employers

ICE has allowed employers operating remotely to use a “flexible process” to view employee documents electronically, rather than in person until June 18, 2020.

- Instead of in-person presentation of documents, employee must show the employer their documentation electronically (e.g., via email, webcam).
- Employer representative should enter “COVID-19” in the open text box in Section 2 as the reason for the physical inspection delay.
- Employers who used the flexible process must conduct in-person inspection of employee documents within three business days of the expiration of this program.
- No employer is required to use the flexible procedure. An employer may still designate any person to act as an authorized representative to review the original documents on behalf of the employee and to complete Section 2 or 3 of the Form I-9.

## See:

- <https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance>
- <https://www.ice.gov/news/releases/ice-announces-extension-flexibility-rules-related-form-i-9-compliance>



# Return to Work for Those on Work Visas



Return to work for a visa-sponsored individual requires a case-by-case analysis, given the complexities involved. Contact an immigration lawyer to discuss requirements, timing, and strategy.

Some things to consider for employees on H-1B, E-3, H-1B1:

- If the employee is working from home, have you posted the required notice?
- Are there any wage or back-pay issues that have arisen during a period of furlough or reduced pay?
- Will return to work role have a material change than prior role described on petition?



# Employee Benefits Considerations

# Group Health Plan Issues

- Ensure returning employees' coverage is reinstated, to the extent possible—check plan document and with insurer
- Were benefits continued during absence?
  - If employment technically continued (furlough / leave of absence), and new hours less than required minimum, check for insurer's special treatment of reduced hours and how long treatment lasts
  - If COBRA triggered upon prior termination of employment, may be able to automatically reinstate or waive new eligibility period
- If returning employees triggered COBRA, any COBRA gap?



# Group Health Plan Issues, cont'd

- IRS and DOL guidelines “toll” many deadlines, for both plans and participants, including for COBRA elections
- “Tolling” means that in calculating the deadline, you disregard the “Outbreak Period”
- “Outbreak Period” runs from March 1, 2020 until 60 days after the National Emergency ends; currently means the Outbreak Period would last until September 23, but could be cut short or extended dealt with state by state
- Address any recoupment of employer paying employee’s share of premium during absence

# Group Health Plan Issues, cont'd

- New IRS guidance allows greater flexibility under Section 125 cafeteria plans
- Increased ability for mid-year elections to add or drop coverage, or increase or decrease dollar elections under flexible spending accounts (FSAs) and dependent care accounts (DCAs)
- Extended grace periods and carry-overs for using amounts in FSAs and DCAs after the end of the plan year
- New rules permissive, not required, but will require retroactive plan amendments (amendment deadline December 31, 2021)

# Retirement Plan Issues

- General rule: count all service for eligibility and vesting
  - Eligibility: once a participant, always a participant – rehired participants join immediately
  - Vesting: focus on “year of service,” which is a 12-month period in which they have 1,000 (or fewer, as specified in the plan) hours of service, or just continued service for elapsed time method
- Exception to general rule applies if plan uses “break in service” rules, but that is rare, particularly for 401(k) plans
- Continue deferral elections, unless changed
- Continue timely deposits!





# Retirement Plan Issues, cont'd

- Timely delivery of notices regarding plan changes (eliminated match, etc.), but noted flexibility
- Partial plan termination requires accelerated vesting of affected participants
- Partial plan termination rule of thumb looks at drop in 20% of participants, but wait until year end to evaluate
- CARES Act allows (but does not require) more liberal distribution and loan rules (will require retroactive plan amendment, generally by 12/31/2022)

Questions



# Thank you



**Gregory Fisher**

Partner, Anchorage

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

907.257.5335



**Stuart Harris**

Partner, Portland

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

503.778.5428



**Elizabeth Hodes**

Partner, Anchorage

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

907.257.5337



**Megan Vogel**

Counsel, Seattle

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

206.757.8258