

Health & Safety Board Approves Long-Awaited Updates to Cal/OSHA's COVID-19 Emergency Temporary Standards (ETS) for the Workplace

Changes to the Current ETS¹

As a preliminary matter, the revised ETS clarify that none of the rules apply to “employees teleworking from a location of the employee’s choice, which is not under the control of the employer.” The original ETS only exempted places of employment with one employee who did not have contact with others. This clarification means that, for example, employees who work from home, but around others (e.g., family members, roommates, etc.), or who choose to work remotely at a working-sharing space, sublet office, or public place (e.g., library or coffee shop) over which the employer has no control, are not covered by the ETS. This is a welcome clarification given the continued prevalence and popularity of remote work arrangements.

Vaccinated Employees

Under the revised ETS, “fully vaccinated” employees would *no longer* need to:

1. Be excluded from the workplace after an exposure via “close contact” to a COVID-19 positive person – unless they test positive or develop symptoms.
2. Wear a mask indoors if *all persons* in the same room are fully vaccinated and have no COVID-19 symptoms.²
3. Wear a mask outdoors – unless they have COVID-19 symptoms.
4. Be offered free COVID-19 testing during paid time if they were exposed via close contact to a COVID-19 person.
5. Work behind a cleanable solid partition (e.g., plexiglass) when working at a location where six-foot distancing cannot be maintained.

Of significance to all employers, per the revised ETS, employees are deemed fully vaccinated only when the *employer has documentation showing* that 14 days have passed since their second two-dose COVID-19 vaccination shot, or their one-dose vaccination shot (i.e., the Johnson & Johnson vaccine). Given this new requirement, employers may not rely on the “honor system” regarding who is vaccinated, but will

¹ The revised ETS make changes to the current rules pertaining to employer-provided housing and transportation, however, these are beyond the scope of this article.

² Because this rule applies to *all persons* (as opposed to all employees), and the term “fully vaccinated” requires documentation of vaccination status, fully vaccinated employees working in a room with any customers, vendors, or the general public will not be able to shed their masks - unless the employer verifies the vaccination status of each person, which as a practical matter will be unworkable in most situations.

need to collect vaccination documentation from employees in order to take advantage of the relaxed workplace rules for vaccinated employees.

There is no guidance on what type of “documentation” is required or sufficient. However, based on the definition of “fully vaccinated,” the documentation must show: (1) the name of the employee, (2) the employee received both shots of a two-dose vaccine or the single-dose vaccine, (3) the date the second dose (or single dose) was received; and (4) the type of vaccine received, because it must be one that is approved by the FDA for emergency or full use. The vaccination cards issued by most vaccination clinics will suffice because they provide all of this information. Other documentation could also conceivably suffice, as long as it has all of these items of information.

The revisions also expressly state that any employee medical record required by the ETS, which presumably includes vaccination cards, must be kept confidential unless disclosure is permitted or required by law. This would not, however, appear to restrict an employer’s ability to implement different workplace safety rules (in accordance with the ETS) for vaccinated versus unvaccinated employees, which may necessarily suggest or reveal employees’ vaccination status to coworkers.

Consistent with Centers for Disease Control and Prevention (CDC) guidelines, the original ETS specified that an exposure via “close contact” means being within 6 feet of an infected person for a cumulative total of 15 minutes or more over a 24-hour period during the “high-risk exposure period,” i.e., when the person may be contagious. However, the revised ETS also provide that a close contact does NOT include a COVID-19 positive employee who was wearing a “respirator” under a Cal/OSHA-compliant respiratory protection program.³ A respirator is not the same as a face covering, but does include N95 masks, as well as other respiratory protective devices approved by the National Institute for Occupational Safety and Health (NIOSH).

Face Coverings

The controversial requirement for employers to require employees to wear face coverings have only been relaxed when: (1) all persons in a room are fully vaccinated; (2) fully vaccinated employees are working outdoors; or (3) unvaccinated employees are working outdoors and can maintain six-foot social distancing. The new relaxed rules are detailed in the “Vaccinated Employees” section above. Also of note, there is no sunset or expiration period for the continued face covering rules.

Under the revised ETS, employees will need to know if everyone sharing their work rooms are vaccinated. Yet, the regulations do not address how an employer may or should implement these new face covering rules without intruding on employees’ sense of privacy regarding their medical condition, disability status, religious beliefs or political

³ See [here](#) for a summary of Cal/OSHA’s requirements for a compliant respirator program and links to related resources. Note that there are different program requirements depending on whether respirator use is required or voluntary.

views. We expect Cal/OSHA will address this important issue in a revised set of FAQs, which the OSHSB has requested be prepared as quickly as possible.

In a notable tightening of the rules, the revised ETS now provide that a scarf, ski mask, balaclava, bandana, turtleneck, collar, or single layer of fabric are *not* compliant face coverings. The new rules specify that a face covering must either be a medical, surgical, or *two fabric layer* mask, or a respirator. This rule change is significant insofar as employers are required to enforce the wearing of compliant face coverings in their workplaces, and also because employers must *provide* employees with compliant face coverings. Many employees currently choose to wear their own masks at work, and many of those are single fabric layers.

Physical Distancing

In a welcome change, employers will no longer have to enforce physical distancing for employees working outdoors, *unless* they are working at an “outdoor mega event,” which is defined as an event that includes over 10,000 participants or spectators outdoors. Examples include, conventions, shows, concerts, sporting events, theme parks, festivals and parades. Moreover, all physical distancing mandates in the revised ETS will end on July 31, 2021.

Between the date the revised ETS become effective (most likely June 15) and July 31, 2021, six-foot distancing must be maintained between employees working *indoors or at outdoor mega events*. However, a broad exception to this physical distancing requirement was added to the final version of the revised ETS for employers that provide respirators to all unvaccinated employees for voluntary use. And given that other parts of the ETS *require* employers to offer respirators to unvaccinated employees, it appears the physical distancing rules no longer apply when respirators are offered. According to [Cal/OSHA’s press release](#) on June 4, 2021 about the revisions to the ETS, this was an intentional, broad exception for all physical distancing rules.

Nevertheless, the revised ETS provide these additional, more limited exceptions to physical distancing rule: (1) physical distancing is not mandatory where an employer can demonstrate it is “not feasible”⁴; and (2) employees wearing respirators *required* by the employer in compliance with Cal/OSHA’s respirator program rules need not physically distance from others.

Finally, if an employee is exempted from wearing a face covering due to medical or religious reasons, or because they are performing tasks that cannot feasibly be done with the covering, the revised ETS require they maintain six-foot distancing from others

⁴ This is a modest relaxing of the rule as the current ETS requires six-foot distancing unless doing so is “impossible.” However, when not feasible, the rules state that as much space as possible must be maintained between persons.

unless the unmasked employee is either fully vaccinated or tested at least weekly for COVID-19 during paid time and at no cost to the employee.

Engineering Controls

Under the revised rules, the “cleanable solid partition” requirements in the workplace will expire on July 31, 2021. Employers can then remove partitions they erected at work stations where six-foot physical distancing could not be maintained at all times. This includes partitions in high-contact areas such as cash registers, desks, and production line stations.

Between the date the revised ETS become effective (likely June 15) and July 31, cleanable solid partitions are only required for employees working indoors and at outdoor mega events and only if the employer does not provide respirators to unvaccinated employees for voluntary use. In those limited circumstances, partitions are required when the employee is assigned to a work station for extended periods (e.g., cash registers, desks, or production line stations) and physical distancing is not maintained at all times.

Training

Additional items have been added to the ETS’ list of required training topics, including information on COVID-19 vaccinations, COVID-19 testing accessibility, the employer’s policies on COVID-19, and all legally mandated and applicable sick and vaccination leave (i.e., information regarding California’s COVID-19 Supplemental Sick Paid law and any similar local ordinances). In addition, employers who are required to provide respirators to unvaccinated employees must provide training on how to properly wear the respirator and how to perform a seal check. Employers must inform employees as part of such training that respirators such as N95 masks protect them from airborne diseases like COVID-19, whereas face coverings primarily protect other people who may be around them.

Employee Notification of COVID-19 Exposure

The revised ETS incorporate the strict notice requirements of AB 685, including that the employers notify all employees of a potential workplace exposure *within one day* of learning about the COVID-19 case. The content for the notice has also been adjusted to align with AB 685.

In addition to written notice, the revised ETS now require *verbal* notice to exposed employees if the employer has reason to know the employee did not receive the written notice. Thus, for example, if the employer is aware that employees cannot, or do not, access the employer’s email system through which the notice was sent, or they do not reply to a request to acknowledge receipt of an emailed or texted notice, arguably the employer must then follow-up with verbal notification. The revised ETS also specify that the required notice be in a language understandable by the employee, adding a translation obligation in applicable circumstances.

Excluding COVID-19 Exposed & Positive Employees From the Workplace

As described above, fully vaccinated employees need not be excluded from the workplace if they are exposed via close contact to a COVID-19 positive person. In addition, employees who have already had COVID-19 *within 90 days* of an exposure via close contact (i.e., during a period when they are naturally immune), would also not need to be excluded from the workplace. The 90-day natural immunity period is measured from the date of COVID-19 symptom onset, or the date of the first positive COVID-19 test for asymptomatic persons. Although recent scientific studies suggest the period of natural immunity is far greater than 90 days, the revised ETS take a conservative approach.

Notably, both categories of employees (vaccinated and naturally immune) must still be excluded from the workplace if they develop symptoms after an exposure. However, in the unique instance of a fully vaccinated person testing positive for COVID-19 but having no symptoms, the revised ETS state they need not be excluded from the workplace if the local health department allows them to remain. It remains to be seen, however, if any local health departments would actually be willing to provide an employer with such an exemption.

As described above, the revised ETS also provide that exposure via a close contact does NOT include a COVID-19 positive employee who was wearing a respirator under a Cal/OSHA-compliant respiratory protection program.

Consistent with current guidance from the California Department of Public Health, under the revised ETS, the workplace exclusion period for *asymptomatic employees* with an exposure via close contact is 10 days from the last known close contact. A shorter period of 7 days is permitted for asymptomatic health care, emergency response and social services workers with a negative PCR test when there is a critical staffing shortage.

And, employees exposed via close contact who *develop symptoms* must be excluded from the workplace until EITHER: (1) 10 days have passed since the *symptoms first appeared*; (2) they are fever-free for 24 hours without medication; and (3) their symptoms have improved OR: (a) they have a negative PCR test after the onset of symptoms; (b) they are fever-free for 24 hours without medication; and (c) 10 days have passed since the last known *close contact*.

Individual & "Outbreak" Testing

The revised ETS eliminate the requirement to provide testing to fully vaccinated employees even when they are exposed to COVID-19 in the workplace. However, the revised ETS *substantially expand the testing requirement for unvaccinated employees*. Under the new rule, employers will be obligated to make no-cost testing available to unvaccinated employees during paid time whenever they have COVID-19 symptoms, regardless of whether they were ever exposed at work. Notably, there is no exception to the new testing rule for employees who work remotely. Hopefully this is an oversight

that will be addressed in Cal/OSHA's forthcoming FAQs. The new testing obligation will go into effect as soon as the revised ETS are implemented, which will most likely be June 15.

In a welcome change, the revised ETS also replace so called "outbreak" testing requirements based on an "exposed workplace," with an "exposed group" concept. Under this revision, the onerous outbreak testing rules would only apply when three or more COVID-19 cases emerge within 14 days at a specific work location, working area, or common area at work where a positive COVID-19 person was present while contagious, except for short periods where they were "momentarily pass[ing] through" without congregating. Common areas include bathrooms, hallways, eating and waiting areas. If the COVID-19 positive person was present at a work location, working area, or common area for less than 15 minutes and all persons present were wearing face coverings, such persons would not be part of the exposed group subject to outbreak testing. Similarly, if the COVID-19 positive person was part of a distinct group like a work crew or shift that did not overlap with other such groups, only those employees who worked in the COVID-19 positive employee's group are considered the "exposed group." Finally, the ETS make clear than an exposed group can include the employees of more than one employer.

Consistent with CDC guidance, the revised ETS provide that COVID-19 positive persons are contagious during their "high-risk period," which for symptomatic employees is two days before symptoms began through 10 days after symptoms began, so long as 24-hours have passed with no fever (without the use of fever-reducing medicine) and symptoms have improved. For asymptomatic employees, the high-risk period is from two days before, through 10 days after, the specimen for their first positive COVID-19 test was collected.

In another welcome change, the onerous outbreak testing obligations would no longer apply solely on the basis of a local public health department identifying the employer's "workplace" as the location of an outbreak. The more specific, above-described conditions related to an "exposed workgroup" would also need to be present.

Cleaning Protocols

Consistent with more current scientific knowledge, the revised ETS have modified the workplace disinfecting rules to take into account the very low risk of transmission through touched surfaces. The new rules no longer require "disinfecting" of work surfaces or shared equipment except where they were used by a COVID-19 positive person during their infectious period, the area or equipment is indoors, *and* such area or equipment will be used by another employee within 24 hours.

Further, the revised ETS will no longer prohibit sharing frequently used items such as phones, headsets, desks, keyboards, writing materials, instruments or tools. These items also no longer need to be disinfected between use by different people (i.e., no more "new" and "used" pen holders). And, employers will no longer need to minimize employees sharing vehicles.

Personal Protective Equipment

In another significant change, the revised ETS add a new obligation to provide unvaccinated employees with extra protective equipment. Beginning July 31, 2021, employers would be required to provide respirators for voluntary use, and in compliance with the Cal/OSHA respiratory compliance program, to all *employees working indoors and at outdoor mega events who are not fully vaccinated*. Similarly, within 15 days of the revised ETS' effective date (which is likely June 15), employers would be required to provide *and encourage* unvaccinated employees to use respirators when they will be in a vehicle with another unvaccinated person for 15 minutes or more.

These new obligations mean that, regardless of whether employees choose to wear a respirator, employers must be prepared to offer them free of charge and comply with the requirements for a respirator program for voluntary respirator use, including but not limited to, providing [specific information](#) to employees on respirator use, having written procedures regarding the cleaning, storage and maintenance of respirators, and designating a qualified program administrator. See [here](#) for a summary of Cal/OSHA's requirements for a compliant respirator program and links to related resources.

Paid Leave

Potentially the most controversial requirement of the original ETS is the pay and benefit continuation provision, which provides that employees who are otherwise able and available to work but excluded from the workplace because they had or were exposed to COVID-19, must continue to be paid and retain their seniority and benefits.

The revised ETS do not eliminate this obligation. In fact, the revised ETS clarify that employees need not be "otherwise able and available to work" to be eligible for pay continuation. In other words, employees who are unable to work because of illness or other reasons even if they had not been excluded from work under the ETS rules, remain entitled to pay continuation while the exclusion is in effect. On the other hand, the revised ETS now clearly provide that if the employee receives disability payments or workers' compensation temporary disability while excluded from work under ETS, they are *not* also entitled to pay continuation from the employer. Notably, the revised ETS do *not* require such disability or workers' compensation benefits to equal 100% of the employee's regular wages, thus employers are not obligated to supplement such benefits to keep the employee whole.

Finally, the revised ETS do not substantively change the provision that employers need not offer pay continuation if they can show the COVID-19 exposure was not work related. The ETS continue to allow an employer to satisfy the pay continuation obligation through paid sick leave available to the employee, but only when permitted by law. As most employers are aware, California law prohibits employers from requiring employees to use their state-mandated paid sick leave while absent from work. Therefore, under the ETS, employees who choose not to use their state-mandated sick time while excluded from the workplace for COVID-19 reasons would still be entitled to pay continuation.