

Cal/OSHA's Newly Approved Emergency Temporary Standards RE: COVID-19 Call for Immediate Action by Employers

On November 19, 2020, the California Department of Industrial Relations' ("DIR") Occupational Safety and Health Standards Board (the "Board") unanimously adopted [emergency temporary standards](#) to protect workers from hazards related to COVID-19. The emergency standards were approved on November 30, 2020 by the Office of Administrative Law and put into effect immediately.

The Board has acknowledged that these standards are flawed, and for that reason, it has requested that Cal/OSHA convene an Advisory Committee meeting in December to work on making improvements and clarifications. Additionally, Cal/OSHA has posted a [FAQs](#) page and a [one page fact sheet](#) to aid in interpreting the new standards and the layers of uncertainty that they have added to an already complex regulatory landscape.

The emergency standards, which will be effective for at least 180 days, are applicable to all California employees and places of employment except for: (1) workplaces with a single person who does not have contact with others; (2) employees working from home; (3) and employees already covered by Cal/OSHA's [Aerosol Transmissible Diseases standard](#) (health care facilities, laboratories, etc.).

While a number of the emergency standards track and overlap with existing regulations, there are several new obligations for employers, three of which are particularly burdensome:

- establish, implement, and *maintain a comprehensive written COVID-19 "Prevention Program"* that addresses numerous elements of COVID-19 health and safety obligations in the workplace ([Cal/OSHA has made a Model COVID-19 Prevention Plan available](#));
- *offer testing at no cost*, during working hours, to employees who may have been exposed in the workplace (with substantial additional testing requirement during "outbreaks"); and
- *pay employees who are excluded from the workplace* due to a work-related COVID-19 case or exposure at their regular wages while out of work.

Requirement for Written COVID-19 Prevention Program

Cal/OSHA's new emergency standards require employers to prepare a *written description* of how they are complying with all of the agency's required precautions, actions and remediation to keep employees who work on-site safe from COVID-19.

The following definitions apply to these health and safety standards and provide important context for implementation:

- A "COVID-19 case" means a person who: (1) has a positive COVID-19 test; (2) is subject to a COVID-19-related order to isolate issued by a local or state health official; or (3) has died due to COVID-19.
- A "COVID-19 exposure" means being within six feet of a COVID-19 case for a cumulative total of 15 minutes or greater in any 24-hour period within or overlapping with the "high-risk exposure period." This is consistent with the Centers for Disease Control and Prevention's (CDC) definition of "close contact."
- A "high risk exposure period" is defined as follows: (1) for persons who are symptomatic, from 2 days before they first develop symptoms until 10 days after symptoms first appeared, and 24 hours have passed with no fever, without the use of fever-reducing medications, and symptoms have improved; and (2) for persons who test positive but never develop COVID-19 symptoms, from 2 days before, until 10 days after, the specimen for their first positive test for COVID-19 was collected.

An employer's written COVID-19 Prevention Program must contain the following minimum elements:

1. A plan for communicating to employees about COVID-19 prevention procedures, testing, symptoms and illnesses, including a system for employees to report exposures without fear of retaliation.

For example, this may include communication of policies for accommodating employees who are at increased risk for COVID-19 due to existing medical or other conditions; informing employees of reasons for testing and possible consequences of a positive test; and available avenues to communicate about exposure and/or positive cases in the workplace.

2. A plan for identification and evaluation of hazards, including screening employees for symptoms and identifying workplace conditions and practices that could result in potential exposure.

For example, this could include taking temperatures and doing daily symptom screening; working to minimize in-person interaction; identifying high-use areas

and high-touch objects for regular sanitizing; and evaluating how to maximize ventilation and outside air flow in enclosed spaces.

3. A plan for investigating and responding to COVID-19 cases in the workplace – responding immediately to potential exposures by following steps to determine who may have been exposed, providing notice within one business day about potential exposures, and offering testing at no cost to workers who may have been exposed.

Some of these notices and testing obligations go further than current guidance from the Centers for Disease Control and Prevention and the California Department of Public Health (CDPH) (see CDPH's [COVID-19 Employer Playbook](#)), and the standards require that this entire process be spelled out in the employer's written Prevention Program. Specifically, when there has been a COVID-19 case at the place of employment, an employer must take the following actions:

- Determine the day and time the COVID-19 case was last present in the workplace and, to the extent possible, the date of the positive COVID-19 test(s) and/or diagnosis, as well as the date the COVID-19 case first had one or more COVID-19 symptoms, if any were experienced.
- Determine who may have had a COVID-19 exposure. This requires an evaluation of the activities of the COVID-19 case and all locations at the workplace which may have been visited by the COVID-19 case during the high-risk exposure period.
- Give notice of the potential COVID-19 exposure, ***within one business day***, in a way that does not reveal any personal identifying information of the COVID-19 case, to all employees who may have had COVID-19 exposure and their authorized representatives AND all independent contractors and other employers present at the workplace during the high-risk exposure period (as defined above). Note: this requirement is similar to the employee notice requirements in A.B. 685, which has been signed by Governor Newsom but does not go into effect until January 1, 2021.
- *Offer COVID-19 testing at no cost to employees during their working hours* to all employees who had potential COVID-19 exposure in the workplace. Although not entirely clear, this appears to require that employees be paid for their time while testing, which may have significant cost implications for employers who cannot afford to offer on-site testing. Cal/OSHA's authority to mandate paid testing time is in question and may be the subject of immediate legal challenge.

- Investigate whether any workplace conditions could have contributed to the risk of COVID-19 exposure and what could be done to reduce exposure to COVID-19 hazards.

This information generally must be kept confidential, however, unredacted information and medical records related to a COVID-19 positive case must be provided to the local health department within 48 hours in the event of an “outbreak” (discussed further below) and, *upon request*, to the CDPH, Division of Occupational Safety and Health Administration, the National Institute for Occupational Safety and Health.

4. Develop a process for correcting COVID-19 hazards, including correcting unsafe conditions and work practices as well as providing effective training and instruction.

This will include, for example, documenting a procedure by which responsible persons within the entity are informed of hazards and addressed, as well as how these changes are then communicated to relevant employees.

5. Provide COVID-19 related information, training and instructions.

This includes training and instructing employees on policies and procedures to protect employees from COVID-19 hazards, providing basic information about COVID-19 and how it is spread, methods of physical distancing, importance of the use of face coverings, regular handwashing and not coming into work if experiencing symptoms.

6. Physical Distancing

This standard requires that all employees be separated from other persons by at least six feet, except where an employer can demonstrate that six feet of separation is not possible or where there is momentary exposure while persons are in movement. When it is not possible to maintain a distance of at least six feet, individuals are to be as far apart as possible, and, for fixed locations where proper distancing is not possible, cleanable solid partitions must be installed. Other methods for establishing physical distancing include: telework or other remote work arrangements; reducing the number of persons in an area at one time; visual cues such as signs and floor markings to indicate direction and path of travel; and staggered arrival, departure, work, and break times.

7. Face Coverings Must Be Provided by Employers

In a departure from existing guidelines, the new standards add an affirmative obligation on the part of employers to provide face coverings and to ensure they are worn by employees over the nose and mouth, at all times when indoors (unless a specified exception exists, as described below), when outdoors and less than six feet away from another person, and where required by orders from the CDPH or

local health department. The standards are unclear as to whether employees are still allowed to use their own face coverings. Thus, until there is further clarification provided, employers are advised to make face coverings available to all employees, even if employees continue to use their own.

The standards also expressly state that face shields are not a replacement for face coverings, although they do allow for them to be worn together for additional protection.

Exceptions to the face coverings requirement include: (a) when an employee is alone in a room; (b) while eating and drinking at the workplace, provided employees are at least six feet apart and there is an outside air supply to the area; if indoors, separation has been maximized to the extent possible; (c) employees wearing respiratory protection in accordance with applicable safety orders; (d) employees who cannot wear face coverings due to a medical or mental health condition or disability, or who are hearing-impaired or communicating with a hearing-impaired person; and (e) specific tasks that cannot feasibly be performed with a face covering (limited to the time period in which such tasks are actually being performed).

Any employee not wearing a face covering, a face shield with a drape or other effective alternative, or respiratory protection, for any reason, must be at least six feet apart from all other persons unless the unmasked employee is tested at least twice weekly for COVID-19. Employers may not use COVID-19 testing as an alternative to face coverings when face coverings are otherwise required.

8. Personal protective equipment and other methods to prevent and control spread and transmission.

This may include installing partitions in locations where it is not possible to maintain physical distancing; maximizing quantity of outside air; implementing regular cleaning and disinfecting procedures; and evaluating the need for personal protective equipment (such as gloves, goggles, and face shields), and providing such personal protective equipment as needed.

9. Reporting, recordkeeping and access.

Employers are required to report information about COVID-19 cases in the workplace to the local health department in accordance with local law and/or in the event of an outbreak. Any COVID-19-related serious illnesses (generally, illness requiring inpatient hospitalization) or death of an employee occurring in a place of employment or in connection with any employment must be reported to Cal/OSHA *within eight hours* of when the employer knew or should have known of the illness. As of the date this e-update was published, Cal/OSHA had not established a dedicated COVID-19 reporting channel, thus employers should use Cal/OSHA's

general [telephone or email reporting options](#) for serious workplace injuries or illnesses.

Employers are also required to maintain records of the steps taken to implement the written COVID-19 Prevention Program and make it available at the workplace to employees, authorized employee representatives, and to Cal/OSHA representatives, upon request. Employers must keep records and track all COVID-19 cases with the employee's name, contact information, occupation, location where the employee worked, the date of the last day at the workplace, and the date of a positive COVID-19 test.

10. Removal of COVID-19 exposed workers and COVID-19 positive workers from the workplace ***with measures to maintain pay and benefits.***

Similar to current CDC guidelines, the Cal/OSHA standards call for employers to exclude employees who are "COVID-19 cases" from the workplace until the return to work requirements (described below) are met and to exclude employees with "COVID-exposure" from the workplace for 14 days after the last known exposure to a COVID-19 case.

The standards go one (large) step further and mandate that, for those employees excluded from the workplace for these COVID-19 related reasons, ***"employers shall continue and maintain an employee's earnings, seniority, and all other employee rights and benefits, including the employee's right to their former job status."***

The Board's authority to mandate paid leave benefits has been questioned but remains untested. This aspect of the standards will likely be the subject of immediate legal challenge.

Notably, there is no cap on the amount of earnings that must be continued if employees are excluded for work, nor any limit on the "leave" in the requirement, meaning an employee could receive it multiple times. Additionally, there is no guidance regarding proper calculation of wages (i.e., for employees who work varying schedules or overtime).

Also problematic is the fact that the standards state that employers are "allowed to use employer-provided employee sick leave benefits for this purpose and consider benefit payments from public sources in determining how to maintain earnings, rights and benefits," but do not explain how this new paid leave will interact with existing paid sick leave provided under the Families First Coronavirus Response Act or the Supplemental Paid Sick Leave law (A.B. 1867), including whether benefits under those leaves will be considered "benefit payments from public sources" as referenced in the standards.

Additionally, under existing California law, employers cannot force employees to use statutorily-required paid sick time, so this is another area where the standards appear to conflict with current law.

Finally, the standards provide that the compensation and benefits described above *do not apply* to any period of time that an employee is unable to work for reasons unrelated to preventing COVID-19 transmission at the worksite, nor where the employer can demonstrate that the COVID-19 exposure is not work-related (e.g., the employee has informed their employer that they were exposed to COVID-19 by a friend or family member outside of the workplace). These distinctions and nuances will no doubt create added complexity and burden for employers attempting to comply with the standards' paid leave obligation.

11. Criteria for employees to return to work after recovering from COVID-19.

Under the standards, the employer's written prevention plan must set forth specific criteria regarding how and when employees are allowed to return to the workplace. In particular, the plan must state that employees who are COVID-19 cases *with symptoms* may not return to work until:

- At least 24 hours have passed since a fever of 100.4+ has resolved without the use of fever-reducing medications;
- COVID-19 symptoms have improved; **and**
- At least 10 days have passed since symptoms first appeared.

Employees who tested positive but *do not have symptoms* may not return to work until a minimum of 10 days have passed since the date of specimen collection of their first positive COVID-19 test.

Additionally, if a public health authority issues the order to isolate or quarantine, the employee may not return to work until either period of isolation or quarantine is lifted. If no period is specified, then the period shall be 10 days from the time the order to isolate was effective, or 14 days from the time the order to quarantine was effective.

Finally, the standards provide that the return to work criteria set forth above are what govern when an employee will be allowed to reenter the workplace and having a negative COVID-19 test is not one of the requirements. This leaves open the question of whether an employer may nonetheless elect to make a negative COVID-19 test result a return to work requirement.

New Requirements for COVID-19 “Outbreaks”

Cal/OSHA's emergency standards also contain requirements for testing and notifying public health departments of “Multiple COVID-19 Infections and COVID-19 Outbreaks” (3 or more cases in a workplace in a 14-day period) and “Major COVID-19 Outbreaks” (20

or more cases within a 30-day period). These standards appear to apply to all workplaces regardless of size.

In the event of *Multiple COVID-19 Infections and COVID-19 Outbreaks*, employers must inform all employees of how they can obtain testing (whether through the employer, local health department, a health plan, or at a community testing center) and offer COVID-19 testing to all employees at the exposed workplace during the period of the outbreak or the relevant 14-day period. This testing must be offered free of charge to the employee, during employee working hours, and immediately upon being covered by this outbreak definition. This same testing must then be offered again one week later for the same employees. Thereafter, employers must provide *continuous* COVID-19 testing of employees who remain at the workplace at least once per week, or provide testing more frequently if recommended by the local health department.

Similarly, if a *Major COVID-19 Outbreak* occurs, employers must inform all employees present at the exposed workplace during the relevant 30-day period(s) and who remain at the workplace of how they can obtain testing and offer it at no charge, during employee working hours, and twice a week or more frequently if recommended by the local health department. These outbreak requirements will continue to apply until there are no new COVID-19 cases detected in a workplace for a 14-day period.

In addition to the testing requirements, employers with either type of outbreak must exclude all COVID-19 positive employees and employees with a COVID-19 exposure from the workplace, conduct an investigation of the COVID-19 illness, and provide notice to the local health department within 48-hours of learning of the outbreak.

New Requirements for Employer-Provided Housing and Transportation

Cal/OSHA's standards also include specific requirements for infection prevention in employer-provided housing and transportation to and from work. If housing is provided, housing assignments must be made based on individuals who work together on the same crew or shift or who are family members. Employers must also ensure there is sufficient space in the units to permit social distancing while the employees are in the various units and that the units are cleaned at least once a day. Additionally, the employer must have procedures for screening, testing and isolation of positive cases and exposed persons. If transportation is provided, employees must be *screened before boarding*, sit at least three feet apart, and wear face coverings during transportation.

Consequences of Non-Compliance

Employers that do not comply with the standards may face fines in accordance with Cal/OSHA's [penalty structure](#), which assigns varying levels of penalties for different classes of citations including, "Regulatory, General, Serious, Repeat, and Willful." The maximum amount of penalties vary greatly: for Regulatory or General violations it is \$13,277; for Serious violations it is \$25,000; and for Repeat or Willful violations it is \$132,765.

Cal/OSHA has a robust online employee complaint portal and has also stepped up their auditing functions, and other enforcement mechanisms, during the pandemic.

What This Means

With the new standards going into effect immediately, California employers need to act now to assess their current pandemic health and safety protocols and revise and supplement them appropriately for compliance with the new standards, including implementing a written COVID-19 Prevention Program.

Employers should also watch for updates as Cal/OSHA may modify the standards in the coming month. Additionally, any legal challenges to the emergency standards could alter employer obligations.

For questions regarding the new Cal/OSHA standards or assistance with compliance, please contact your PPSC attorney, or any of the authors listed below.

Authors

Denise Brucker
Camille Gustafson
Sierra Spitzer