
Cal/OSHA Revises COVID-19 Emergency Temporary Standards for a Third and Final Time

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While the COVID-19 pandemic is hopefully slowing down, the continuing obligation for California employers to enforce COVID-19 prevention protocols in the workplace remains. The California Division of Occupational Safety and Health's ("Cal/OSHA") third revision to the COVID-19 Emergency Temporary Standards regulations ("Updated COVID-19 ETS") was approved by the Cal/OSHA Board on April 21, 2022, and is expected to go into effect upon approval of the Office of Administrative Law – on or about May 5, 2022. The Updated COVID-19 ETS replaces the previous version that became effective on January 14, 2022, and is expected to be the last revision to the COVID-19 ETS before these temporary standards expire on December 31, 2022.

The Updated COVID-19 ETS does not have as many substantive changes as compared to the previous revisions. A significant portion of the changes to the COVID-19 ETS removes or relaxes some of the previous COVID-19 standards, while also incorporating existing standards based on the impact of California Department of Public Health ("CDPH") orders issued since the last revision. Below is a summary of the revisions made in the Updated COVID-19 ETS:

New and Updated Definitions in COVID-19 ETS

Clarification on Use of a COVID-19 Self-Test

The last revision to the COVID-19 ETS noted that an employee who uses a COVID-19 self-test cannot both self-administer and self-read the test unless observed by an employer or authorized telehealth proctor. This created a lot of confusion regarding the ability for an employee to use a COVID-19 self-test to meet any testing obligations, such as to verify a negative test for return-to-work protocols. The Updated COVID-19 ETS now allows an employee to use a COVID-19 self-test that is both self-administered and self-read by the employee so long as the employee can provide another means of independent verification of the results, such as providing a time-stamped photograph of the results.

Removal of "Fully Vaccinated" References

The Updated COVID-19 ETS removes the term "fully vaccinated" and no longer distinguishes between employees based on their vaccination status in the application of COVID-19 prevention protocols in the workplace.

“Face Covering”

The updated definition of “face covering” still requires that any fabric-based face covering include at least two layers, but removes the “light test” requirement that such fabrics do not allow light to pass through when held to a light source. Any obligation to wear a face covering in the workplace under the Updated COVID-19 ETS is now by default based on any required CDPH orders. Where face coverings are not required by the CDPH, any such requirements issued by local health departments would still be enforced under the Updated COVID-19 ETS.

“Infectious Period” Replaces “High Risk Exposure” References

The Updated COVID-19 ETS replaces the “high risk exposure” period definition with a new term – “infectious period.” However, the underlying definition of the term based on the timeline for an exposure to a positive COVID-19 case remains unchanged.

“Returned Case”

To address employees who were previously confirmed COVID-19 cases in the past 90 days and who have not exhibited any COVID-19 symptoms upon returning to work during that time, the Updated COVID-19 ETS now includes the term “returned case.” As applied in the Updated COVID-19 ETS, an employer does not need to provide a COVID-19 test to a “returned case” employee who is a close contact.

Modifications to Workplace Exclusion and Return to Work Protocols for Close Contacts and COVID-19 Cases

Since the last revision to the COVID-19 ETS became effective on January 14, 2022, there have been a number of changes in the CDPH guidelines regarding when employees who are a “close contact” or a confirmed COVID-19 case need to quarantine and be excluded from the workplace. While Cal/OSHA subsequently adopted those revised CDPH guidelines pursuant to Governor Newsom’s December 14, 2020 Executive Order N-84-20, this still created a lot of confusion over what standards employers should follow. Following this, the Updated COVID-19 ETS generally incorporates the most recent CDPH guidelines issued earlier this month on April 6, 2022:

<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-on-Isolation-and-Quarantine-for-COVID-19-Contact-Tracing.aspx>

“Close Contact” Employees Generally Are Not Required to Quarantine

The Updated COVID-19 ETS maintains the existing definition of a “close contact”, which is defined as being within six feet of a COVID-19 case for a cumulative total of 15 minutes or more in any 24-hour period during the infectious period. However, the Updated COVID-19 ETS now has removed the previous “close contact” workplace exclusion guidance and replaced it with a direction for employers to follow the most recent CDPH guidance related to workplace exclusions. Under the April 6, 2022 CDPH guidance referenced above, most “close contact” employees – regardless of vaccination status – are not required to quarantine unless they work in a “high risk setting”, such as a correctional facility or adult/senior care facility. Under the

current CDPH guidance, a “close contact” employee does not need to be excluded from the workplace and should follow the following guidelines if they are asymptomatic:

- Obtain a COVID-19 test within 3-5 days of last exposure; and
- Wear a face covering around others for a total of 10 days from the date of last exposure.

If the “close contact” employee develops symptoms, they should then be excluded from the workplace and obtain a COVID-19 test to confirm their status. If the test results are positive, the employee should then be treated as a COVID-19 case for purposes of workplace exclusion.

Workplace Exclusion Rules for COVID-19 Cases

Unlike the provisions regarding “close contact” employees that directly reference current CDPH guidelines, the Updated COVID-19 ETS still includes express provisions regarding the ability for a confirmed COVID-19 case employee to return to work that generally match the existing CDPH guidelines. This includes the following return to work requirements:

- A COVID-19 case who is asymptomatic or has improved symptoms cannot return to work until at least 5 days have passed from the date the symptoms began or the date of the first positive test if asymptomatic;
- There must have been at least 24 hours since the COVID-19 case has had a fever of 100.4 degrees Fahrenheit or higher without the use of fever reducing medications; and
- The COVID-19 case has a negative COVID-19 test taken on the fifth day or later after symptoms began or the first positive test if asymptomatic. If the COVID-19 case is unable to obtain or chooses not to obtain a COVID-19 test within these timeframes, the employee must remain out of work for 10 days from the date symptoms began or the first positive test if asymptomatic.

In the event that a COVID-19 case’s symptoms are not improving, the employee may not return to work until at least 24 hours have passed since the employee has had a fever of 100.4 degrees Fahrenheit or higher without the use of fever reducing medications; and the symptoms are resolving or 10 days have passed from when the symptoms began.

Any COVID-19 case who is allowed to return to work is required to wear a face covering in the workplace until 10 days have passed since the symptoms began or the date of the first positive test if asymptomatic.

While the above-referenced provisions regarding a COVID-19 case in the Updated COVID-19 ETS have generally been revised to match the existing CDPH guidelines, it is possible these provisions may be subject to change based on any new CDPH workplace exclusion guidelines issued in the future.

Workplace Exclusion Pay Rules Remain Unchanged

Although the applicable standards regarding the workplace exclusion of “close contact” and COVID-19 case employees have been modified, the Updated COVID-19 ETS does not modify the workplace exclusion pay rules that have been a part of the COVID-19 ETS since it was initially adopted in November 2020.

Other Revisions in the Updated COVID-19 ETS

Elimination of Cleaning/Disinfection Procedures

The Updated COVID-19 ETS now removes an employer’s obligation to implement cleaning and disinfection procedures in the workplace related to frequently touched surfaces or areas where a confirmed COVID-19 case was present.

Updated Guidelines for COVID-19 “Outbreak” and “Major Outbreak”

For employees in an exposed group where there is an “outbreak” (3 or more COVID-19 cases in a workplace within a 14-day period) or “major outbreak” (20 or more COVID-19 cases in a workplace within a 30-day period), the Updated COVID-19 ETS have made some revisions to an employer’s response and the application of workplace exclusion rules as follows:

- Any employees considered a “close contact” during an “outbreak” shall have a negative COVID-19 test within 3-5 days of the last exposure or the employee would have to be excluded from the workplace in the same manner as a COVID-19 case.
- For a “major outbreak”, any employees in the exposed group shall follow the COVID-19 testing requirements or be excluded from the workplace in the same manner as a COVID-19 case.
- An employer is no longer required to consider or use solid partitions where social distancing of 6 feet or more is not feasible.

Next Steps for Employers

After Cal/OSHA’s Updated COVID-19 ETS requirements go into effect in early May 2022, California employers will be required to review and update their existing COVID-19 Prevention Program (CPP) and other workplace protocols, along with implementation of such updates in the workplace. In addition, California employers should also review the updated April 6, 2022 CDPH isolation/quarantine recommendations and apply those going forward for any COVID-19 cases or close contacts in the workplace.

This Guidance is intended to provide employers with a summary of important modifications in the Updated COVID-19 ETS, but it is not a substitute for reviewing the updated regulations themselves. The Updated COVID-19 ETS, including track revisions showing changes from the current regulations are available at:

<https://www.dir.ca.gov/oshsb/documents/Apr212022-COVID-19-Prevention-Emergency-txtcourtesy-3rd-Readoption.pdf>

If you have questions regarding this Guidance or the Updated Regulations, please contact an attorney in our Employment Law group by phone or via email at the contact information below.

Boutin Jones attorneys are available to assist employers on compliance with, and to answer any other questions regarding these new laws or other related COVID-19 employment laws. Please contact an attorney in our Employment Law Group by phone at (916) 321-4444 or via email:

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