
**UPDATE: Cal/OSHA Adopts Revised COVID-19
Emergency Temporary Standards Regulations that Incorporate California’s
“Reopening” for Employees with Less Stringent COVID-19 Restrictions**

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NOTE: *This is an Update to our previous June 8, 2021 Legal Alert regarding an earlier version of the revised COVID-19 Emergency Temporary Standards regulations that the California Occupational Safety & Health Standards Board (“Cal/OSHA Board”) initially approved on June 3, 2021, and then subsequently decided to withdraw on June 9, 2021. This Update covers the most recent revisions to the COVID-19 Emergency Temporary Standards that were ultimately approved by the Cal/OSHA Board on June 17, 2021, and then became effective immediately through Executive Order N-09-21 issued by Governor Gavin Newsom.*

On June 15, 2021, California “reopened” from the COVID-19 pandemic by lifting most COVID-19 restrictions, including social distancing requirements, occupancy limitations, and the obligation for fully vaccinated employees to wear face coverings indoors in most settings in accordance with the federal Centers for Disease Control (“CDC”) and California Department of Public Health (“CDPH”) guidelines. However, this “reopening” on June 15, 2021 did not yet apply to California workers in the workplace as the California Division of Occupational Safety and Health (“Cal/OSHA”) continued to require California employers to comply with its November 2020 Emergency Temporary Standards regulations that kept most of those COVID-19 restrictions in place.

However, this divergence has now ended. Today, June 17, 2021, the Cal/OSHA Board approved revised Emergency Temporary Standards (“Updated Regulations”) which modify the initial set of regulations it originally issued in November 2020, and that are now generally tailored to coincide with the CDC and CDPH guidelines that have been reflected in California’s “reopening.”

In another interesting twist, while these Updated Regulations would normally have become effective on June 28, 2021 following approval of the Office of Administrative Law, Governor Gavin Newsom instead promptly issued Executive Order N-09-21 following today’s Cal/OSHA Board decision to implement the Updated Regulations effective immediately:

<https://www.gov.ca.gov/wp-content/uploads/2021/06/6.17.21-ETS-EO-N-09-21.pdf>

Once formally approved, the Updated Regulations will stay in effect for at least 180 days, but are subject to amendment, renewal, or permanent adoption by the Cal/OSHA Board during this time period.

Similar to the November 2020 regulations, the Updated Regulations still do not apply to worksites with only one employee who does not have physical contact with any other person; employees covered by the Aerosol Transmissible Diseases Standards; and employees who work from home. In addition, the Updated Regulations also clarify that they do not apply to employees who are teleworking from a location of the employee's choice, which is not under the control of the employer.

Below is an overview of the changes in the Updated Regulations:

I. Updates to COVID-19 Prevention Program and Impact on Workplace

The most substantive changes in the Updated Regulations require employers to revise their written COVID-19 Prevention Program ("CPP") initially implemented with the November 2020 regulations in order to update and implement the following COVID-19 workplace safety obligations.

A. Elimination of Physical Distancing and Workstation Partition Requirements

The Updated Regulations now eliminate previous requirements to maintain physical distancing of six feet between employees or to use workstation partitions where such physical distancing is not feasible. The only obligation for an employer to implement physical distancing requirements and workplace partitions applies to an exposed group of employees as part of a "major outbreak" where 20 or more employees are considered a COVID-19 case in a 30-day period in the workplace. Otherwise, physical distancing and workplace partitions are only recommended, but not required, for an exposed group of employees in the less serious situation of an "outbreak" where three or more employees are considered a COVID-19 case in a 14-day period in the workplace.

B. Face Coverings No Longer Required for Fully Vaccinated Employees

The Updated Regulations no longer require "fully vaccinated" employees to wear face coverings in the workplace while indoors or in vehicles. In addition, all employees are no longer required to wear face coverings in the workplace while outdoors. However, the Updated Regulations do note that face coverings can be required for employees – regardless of vaccination status – where required by CDPH orders, or as applied to an exposed group of employees subject to an "outbreak" or "major outbreak."

However, the Updated Regulations also place the burden on employers to document an employee's "fully vaccinated" status to no longer require the use of a face covering. The term "fully vaccinated" is defined under the Updated Regulations as follows (emphasis added):

*"Fully vaccinated" **means the employer has documented** that the person received, at least 14 days prior, either the second dose in a two-dose COVID-19 vaccine series or a single-dose COVID-19 vaccine. Vaccines must be FDA approved; have an emergency use authorization from the FDA; or, for persons fully vaccinated outside the United States, be listed for emergency use by the World Health Organization (WHO). [8 C.C.R. § 3205(b)(9).]*

To clarify this definition of “fully vaccinated” employees, Cal/OSHA recently updated their Frequently Asked Questions (FAQ’s) related to the Updated Regulations to provide additional guidance for employers:

<https://www.dir.ca.gov/dosh/coronavirus/Revisions-FAQ.html>

In these updated FAQ’s, Cal/OSHA interprets this “documented” obligation under the Updated Regulations to mean that an employer can accept one of the following to document an employee’s fully vaccinated status:

- A copy of the employee’s vaccine card;
- Other written proof of vaccination from the employee; or
- An employee’s self-attestation of their vaccination status.

The Cal/OSHA FAQ’s then notes that an employee has the right to decline to state if they are vaccinated or not, but that an employer must consider the employee as unvaccinated in such circumstances.

For employees who are not “fully vaccinated”, the Updated Regulations still require that face coverings be used in the workplace while indoors or in vehicles, with the following limited exceptions:

- Employee is alone in a room or vehicle;
- While eating or drinking in the workplace, provided employees are at least six feet apart and there is an outside air supply provided if indoors to the extent feasible;
- Where employees are wearing respirators (such as N95 masks)
- Employee who cannot wear face coverings due to a medical condition/disability (but then have to wear an effective non-restrictive alternative such as a face shield)
- Specific tasks that cannot be feasibly performed with a face covering (limited only to time actually performing such tasks)

The Updated Regulations also elaborate on the definition of “face covering” to include: a surgical mask, medical procedure mask, respirator, or tightly woven fabric or non-woven material of at least two layers. However, the Updated Regulations note that a scarf, ski mask, balaclava, bandana, turtleneck, collar, or single layer of fabric are not considered a sufficient “face covering.”

Finally, an employer is obligated to provide a qualified face covering to employees who are not fully vaccinated, and to any employee upon request – regardless of vaccination status.

C. Providing Respirators to Unvaccinated Employees for Voluntary Use

The Updated Regulations now also reference respirators approved by the National Institute for Occupational Safety and Health (“NIOSH”), such as an N95 filtering facepiece respirator. Upon request of an unvaccinated employee who works indoors or in vehicles with more than one person, an employer is required to provide such a respirator for voluntary use. In providing a respirator, an employer is required to follow existing Cal/OSHA regulations regarding the voluntary use of such respirators (8 C.C.R. section 5144(c)(2)), including the following:

- Provide a respirator at the employee’s request or permit the employee to use their own respirator if the employer determines that respirator use will not create a hazard, and provide information on how to use the respirator;
- Establish and implement a written respiratory protection program to ensure that any employee using a respirator voluntarily is medically able to use that respirator, and that the respirator is cleaned, stored, and maintained so that its use does not present a health hazard to the user.

Under the Updated Regulations, an employer must also encourage the use of respirators and ensure that employees are provided with a respirator of the correct size.

D. Updates to “Close Contact” Tracing, Employee Notice, COVID-19 Testing, Workplace Exclusion, and Reporting Requirements

The Updated Regulations still require an employer to take certain actions upon notice that a “COVID-19 case” has been present in the workplace where there has been “close contact” with another employee. Such “close contact” is still defined as being within six feet of a COVID-19 case for a cumulative total of 15 minutes or more during a 24-hour period within the high-risk exposure period. However, the Updated Regulations no longer require an employer to include any employees who would otherwise be considered a “close contact” if they were wearing respirators at that time.

The Updated Regulations also revised the exposure notice requirements for close contacts to align with the notice requirement under Labor Code section 6409.6 (last year’s AB 685, effective January 1, 2021).

While the Updated Regulations still require employers to make COVID-19 testing available at no cost to employees during “paid time” for any employee who had a close contact in the workplace, employees who meet one of the following criteria are now excluded from such testing requirements:

- Previous COVID-19 case who already satisfied the regulation’s return to work criteria;
- Previous COVID 19 case who has remained free of symptoms for 90 days after the initial onset of COVID-19 symptoms;

- Previous COVID-19 case who never developed symptoms and 90 days have passed after the first positive test; or
- “Fully vaccinated” before the close contact and does not have COVID-19 symptoms.

The Updated Regulations also indicate that the above-referenced employees who are now exempt from COVID-19 testing requirements also no longer need to be excluded from the workplace as a “close contact” to a COVID-19 case.

For employees excluded from the workplace because they are a work-related “COVID-19 case” or “close contact”, Cal/OSHA still requires an employer to continue to pay and maintain the employee’s earnings, seniority, and all other employee rights and benefits as if the employee had not been excluded from the workplace. The Updated Regulations no longer require that such excluded employees be “otherwise able and available to work.” However, employers can still require that employees use accrued sick leave benefits. In addition, this obligation does not apply to an employee who receives disability payments or was covered under workers’ compensation.

While the return to work criteria for employees who considered a “COVID-19 case” remain unchanged, the Updated Regulations provide new return to work criteria for “close contact” employees excluded from the workplace:

- Persons who had a close contact but never developed symptoms may return to work when 10 days have passed since the last known close contact.
- Persons who had a close contact and developed any COVID-19 symptom cannot return to work until they have met the return to work criteria for COVID-19 cases with symptoms, or:
 - The person tested negative for COVID-19 using a polymerase chain reaction (PCR) COVID-19 test with specimen taken after the onset of symptoms;
 - At least 10 days have passed since the last known close contact; and
 - The person has been symptom-free for at least 24 hours, without using fever-reducing medications.

The Updated Regulations also provide for earlier return to work criteria during critical staffing shortages for persons who had a close contact and are health care workers, emergency response workers, and certain social service workers who did not develop COVID-19 symptoms.

Finally, the Updated Regulations have eliminated the requirement that an employer immediately report to Cal/OSHA any COVID-19 related serious illness or death of an employee when the death occurs in the workplace or when the illness or death is work related.

E. Additional Updates to Written COVID-19 Prevention Program

The Updated Regulations also require employers to revise their CPP to include the following:

- Describe how employees at increased risk of severe COVID-19 illness can request accommodations (rather than describing the policies and procedures for accommodating such employees).
- Provide information about how to access COVID-19 testing and vaccination, and how vaccination is effective at preventing COVID-19 and protecting against transmission and serious illness or death.
- Evaluate whether use of HEPA filtration units would reduce the risk of COVID-19 transmission and review the California Department of Public Health’s Interim Guidance for Ventilation, Filtration, and Air Quality in Indoor Environments:

<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Interim-Guidance-for-Ventilation-Filtration-and-Air-Quality-in-Indoor-Environments.aspx>.

- Specify how employees can participate in identification and evaluation of COVID-19 hazards.
- Specify COVID-19 related benefits available to employees.
- Training on proper use of face coverings, N95 masks, and respirators.
- Training on proper use of respirators provided for voluntary use, including how to perform a seal check. (See below for more information on the new respirator requirement.)

II. COVID-19 “Outbreaks”, “Major Outbreaks”, and Employee Housing/Transportation

The Updated Regulations also modify an employer’s obligation when there is a COVID-19 “outbreak” in the workplace. First, the regulations now focus on an employer’s obligations towards a more defined “exposed group”, as opposed to “workplace”, in response to an outbreak.

An “exposed group” is defined to include any employees in a work area that was accessed by a COVID-19 case during the high-risk exposure period, except for work areas where persons momentarily pass through while everyone is wearing face coverings without congregating. Furthermore, an “exposed group” does not include employees who were not present at the workplace at the same time as a COVID-19 case, or where the COVID-19 case, while wearing a face covering, visited the work area for less than 15 minutes during the high-risk exposure period.

Following this, an “outbreak” occurs when three or more COVID-19 cases within an “exposed group” visit the workplace during their high-risk exposure period within a 14-day period. While

employers are still required to provide COVID-19 testing to all employees within the exposed group at no cost to the employee and during the employee's paid time, the Updated Regulations now exclude employees who meet one of the following criteria from such testing requirements:

- Not present in the workplace during the applicable 14-day period of the outbreak;
- Previous COVID-19 case who satisfied the regulation's return to work criteria;
- Previous COVID 19-case who has remained free of symptoms for 90 days after the initial onset of COVID-19 symptoms;
- Previous COVID-19 case who never developed symptoms and 90 days have passed after the first positive test; or
- "Fully vaccinated" before the outbreak and does not have COVID-19 symptoms.

Employees in the exposed group must be tested "immediately", and again one week later. After the first two required tests, an employer must make COVID-19 testing available to all employees in the exposed group who remain at the workplace once per week or more frequently if recommended by the local health department, until there are no new COVID-19 cases detected in the workplace for 14 days.

The Updated Regulations also require an employer during an outbreak to reinstate face covering requirements for all employees in the exposed group when indoors or when outdoors and less than six feet away from another person, unless one of the limited face covering exceptions for unvaccinated employees referenced earlier applies. An employer is also required during an outbreak to provide notice to employees in the exposed group who are not fully vaccinated of their right to request a respirator for voluntary use. As referenced earlier, employers during an outbreak shall evaluate whether to implement physical distancing requirements and workplace partitions, but are not required to do so.

As for a "major outbreak" that involves 20 or more employee COVID-19 cases in an exposed group within a 30-day period, the Updated Regulations have shortened an employer's requirements to generally follow the obligations referenced above during an "outbreak", provide for additional COVID-19 testing, and to take additional steps to review existing conditions to ensure workplace safety. In addition, employers in a "major outbreak" are required to provide respirators for voluntary use to employees in the exposed group who have not requested one, and to implement physical distancing requirements and workplace partitions for employees in the exposed group who are not required by the employer to wear respirators.

Finally, the Updated Regulations also revised the sections on employer-provided housing and transportation to include similar employee exceptions noted above and to clarify what applicable safety measures must be undertaken.

III. Next Steps for Employers

These Updated Regulations include significant changes that will require California employers to review their existing COVID-19 workplace safety policies and procedures. This includes updating their existing written CPP, along with implementation of such updates in the workplace. This Guidance is intended to provide employers with a summary of important modifications in the Updated Regulations, but it is not a substitute for reviewing the Updated Regulations themselves. The Updated Regulations, including track revisions showing changes from the initial November 2020 COVID-19 Emergency Temporary Standards regulations are available at:

<https://www.dir.ca.gov/oshsb/documents/Jun172021-COVID-19-Prevention-Emergency-txtcourtesy-Readoption.pdf>.

In addition, Cal/OSHA continues to update their FAQ's, Fact Sheets and other resources related to these Updated Regulations that can provide further guidance to employers. These resources are available at:

<https://www.dir.ca.gov/dosh/coronavirus/ETS.html>.

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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