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Cal/OSHA Enacts COVID-19 Emergency Temporary Standards

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On November 19, the Cal/OSHA Standards Board adopted an emergency temporary standard with respect to COVID-19, creating a number of new requirements for California employers. On November 30, the Office of Administrative Law approved the proposed emergency temporary standard and employers must now comply with this new standard effective immediately. This emergency temporary standard will remain in effect for 180 days and may be extended in the future.

Many of the provisions of this new regulation are already required by Cal/OSHA with respect to an employer's injury and illness prevention programs (IIPP), such as the requirement to use face coverings, physically distance, as well as to identify and address hazards. However, the regulations also impose new requirements and expand on other requirements previously imposed on employers.

Critically, the regulations impose three key requirements for covered employers: (1) establish, implement, and maintain an effective written COVID-19 prevention program; (2) provide compensation to employees who are excluded from the workplace but are otherwise able and available to work; and (3) provide testing to employees who are exposed to a "COVID-19 case," and if there are multiple infections or a major outbreak, a requirement to implement regular workplace testing for employees in the exposed work areas.

Cal/OSHA intends to hold a stakeholder meeting in December to explain the rule, answer questions and give interested parties an opportunity to provide feedback on the rule, with an advisory committee meeting to be scheduled soon after. Cal/OSHA has also provided FAQs to help explain the rule and noted that these FAQs will be expanded on an "ongoing basis" to assist in understanding the regulations.

This alert focuses on the key requirements of the Cal/OSHA emergency temporary standard and provides a general overview of the other requirements of this new regulation.

Who is covered?

The emergency temporary standard applies to all California employers and employees, with three exceptions:

1. Places of employment with one employee who does not have contact with other persons
2. Employees working from home
3. Employees who are covered by the aerosol transmissible diseases regulation

Do California employers need to develop a written plan to comply with the emergency temporary standard?

Yes, in order to comply with the emergency temporary standard, all covered California employers must develop a written COVID-19 prevention program or ensure that all of the elements required under the emergency temporary standard are covered in their existing IIPP.

What must be covered in the written plan?

The following must be implemented in accordance with an employer's written plan:

- Communication to employees about the employer's COVID-19 prevention procedures

- Identification, evaluation and correction of COVID-19 hazards
- Physical distancing of at least six feet unless it is not possible
- Use of face coverings
- Use of engineering controls, administrative controls and personal protective equipment as required to reduce transmission risk
- Procedures to investigate and respond to COVID-19 cases in the workplace
- Employer-provided COVID-19 training for employees
- Employer-provided testing for employees who are exposed to a COVID-19 case, and in the case of multiple infections or a major outbreak, implementation of regular workplace testing for employees in the exposed work areas
- Exclusion of COVID-19 cases and exposed employees from the workplace until they are no longer an infection risk
- Recordkeeping of COVID-19 cases and certain reporting of serious illnesses and multiple cases to Cal/OSHA and the local health department

Cal/OSHA has provided a model COVID-19 prevention plan for employers to customize. While the model plan is a good resource, the plan ultimately implemented and maintained by employers should be crafted specifically for the employer's business. The model plan contains a number of sample appendices to help guide employers through: (1) identifying COVID-19 hazards; (2) conducting COVID-19 inspections; (3) investigating COVID-19 cases and tracking required notification to those with COVID-19 exposure; and (4) tracking training provided to employees.

When do employers need to exclude employees from the workplace, and for how long?

Under the regulations, employers must ensure that "COVID-19 cases" are excluded from the workplace until the return to work criteria specified in the regulations are met, and must also exclude all employees with "COVID-19 exposure" from the workplace. While the CDC recently published guidance that individuals without symptoms could end a quarantine on day 10 without testing (or on day seven after receiving a negative test result), the emergency temporary standards required a 14 exclusionary period. However, on December 14, the California Department of Public Health (CDPH) published its own quarantine guidance that provides that all asymptomatic COVID-19 exposures may discontinue quarantine after day 10 with or without testing. The CDPH quarantine guidance also provides that, during critical staffing shortages, exposed asymptomatic health care workers, emergency response workers, and social service workers who work face to face with clients in the child welfare systems or in assisted living facilities may discontinue quarantine after day 7 if they receive a negative COVID-19 PCR test result from a specimen collected after day 5. Also on December 14, Governor Newsom issued Executive Order N-84-20, which suspends the exclusion period set forth in the Cal/OSHA regulations to the extent that they exceed the longer of: (i) the quarantine period recommend by the CDPH, or (ii) any applicable quarantine or isolation period recommend or ordered by a local health officer who has jurisdiction over the workplace. Thus, the exclusion period may still exceed 10 days if required by a local health order.

The regulations define a "COVID-19 case" as 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
3. Has died due to COVID-19, in the determination of a local health department or per inclusion in the COVID-19 statistics of a county

A COVID-19 case with COVID-19 symptoms must be excluded from the workplace until:

1. At least 24 hours have passed since a fever of 100.4 or higher has resolved without the use of fever-reducing medications
2. COVID-19 symptoms have improved
3. At least 10 days have passed since COVID-19 symptoms first appeared

If a COVID-19 case is asymptomatic, the affected individual must be excluded from the workplace for at least 10 days since the date of the specimen collection of their first positive COVID-19 test.

The regulations also make clear that an employer *cannot* require a negative COVID-19 test before allowing an

employee to return to work.

The regulations define a “COVID-19 exposure” as 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,” *even if a face covering was worn.*

The regulations define the “high-risk exposure period” differently for persons who develop symptoms and those who are asymptomatic. For those who develop symptoms, the high-risk exposure period runs from two days before symptoms are first developed through ten days after symptoms first appeared, and 24 hours have passed with no fever (without the use of fever-reducing medications), and symptoms have improved. For those who are asymptomatic, the high-risk exposure period runs from two days before until ten days after the specimen for the first positive test for COVID-19 was collected.

The regulations also provide that, for employees who have not been excluded or isolated by the local health department, such employees need not be excluded by the employer if they are temporarily reassigned to work where they do not have contact with other persons until the return to work requirements of subsection described above are met. At the very least, this suggests that employers could reassign employees who would otherwise need to be excluded under the regulations to work remotely during the exclusion period.

When do employers need to pay employees excluded from the workplace?

Under the emergency temporary standards, for employees excluded from work in the circumstances described above and who are “otherwise able and available to work,” employers must “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, as if the employee had not been removed from the job.” An employer may use employer-provided sick leave benefits for this purpose and can consider benefit payments from public sources in determining how to maintain earnings, rights and benefits, where permitted by law and when not covered by workers’ compensation.

In addition, the regulations appear to provide that employees earnings be maintained *each time* they are excluded from the workplace and “otherwise able and available to work.” So, for example, if an employee is excluded from the workplace as a “COVID-19 exposure” multiple times, the obligation to continue to pay the employee while they are excluded would exist each time the employee is excluded.

The regulations do not make clear in what circumstances a “COVID-19 case” would be considered “able and available to work.” For instance, the regulations do not specify whether an asymptomatic COVID-19 case would be considered “able and available to work” or whether a symptomatic COVID-19 case with minimal symptoms would similarly be considered “able and available to work.” The regulations further suggest, as described above, that employers can reassign employees to work remotely while otherwise excluded from the office. We expect that the FAQs will be updated to provide further clarification on an employer’s obligation to continue and maintain earnings to an employee excluded from the workplace.

The regulations do provide two exceptions to the rule requiring employers to continue and maintain earnings, seniority, and all other employee rights and benefits during a period of exclusion. Such rule does not apply: (1) during any period of time when the employee is unable to work for reasons other than protecting persons at the workplace from possible COVID-19 transmission; and (2) *if the employer demonstrates that COVID-19 exposure is not work-related*. The regulations do not provide any clarification as to how an employer could demonstrate that COVID-19 exposure is not work related, though we expect that the FAQs will be expanded to cover this topic.

What are an employer’s COVID-19 testing obligations under the emergency temporary standard?

Under the emergency temporary standard, employers must offer testing to an employee at no cost and during working hours in the event of a potential COVID-19 work-related exposure. Employers do not need to provide

the testing themselves, and it could be through a local health department, health plan or at a community testing center. However, an employer may need to line up a vendor or third party in order to ensure that it will be able to promptly offer testing to its employees at no cost in the event of exposure. Employees also must be *notified within one business day* if they may have had COVID-19 exposure.

In the event of an outbreak (three or more COVID-19 cases in an "exposed workplace" within a 14-day period or identified as an outbreak by a local health department) or a major outbreak (20 or more COVID-19 cases in an "exposed workplace" within a 30-day period), an employer must provide additional testing as follows:

1. In the event of an outbreak, an employer must provide testing to all employees in the "exposed workplace" and exclude positive cases and exposures from work, repeat the testing one week later, and continue testing employees at least weekly until the workplace no longer qualifies as an outbreak
2. In the event of a major outbreak, an employer must provide testing to all employees in the "exposed workplace" at least twice weekly and exclude positive cases and exposures until there are no new cases detected for a 14-day period

An employer does not need to test all employees at the workplace, but only those in the "exposed workplace." The regulations define "exposed workplace" as any work location, working area or common area used or accessed by a COVID-19 case during the high-risk period, including bathrooms, walkways, hallways, aisles, break or eating areas and waiting rooms. The FAQs clarified this definition to provide that Cal/OSHA does not expect employers to treat areas where masked workers momentarily pass through the same space without interacting or congregating as an "exposed workplace." So, an employer will need to identify the areas of the workplace accessed by the COVID-19 case during the high risk period in order to determine which employees need to be notified of potential exposure and which employees need to be offered COVID-19 testing, but will not have to offer testing all employees in the workplace to the extent they were not present in the "exposed workplace" during the high-risk period.

What does this mean for employers?

Employers covered by this emergency temporary standard should take immediate steps to review their current COVID-19 plans and IIPP to ensure that all of the requirements set forth in this standard are included. As a reminder, this standard went into effect immediately upon approval on November 30. While Cal/OSHA has indicated that an employer's good faith efforts in working towards compliance will be considered, it has also identified some aspects, such as eliminating hazards and implementing testing requirements during an outbreak, as essential for immediate compliance.

In addition, employers should keep in mind that this emergency temporary standard is in additional to other guidelines published by the state and local counties/cities, and as with the interplay between state and local county shelter-in-place orders, employers will need to follow the most restrictive rules.

Employers can utilize the model COVID-19 prevention plan as a starting point in creating a COVID-19 Prevention Plan specific to their workplace. Employers should also continue to monitor the FAQs published by Cal/OSHA for additional guidance on the compensation requirements and for further clarity on other aspects of the regulations.

If you have any questions about the emergency temporary standard or have any other employment questions or issues that have arisen given the emergency temporary standard, please reach out to a member of the Cooley employment & labor practice.

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