

## Cal/OSHA Enacts New COVID-19 Emergency Temporary Standards

June 9, 2021

[Please see updated guidance in our alert from June 21](#) □

On June 3, 2021, the California Division of Occupational Safety and Health Standards Board adopted new [emergency temporary standards](#) with respect to COVID-19. Although many employers were expecting less restrictive rules, the new standards don't measurably reduce the requirements on California employers. On June 15, the Office of Administrative Law is expected to approve the proposed modifications. California Gov. Gavin Newsom may, through executive action, amend the emergency temporary standards [as he did previously](#). However, it remains unclear whether Newsom will take such action before the June 15 effective date. Once adopted, the new emergency temporary standards will remain in effect for 180 days and may be extended in the future. As such, barring action by Newsom, employers with in-person operations should review the modifications and be prepared to comply by June 15.

Critically, the modified regulations impose three new requirements for covered employers:

1. For all employees working indoors or at outdoor "mega events," which are events with more than 10,000 attendees, employers can satisfy the physical distancing requirements that remain in effect through July 31, 2021, by providing all employees who aren't fully vaccinated with respirators (e.g., an N95 mask) for voluntary use
2. If physical distancing can't be maintained at all times, and respirators aren't provided to employees who aren't fully vaccinated and are working indoors or at outdoor "mega events," an employer must install cleanable solid partitions between the employee and other people
3. Starting July 31, employers must provide a respirator to all employees who aren't fully vaccinated for voluntary use and train employees on how to properly wear a respirator

Cal/OSHA is expected to issue updated [Frequently Asked Questions](#) explaining the new changes. As with previous FAQs, Cal/OSHA will regularly expand and revise the FAQs to assist in understanding the regulations.

Importantly, California employers must comply with all federal, state and local COVID-19 orders, including federal guidance from the US Centers for Disease Control and Prevention (CDC), state guidance from the California Department of Public Health (CDPH) and Cal/OSHA, and county-based health orders. With workplace requirements coming from various sources, employers must comply with the most restrictive rules. This alert focuses solely on the recently revised Cal/OSHA emergency temporary standards.

### **Employers can satisfy physical distancing requirements by providing respirators for voluntary use**

Like the previous regulations, employers must continue to enforce physical distancing in the workplace of at least six feet between employees and other individuals through July 31.

However, until July 31, there are three exceptions to the distancing requirements:

1. When employees are required to wear respirators or respirators are provided for voluntary use to all employees who are unvaccinated or not fully vaccinated
2. When physical distancing of six feet is not feasible (though cleanable solid partitions may need to be installed at workstations)
3. Momentary exposure while people are in motion

The physical distancing requirements will be relaxed after July 31, at which point physical distancing and barriers are no longer required (except during outbreaks, as explained below).

Given this, employers who don't enforce distancing rules must provide all employees who are unvaccinated or not fully vaccinated with a respirator for voluntary use. Alternatively, before July 31, employers who can enforce physical distancing don't need to provide respirators.

Whenever respirators are provided, employers must provide training on proper respirator use. The regulation defines a "respirator" as a respiratory protection device approved by the National Institute for Occupational Safety and Health (NIOSH) to protect the wearer from particulate matter, such as N95 masks.

Under the new regulations, a "fully vaccinated" person is one for whom the employer has documentation showing 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 (which must be FDA approved or have emergency use authorization from the FDA). The regulations don't indicate what documentation is required for a person to be considered "fully vaccinated," but the upcoming FAQs will likely address this question.

Employers are also required to determine whether HEPA filtration units or other air cleaning systems would reduce the risk of COVID-19 transmission and implement their use, if feasible.

## **Employers must provide face coverings and enforce proper use**

Employers are still required to provide employees with face coverings and enforce their proper use. However, under the modified regulations, face coverings are not required when:

1. Employees are alone in a room, or when all people in a room are fully vaccinated and don't have COVID-19 symptoms
2. Fully vaccinated employees are outdoors and don't have COVID-19 symptoms

The regulations don't make clear how employers should differentiate between employees so they will know whether everyone in a room is fully vaccinated and face coverings aren't needed. As such, employers who aren't aware of the vaccination status of their employees may choose to require all employees to wear masks. Alternatively, employers with mandatory vaccination policies (resulting in a workforce that is entirely vaccinated) may relax masking rules. Note, however, that if an employer adopts a policy only permitting those who are fully vaccinated to come into the office, an employer will still need to go through the interactive process with any employee who wishes to come into the office but has a medical condition or sincerely held religious belief that prevents them from taking the vaccine consistent with [guidance from the Equal Employment Opportunity Commission](#) and the [California Department of Fair Employment and Housing](#).

The new regulations make clear that a scarf, ski mask, balaclava, bandana, turtleneck, collar or single layer of fabric **do not satisfy the face covering requirement**. Employers are required to ensure employees are wearing proper face coverings.

## **Employers must provide COVID-19 testing to exposed employees during a COVID-19 outbreak or major outbreak**

Employers are still required to offer testing to an employee at no cost and during working hours in the event of a potential “close contact,” the term now used in lieu of the previous “COVID-19 exposure” term. The new regulations provide employers three exceptions to the testing requirement. Testing is no longer required after close contact for:

1. Employees who were fully vaccinated before the close contact occurred and don't have COVID-19 symptoms
2. COVID-19 cases who have returned to work pursuant to the return-to-work criteria, and have remained free of COVID-19 symptoms for 90 days after the initial onset of symptoms
3. COVID-19 cases who never developed symptoms 90 days after their first positive test

**Employees also must be notified within one business day** if they may have had a close contact. Unlike the previous regulation, the new emergency temporary standards **require such notice when the employer knew or should have known** of a COVID-19 case. Further, the new regulations require employers to **provide verbal notice if they reasonably should know** that the employee has not received notice or has limited literacy in the language used in the notice.

## **Employers must exclude COVID-19 cases from the workplace**

Under both the old and new 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 who had a close contact with a COVID-19 case from the workplace. **Employers still cannot require a negative COVID-19 test** before allowing an employee to return to work.

The regulations still require the exclusion of a COVID-19 case with COVID-19 symptoms from the workplace until these three conditions are met:

1. At least 24 hours have passed since a fever of 100.4 degrees Fahrenheit 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 the COVID-19 symptoms first appeared

However, the new regulations allow the return of an excluded symptomatic employee if these three conditions are met:

1. The employee tested negative for COVID-19 with a specimen taken after symptoms began
2. At least 10 days have passed since the last known close contact
3. The employee has been symptom-free for at least 24 hours without fever-reducing medications

Unlike the old regulations, the new emergency temporary standards provide that employees who had a close contact don't need to be excluded if they were fully vaccinated before the contact occurred and are non-symptomatic, or if they recovered from COVID-19 within the last 90 days.

## **Employers must modify COVID-19 prevention programs to comply with updates**

Employers are still required to maintain a written COVID-19 prevention program, and there are some key changes that must be

made to programs previously adopted. For example, employers must review the CDPH's [Interim guidance for Ventilation, Filtration and Air Quality in Indoor Environments](#), and the COVID-19 prevention training must now include information on how the vaccine is effective at preventing COVID-19 and protecting against both transmissions and serious illness or death.

It is expected that Cal/OSHA will release an updated [Model COVID-19 Prevention Plan](#) to address the changes to the emergency temporary standards; if not, employers will need to ensure that they update their COVID-19 prevention program to address the modifications to the emergency temporary standards.

It is also worth noting that Cal/OSHA initially rejected the proposed regulations, noting that they were more onerous than those of the CDC and CDPH. However, Cal/OSHA ultimately approved the regulations, and created a subcommittee to work with Cal/OSHA in exploring new alternatives and revisions. In its [press release](#) announcing the changes, Cal/OSHA noted that it may further refine the regulations in the coming weeks to take into account changes in circumstances (such as low case rates across the state).

## What else does this mean for employers?

Employers covered by this emergency temporary standard should take immediate steps to review their current COVID-19 plans and injury and illness prevention programs to ensure that all requirements set forth in the regulations are included. As a reminder, these standards are expected to go into effect immediately upon approval on June 15.

In addition, employers should keep in mind that this emergency temporary standard is required alongside other guidelines [published by the state](#), counties and cities, and as with the interplay between state and county shelter-in-place orders, employers need to follow the most restrictive rules.

Employers should continue to monitor the [updated 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 standards or have any other employment questions or issues related to the emergency temporary standards, please reach out to a member of the Cooley employment team.

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