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Cal/OSHA Enacts New (for Real This Time) COVID-19 Emergency Temporary Standards

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On June 11, 2021, the Cal/OSHA Board published newly revised [emergency temporary standards](#) (ETS), which were discussed and adopted at its June 17 public meeting. The same day, Gov. Gavin Newsom issued an executive order bypassing the typical 10-day review process, making the revised ETS effective immediately on June 17.

The revised ETS modify the rules for employers and are more in line the current guidance from the [Centers for Disease Control and Prevention](#) (CDC) and the [California Department of Public Health](#) (CDPH). Cal/OSHA also recently updated the [FAQs regarding the revised ETS](#), which provides useful guidance for employers.

Specifically, under the revised ETS:

- Employers must continue to require face coverings for unvaccinated employees, but fully vaccinated workers may now unmask in most settings, if their vaccination status is documented
- Employers must provide respirators to unvaccinated employees upon request, except in certain situations when respirators may need to be offered to certain employees, regardless of vaccination status
- Physical distancing requirements have been eliminated regardless of vaccination status, subject to certain exceptions
- Employers must continue to provide COVID-19 testing to employees potentially exposed to COVID-19 in the workplace, subject to certain exceptions (including certain fully vaccinated workers)
- Employers must continue to exclude COVID-19 cases from the workplace
- Employers must continue to maintain a written COVID-19 prevention program and train employees

This alert further explores each of these requirements.

Please keep in mind that California employers must comply with all federal, state and local COVID-19 orders, including federal guidance from the CDC, state guidance from the 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 Cal/OSHA ETS (as recently revised).

Employers may permit fully vaccinated employees to be indoors without a face covering

While Cal/OSHA's original ETS, implemented in November 2020, required all employees to wear face coverings in the workplace regardless of vaccination status, the revised ETS now state that employers do not need to require fully vaccinated workers to wear face coverings indoors, **if they've documented an employee's vaccination status.**

For employees who are not fully vaccinated, face coverings remain required when indoors or in vehicles, subject to certain exceptions, such as when:

- They are alone in a room or vehicle
- They are eating or drinking
- They require an accommodation
- Their job duties make a face covering infeasible or create a hazard

An employee is considered fully vaccinated when 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. The vaccine must have been approved by the US Food and Drug Administration, have emergency use authorization from the FDA or, for persons fully vaccinated outside the US, be listed for emergency use by the World Health Organization.

The [FAQs recently published by Cal/OSHA](#) shed light on the documentation required to determine whether someone is fully vaccinated and does not need to wear a face covering. The FAQs state that this vaccination record must be kept confidential, and include three examples of acceptable options for documenting vaccination status:

- Employees provide proof of vaccination, such as a vaccine card, image of a vaccine card or healthcare document showing vaccination status, and the employer maintains a copy
- Employees provide proof of vaccination and the employer maintains a record of who presented proof, but not the vaccine record itself
- Employees self-attest to vaccination status and the employer maintains a record of who self-attests

The revised ETS also clarify 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 certain workers with respirators and train them on proper use

The revised ETS require employers to provide a respirator to employees in two situations:

- When an unvaccinated employee who works with others indoors or in a vehicle requests a respirator
- When there is a major outbreak (20 or more COVID-19 cases in an exposed group), to any employee in the exposed group for voluntary use

Employees provided with a respirator must be trained on its proper use and Cal/OSHA has indicated it will publish a video that employers can use for this purpose.

The FAQs provide some clarity as to what is meant by “provide respirators upon request.” The FAQs note that an employer may either stock respirators and offer them to employees, or poll workers first to determine which employees wish to be provided with a respirator before obtaining them. In the event of a major outbreak, an employer must offer respirators to all employees in the exposed group without waiting for a request from an employee, immediately upon determining that there is a major outbreak.

While respirators should be provided as soon as possible upon request or upon a major outbreak, Cal/OSHA has indicated that because it may be difficult for employers to source respirators, Cal/OSHA will not cite employers who make a good faith effort to provide respirators as soon as possible when requested. Cal/OSHA has provided a [list of vendors](#) who may have N95 respirators available in large quantities. The State of California has also [pledged to provide](#) a one-month supply of respirators to businesses that need to satisfy this requirement.

Employers no longer must enforce physical distancing, except in certain situations

Under the revised ETS, employers no longer need to enforce physical distancing, regardless of vaccination status. However, employers are not prevented from implementing physical distancing or barriers to prevent the spread of COVID-19.

The regulations make clear that, while physical distancing is no longer required, employer must continuously assess workplace hazards, and there may be circumstances where physical distancing is necessary. The regulations also make clear that employers must evaluate whether physical distancing or barriers are necessary to help control the transmission of COVID-19 in the event of an outbreak (three or more COVID-19 cases within an exposed group), **but must enforce** physical distancing and use barriers in the event of a major outbreak, regardless of vaccination status.

Employers must still provide COVID-19 testing to exposed employees

Employers are still required to offer testing to employees 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:

- Employees who were fully vaccinated before the close contact occurred and do not have COVID-19 symptoms
- 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
- COVID-19 cases who never developed symptoms 90 days after their first positive test

The regulations define a “COVID-19 case” as someone who has a positive COVID-19 test or diagnosis, is subject to a COVID-19 related order to isolate issued by a health official or has died due to COVID-19.

However, in the event of a major outbreak, testing must be made available to all employees in the exposed group, regardless of vaccination status.

Employees also must be notified within one business day of a COVID-19 case that was in the workplace during the “high-risk exposure period,” as defined in the regulations. **Such notice is also now required 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

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

- 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
- COVID-19 symptoms have improved
- At least 10 days have passed since COVID-19 symptoms first appeared

However, the new regulations maintain the same exceptions as the now-rescinded regulations and allow the return of an excluded, symptomatic employee if these three conditions are met:

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

The new ETS also provide that employees who had a close contact do not need to be excluded if they were fully vaccinated before the contact occurred and are nonsymptomatic, or if they recovered from COVID-19 within the last 90 days.

Employers must modify their COVID-19 prevention programs to comply with the updates to the ETS

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 transmissions and serious illness or death.

Cal/OSHA announced at its June 17 board meeting that it will release an updated [Model COVID-19 Prevention Plan](#) to address the changes to the ETS. Employers will need to ensure that they update their COVID-19 prevention program to address the modifications to the ETS.

What does this mean for employers?

Employers covered by this ETS 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 went into effect immediately on June 17.**

In addition, employers should keep in mind that this ETS 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 will need to follow the most restrictive rules.

Employers should also continue to monitor the [updated FAQs published by Cal/OSHA](#) for additional guidance on other aspects of the regulations.

If you have any questions about the ETS or any other employment questions or issues related to the ETS, please reach out to a member of the Cooley employment team.

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