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LEGAL UPDATE

January 13, 2022

To: Superintendents, Member School Districts (K-12)

From: Jennifer Henry, Associate General Counsel

Subject: Cal/OSHA Emergency Temporary Standards Revisions Go Into Effect January 14, 2022
Memo No. 03-2022

On December 16, 2021, Cal/OSHA revised the readopted the COVID-19 Prevention Emergency Temporary Standards (“ETS”). The revised ETS incorporate the latest California Department of Public Health (“CDPH”) recommendations, take effect on January 14, 2022, and are set to expire in April 2022, unless extended. They apply to most employers including local educational agencies (“LEAs”).¹

The ETS originally went into effect in November 2020, and were revised in June 2021.

Continuing Cal/OSHA ETS That Remain Unchanged:

- Employers still must have a written COVID-19 Prevention Program (“CPP”) that addresses employee exposures, policies to correct unsafe conditions, and allowing time for cleaning.
- Employers must continue providing training to employees about COVID-19.
- Employers are to continue to follow CDPH guidance regarding face coverings. For example, CDPH currently requests masks to be worn in all indoor public settings, regardless of vaccine status, until February 15, 2022.² However, schools are subject to a separate CDPH order requiring universal indoor face covering that does not have an end date at this time.³

¹ Link to text: <https://www.dir.ca.gov/oshsb/documents/Dec162021-COVID-19-Prevention-Emergency-txtcourtesy-2nd-Readoption.pdf>.

² <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/guidance-for-face-coverings.aspx>.

³ <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Requirement-for-Universal-Masking-Indoors-at-K-12-Schools.aspx>.



- Employers must continue to notify employees, union representatives and other workers of a workplace COVID-19 exposure within one business day.

ETS Revisions that Begin January 14, 2022:

Definition of Fully Vaccinated:

“Fully vaccinated” is now defined to mean that the employer has documented:

(A) A person’s status two weeks after completing primary vaccination with a COVID-19 vaccine with, if applicable, at least the minimum recommended interval between doses in accordance with the approval, authorization, or listing that is:

1. Approved or authorized for emergency use by the FDA;
2. Listed for emergency use by the World Health Organization (WHO); or
3. Administered as part of a clinical trial at a U.S. site, if the recipient is documented to have primary vaccination with the active (not placebo) COVID-19 vaccine candidate, for which vaccine efficacy has been independently confirmed (e.g., by a data and safety monitoring board) or if the clinical trial participant at U.S. sites had received a COVID-19 vaccine that is neither approved nor authorized for use by FDA but is listed for emergency use by WHO; or

(B) A person’s status two weeks after receiving the second dose of any combination of two doses of a COVID-19 vaccine that is approved or authorized by the FDA, or listed as a two-dose series by the WHO (i.e., a heterologous primary series of such vaccines, receiving doses of different COVID-19 vaccines as part of one primary series). The second dose of the series must not be received earlier than 17 days (21 days with a 4-day grace period) after the first dose.⁴

Face coverings:

- Employees who are exempt from wearing a face covering due to a health condition or disability and cannot wear a non-restrictive alternative must physically distance at least six feet from others and either be fully vaccinated or tested at least weekly for COVID-19.
- Face coverings must have at least two layers, and not let light pass through when held up to a light source. Gaiters can now be worn, but must be doubled over to have two layers. Face coverings must fit snugly and cover the nose and mouth.
- Employers must provide face coverings to any employee who requests them, not just to unvaccinated employees.

Testing and Exclusion:

- After a close contact at work, employers are now required to make COVID-19 testing available at no cost and during paid time to both unvaccinated and vaccinated employees, even if asymptomatic.
- During outbreaks, employers must make weekly testing available to all employees who were exposed, whether asymptomatic or vaccinated.

⁴ 8 CCR 3805(b)(9).



- After a close contact, all employees must wear a face covering and maintain six feet of physical distancing for 14 calendar days, including vaccinated employees and employees recently recovered from COVID-19. Also must follow new Return to Work criteria (below).
- At home tests, in order to rely on at home test results, the test kit must be authorized by the FDA (including EUA approval), and the employer or a telehealth professional must observe the specimen collection and processing the test results.

One exception to the above is that an employee who returned to work after testing positive, who subsequently has a close contact but never developed COVID-19 symptoms, does not need to be excluded from the workplace for 90 days after the first positive test. This exception only applies if these employees wear a face covering and maintain six feet of distance from others while at the workplace for 14 days following the last date of close contact.

Return to Work Criteria After a Close Contact: See the attached “Return to Work Criteria” at the end of this legal update for the statutory language and changes. Prior Return to Work criteria allowed for return to work early upon a negative test or if asymptomatic. Now, consistent with CDPH guidelines, employees may only return to work after a close contact: a) fourteen calendar days later; b) ten calendar days later if the employee wears a face covering and stays six feet distanced until fourteen days has passed; or c) seven calendar days later if employee tests negative at least five days after the close contact, and wears a face covering and stays distanced six feet until fourteen calendar days have passed. These time frames will automatically update if CDPH updates their guidelines.

Exclusion Pay: If an employee is excluded due to a workplace exposure, they must still receive continued pay and benefits while excluded.⁵ Employers may use employee’s sick leave for this purpose, but where sick leave has been exhausted, the employer must continue the employee’s pay. There are two exceptions to this: (1) if the employee received disability payments or was covered by workers’ compensation and received temporary disability; and (2) the employee did not acquire COVID-19 in the workplace.⁶

FAQs: Cal-OSHA released a FAQ about the new regulations on January 7, 2022, which can be found here: <https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html#iso>

Next Steps:

It is recommended that LEAs update their CPP⁷ to reflect the ETS revisions.⁸

⁵ See 8 CCR 3805 § 3805(c)(9)(D). Note that Cal/OSHA’s “exclusion pay” should not be confused with California’s Supplemental Paid Sick Leave that required up to 80 hours of supplemental paid sick leave for various COVID-19 reasons, but expired in September 2021.

⁶ 8 CCR 3805(c)(9)(D).

⁷ See Cal/OSHA, *COVID-19 Emergency Temporary Standards: What Employers Need to Know About the Recommended Revisions* (updated June 16, 2021), available at https://www.dir.ca.gov/dosh/dosh_publications/06-16-21-ETS-Revisions.pdf.

⁸ It is especially important to ensure your CPP is updated now that Senate Bill 606 went into effect on January 1, 2022, which gives Cal/OSHA greater enforcement authority. (See https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB606).



After reviewing these requirements, some accommodations provided to employees for medical or religious reasons may not be in compliance with the revised ETS. Consider whether the interactive process must be re-engaged in with any employees, particularly to address accommodations around self-testing and face coverings.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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RETURN TO WORK CRITERIA

Yellow Highlighting Shows January 2022 Changes

“(10)(A) COVID-19 cases with COVID-19 symptoms shall not return to work until:

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; and
2. COVID-19 symptoms have improved; and
3. At least 10 days have passed since COVID-19 symptoms first appeared.

(B) COVID-19 cases who tested positive but never developed COVID-19 symptoms shall not return to work until a minimum of 10 days have passed since the date of specimen collection of their first positive COVID-19 test.

(C) Once a COVID-19 case has met the requirements of subsection (c)(10)(A) or (B), as applicable, a negative COVID-19 test shall not be required for an employee to return to work.

(D) Persons who had a close contact may return to work as follows:

1. Persons who had a close contact but never developed any COVID-19 symptoms may return to work after **14 days have passed since the last known close contact unless either of the exceptions in subsections (c)(10)(D)1.a. or b. applies:**

- a. Ten days have passed since the last known close contact and the person wears a face covering and maintains six feet of distance from others while at the workplace for 14 days following the last date of close contact.
- b. Seven days have passed since the last known close contact; the person tested negative for COVID-19 using a COVID-19 test with the specimen taken at least five days after the last known close contact; and the person wears a face covering and maintains six feet of distance from others while at the workplace for 14 days following the last date of close contact.

2. Persons who had a close contact and developed any COVID-19 symptom cannot return to work until these requirements have been met.

...

(E) If an order to isolate, or quarantine, or exclude an employee is issued by a local or state health official, the employee shall not return to work until the period of isolation or quarantine is completed or the order is lifted. If no period was specified, then the period shall be in accordance with the return to work periods [stated herein.]

Cal. Code Regs, tit. 8, section 3205(c)(10)