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LEGAL UPDATE

January 19, 2022

To: Superintendents, Member School Districts (K-12)
From: Jennifer Henry, Associate General Counsel
**Subject: Cal/OSHA Adopts CDPH Isolation Criteria - Emergency
Temporary Standards Revisions
Memo No. 03-2022 SECOND REVISION**

***This Legal Update, formerly dated January 14, 2022 has been revised to correct a typographical error in the citation of a regulation. No other changes have been made.**

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

On December 30, 2021, and January 8, 2022, CDPH revised its recommended isolation and quarantine periods, based on CDC’s revised recommendations.² In response, this week, Cal/OSHA clarified that its recommended isolation and quarantine periods in the ETS will be overridden by any CDPH applicable isolation or quarantine recommendation if the ETS periods are longer than those recommended by CDPH.³

CDPH revised its Frequently Asked Questions to reflect that, effective January 14, 2022, the new CDPH isolation and quarantine recommendations replace the ETS exclusion periods and return to work criteria.⁴

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-on-Isolation-and-Quarantine-for-COVID-19-Contact-Tracing.aspx>

³ <https://www.dir.ca.gov/DIRNews/2022/2022-03.html>, citing to Governor Newsom Executive Order N-84-20 December 2020. (<https://www.gov.ca.gov/wp-content/uploads/2020/12/12.14.20-EO-N-84-20-COVID-19.pdf>).

⁴ <https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html#iso>



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, 2022.⁵ However, schools are subject to a separate CDPH order requiring universal indoor face covering that does not have an end date at this time.⁶
- Employers must continue to notify employees, union representatives and other workers of a workplace COVID-19 exposure within one business day.

ETS revisions that go into effect on January 14, 2022:

Definition of Fully Vaccinated: Employees can now combine different COVID-19 vaccines to be considered “fully vaccinated.” For example, when an employee receives one dose of Pfizer-BioNTech and then one dose of the Moderna vaccine, the second dose needs to be received no earlier than 17 days after the first dose. In addition, the revised ETS now permit trial vaccines, subject to certain additional requirements, such as the recipient must have received the active vaccine candidate and not the placebo.⁷

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.

⁵ <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/guidance-for-face-coverings.aspx>.

⁶ <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Requirement-for-Universal-Masking-Indoors-at-K-12-Schools.aspx>.

⁷ 8 CCR 3205(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 CDPH’s quarantine and isolation guidance (below).
- 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.⁸

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: Cal/OSHA has clarified that employers should follow [CDPH’s new quarantine and isolation recommendations](#),⁹ that CDPH issued December 30, 2021, which Cal/OSHA officially made applicable effective January 14, 2022. If an LEA’s local health department orders a different quarantine and isolation period than CDPH, the LEA must comply with the longer of the two. Generally, the current CDPH isolation requirements are for employees who test positive and unvaccinated employees who have had a close contact at work to stay home for five days, then to return after Day 5 if they are asymptomatic and test negative on Day 5 or later, and continue to stay masked indoors at work until Day 10. Vaccinated employees that have had a close contact at work may forego a quarantine if they are asymptomatic, test negative on Day 5, and stay masked until Day 10.

Exclusion Pay: If an employee is excluded due to a workplace exposure, they must still receive continued pay and benefits while excluded.¹⁰ 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 at their regular rate. There are two exceptions to this if: (1) 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.¹¹ Cal/OSHA has stated that employees who are able may be assigned to telework during this period (however, if an LEA does so, they should not deduct from an employee’s sick leave for days when the employee teleworks).

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>

⁸ https://www.dir.ca.gov/dosh/dosh_publications/COVIDOnePageFS-12-16-2021.pdf.

⁹ <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-on-Isolation-and-Quarantine-for-COVID-19-Contact-Tracing.aspx>.

¹⁰ See 8 CCR 3205 § 3205(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.

¹¹ 8 CCR 3205(c)(9)(D).



Next Steps:

It is recommended that LEAs update their CPP¹² to reflect the ETS revisions.¹³

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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¹² 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.

¹³ 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).