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Cal/OSHA Issues Revised COVID-19 Emergency Rule – Third Re-Adoption

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The California Occupational Safety and Health Standards Board has just released a proposed draft for the third re-adoption COVID-19 Emergency Temporary Standard (ETS). The Board will vote on the proposed rule at its next meeting on April 21, 2022, and the text is expected to be approved. This new rule will remain in effect until December 31, 2022, after which time the Board may consider a permanent infectious disease standard for general industry – presenting another battle to be waged. Here is a redlined draft showing changes from the current emergency rule.

Some of the changes in this draft ETS are minor, while others are quite substantive. Here are some highlights:

- The over-arching take away is that the Board is moving away from rule based criteria for compliance and towards deferring to public health orders from the California Department of Public Health (CDPH). This is made clear in the note at the top of the new rule [§ 3205(a)], which refers to Governor Newsom's directive in Executive Order N-84-20 that for all intents and purposes the ETS's exclusion provisions are replaced by CDPH's isolation and quarantine requirements. Further, the term "high risk exposure" is replaced with "infectious period" – as used by CDPH – and the definition adds that the stated time periods apply "…unless otherwise defined by CDPH regulation or order, in which case the CDPH definition shall apply." Similarly, the definition of "close contact" now defers to any "regulation or order of the CDPH" for its meaning.
- The term "fully vaccinated" is deleted from the emergency rule's definitions and a new definition "returned case" is added. This term refers to a COVID-19 case who has returned to the workplace and remains symptom free. The draft rule provides that employers are not required to make testing available to returned cases. After 90 days symptom-free, these individuals are removed from the status of "returned case." Again, the rule defers to CDPH if that agency has set a different period by regulation or order.
- The definition of "COVID-19 test" is revised to more precisely address the circumstances when the testing protocols apply. The rule strikes from the definition language borrowed from the (now withdrawn) Federal OSHA ETS, and adds, "To meet the return to work criteria [], a COVID-19 test may be both self-administered and self-read only if another means of independent verification of the results can be provided (e.g., a time-stamped photograph of the results)."
- The mandate for face coverings for all unvaccinated workers has been dropped, except as may be required by orders from CDPH, but the proposed rule retains the requirement that employers provide face coverings

upon employee request. The proposed rule also removes the social distancing requirement for workers who cannot, under an exception, wear face coverings when required.

- The requirement to provide, upon request, respirators for voluntary use applies to all employees working indoors or in vehicles,, regardless of vaccination status.
- Disinfection and cleaning provisions are removed entirely from this rule iteration, including in the housing and transportation sections.
- The exclusion and return-to-work criteria are revised to mirror CDPH's guidance on isolation and quarantine periods.
- The exclusion pay provision has been retained, despite earlier representations by DOSH.
- The requirement to provide "cleanable, solid partitions" where social distancing is not feasible has been stricken from the outbreak and major outbreak sections.