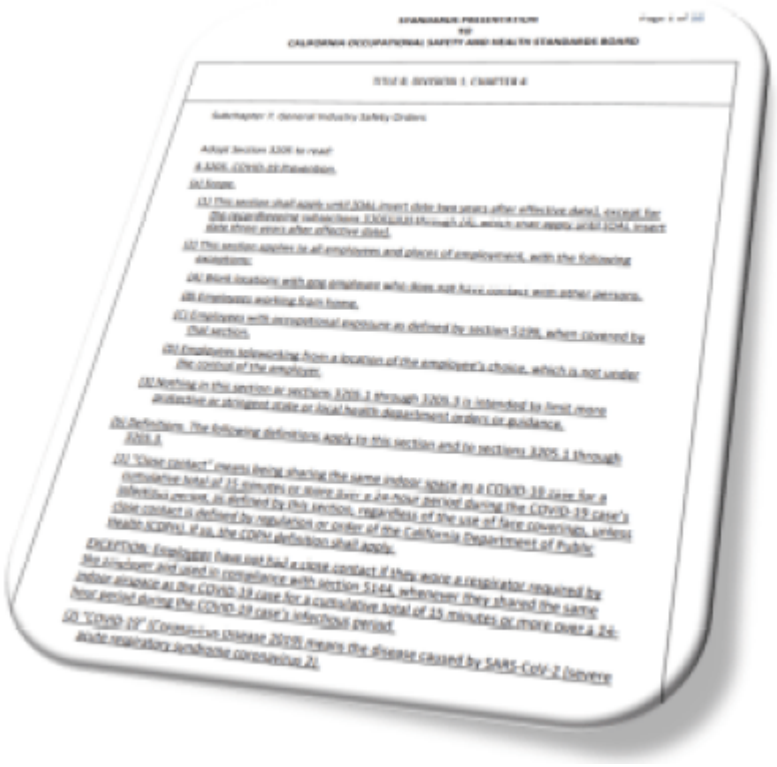
SEPTEMBER 16, 2022 | LEGISLATIVE & STANDARDS BOARD UPDATES

Cal/OSHA Moves Closer to Issuing Its COVID-19 Non-Emergency Standard

BY MEGAN STEVENS SHAKED

In July 2022, the California Division of Occupational Safety and Health (Cal/OSHA) revealed a proposed Permanent COVID-19 regulation. The draft permanent rule is intended to replace the current version of the COVID-19 Emergency Temporary Standard (ETS) that is set to expire at the end of 2022. Here is a link to the agency's draft regulatory text for the permanent rule.

On July 29, 2022, the Standards Board issued a rulemaking notice that set both the date for a meeting of the Standards Board when the proposed COVID-19 permanent rule would be debated and discussed, as well as an official due date for written comments from interested stakeholder. Both of those were yesterday, ***September 15, 2022***. A vote on a proposed final rule is expected in late November or December, with the rule replacing the ETS and going into effect on January 1, 2023 and continuing through December 2024.



Background about the Proposed Permanent Rule

The proposed non-emergency rule (commonly referred to as the permanent rule) would apply until 2 years after

effective date, with recordkeeping requirements applying until 3 years after effective date. The most significant expansion in the proposal is the incorporation of the controversial new definition of "close contact" from the California Department of Public Health, which **now means "someone sharing the same indoor airspace; e.g., home, clinic waiting room, airplane etc., for a cumulative total of 15 minutes or more over a 24-hour period (for example, three individual 5-minute exposures for a total of 15 minutes) during an infected person's (laboratory-confirmed or a clinical diagnosis) infectious period."**

The proposal does include some scaling back. For example, the proposed permanent rule no longer requires a written COVID-19 Prevention Program in the same manner that the ETS has. Rather, it requires addressing COVID-19 as a workplace hazard under the Injury and Illness Prevention Program standard (section 3203) (which itself requires employers establish, implement and maintain an effective Injury and Illness Prevention Program). It also proposes to eliminate the requirement for employers to provide "exclusion pay" for employees isolating with confirmed cases.

The proposed permanent rule does, however retaining several key provisions from the ETS:

- Employer procedures to investigate COVID-19 illness at work
- Employer procedures for responding to COVID-19 cases at work (providing specifics for COVID-19 cases and calls for employers to review current CDPH guidance for close contacts)
- Offering testing for close contacts
- Providing notice of COVID-19 cases and close contacts
- Requiring face coverings where required by CDPH
- Providing respirators (N95s) for voluntary use, upon request
- Maintaining ventilation systems
- Certain reporting and recordkeeping requirements
- The non-emergency rule also consolidated, but retained, heightened requirements in Outbreak and Major Outbreaks circumstances, as well as requirements for employer-provided housing and transportation.

Some other key elements of the proposed permanent rule include:

- Requiring employers to review applicable orders and guidance related to COVID-19 from the State of California and local health department.
- Training requirements must be in accordance with the Injury and Illness Prevention Program standard (section 3203(a)(7))

Written Comments

Conn Maciel Carey's OSHA Practice organized a coalition of employers and trade groups to collaborate to submit public comments on this proposal and participate in all aspects of the rulemaking process to advocate for the most manageable COVID-19 Rule possible. The two most recent major steps we took with our Employers COVID-19 Coalition was to submit a comprehensive set of written comments to the Cal/OSHA Board record on September 12th and to testify at the Standards Board meeting yesterday.

Here is a copy of our as-filed comments.
To summarize, we address in the comments that:



- Core elements of the proposed permanent rule are not aligned with the Centers for Disease Control and Prevention ("CDC") recommendations that preventing severe illness should be prioritized over focusing on transmission and case counts. As knowledge of the COVID-19 disease continues to evolve, the Rule has become unwarranted.
- The sunset date for the Proposed Permanent Rule ("2 years after effective date") is excessive and inflexible. If the Rule remains in effect while severe illnesses associated with COVID-19 such as hospitalization and deaths continue to decline, it will become outdated and ultimately obsolete.
- The proposed definition of close contact – "sharing the same indoor airspace" – is too vague and not sustainable for many employers. The requirements under the CDPH's definition have resulted in a significant financial and personnel burden on employers. The CDPH's recommendation that any close contact under this new definition be tested between three to five days after exposure is not justified given the miniscule amount of positive COVID-19 test results.
- Requiring a work-relatedness element for cases to contribute to a determination that the workplace is experiencing an Outbreak.
- Other important issues our coalition members identified in our planning and strategy sessions.

Earlier this week, InsideOSHA ran an article detailing the Cal/OSHA COVID-19 rulemaking, which included a nice summary of our coalition's written comments.

Standards Board Meeting

Yesterday, September 15, 2022, the Cal/OSH Standards Board convened to hear public comment from interested

stakeholders on the proposed non-emergency rule. Labor and management affiliated groups participated. Many employer groups, including our Employers COVID-19 Prevention Coalition, highlighted key concerns including:

- Lack of need for a permanent rule
- Concerns and uncertainty around the new broader definition of "close contact"
- Continued challenges and burden associated with contact tracing requirements
- Ongoing problems and costs implementing the onerous Outbreak provisions with little impact on spread of the virus

Labor representative spoke as well, mostly supporting the adoption of the 2-year standard, with a strong push to re-insert the exclusion pay requirement that has been in the ETS back into the proposed permanent rule.

Some board members expressed concerns about the draft, and expressed their own view that the draft should re-add exclusion pay before a vote. To make such a change, the Standards Board would need to issue a "15-day change notice" to permit further public comment. So the next development will be either a 15-day change notice, meaning there will be changes from this draft prior to the vote, or we see a final proposed rule that is essentially the same as the current proposal and the Board proceeds to a vote later this year.