SEPTEMBER 20, 2021 | LEGISLATIVE & STANDARDS BOARD UPDATES

CAL/OSHA PROPOSES "PERMANENT" COVID-19 PREVENTION RULE – UNDER REVIEW BY ITS ADVISORY COMMITTEE

Cal/OSHA has just convened an Advisory Committee to consider a proposed permanent Cal/OSHA COVID-19 prevention permanent rule, scheduled to meet on September 23, 2021. Conn Maciel Carey has been invited to serve on the Advisory Committee, on behalf of the California Employers COVID-19 Prevention Coalition – composed of a broad array of California and national employers substantially impacted by Cal/OSHA's COVID-19 standards.

Last Friday, the Division of Occupational Safety and Health (DOSH) posted the attached discussion draft for the proposed permanent rule. If adopted, the permanent rule would expire in 2 years (subject to renewal/amendment) and replace the existing Cal/OSHA COVID-19 Emergency Temporary Standard (ETS). We expect that upon the permanent rule sunsetting, the Cal/OSHA Standards Board might take up a permanent general infectious disease standard – which would be another battle to be waged. There is a broad consensus among the employer community that a general infectious disease standard is unnecessary and ill advised, in light of the existing Injury and Illness Prevention Program (IIPP) and Aerosol Transmissible Diseases standards and the inability to prescribe specific measures to address pandemics that have yet to arise.

As many may recall, the ETS was hurriedly adopted around Thanksgiving last year and then amended in June 2021 following bizarre twists and turns, with the Standards Board reconsidering proposed text and votes faced with concerns the draft amendment was not aligned with CDC guidance and was otherwise unwieldy. Ultimately, the Standards Board formed a subcommittee to consider the future of the ETS that has met regularly since June.

Big picture, the draft permanent rule is largely a significant improvement over the ETS but there are some areas of concern that we hope are addressed through the Advisory Committee process. We have summarized how the draft permanent rule materially departs from the ETS:

- ***No Requirement for Separate COVID-19 Prevention Program:*** Employers do not need to maintain a written COVID-19 Prevention Program, and, instead, COVID-19 hazards must be "***addressed as required by [the Injury and Illness Prevention Program standard].***" The draft permanent rule includes specific requirements for how employers must address COVID-19 hazards, focused broadly on preventing, identifying and correcting COVID-19 hazards, employee training, and investigating and responding to COVID-19 illness.

- ***No Exclusion Pay:*** The permanent rule removes the exclusion pay provision, which is a major improvement given its significant economic toll and that, problematically, it allows for private lawsuits to recovery any unpaid benefits. DOSH has indicated, however, that pay continuation will be left to the California legislature to address on a permanent basis. The 2021 COVID-19 Supplemental Paid Sick Leave law provides for quarantine pay, among other COVID-19 related benefits, through the end of this month, and we expect that as the permanent Cal/OSHA rule is adopted, the legislature would advance in tandem a bill to continue exclusion pay in some form.
- ***COVID-19 Testing for Close Contacts:*** Employers will no longer be required to make COVID-19 testing available at no cost to employees with COVID-19 symptoms who are not fully vaccinated. Instead, under the permanent rule, employers must provide testing for all employees with a close contact in the workplace, regardless of vaccination status, except for recently recovered COVID-19 cases without symptoms.
- **Exclusion of Close Contacts:** Employers must exclude any close contacts from the workplace for the quarantine period. The proposed permanent rule removes the exception for employees who were fully vaccinated before the close contact and who do not develop COVID-19 symptoms. Thus, if legislation passes adopting an exclusion pay requirement, this could be costly for employers, as they would need to provide pay each time an employee is quarantined due to a close contact in the workplace – meaning being within 6 feet of a COVID-19 case for a cumulative total of 15 minutes or greater in a 24-hour period, regardless of whether the employee is vaccinated and wore a face covering.
- ***Face Coverings When Required by CDPH:*** Under the ETS, employers are required to provide face coverings to unvaccinated employees and ensure the face coverings are worn when indoors or in vehicles. The permanent rule adds that employers must otherwise provide face coverings and ensure they are worn by employees, regardless of vaccination status, "when required by [the California Department of Public Health."
- ***Employees Without Face Coverings Due to Specific Exemptions:*** The permanent rule requires that where an employee is not wearing a face covering due to a disability, or because the specific task cannot feasibly be performed with a face covering, the employer must take effective action to address the potential hazard. The ETS requirements for physical distancing and testing under these circumstances have been removed.
- ***Respirators for Employees at Increased Risk of Severe Illness:*** Employers are no longer required to provide, upon request, respirators for voluntary to employees who are not fully vaccinated, except if an outbreak occurs. Instead, the permanent rule requires the employer to provide an N95 respirator for voluntary use to any employee who has been identified by a health care professional as being at increased risk of severe illness from COVID-19, regardless of vaccination status.
- ***Vaccination Record Required for Fully Vaccinated Employees:*** The proposed permanent rule provides that for an employee to be considered "fully vaccinated," and thus excluded from the ETS's face coverings requirement, the employer must have for that employee, "an electronic or physical copy of a vaccination record" including the vaccination dates. The employer must retain this "vaccination record" for 2 years "beyond the period in which the record is necessary to meet the requirements" of the COVID-19 rules.
- ***Handwashing, Cleaning and Disinfection Requirements Removed:*** The permanent rule does not include any of the ETS's provisions on handwashing or cleaning and disinfection of the workplace.
- ***Outbreaks:*** Under the proposed permanent rule, face coverings are required for all employees during outbreaks, regardless of vaccination status. The testing exemption for fully vaccinated employees is removed.
- ***Employer Provided Housing:*** If employees living in the same housing are fully vaccinated, only the quarantine and isolation provisions apply.

- ***Employer Provided Transportation:*** This permanent rule applies only to transportation "to and from work" during the course of employment, and the exemption for vehicles where all employees are fully vaccinated has been removed. The rule simplifies the transportation provisions and specifies that the requirements of COVID-19 Prevention Rule, Section 3205, otherwise apply.
- ***Deference to CDPH:*** The permanent rule otherwise defers to the California Department of Public Health on the definitions of "close contact," "infectious period" and isolation period for COVID cases, where applicable.