DECEMBER 8, 2021 | LEGISLATIVE & STANDARDS BOARD UPDATES

Cal/OSHA Standards Board to Consider Revised COVID-19 Emergency Rule for Re-adoption

The Cal/OSHA Standards Board has issued a revised draft of the COVID-19 Emergency Temporary Standard (ETS) for a second re-adoption. This draft shows in underlined text the latest proposed changes from the current emergency regulation (not the October draft text discussed in our prior blog post). The second re-adoption of the ETS, if adopted, will be effective from January 14, 2022 to April 14, 2022, and then could be replaced by a "permanent" COVID-19 rule.

At its December 16, 2021 meeting, the Standards Board will consider this proposed revised ETS, as well as discuss the proposed "permanent" COVID-19 rule being considered to replace the ETS once the emergency rule expires.

Below are the areas where the ETS text proposed for a second re-adoption materially departs from the current rule:

- **Removal of exemptions for fully vaccinated employees:** The existing exemptions for fully vaccinated employees are modified in numerous areas. For example:
  - Employers must exclude fully vaccinated employees who had a close contact, ***unless such employees wear a face covering and maintain 6 feet of distance from others at the workplace for 14 days following the last date of close contact.*** (The return-to-work criteria recognize circumstances where the exclusion period may be shortened to 10 or 7 days) The most troubling aspect of this rule change is the requirement that vaccinated employees maintain physical distancing at all times, which is not feasible in most workplaces. If fully vaccinated employees must be excluded as a result, the employer is on the hook for exclusion pay during that period.
  - COVID-19 testing must be available at no cost, during paid time, to all employees having a close contact, ***regardless of vaccination status.*** Note that, in addition to paying for the COVID-19 test, employers are responsible for covering the employees' wages and transportation costs (as applicable) associated with testing.
  - Fully vaccinated employees are no longer exempt from the requirement that employers make regular COVID-19 testing available during outbreaks.
  - A person screening employees for COVID-19 symptoms must wear a face covering, regarding of whether the screener was fully vaccinated.

  - Under the employer provided housing rule, the quarantine exclusion for fully vaccinated residents having a close contact has been removed.
- **Close Contact Exclusion Where Employee Recently Recovered from COVID-19:** Any employee having a close contact who previously had COVID-19, within 90 days after symptom's onset, must wear face coverings and maintain 6 feet of distance from others for 14 days following the last close contact to meet the exemption. Like the close contact exception for fully vaccinated employees, this physical distancing requirement is problematic.
- **COVID-19 Test Must be Observed**: Under a revised definition, a "COVID-19 test" cannot be both self-administered and self-read, unless observed by the employer or "an authorized telehealth proctor." Examples of approved tests include proctored over-the-counter tests, and tests where specimen collection and processing is either done or observed by an employer.
- **Notice of COVID-19 Cases in the Workplace:** As clarified, employers must provide notice of a COVID-19 case to "all employees who were on the premises at the same worksite as the COVID-19 case during the high-risk exposure period." **The notice may be "in a manner the employer uses to communicate employment-related information."** This revision concerning the method of notice provides employers greater flexibility in how they notify employees of the COVID-19 case.
- **"Face covering":** The definition of "face covering" is revised to recognize, as an acceptable option, gaiters that have two layers of fabric or are folded to make two layers. The proposed rule would also require that any employee who cannot wear a face covering (or a non-restrictive alternative) due to a disability or medical condition be at least 6 feet from others in the workplace and either be "fully vaccinated or tested at least weekly for COVID-19 during paid time and at no cost to the employee." Lastly, under the transportation rule, the exemption from the face covering requirement for fully vaccinated employees in employer provided vehicles has been removed.