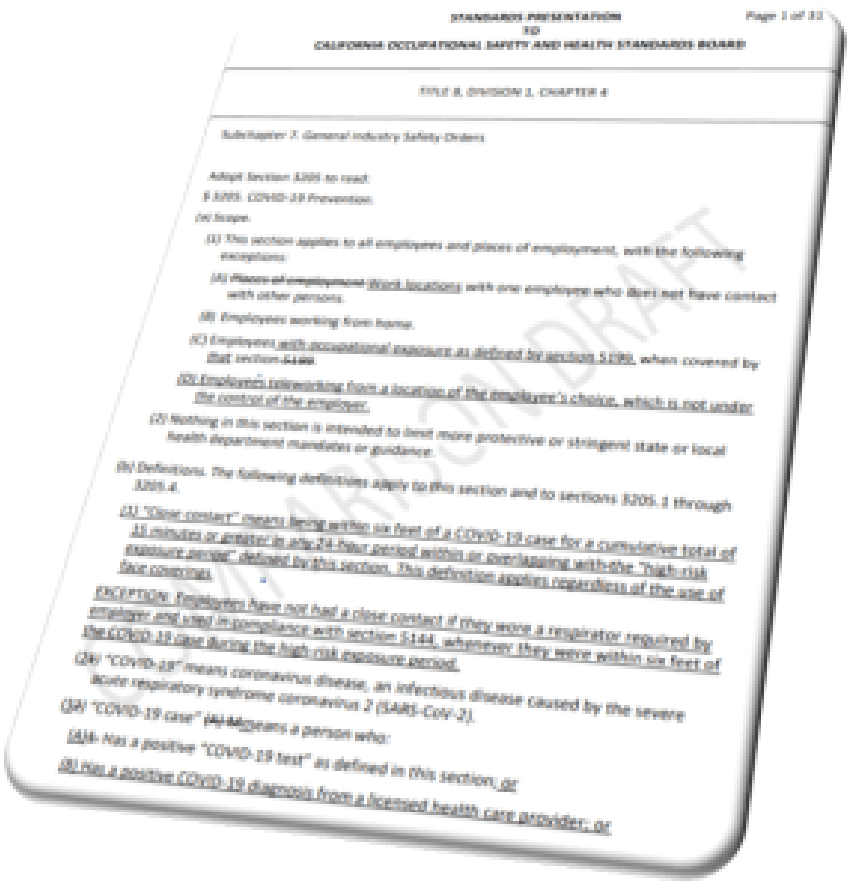
JUNE 4, 2021 | LEGISLATIVE & STANDARDS BOARD UPDATES

Cal/OSHA Standards Board Votes Down – Then Revotes to Adopt, with Reservations – Cal /OSHA Revised COVID-19 Emergency Temporary Standard

By Conn Maciel Carey's COVID-19 Task Force

Yesterday, June 3, 2021, the California Occupational Safety and Health Standards Board (Board) convened and, in a bizarre turn of events, voted against, and then, moments later, voted to approve, Cal/OSHA's revised COVID-19 Emergency Temporary Standard (ETS). The revised ETS is expected to take effect on June 15, 2021.

The Board initially voted 4-3 against adoption of the revised ETS, and next voted to set up a Subcommittee of three Board members to meet with the Division of Occupational Safety and Health (Division) to make the rule "better." The Board members rejecting the proposal had expressed concern over the clarity of the vaccination documentation requirement, the continued use of face masks in the workplace, and the mandate for employers to provide N95 respirators for unvaccinated workers. Yet, the stated goals for this Subcommittee are ambiguous, to say the least.



At that point, the Board members expressed concern about the existing ETS remaining in effect indefinitely in the meantime, and took a break apparently to confer over whether to reconsider their earlier vote. After returning to the meeting, the Board voted unanimously, without explanation, to adopt the revised ETS while the Subcommittee considers further changes. The meeting lasted into the evening, with public comments from over 100 speakers.

As background, the Division initially introduced a revised version of the COVID-19 ETS to the Board for its consideration on May 7th. The Board was originally scheduled to meet on May 20th to consider that revised version, but, at the Division's request, the meeting was pushed back a couple weeks so that Division could revisit its proposed revisions in light of the CDC's May 13th guidance regarding vaccinated persons and face masks, as well as associated guidance announced by the California Health & Human Services Agency. Although it appeared the delay was a sign the Division would improve at least a few of the most problematic provisions to align with that guidance, the revised version actually stayed much the same, and, in some ways, became worse for employers and workers. Indeed, the revised version that the Board ultimately adopted does not recognize an exception to the mask mandate for employees who are indoors and fully vaccinated (unless all people in the room are fully vaccinated, and do not have any symptoms that are associated with COVID-19). The revised ETS also imposes various new requirements, including that employers provide N95 respirators to unvaccinated employees for voluntary use beginning July 31, 2021.

On behalf of the California Employers COVID-19 Prevention Coalition, Conn Maciel Carey participated in yesterday's meeting and submitted written comments addressing a variety of concerns related to the revised ETS, including, among others, that:



CONN MACIEL CAREY

June 2, 2021

Chair David Thomas and Board Members
Occupational Safety and Health Standards Board
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State of California
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Re: **Comments and Recommendations About Proposed Amendments to Cal/OSHA's Emergency COVID-19 Prevention Rule**

Dear Chair Thomas and Members of The Board:

On behalf of the California Employers COVID-19 Prevention Coalition ("the Coalition"), we have served on the Advisory Committee of the Cal/OSHA COVID-19 Emergency Temporary Standard (the Emergency Temporary Standard or ETS) and otherwise actively engaged in this important rulemaking. We respectfully offer these comments concerning the proposed revisions to the Emergency Temporary Standard published on May 7 and 28, 2021 for consideration by the Standards Board on June 3, 2021.

The California Employers COVID-19 Prevention Coalition is composed of a broad array of California and national employers substantially impacted by Cal/OSHA's Emergency Temporary Standard. Included among its members are companies representing manufacturing, retail, airline operations, aerospace/defense, agriculture, construction, wholesale food distribution, landscaping services, petroleum refining, logistics, veterinary services, steelmaking, and other industries, with a combined hundreds of workplaces with hundreds of thousands of employees across California.

While the Coalition was pleased that several of the recommendations that we had previously detailed during the February Advisory Committee meetings, and in written comments submitted in March, were addressed in the proposed revised version of the ETS, we submit these comments to address several aspects of the draft revised ETS that greatly concern our members. Of particular concern to our Coalition are the requirements to provide N95 respirators for voluntary use to every single unvaccinated worker in the state, the significant gap between the ETS's requirements for masks and distancing for fully vaccinated workers and the science-based guidance from the Centers for Disease Control and Prevention ("the CDC") adopted by the rest of the country, as well as the obligation to obtain/retain documentary proof of vaccination status in order to consider someone fully vaccinated.

- **Vaccines**. The revised ETS does not recognize the proper, science-based exception to the mask mandate – under Sec. 3205(c)(7) – for an employee who is fully vaccinated. Rather, a vaccinated employee may only forego a mask when "all persons in a room are fully vaccinated and do not have COVID-19 symptoms." But the vaccines have proven effective against contracting and transmitting the COVID-19 and against experiencing serious illness. Clearly this is inconsistent with the CDC's May 13th guidance, the position adopted essentially everywhere else in the entire country, and California's plan to reopen its economy on June 15th.
- **Respirators**. Any mandate to supply N95 respirators to every worker in California for which the employer does not have a document verifying that the worker is fully vaccinated is ill-conceived. Based on a projected 20% of Californians not getting the COVID-19 vaccine past the July 31st deadline (for a variety of reasons including personal beliefs and health conditions), to supply N95 respirators for unvaccinated employees under the revised ETS, out of a workforce of 20 million, that means 4 million workers who will need to be provided an unlimited supply of N95s for voluntary use for the entire effective life of the ETS. And that projection is a minimum – consider employees who refuse to share their vaccination status, or employees at workplaces where employers make no effort to verify vaccination status. This will undoubtedly result in shortages again for the healthcare sector that still requires N95s, regardless of vaccination status, as well as employers that are required to provide N95 respirators during wildfire season under Cal/OSHA's wildfire

smoke rule.

- **Record Retention**. The revised ETS should be changed to state that COVID-19 lab test results and documentation of proof of vaccination are not covered by the employee medical record retention regulation. The 30+ year retention requirement for medical records is primarily designed to address the potential long-term latency periods for the onset of certain work-related illnesses. That purpose is not relevant to these types of records in this context. Since the 30+ year retention requirement may be shortened by explicit retention periods in specific standards, the revised ETS should include a shorter retention period, namely, one year.
- **Exclusion Pay**. The revised ETS states that exclusion pay is "subject to enforcement through procedures available in existing law," creating a private right of action that is not aligned with Cal/OSHA's mission to advance workplace safety and health. This provision will surely spur wage and hour litigation, particularly collective actions under the Private Attorneys General Act ("PAGA") seeking compounded penalties independent of the wages allegedly due, against a substantial number of business that are recovering economically from the pandemic.
- **Outbreaks**. The ETS, as originally adopted and in its revised form, improperly places the burden on employers to manage non-work community spread. The ETS's outbreak sections should be amended in several ways:
    - First, the cases that trigger a determination of an outbreak should be found to be epidemiologically-linked to work and the workplace (*e.*, transmission occurred within/at the workplace). It is common sense that an outbreak at work involves the virus being spread among co-workers. Obvious coincidental, non-work-related cases should not implicate onerous provisions in a workplace regulation.
    - Second, the outbreak period should be reduced from 14 to 10 days. The original 14-day period was obviously intended to align with the ETS's original 14-day quarantine requirement. As that quarantine period has now been shortened to 10 days for asymptomatic close contacts, and employees who test positive can also be cleared to return to work in as few as 10 days regardless of whether they experienced symptoms, the outbreak period should realign with that period.
    - Third, the ETS should state that rather than using the testing date for purposes of measuring the period for assessing outbreaks and major outbreaks, employers should use the beginning date of each case's high-risk exposure period. The regulatory text and/or the associated FAQ should be changed accordingly.
    - Finally, the ETS should state that the date from which to determine the end of an outbreak is the last date that the last case in the outbreak group was at the facility during his/her high-risk exposure period.
- **Notice**. Cal/OSHA's change to the regulatory text – that notice of a COVID-19 case should now be conveyed to "[a]ll employees at the worksite during the high risk exposure period" – moves in exactly the wrong direction. By changing the notice to all employees at the worksite, regardless of any actual interaction with the infected individual, or even presence during any shared time and space within the worksite with the infected worker, people who have zero risk of personal exposure would be notified of a positive case, implying that they may have been exposed and turning these notices into something of a nuisance alarm. Additionally, the forms of notice provided as examples in the revised ETS – personal service, email, or text

message – are too inflexible. A form of posting that can reasonably be anticipated to be received by the employee within one business day should be acceptable under the rule.

- **Testing**. The revised ETS should not require employers to make COVID-19 testing available during paid time to all unvaccinated employees who had close contact in the workplace. Given the ready availability of easy and free testing throughout California, there is no longer a need to shift the burden for procuring testing/making it available to employers. Moreover, it is not reasonable to require employers to provide paid time off for employees to get tested, when exposures that may warrant testing could just have easily (or much more easily) have occurred outside the workplace.
- **Training**. Cal/OSHA should delete the additional training topics from the revised ETS, or, at most, it should be identified as a subject to be "communicated to employees," as opposed to a subject required in training. Adding new mandatory training subjects, even simple ones, will mean an additional round of training for every employer in the state. By creating a communication, rather than a training, requirement for these new subjects, employers can convey to employees the new topics via written communications, postings, or other methods that do not involve convening all employees for yet another training session.
- **Barriers**. The revised ETS should not include any requirement to install barriers. Rather, the revised ETS should include permissive language, allowing employers to draw upon the wide array of effective engineering and administrative controls that have been identified throughout the pandemic (i.e., the revised ETS should adopt the recommendations made by Federal OSHA in one of its earliest COVID-19 guidance documents by requiring employers to implement the hierarchy of controls).

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