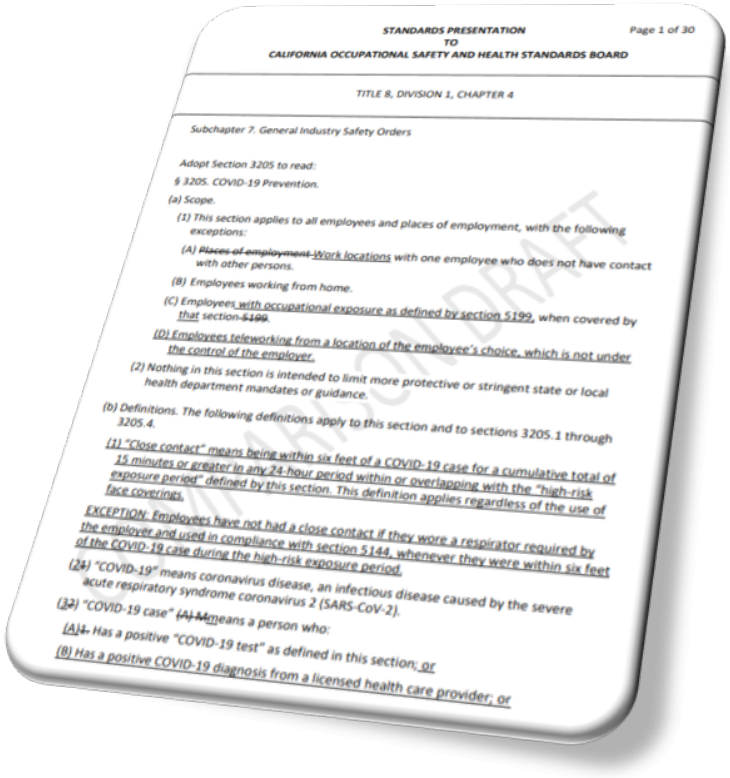
JUNE 16, 2021 | LEGISLATIVE & STANDARDS BOARD UPDATES

Cal/OSHA's COVID-19 ETS To Be Updated This Week — And They Mean It This Time

By Andrew J. Sommer and Eric J. Conn

We are barreling towards major changes to Cal/OSHA's COVID-19 requirements for California employers expected to take effect on Thursday or Friday of this week.



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TO
CALIFORNIA OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD

TITLE 8, DIVISION 1, CHAPTER 4

Subchapter 7. General Industry Safety Orders

Adopt Section 3205 to read:

§ 3205. COVID-19 Prevention.

(a) Scope.

(1) This section applies to all employees and places of employment, with the following exceptions:

(A) ~~Places of employment~~ Work locations with one employee who does not have contact with other persons.

(B) Employees working from home.

(C) Employees with occupational exposure as defined by section 5199, when covered by that section ~~5199~~.

(D) Employees teleworking from a location of the employee's choice, which is not under the control of the employer.

(2) Nothing in this section is intended to limit more protective or stringent state or local health department mandates or guidance.

(b) Definitions. The following definitions apply to this section and to sections 3205.1 through 3205.4.

(1) "Close contact" means being within six feet of a COVID-19 case for a cumulative total of 15 minutes or greater in any 24-hour period within or overlapping with the "high-risk exposure period" defined by this section. This definition applies regardless of the use of face coverings.

EXCEPTION: Employees have not had a close contact if they wore a respirator required by the employer and used in compliance with section 5144, whenever they were within six feet of the COVID-19 case during the high-risk exposure period.

(2~~1~~) "COVID-19" means coronavirus disease, an infectious disease caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

(3~~2~~) "COVID-19 case" ~~(A) M~~means a person who:

(A) ~~1.~~ Has a positive "COVID-19 test" as defined in this section; or

(B) Has a positive COVID-19 diagnosis from a licensed health care provider; or

After the back and forth with the last revised ETS that was voted down, then approved minutes later, the clawed back a few days later to make way for another revised ETS, late last week, Cal/OSHA released the ***new revised text*** for its COVID-19 ETS.

The text of what appears now to become the official updated version of Cal/OSHA COVID-19 ETS is available

here, and a redline comparison with the presently effective text is here. Additionally, DOSH has just issued these FAQs clarifying the intent of the proposed revised COVID-19 ETS.

Below is our summary of the major substantive changes coming to the ETS, as compared to the prior proposed revisions (subsequently withdrawn), as well as highlighted guidance that interprets or expands on these anticipated new regulatory requirements.

Substantive Revisions to the ETS Text

As expected, these latest changes were limited given the short window for issuing revisions following the Standards Board's special meeting earlier this week. We understood that the face mask requirement would be modified, as to fully vaccinated employees, but it was unclear what other changes would be made. We have summarized the meaningful revisions as part of our initial analysis:

- **Physical Distancing Requirements Deleted – 3205(c)(6):** This is a major improvement, as the prior revised text retained physical distancing until July 31st.
- **Face Masks for Vaccinated/Unvaccinated Workers – 3205(c)(6) [formerly (c)(7)]**: Under the presently effective standard, employees must wear face masks when indoors, or when outdoors and closer than 6 feet, subject to certain exceptions. After CDPH updated its guidance earlier this week to match CDC's, we expected changes to this requirement. In this new text, we see more consistency with CDC/CDPH's updated guidance and, specifically, **fully *vaccinated workers are not required to wear face masks.*** For unvaccinated workers, masks will be required indoors or when in vehicles, with limited exceptions. The revised text requires that "upon request" employers provide face masks to employees, regardless of vaccination status.
- **N95s for Unvaccinated Employees and Stockpiling – 3205(c)(6)(B) and others:** A major concern for employers has been the requirement to stockpile N95 respirators of the proper size for voluntary use by unvaccinated employees. Given the percentage of the workforce remaining unvaccinated, the volume of N95s that would have needed to be purchased was considerable. We've also raised concerns over waste, as the general consensus was that employees who did not want to get vaccinated would likely not want to wear a less comfortable N95 respirator and thus those stockpiled respirators would go to waste. Here, the new text adds some key language that employers must provide such respirators "upon request."
- **Work Station Partitions Not Required Except in Major Outbreaks – 3205(7) and others:** The requirement to install "cleanable solid partitions" at fixed work stations where physical distancing is not maintained has been deleted. Note, however, that if an outbreak occurs, employers must "evaluate whether to" re-institute physical distancing and, where physical distancing is not feasible, use partitions. But where a major outbreak occurs, employers must "install" partitions for fixed work stations where physical distancing is not maintained.
- **Verification of Vaccination Status – 3205(b)(9):** Under the definition of "fully vaccinated," the revised text provides that an employer has "documented" that the person was vaccinated. This replaces the previous proposed text providing that the employer have "documentation" of the employee's vaccination status, suggesting a record retention obligation.
- **International Vaccines – 3205(b)(9):** While the prior draft did not recognize foreign vaccines, this new version recognizes for persons vaccinated outside the United States, vaccines "listed for emergency use by the World Health Organization" – which should be especially helpful for international employers.

FAQs on Proposed Revisions

The FAQs address the proposed requirement that employers provide unvaccinated employees – upon request – respirators for voluntary use for work indoors or in vehicles with more than one person. Regrettably, the guidance takes "upon request" to mean that employers should provide the requested respirators "as soon as possible." Employers are expected have enough respirators "on hand of the correct size and type to fulfill reasonably foreseeable requests upon demand." This guidance fails to afford the needed lag time to obtain respirators following an employee request and does not obviate employer concerns over the stockpiling of N-95 respirators.

> ***Q: What does it mean to "provide respirators upon request"?***
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> ***A:*** *An employer must be able to provide the respirator upon request. Initially, an employer may either stock respirators and offer them to employees or may poll workers to determine which employees wish to be provided a respirator before obtaining them. However,* ***once an employer has established that it has employees who wish to wear respirators, it should have enough on hand of the correct size and type to fulfill reasonably foreseeable requests upon demand.*** *If an employee prefers to select and purchase their own respirator, an employer may permit this alternative, as long as the employer reimburses the employee in timely manner.*
>
> *In a major outbreak respirators must be offered to employees regardless of vaccination status and without waiting for a request from the employee. The employer must offer respirators immediately upon determining a major outbreak is underway.*
>
> *An employer is under a continuing obligation to provide respirators to eligible unvaccinated employees at any time they communicate to the employer their desire to wear one.*
>
> ***Q: How soon does a respirator need to be provided after an employee requests it?***
>
> ***A****: After initial implementation as described above, employers should provide requested respirators to unvaccinated employees* ***as soon as possible.***

The FAQs attempt to address concerns over N-95 shortages by offering that employers will not be cited where they have made "a good faith estimate and effort" to timely provide respirators. This might mean that if the employer estimates N-95 volumes based on the regular number of employee requests and then there is an unexpected spike in demand and N-95 respirators are unavailable at the time given the supply chain, DOSH would not take any enforcement action as a result. But, FAQs are not legally binding.

> ***Q: What if more employees request respirators than the employer anticipates and the employer runs out of respirators? Will Cal/OSHA cite the employer?***
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> ***A: Cal/OSHA will not cite employers who make a good faith estimate and effort to provide respirators as soon as possible to employees that request them.*** *If an employer runs out of respirators, they should order more respirators immediately. Cal/OSHA lists some but not all vendors that sell N95 respirators in large quantities (vendors able to fulfill orders of more than 100,000 units) at*

https://www.dir.ca.gov/dosh/wildfire/List-of-N95-Vendors.pdf. There are many vendors who have N95s available in smaller quantities.

The FAQs also make clear that respirators will need to be replaced when "damaged, deformed, dirty, or difficult to breathe through," in accordance with the manufacturer's instructions.

> ***Q: How often must an employer provide an employee with a new respirator?***
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> ***A:*** *For voluntary use, the need to replace a respirator varies with use and environment. Filtering facepiece respirators are disposable respirators that cannot be cleaned or disinfected.* ***They must be replaced if they get damaged, deformed, dirty, or difficult to breathe through. A best practice is to replace filtering facepiece respirators at the beginning of each shift. Employers should follow the manufacturer's instructions.*** *CDC recommends replacing a disposable filtering facepiece respirator, such as an N95, after it has been taken on and off five times. Filtering facepiece respirators may not fit correctly after repeated use.*

On the question of how to verify employee vaccination status, critically, the FAQs recognize self-attestation as an option "provided that employer maintains a record of who self-attests."

> ***Q: Is documentation required for a fully vaccinated employee to work without a face covering indoors?***
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> ***A:*** *Yes.* ***Vaccination status must be documented. The proposed revised ETS does not specify a particular method.*** *The employer must have record [sic] the vaccination status for any employee not wearing a face covering indoors and this record must be kept confidential. Acceptable options include:*
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> - *Employees provide proof of vaccination (vaccine card, image of vaccine card or health care document showing vaccination status) and employer maintains a copy.*
> - *Employees provide proof of vaccination. The employer maintains a record of the employees who presented proof, but not the vaccine record itself.*
> - ***Employees self-attest to vaccination status and employer maintains a record of who self-attests.***
> - *Nothing in the proposed revised ETS prevents an employer from requiring all employees to wear a face covering instead of having a documentation process.*

Next Procedural Steps

The original emergency regulation remains in effect until this revised text is passed by the Standards Board, and typically after 10 more days awaiting approval by the Office of Administrative Law. If the proposed revised draft is adopted at the Standards Board's at its next regularly-scheduled meeting, which is this Thursday, June 17th, it would go into effect 10 days later (June 28th) under the usual rulemaking process. Until the revised standard takes effect, employers will need to continue under the present ETS including after the state's planned reopening on June 15th. But to speed things along, Governor Newsom just announced that he will issue an executive order on Thursday – when the Standards Board is set to vote on the proposed Cal/OSHA ETS revisions – waiving the

Office of Administrative Law's review period.

So if the Board adopts the ETS revisions on Thursday, as is expected, they will take effect immediately. "That should clear up any ambiguity," Gov. Newsom said at a press conference earlier this week. "We'll be consistent with the [Centers for Disease Control and Prevention's] guidelines." Additionally, Newsom said that the state is expected to announce details of electronic versions of COVID-19 vaccine cards. "It's not a passport. It's not a requirement. It's just the ability now to have an electronic version of that paper version," he said. "And so you'll hear more about that in the next couple of days." Further updates on this issue, among others, are expected later in the week. Stay tuned.