


NOVEMBER 4, 2022 | LEGISLATIVE & STANDARDS BOARD UPDATES

# California Employers COVID-19 Prevention Coalition Submits Second Round of Comments on Cal/OSHA's Non-Emergency COVID Rule

The rulemaking process continues for Cal/OSHA's Proposed Non-Emergency COVID-19 rule, with the second comment period for the modifications closing.

Conn Maciel Carey again submitted comments on behalf of the California Employers COVID-19 Prevention Coalition. The Coalition, comprised employers and trade groups, has been active in the rulemaking for the Cal/OSHA COVID-19 Prevention Emergency Temporary Standard (ETS) and the Proposed Non-Emergency/Permanent COVID-19 Prevention Standard (Proposed Non-emergency Rule). 

A copy of the Coalition's October 31 comments are available [here](#). To summarize, our comments primarily addressed three concerns raised by the rule modifications:

## Definition of Close Contact

On October 13, 2022, the California Department of Public Health updated its definition of "close contact" to distinguish between indoor spaces of 400,000 or fewer cubic feet per floor and those larger indoor spaces greater than 400,000 cubic feet per floor. For the larger workplaces, CDPH returned to the Centers for Disease Control and Prevention's measurable "close contact" standard, incorporating the 6-foot benchmark consistently relied upon by OSHA, public health agencies and employers across the country for over two years. However, for smaller indoor spaces, the CDPH definition continues to rely on the concept of "sharing the same **indoor airspace**." The comments advocated that a similar definition should apply to all indoor workplaces and not just larger spaces, as called for in the revised CDPH definition.

We requested that if the Board is inclined to retain the more expansive definition of "close contact" for smaller indoor spaces, that the rule add clarifying language recognizing the importance of proximity to the COVID-19 case, as well as the direction of airflow, the facility's configuration and engineering controls, as considerations in determining close contacts.

## Exclusion Pay

During the October Standards Board meeting, there was heated discussion over the topic of exclusion pay. The

Proposed Non-Emergency Rule has omitted exclusion pay, which has been part of the ETS for employees who quarantine or isolate due to a COVID-19 workplace exposure. In our comments, we have advocated against including exclusion pay in the Proposed Non-Emergency Rule given the evolving COVID-19 conditions, including the availability of vaccinations, milder symptoms and significantly lower rates of COVID-19 related hospitalizations and fatalities, and the community-spread characteristic of COVID-19 infection. In announcing that California's COVID-19 State of Emergency will end on February 28, 2023, Governor Newsom cited these very circumstances to support that decision.

In response to questions and doubts conveyed by various members of the Standards Board at its last meeting, our comments provide an overview of the numerous California laws providing job protections and benefits for reasons related to COVID-19, including workers' compensation paid benefits, paid disability and family leave benefits, paid sick leave, and other protections under the California Fair Employment and Housing Act, California Family Rights Act and California Labor Code.

The comments also offered an explanation for why the exclusion pay provision under the Aerosol Transmissible Diseases Standard is unique and not appropriate for expansion to all employers across all industries.

### **Sunset Clause**

Finally, we reiterated our recommendation that the Proposed Non-Emergency Rule include alternative bases for terminating the Rule. This is particularly critical in light of Governor Newsom's announced end of the COVID-19 State of Emergency.

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**Conn Maciel Carey LLP**

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