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Comment Period Set for Cal/OSHA's Permanent COVID-19 Rule

BY ERIC J. CONN

Last month, the California Division of Occupational Safety and Health (Cal/OSHA) revealed a proposed Permanent COVID-19 regulation. The draft permanent rule is intended to replace the current version of the COVID-19 Emergency Temporary Standard (ETS) that is set to expire at the end of 2022. Here is a link to the agency's draft regulatory text for the permanent rule.

The proposed permanent rule is expected to remain in effect for two years, except for the record-making and recordkeeping provisions that would remain effective for three years.

On July 29, 2022, the Standards Board issued the attached rulemaking notice that set both the date for a meeting of the Standards Board when the proposed COVID-19 permanent rule would be debated and discussed, as well as an official due date for written comments from interested stakeholder. Both of those are set for ***September 15, 2022***.

The rulemaking process for the proposed permanent rule is different than with the prior iterations of the emergency COVID-19 rulemaking. A nonemergency rule requires a minimum 45-day period for the public to comment to the agency in writing on the proposed regulation. After the hearing, DOSH will theoretically review written and oral comments and potentially make changes to the proposed rule based on that, or perhaps even return the proposed rule to Cal/OSHA for further work. If substantial changes are made related to the initial proposal, an additional 15 days of notice for further public comment is required. Presently, we understand the Board intends to schedule a vote on the proposed rule in December, and the permanent rule, if adopted, would take effect January 1st, as the final renewed COVID-19 emergency rule expires.

Among several important issues in the proposed permanent rule is the new definition of "Close Contact" exposure incorporated in the rule. Here is some background about that issue:

CDPH's New "Close Contact" Definition

When the current version of the COVID-19 ETS was adopted, it specified that if "close contact" was redefined "by regulation or order of the [California Department of Public Health (CDPH)]," the CDPH definition would apply for purposes of enforcement of the ETS rather than the definition provided in the ETS itself. CDPH issued an order on June 8, 2022 updating its definition of "close contact," so that new definition automatically and

immediately applied to the ETS. Cal/OSHA then updated its FAQs on June 21st to make clear that and how that new definition applies to the ETS. On July 18, CDPH followed up with its own updated FAQs to address this new definition:

Q: CDPH has revised its definition of "close contact," and this new definition applies to the ETS because it is included in a state public health officer order. A "close contact" is now "someone sharing the same indoor airspace, e.g., home, clinic waiting room, airplane etc., for a cumulative total of 15 minutes or more over a 24-hour period (for example, three individual 5-minute exposures for a total of 15 minutes) during an infected person's (laboratory-confirmed or a clinical diagnosis) infectious period."

What is a shared indoor airspace in the context of the ETS, and how should an employer determine who has had a close contact?

A: Consistent with CDPH guidance on identifying close contacts, a shared indoor airspace may be analyzed in several ways. Smaller spaces contained within a large indoor space that are separated by floor-to-ceiling walls are not part of the same indoor airspace as the large indoor space. These smaller spaces may include suites, rooms, waiting areas, bathrooms, or break or eating areas. In these settings, an employer would determine close contacts by evaluating which employees shared that smaller space

with a COVID-19 case for 15 minutes or more over a 24-hour period.

Larger indoor settings that are not divided into smaller spaces that are separated by floor-to-ceiling walls may constitute a shared indoor airspace. These settings may include open-floor-plan offices, warehouses, retail stores, or manufacturing or food-processing facilities. In those cases, employers must evaluate whether employees shared the same indoor airspace on a case-by-case basis, considering the duration and proximity of the contact, regardless of the specific task of the employees. For example, there may be a close contact between employees in an open-floor-plan plant even though the two persons worked on separate machines, one as a maintenance worker and one as a packer on an adjacent line. Proximity and length of exposure are key to this determination.

There may be both large indoor spaces as well as smaller spaces within them. Employers with both large indoor spaces and smaller indoor spaces within the large indoor spaces must evaluate close contacts in both types of spaces. For example, in an open-floor-plan office or warehouse (large indoor space) with a bathroom and break area (smaller spaces), the employer must evaluate both types of spaces to determine who had a close contact.

While the DOSH guidance still leaves many questions unanswered, there is some helpful language to assist employers in determining close contacts. Particularly in large indoor spaces, Cal/OSHA calls for employers to analyze large indoor settings that are not divided into smaller spaces on a "case-by-case basis" and specifies that "proximity and length of exposure are key to this determination." The ETS and FAQs remain silent, however, about what other measures Cal/OSHA would consider in determining the "shared indoor airspace."

For smaller spaces, the FAQ calls for employers to determine close contacts "by evaluating which employees shared that smaller space with a COVID-19 case for 15 minutes or more over a 24-hour period."

During the Standards Board meeting held on July 21, agency-aligned Board Member Laura Stock requested further information from DOSH on how the new definition of close contact is playing out in enforcement actions. Stock acknowledged that the new definition introduces ambiguity and that it seems to leave employers to determine whether people are sharing indoor airspace. In response to the inquiry, DOSH punted that it had no further information at this time, but hoped to have more to share at the next board meeting.

Last Chance to Join the Employer Coalition

It is critical that employers impacted by this proposed rule make their voices heard at this final stage. To facilitate that, Conn Maciel Carey's national OSHA Practice has organized a coalition of employers and trade groups to work on Cal/OSHA's COVID-19 rulemakings. As you may know, we were deeply involved in the Cal/OSHA ETS rulemaking process. In 2020, we organized a broad coalition of California and national employers to:

1. Evaluate and educate our members about the proposed emergency rule
2. Participate as one of only small handful of employer/industry representatives on the formal Advisory Committee established by Cal/OSHA for this rulemaking
3. Submit a formal, substantive request to extend the comment period for the rulemaking to allow the agency time to actually consider stakeholder comments

4. Prepare a set of comprehensive written comments raising serious concerns about not only the substance of the rule, but also the extremely rushed rulemaking process
5. Develop an additional set of comments for California's Office of Administrative Law – the final gatekeeper for new regulations (like federal OMB)
6. Give testimony at both a pre-rule hearing and a post-rule stakeholder meeting and
7. Provide regular and frequent status reports and substantive updates to our members about the ETS and related guidance from Cal/OSHA.

Thanks to our California Employers COVID-19 Prevention Coalition and other stakeholders' efforts, we have seen some very positive developments related to the Cal/OSHA ETS, including the issuance of several batches of FAQs by Cal/OSHA attempting to address some of the concerns and recommendations we addressed. Also because of that work, we were invited by Cal/OSHA, on behalf of our Coalition, to participate on the Advisory Committee for the ETS, and attended the Advisory Committee meetings on February 11, 12, and 16, 2021.

We have officially reconvened this Coalition to work on the proposed permanent rule. We have opened membership in this fee-based group to allow additional employers and trade groups to participate and support the work we are doing to advocate against the need for a permanent COVID-19 regulation, or for the most reasonable version of the rule possible, if the Board will proceed to adopt one.

As the comments are now due to the Standard Board by September 15th, we plan to circulate a draft of our comments to our coalition soon and to hold a virtual meeting with our coalition members to obtain feedback and ensure the comments effectively address the proposed rule's impact on our participants' businesses and industries

There is more time for organizations to get involved in the Coalition, but this is the last opportunity that California employers will have to have a say in whether the state adopts a permanent COVID-19 rule and how onerous it is.

If you are interested in participating in the coalition, please let us know as soon as possible. We want to ensure as much time as possible to hear your input and get your feedback about any talking points or written comments we prepare.

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