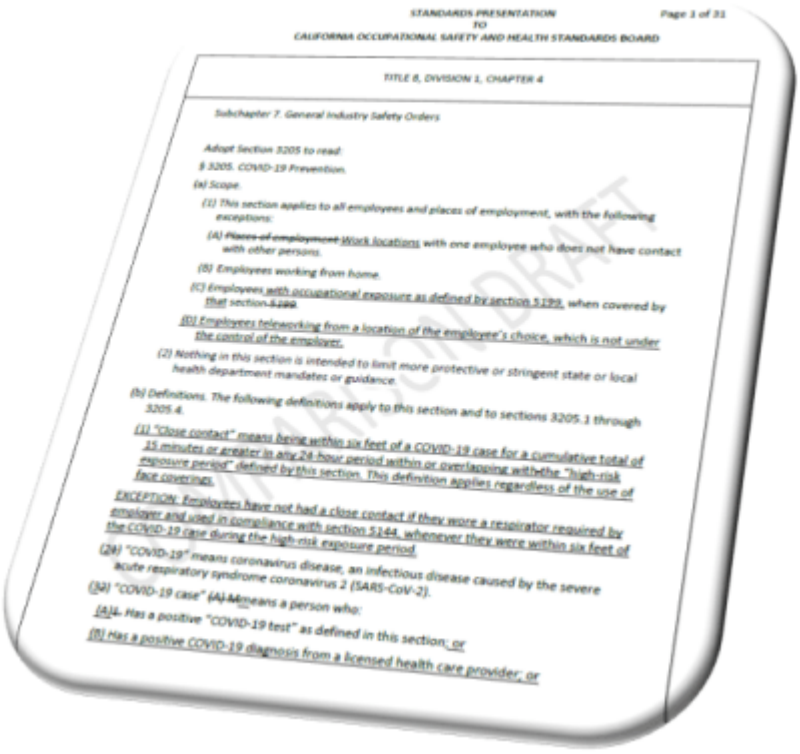
MAY 18, 2021 | LEGISLATIVE & STANDARDS BOARD UPDATES

More On Cal/OSHA's Proposed Amendments to its COVID-19 ETS

By Fred Walter

In our May 11th blog article, we covered some of the most important changes to Cal/OSHA's COVID-19 emergency temporary standard that the Division has proposed for approval at the next Cal/OSHA Standards Board meeting later this week on May 20, 2021. Here we offer some additional insights into the amendments and their likely impact on California employers.



STANDARDS PRESENTATION TO CALIFORNIA OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD

Page 1 of 31

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

(3) "COVID-19 case" ~~(A) M~~eans 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

Face coverings: The new language mentions several options for face coverings but does not mention a popular one — gaiters. Responding to a question we presented to the Division, Cal/OSHA confirmed that gaiters can be an acceptable face covering if they are doubled over to create two layers of protection.

Written notice of COVID-19 cases: Verbal notice can be substituted where the employer has reason to know that an employee will not get the written notice or has such "limited literacy" that a written notice will be ineffective.

Testing: The requirement that employers *"offer"* testing, which was ambiguous from Day One, has been changed to: *"Make … testing available…,"* an almost completely verbatim copy of a suggestion made in written comments by CMC's California Employers COVID-19 Prevention Coalition during the Advisory Committee process. You're welcome Cal/OSHA.

The requirements that the test be free to the employee and conducted on company time remain. In a bit of foresight, the new rule will provide an exception for employees who are fully vaccinated before a close contact and remain symptom-free.

Training: This and other sections of the new regulation signal a shift to what might be called "mandatory-voluntary" use of the N95. Subsection (c)(5)(E) of the proposed amended ETS states that "whenever" employers provide respirators for voluntary use, they must train those employees on how to properly wear them and perform a "seal check." Fit-testing and the respiratory protection regulation (8 CCR 5144) are not mentioned here, but that is not the end of the story.

July 31, 2021 – The Magical Date

On July 31, 2021 the regulation's provisions for physical distancing and barrier protections will sunset. In their place will be a mandate that, starting 15 days after these revisions become law:

"… employers shall provide respirators for voluntary use in compliance with section 5144 [the respiratory protection standard] to all employees who have not been fully vaccinated, and encourage use of those respirators, when employees are in a vehicle with at least one other person for 15 minutes or more."

It appears the Division learned nothing from our experience last season when competition between healthcare and firefighters drained the State of N95s. Now, just as the State is entering what is expected to be a fire season more dangerous than the last, employers will again be in competition for rapidly diminishing stocks of N95s.

Back at the beginning of the COVID-19 crisis, it was thought that N95s were one-time use only. That's what many manufacturers recommended. Now the Division points to CDC advice that N95s that are kept clean and dry can be reused up to 5 times. But what of the employer who relies on the CDC when the manufacturer's instructions are more restrictive? Title 8's repeated requirements that employer follow manufacturer recommendations are bound to lead to citations, especially when the regulations mention the CDC not once.

Employers will have only a few days to put new tracking systems in place to identify who is vaccinated and who is not, provide the latter with one or more N95s and urge them to become vaccinated. The new rule raises some interesting questions about privacy and confidential medical information — What says "unvaccinated" quite so clearly as being the only worker on the floor wearing an N95? Since California law does not prohibit employers from requiring vaccination, one alternative will be to establish a policy of termination or suspension of workers

who refuse to become vaccinated, which will lead to problems of its own.

And the language about use in **vehicles** is poorly drafted. It is unclear whether this refers to employees' work-related travel; if so, this should be addressed in 3205.4 on Employer-Provided Transportation. Whether unintentionally created by inartful drafting or something more sinister, this language will mark a new expansion of Cal/OSHA's jurisdiction by requiring employers to monitor their employees' personal use of vehicles without limitation.

The last bit of bad news is that the **wage continuation provisions** of the amendments now have added language that "Unpaid wages owed under this subsection are subject to enforcement through procedures available in existing law." Some see this as merely Cal/OSHA's attempt to avoid a turf war with the Division of Labor Standards Enforcement. If so, why use such broad language? Many others see this sentence as opening the door for PAGA claims.

Finally, we foresee major editing of Cal/OSHA's FAQs on the ETS to catch up to these changes, which means that California employers will have to continue keeping their eyes on multiple sources of regulatory text and guidance in order to remain in compliance. Stay tuned.

As in our initial blog on these changes, we recommend a quick review and gap assessment of your current COVID-19 Infection Control programs. Contact any of the attorneys in Conn Maciel Carey's OSHA Practice if you have questions about Cal/OSHA's COVID-19 ETS and how these amendments will affect your compliance strategies.

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