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Cal/OSHA COVID-19 Non-Emergency Rule Is Adopted

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On December 15, the California Occupational Safety and Health Standards Board voted 6-1 to adopt the COVID-19 Prevention Non-Emergency Regulations. The Non-Emergency Rule was proposed to replace the Cal/OSHA COVID-19 Emergency Temporary Standard, which has been in effect in four different versions since November 30, 2020 and is set to expire on December 31, 2022.

The Office of Administrative Law will now review the new regulation, which is expected to be formally approved, effective January 1, 2023.

Discussion from the Standards Board Meeting

During the meeting, stakeholders provided public comments on the proposed Non-Emergency Rule. During the public comment period, Conn Maciel Carey spoke on behalf of the California Employers COVID-19 Prevention Coalition, composed of a broad array of California employers and trade groups substantially impacted by Cal/OSHA's COVID-19 rulemaking. We urged the Board to vote "no" on the proposal, highlighting the availability of vaccinations, testing and treatment and the inflexibility of the two-year fixed term. We also emphasized that the Injury and Illness Prevention Program and public health orders are more nimble, effective tools for addressing COVID-19 hazards than a static prescriptive COVID-19 rule seemingly in conflict with Governor Newsom's plan to end the COVID-19 State of Emergency on February 28, 2023.

Labor representatives urged the Board to continue the protections required under a COVID-specific rule and expressed disappointment that the Non-Emergency Rule does not include exclusion pay. After the initial public comment period, the Board moved to its business meeting and heard staff reports. During Cal/OSHA Chief Jeff Killip's report to the Board, he commented that the ETS helped Cal/OSHA's efforts to improve working conditions and asserted that it was imperative to continue with COVID-19 specific protections.

Board members Laura Stock, Barbara Burgel and David Harrison voiced support for the Non-Emergency Rule and reiterated their displeasure with the regulation not including exclusion pay. Other members commented on the difficulty of working through this rulemaking and acknowledged problems with the rule and lessons learned. Board member Nola Kennedy, for one, called for more data-driven decisions before future votes.

The next expected rulemaking will involve a permanent infectious disease standard. Deputy Chief Eric Berg confirmed that the Division of Occupational Safety and Health is working on the initial draft of the rule and that the proposal could be published as early as the first half of 2023. Mr. Berg confirmed that the draft rule presently includes a provision for exclusion pay.

Overview of the Non-Emergency Rule

The Non-Emergency Rule is patterned after the Emergency Temporary Standard, with the following substantive differences:

Key Definition Changes.

- *Close Contact:* "Close contact" means the following (unless otherwise defined by regulation or order of CDPH, in which case the CDPH definition applies):
  - ***In indoor spaces of 400,000 or fewer cubic feet per floor***, a close contact is defined as sharing the same indoor airspace as a COVID-19 case for a cumulative total of 15 minutes or more over a 24-hour period during the COVID-19 case's infectious period, regardless of the use of face coverings.
  - ***In indoor spaces of greater than 400,000 cubic feet per floor***, a close contact is defined as being within six feet of the COVID-19 case for a cumulative total of 15 minutes or more over a 24-hour period during the COVID-19 case's infectious period, regardless of the use of face coverings.
  - Offices, suites, rooms, waiting areas, break or eating areas, bathrooms or other spaces that are separated by floor-to-ceiling walls shall be considered distinct indoor spaces.
- Exposed Group: The definition of "exposed group" remains mostly the same. However, for the exception concerning individuals who momentarily pass through a work area, the text of the non-emergency rule has eliminated the requirement that "everyone [be] wearing face coverings."
- Infectious Period: "Infectious period" means the following time period (unless otherwise defined by CDPH regulation or order, in which case the CDPH definition applies):
  - For COVID-19 cases who develop COVID-19 symptoms, from two days before the date of symptom onset until:
    - Ten days have passed after symptoms first appeared, ***or through day five if testing negative on day five or later***; and
    - Twenty-four hours have passed with no fever, without the use of fever-reducing medications, and symptoms have improved.
  - For COVID-19 cases who never develop COVID-19 symptoms, from two days before the positive specimen collection date through 10 days (***or through day five if testing negative on day five or later)*** after the date on which the specimen for their first positive test for COVID-19 was collected.
- Returned Case: The non-emergency rule changes the time period (from 90 to 30 days) in which individuals who previously had COVID-19 are considered "returned cases."

COVID-19 Program Elements Removed: A written COVID-19 Prevention Program with a list of detailed enumerated elements is no longer required. Instead, the employer's "COVID-19 procedures" may be addressed in its Injury and Illness Prevention Program or a separate document.

Training Elements Removed: Employee training on COVID-19 must be conducted in accordance with Sec. 3203(a)(7) from the Injury and Illness Prevention Program. The various training topics required under the COVID-19 emergency rule have not been incorporated into the Non-Emergency Rule.

No Exclusion Pay: Exclusion pay is not required under the non-emergency rule, though COVID-19 cases must still be immediately excluded and may not return to work until the return-to-work criteria are met. The employer must provide the excluded COVID-19 cases with applicable information on benefits.

Testing of Close Contacts: Employer shall make COVID-19 tests available at no cost, during paid time, to all employees who had a close contact in the workplace***, with the exception of returned cases***, and provide them with applicable information on benefits.

Notice of COVID-19 Cases: The Non-Emergency Rule requires notice as follows:

- Notify employees and independent contractors who had a close contact, as well as any employer with an employee who had a close contact. Notice must be provided as soon as possible, and in no case longer than the time required to ensure that applicable exclusion requirements are met.
- When Labor Code section 6409.6 or any successor law is in effect, provide notice of a COVID-19 case, in a form readily understandable to employees. Notice must be given to all employees, employers, and independent contractors at the worksite in accordance with the applicable law.
- When Labor Code section 6409.6 or any successor law is in effect, provide notice in accordance with the applicable law to the authorized representative, if any, of the COVID-19 case and of any employee who had a close contact. Also provide notice in accordance with the applicable law to the authorized representative, if any, of all employees on the premises at the same worksite as the COVID-19 case within the infectious period.

Face Coverings and Respirators: Employers must provide face coverings and ensure they are worn by employees when required by a CDPH regulation or order. Employers may not prevent any employee from wearing a face covering, including a respirator, when not required, unless it would create a safety hazard. Upon request, employers must provide respirators for voluntary use in compliance with Subsection 5144(c)(2) [Respiratory Protection] to all employees who are working indoors or in vehicles with more than one person and comply with other related provisions.

Ventilation: For indoor workplaces, employers must review CDPH and the Division guidance regarding ventilation, including "Interim Guidance for Ventilation, Filtration, and Air Quality in Indoor Environments. Employers shall develop, implement, and maintain effective methods to prevent transmission of COVID-19 including one or more of the following actions to improve ventilation:

- Maximize the supply of outside air to the extent feasible, except when the United States Environmental Protection Agency (EPA) Air Quality Index is greater than 100 for any pollutant or if opening windows or maximizing outdoor air by other means would cause a hazard to employees, for instance from excessive heat or cold.
- In buildings and structures with mechanical ventilation, filter circulated air through filters at least as protective as Minimum Efficiency Reporting Value (MERV)-13, or the highest level of filtration efficiency

compatible with the existing mechanical ventilation system.
- Use High Efficiency Particulate Air (HEPA) filtration units in accordance with manufacturers' recommendations in indoor areas occupied by employees for extended periods, where ventilation is inadequate to reduce the risk of COVID-19 transmission.

Reporting and Recordkeeping: There is no longer a requirement to document close contacts, but COVID-19 cases must be recorded in a shadow log:

- Keep a record of and track all COVID-19 cases with the employee's name, contact information, occupation, location where the employee worked, the date of the last day at the workplace, and the date of the positive COVID-19 test and/or COVID-19 diagnosis. Retain the records for two years beyond the period in which the record is necessary to meet applicable requirements.
- Retain notices required by the non-emergency rule in accordance with Labor Code section 6409.6 or any successor law.
- Personal identifying information of COVID-19 cases or persons with COVID-19 symptoms, and any employee medical records must be kept confidential unless disclosure is required or permitted by law. Unredacted information on COVID-19 cases must be provided to the local health department with jurisdiction over the workplace, CDPH, the Division, and NIOSH immediately upon request, and when required by law.

Outbreaks: The outbreak and major outbreak sections have been combined and modestly modified:

1. Outbreak provisions apply if three or more employee COVID-19 cases within an exposed group visited the worksite during their infectious period at any time during a 14-day period, unless a California Department of Public Health (CDPH) regulation or order defines outbreak using a different number of COVID-19 cases and/or a different time period, in which case this "Outbreaks" section applies when the number of cases at the worksite constitutes an outbreak under CDPH's definition. The outbreak provisions apply until there are ***one or fewer new COVID-19 cases*** detected in the exposed group for a 14-day period.
2. COVID-19 Testing must be made available at no cost to employees within the exposed group, regardless of vaccination status, during employees' paid time, except for returned cases and employees who were not present at the workplace during the relevant 14-day period(s). The testing must be made available weekly. Employees who had close contacts must have a negative COVID-19 test taken within three to five days after the close contact or are excluded and must follow applicable return to work requirements starting from the date of the last known close contact.
3. Face Coverings: Employers must ensure employees in the exposed group, regardless of vaccination status, wear face coverings when indoors, or when outdoors and less than six feet from another person, unless an applicable exception applies.
4. Respirators: Employers must notify employees of their right to request and receive a respirator for voluntary use.
5. Investigation, Review, and Hazard Correction: Employers must perform a review of potentially relevant COVID-19 policies, procedures, and controls and implement changes as needed to prevent further spread of COVID-19 when this "Outbreaks" section initially applies and periodically thereafter. The investigation, review, and changes must be documented and include:

- Investigation of new or unabated COVID-19 hazards including employer's leave policies and practices and whether employees are discouraged from remaining home when sick; employer's COVID-19 testing policies; insufficient supply of outdoor air to indoor workplaces; insufficient air filtration; and insufficient physical distancing.
- An update every 30 days that this "Outbreaks" section continues to apply, in response to new information or to new or previously unrecognized COVID-19 hazards, or when otherwise necessary.
- Any changes implemented to reduce the transmission of COVID-19 based on the investigation and review, which may include: moving indoor tasks outdoors or having them performed remotely; increasing the outdoor air supply when work is done indoors; improving air filtration; increasing physical distancing to the extent feasible; requiring respiratory protection in compliance with Section 5144 [Respiratory Protection]; and other applicable controls.

6. Ventilation: In buildings or structures with mechanical ventilation, filter recirculated air with Minimum Efficiency Reporting Value (MERV)-13 or higher efficiency filters if compatible with the ventilation system. If MERV-13 or higher filters are not compatible with the ventilation system, use filters with the highest compatible filtering efficiency. Use High Efficiency Particulate Air (HEPA) air filtration units in accordance with manufacturers' recommendations in indoor areas occupied by employees for extended periods, where ventilation is inadequate to reduce the risk of COVID-19 transmission.
7. Major Outbreaks: If 20 or more employee COVID-19 cases in an exposed group visited the worksite during their infectious period within a 30-day period, employers must take the following additional steps while the "Outbreaks" section applies:
   - COVID-19 Testing must be required of all employees in the exposed group, regardless of vaccination status, twice a week or more frequently if recommended by the local health department with jurisdiction over the workplace. Employers must ensure employees in the exposed group are tested or are excluded and follow applicable return to work requirements.
   - Reporting: Employers must report the outbreak to the Division.
   - Respirators:
     1. Provide respirators for voluntary use in compliance with Subsection 5144(c)(2) [Respiratory Protection] to employees in the exposed group, encourage their use, and train employees provided respirators for voluntary use.
     2. Ensure any employees in the exposed group who are not wearing respirators required by the employer and used in compliance with Section 5144 [Respiratory Protection] are separated from other persons by at least six feet, except where you can demonstrate that at least six feet of separation is not feasible, and except for momentary exposure while persons are in movement. Methods of physical distancing include: telework or other remote work arrangements; reducing the number of persons in an area at one time, including visitors; visual cues such as signs and floor markings to indicate where employees and others should be located or their direction and path of travel; staggered arrival, departure, work, and break times; and adjusted work processes or procedures, such as reducing production speed, to allow greater distance between employees. When it is not feasible to maintain a distance of at least six feet, individuals must be as far apart as feasible.

Employer-Provided Housing: The housing rule has also been modified. In particular, to the extent feasible,

employers must assign employee housing to cohorts that travel and work together, separate form other workers. To the extent feasible, residents who usually maintain a household together must be housed in a single housing unit without other persons. Ventilation requirements remain from the ETS. Employers must still provide face coverings to all residents and provide information to residents on when they should be used in accordance with state or local health department orders or guidance. Employers must still encourage residents to report COVID-19 symptoms. COVID-19 testing requirements remain, though employers no longer have to test all residents of employer provided housing in which there were three or more COVID-19 cases in 14 days. COVID-19 cases must be isolated from all residents who are not COVID-19 cases and close contacts must be quarantined from all other residents.

Employer-Provided Transportation: The transportation rule has been modified and applies to employer-provided motor vehicle transportation **to and from work**, during the course and scope of employment, which is provided, arrange for, or secured by an employer regardless of the travel distance or duration involved, with some exceptions (for example, employees alone in a vehicle, employees taking public transportation, or vehicles in which the driver and all passengers are from the same household outside of work). Employers must respond to COVID-19 cases within a covered vehicle. To the extent feasible, employers must assign transportation such that cohorts travel and work together, separate form other workers. In addition, to the extent feasible, employees who usually maintain a household together must travel together.

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