

Cal/OSHA's New Emergency Standards Regarding COVID-19 Protections in the Workplace

California recently approved new Division of Occupational Safety and Health (Cal/OSHA) emergency standards that require California employers to implement certain measures to protect workers from COVID-19. Among the new provisions is a requirement to continue and maintain the pay, benefits, and seniority of an employee excluded from the workplace as if the employee had not been removed from the job.

To whom do the new standards apply?

The new regulations – enacted as emergency temporary standards – apply to “all employees and places of employment” in California except (1) workplaces where there is only one employee, and that employee does not have contact with other persons; (2) employees working from home; and (3) employees subject to Cal/OSHA's Aerosol Transmissible Diseases Standard, Cal. Code Regs. tit. 8, §5199.

Workers subject to the Aerosol Transmissible Diseases Standard include, among others, those who work in hospitals, skilled nursing facilities, clinics, medical offices, and long term health care facilities, as well as those providing home health care services and paramedic and emergency medical services. The new regulations *do* apply, however, to employees at facilities subject to the Aerosol Transmissible Disease Standard who are not covered by that employer's Aerosol Transmissible Diseases Exposure Control Plan, such as administrative employees who work in areas separate from those where patient care is provided.

When do the standards take effect?

The standards are effective as of November 30, 2020, the date the California Office of Administrative Law approved them.

What do the new emergency standards require?

The standards require employers to “establish, implement, and maintain an effective, written COVID-19 Prevention Program.” The standards enumerate several requirements for these Programs.

Broadly, employers must implement a system for communicating with employees about the matters covered by the standards; identify and evaluate potential COVID-19 hazards; investigate and respond to COVID-19 cases in the workplace; and correct COVID-19 hazards. Employers must also facilitate physical distancing between employees; provide face coverings to employees and ensure that they are worn under most circumstances; and provide other infection controls, including physical barriers between employees who cannot maintain distance from one another, ventilation, and cleaning and disinfection procedures. Employers are directed to provide training and instruction to employees, including regarding COVID-19

prevention techniques and COVID-19-related benefits available to employees under the employer's own policies, any applicable contract, and federal, state, or local law.

To comply with these standards, employers must provide notice of potential COVID-19 exposure to potentially affected employees within one business day, in a manner that does not reveal any personal identifying information of the individual who is the COVID-19 case. Employers must also offer COVID-19 testing to all employees who had potential COVID-19 exposure in the workplace. Testing must be available during working hours and at no cost to employees.

In addition to these broadly applicable requirements, the standards impose specific testing, investigation, and reporting requirements on workplaces experiencing COVID-19 "outbreaks." An "outbreak" occurs when there are three or more COVID-19 cases in a workplace in a 14-day period. A "major outbreak" occurs when there are 20 or more cases in a 30-day period.

The new standards also require certain protections for employees whose employers provide housing or transportation.

Do the new standards require employers to exclude employees from the workplace under some circumstances?

Yes. The standards require employers to exclude "COVID-19 cases" from the workplace until specified requirements are met. Employers must also exclude employees with "COVID-19 exposure" from the workplace for 14 days after their last known exposure to a COVID-19 case.

There is an exception to this rule for employees who are temporarily reassigned to work where they do not have contact with other persons until they meet the regulatory requirements to return to work, so long as the employee has not been excluded or isolated by the local health department.

What benefits must an employer provide to an employee who is excluded from the workplace?

The standards require employers to "continue and maintain an employee's earnings, seniority, and all other employee rights and benefits, including the employee's right to their former job status," when an employee is excluded from work as a COVID-19 case or due to COVID-19 exposure in the workplace, and when the employee is otherwise able and available to work. Thus, employers generally must provide paid time off to excluded employees until the excluded employee satisfies the regulatory criteria to return to work.

Employers may require employees to use employer-provided sick leave benefits and may "consider benefit payments from public sources in determining how to maintain earnings, rights and benefits, where permitted by law and when not covered by workers' compensation." In other words, the employer must ensure that workers excluded under the emergency

standards receive income equivalent to what the employee would have received if not excluded, but may generally offset the amount it pays to the excluded employee by other benefit payments the employee receives.

The standards do not specify any limit on the duration or amount of pay or benefits that must be provided under these provisions, or on the number of times an employee can receive benefits under this provision. Thus, the standards appear to impose an obligation to provide continued pay and benefits even if the employee has exhausted his or her sick leave and any paid leave required by California's COVID-19 Supplemental Paid Sick Leave law or the Federal Families First Coronavirus Response Act.

Employers are not required to provide these benefits for "any period of time during which the employee is unable to work for reasons other than protecting persons at the workplace from possible COVID-19 transmission," or where the employer demonstrates that the COVID-19 exposure is not work-related. The standards do not elaborate on how an employer could show that an exposure is not related to work.

What is a "COVID-19 case"?

The standards define "COVID-19 case" to mean a person who (1) has a positive COVID-19 test, (2) is subject to a COVID-19-related order to isolate issued by a local or state health official; or (3) has died due to COVID-19. For purposes of these standards, a COVID-19 test must be approved by the U.S. Food and Drug Administration ("FDA") or be subject to an Emergency Use Authorization by the FDA.

A person ceases to be a "COVID-19 case" when a licensed health care professional determines the person does not have COVID-19, in accordance with recommendations by the California Department of Public Health or the local health department.

What constitutes "COVID-19 exposure"?

"COVID-19 exposure" is defined as being within six feet of a COVID-19 case for a total of 15 minutes or more within any 24-hour period during the "high-risk exposure period" for COVID-19, regardless of whether the individuals involved were wearing face coverings.

The "high-risk exposure period" is (1) for those who test positive for COVID-19 but never develop symptoms, from two days before until 10 days after the date the specimen for the first positive COVID-19 test was collected; and (2) for those with COVID-19 symptoms, two days before the onset of symptoms until 10 days after symptoms first appeared, and 24 hours have passed with no fever (without use of fever-reducing medications), and symptoms have improved.

When may an excluded employee return to work?

Employees who meet the definition of a "COVID-19 case" and have COVID-19 symptoms may not return to work until (1) at least 24 hours have passed since a fever of 100.4 degrees or

higher has resolved without use of fever-reducing medications; (2) COVID-19 symptoms have improved; and (3) at least 10 days have passed since COVID-19 symptoms first appeared. Employees who tested positive for COVID-19 but never developed COVID-19 symptoms may not return to work until a minimum of 10 days have passed since the date the specimen was collected for the employee's first positive COVID-19 test. Employees need not obtain a negative COVID-19 test to return to work.

If an employee is subject to an order to isolate or quarantine by a local or state health official, the employee may not return to work until the specified period has expired or, if no period is specified, 10 days from the time the order to isolate was effective, or 14 days from the time the order to quarantine was effective.

An employee exposed to COVID-19 at work who is not a COVID-19 case may return to the workplace after 14 days have passed since the last known COVID-19 exposure.

Cal/OSHA may, upon request and subject to certain conditions, permit an employee to return to work on the basis that removal of that employee would create an undue risk to a community's health and safety.

What must employers communicate to employees and employee representatives?

The standard requires employers to communicate to employees how to report COVID-19 symptoms, exposures, and hazards to the employer; how the employee can obtain COVID-19 testing, whether at the workplace or elsewhere; COVID-19 hazards in the workplace, and the employer's policies and procedures to address those hazards; and any policies or procedures for accommodating employees with elevated risk factors for severe COVID-19. Employers must allow employees and authorized employee representatives to participate in the identification and evaluation of COVID-19 hazards. Employers must also inform employees and authorized employee representatives regarding the cleaning and disinfection protocols it has adopted. The employer is required to make the written COVID-19 Prevention Program available to employees and authorized employee representatives.

Employers must give notice regarding potential COVID-19 exposure within one business day to all employees who may have had exposure and their authorized representatives, as well as independent contractors and other employers present in the workplace. Employers must also make available to employees and authorized employee representatives information regarding COVID-19 cases (with personal identifying information removed).

What are the requirements regarding face coverings?

The standards and Cal/OSHA guidance require employers to provide face coverings or to reimburse the cost of face coverings. Face coverings are defined as "a tightly woven fabric or non-woven material with no visible holes or openings, which covers the nose and mouth." The employer must ensure that face coverings are worn by employees over the nose and mouth

when indoors, when outdoors and less than six feet from another person, and when required by state or local public health orders. Face shields cannot substitute for face coverings.

The regulation specifies certain exceptions to the face-covering requirement. These exceptions are for employees alone in a room; employees who cannot wear face coverings for medical, mental health, or disability-related reasons; employees eating or drinking at least six feet apart from one another, so long as exposure to outside air is maximized to the extent possible; and employees wearing respiratory protection in accordance with safety orders. In addition, employees are not required to wear face coverings for specific tasks which cannot feasibly be performed with face coverings, with the unmasked employee at least six feet from all other persons unless unmasked employees are tested at least twice each week for COVID-19.

What do the standards require regarding physical distancing?

The standards require employees to be separated from other persons by at least six feet, “except where an employer can demonstrate that six feet of separation is not possible,” and where exposure is momentary because people are in motion. Among the physical distancing measures proposed by the standards are reducing the number of people in an area at one time, visual cues, adjustments to work processes, and staggered start, end, and break times.

At fixed work locations where it is not possible to maintain six feet of separation between individuals, the employer must install solid partitions between the employee and other persons.

What procedural requirements do the standards impose on employers?

Particularly for unions who are employers, and who may already be complying with the substantive protective measures laid out in the standards, we note that the standards also require (1) development of a written COVID-19 Prevention Program, which documents how the employer will meet the standards; (2) a training program for all employees that explains the employer’s COVID-19 Prevention Program, COVID-19-related benefits to which employees may be entitled, and certain information regarding COVID-19 transmission and prevention; and (3) reporting and recordkeeping as specified in the standards. Cal/OSHA has posted a model COVID-19 Prevention Program on its website.

This is not an exhaustive summary of the requirements of the new standards. Cal/OSHA’s FAQs are available at <http://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html>. If you are interested in further guidance, please contact an attorney at Altshuler Berzon LLP.