

# EMERGENCY TEMPORARY STANDARD (ETS) - CAL/OSHA UPDATE

By Christopher R. Nepacena

**At the height of the COVID-19 pandemic, the California Department of Occupational Safety and Health (Cal/OSHA) established the Emergency Temporary Standards (ETS) to create a uniform set of rules for COVID-19 prevention and outbreak mitigation in the workplace. The ETS required employers to draft a written COVID-19 prevention plan that dictated when face coverings must be worn in the workplace, when testing must occur, and when employees should be excluded from the workplace due to infection or close contact with an infected employee.**

On December 15, 2022, Non-Emergency COVID-19 Prevention Regulations were adopted and will become effective in the month of January 2023 once approved by the Office of Administrative Law (OAL). The ETS will remain in effect until the OAL replaces it with a "permanent" regulation. Once approved, the permanent regulation will be in effect for two years.

So what should California employers know about the upcoming permanent regulation? Read on to see the key changes with the forthcoming permanent regulation.

## **Definitions**

Employers should regularly review the most up-to-date guidance from the California Department of Public Health (CDPH) for the current definitions for the following terms:

### **"Close Contacts"**

- Anyone sharing the same indoor airspace for 15 minutes or more over a 24-hour period for

indoor spaces of 400,000 or fewer cubic feet per floor; or

- Anyone that is within six feet of the COVID-19 case for 15 minutes over a 24-hour period for indoor spaces of greater than 400,000 cubic feet per floor.

### **"Infectious Period"**

- For COVID-19 cases with symptoms, from two days before the onset of symptoms until 10 days have passed (or five days provided the employee tests negative on day five or later) and 24 hours have passed without a fever; or
- For COVID-19 cases without symptoms, from two days before test specimen was collection through 10 days (or through day five provided the employee tests negative on day five or later).

### **"Returned Case"**

- A returned case will be defined as a 30-day period (rather than a 90-day period) following the onset of symptoms or a positive test result.

## **New Notice Requirements**

The permanent regulation will require employers to notify its employees and independent contractors that have been in close contact "as soon as possible" and in no case longer than the time required to ensure that any exclusion requirements are met. Another notable change to the notice requirements is that, effective January 1, 2023, employers can now display a workplace notice in lieu of individual notification. However, employers that choose to do so may continue to provide individual notice in writing to employees.

The notice must be posted within one business day and must be posted for at least 15 days. If the employer posts other workplace notices on an existing employee portal, the notice shall be posted on the employee portal as well. The notice must be in English, and the language understood by the majority of employees. Employers must also continue to provide notice of COVID-19 cases and close contacts to labor unions.

### **Changes to Outbreak Protocols**

The permanent regulation will require employers to make immediate testing available to employees in the exposed group (and weekly thereafter) during an outbreak and offer twice weekly testing during a major outbreak. The outbreak and major outbreak requirements apply until there are "one or fewer" new COVID-19 cases detected in the exposed group for a 14-day period.

The permanent regulation will also require employers to report a major outbreak to Cal/OSHA, although there is currently no guidance as to the timing of when the report should be made. The permanent regulation will also require that employer's use HEPA filters in indoor areas as occupied by employees for extended periods, where ventilation is inadequate to reduce the risk of contamination.

### **Changes to Recordkeeping and Reporting Requirements**

The permanent regulation will no longer require that employers report information about COVID-19 cases and outbreaks to local public health departments. Employers will also be required to 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 test result or diagnosis. These records will need to be maintained for three years after the effective date of the permanent regulation. However, the permanent regulation will no longer require employers to keep records of close contacts.

### **No Exclusion Pay**

The rate of pay for exclusion pay is an employee's regular rate of pay for the pay

period in which the employee is excluded. These employees are entitled to exclusion pay, depending on the length of the required exclusion period and how many days they were scheduled to work during that exclusion period. The permanent regulation, unlike the ETS, will no longer require employers to continue to maintain an excluded employee's earnings and benefits.

### **Conclusion**

As discussed above, the ETS will remain in effect until the OAL approves the permanent regulation. In the meantime, California employers should be prepared to comply with the new requirements once the permanent regulation takes effect. Currently, it is unclear when the effective date of the permanent regulation will be so we will continue to monitor any developments, and encourage employers to reach out to Donahue Fitzgerald's Employment Attorneys with any questions regarding these important changes.



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