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COVID Updates: Cal/OSHA Board Considering Emergency Temporary Standard Revision and EEOC Advises Employers on Incentivized Vaccination

The California Occupational Safety & Health Standards Board (“OSHSB”) was supposed to consider changes to the COVID-19 Emergency Temporary Standard (“ETS”) on May 20, 2021, as we previously reported. But after the Centers for Disease Control (“CDC”) published a May 13, 2021 guidance saying that fully vaccinated individuals could resume pre-pandemic activities without masks, Cal/OSHA asked the OSHSB to delay its consideration of the proposed ETS revisions until Cal/OSHA could “revisit the proposed COVID-19 prevention emergency regulation in light of this new guidance.” Cal/OSHA has now published its new draft regulations, which appear to be stricter than the prior proposal. The OSHSB will consider the new proposal at its June 3, 2021, meeting.

The full text of the proposed revision to the ETS can be found here: <https://www.dir.ca.gov/oshsb/documents/Jun032021-COVID-19-Prevention-Emergency-txtbrdconsider-Readoption.pdf> and a red-line comparison with the May 20th version can be found at: <https://www.dir.ca.gov/oshsb/documents/Jun032021-COVID-19-Prevention-Emergency-txtcourtesy-Readoption.pdf>. It is likely the Standard Board will vote on June 3, 2021. It is anticipated that the revised ETS could become effective on or around June 15, 2021, to align with Governor Newsom’s proposed “re-opening,” or perhaps sooner. Either way, it will be important to see what, if anything, the Governor does that impacts the changed ETS.

What has changed from the May 20th proposal? The revised proposal lacks many of the most sought-after updates related to mask usage, and in fact appears stricter on many measures than the prior proposal, despite relaxed requirements recommended by the CDC. Changes from the earlier proposal include:

- Employers cannot immediately eliminate physical distancing requirements for fully vaccinated worksites—they must keep these measures in place until at least July 31, 2021.
- Employers would be immediately required to offer free COVID-19 testing to unvaccinated symptomatic workers during paid working time, even if there is no indication that the exposure was work related (the previous iteration did not start this requirement until July 31, 2021).
- Fully vaccinated workers who test positive for COVID-19 would still have to be excluded from work for 10 days after the positive test, even if they are asymptomatic.
- After July 31, 2021, employers would have to provide respirators to all employees who are not fully vaccinated for voluntary use.
- Employers would not be able to eliminate cleanable solid partitions in fully vaccinated worksites.

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- Finally, OSHSB added a provision requiring employers to notify employees of the benefits of the COVID-19 vaccine, including that the vaccine has been effective at preventing serious illness or death (in addition to the information required in the prior proposal related to testing accessibility and proper respirator use).

On a positive note, the revisions do not require blanket vaccine-verification, of employees or third parties, along the lines of the onerous requirements we have seen in Santa Clara County, as many employers thought may be included.

But to be “fully vaccinated” for purposes of the limited changes in the new proposed ETS, “means the employer has **documentation** showing that the person received, at least 14 days prior” either the second dose of a two-dose regimen, or a single dose of an FDA approved or emergency authorized vaccine. This is also a departure from the CDC definition of “fully vaccinated,” which includes World Health Organization approved or emergency authorized vaccines. So, if you have employees coming in from abroad that have received the AstraZeneca or Sinopharm vaccines, they technically do not meet the qualifications under the proposed ETS and would have to be treated as if they were unvaccinated.

Various items from the prior proposed version of the ETS remain in place, including:

- Fully vaccinated or naturally immune workers would not need to be excluded from work after a close contact so long as they remain symptom-free.
- Employers still can provide employees who are not fully vaccinated with respirators for “voluntary use” to avoid having to enforce six-foot physical distancing for those individuals.
- Employers would no longer need to offer COVID-19 testing to workplace close contacts if the potentially exposed employees were fully vaccinated or had natural immunity (previously infected within the prior 90 days).
- The definition of a sufficient face covering would include only a medical, surgical, or two-fabric layer mask, or respirator—meaning many of the fancy masks that employees may have personally purchased will no longer meet the safety standard.
- “Outbreak testing” would no longer be required when the local public health department identifies the workplace as the location of an outbreak—which could eliminate the challenge many employers have faced with inconsistency in how local public health departments identify outbreaks.
- Individuals wearing a respirator under a Cal/OSHA-compliant respiratory protection program would be exempt from individuals identified under the definition of a “close contact.”
- Notifications related to close contacts or outbreaks would be required to be given in a language the employee understands, and verbal notice would be permissible.

In addition to the California Cal/OSHA changes discussed above, the federal Equal Employment Opportunities Commission (“EEOC”) has posted updated and expanded

technical assistance which addresses questions arising under federal law. The key updates to the technical assistance are summarized below:

- Federal equal employment opportunity (“EEO”) laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, so long as employers comply with the reasonable accommodation provisions of the ADA and Title VII of the Civil Rights Act of 1964 and other EEO considerations. Other laws, not in EEOC’s jurisdiction, may place additional restrictions on employers. From an EEO perspective, employers should keep in mind that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees may be more likely to be negatively impacted by a vaccination requirement.
- Federal EEO laws do not prevent or limit employers from offering incentives to employees to voluntarily provide documentation or other confirmation of vaccination obtained from a third party (not the employer) in the community, such as a pharmacy, personal health care provider, or public clinic. If employers choose to obtain vaccination information from their employees, employers must keep vaccination information confidential pursuant to the ADA.
- Employers that are administering vaccines to their employees may offer incentives for employees to be vaccinated, as long as the incentives are not coercive. Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information.
- Employers may provide employees and their family members with information to educate them about COVID-19 vaccines and raise awareness about the benefits of vaccination.

The technical assistance can be accessed here: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

Additionally, the EEOC posted a new resource for job applicants and employees, explaining how federal employment discrimination laws protect workers during the pandemic. It can be accessed here: <https://www.eeoc.gov/federal-laws-protect-you-against-employment-discrimination-during-covid-19-pandemic>.

What This Means for Employers:

The rules of the COVID-19 employee management game continue to change. If you need any assistance with your workplace safety planning, or have questions about requirements related to testing, quarantine, or how to pay workers that are out sick with COVID-19, please feel free to reach out to Barsamian & Moody. We can also assist with compliance counseling if you are considering implementing mandatory vaccination programs or creating incentives for your employees to be vaccinated.

The goal of this article is to provide employers with current labor and employment law information. The contents should neither be interpreted as, nor construed as legal advice or opinion. The reader should consult with Barsamian & Moody at (559) 248-2360 for individual responses to questions or concerns regarding any given situation.