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Cal/OSHA Additional FAQs Clarify COVID-19 Emergency Temporary Standards (ETS)

If you have found yourself questioning Cal/OSHA's new COVID-19 Prevention Emergency Temporary Standards (ETS); you are not alone. Like many of California's employment laws, the Division's most recent standards are complex, onerous, and confusing. Even the first set of FAQs the Division issued generated as many questions as they answered. Fortunately, on January 8, Cal/OSHA released additional guidance for employers hoping to clarify the ETS. As before, we encourage all employers read the FAQs in their entirety, but we are summarizing some of the most confusing issues below, particularly with regard to the issue of paid leave. Additionally, Cal/OSHA has indicated that it intends to update this guidance in the future, so be sure to check it often for the most up to date information.

As a quick reminder, the Federal and State COVID paid sick leave laws, both of which provided for 80 hours of paid leave, have expired, but the ETS provides paid leave in certain circumstances. There are a couple of pending lawsuits challenging the ETS, but it is in place for now.

Here are the FAQs: <https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html>

Paid Leave

In short, you have to "exclude" employees from the workplace when they have tested positive, or have been exposed in the workplace (been within 6 feet of somebody who is positive for 15 or more minutes in a 24 hour period), until they meet the return to work criteria (FAQ 47). While those employees are "excluded," you **may** have to pay them.

51. **Q:** Must an employer pay an employee while the employee is excluded from work?

A: If the employee is able and available to work, the employer must continue to provide the employee's pay and benefits. An employer may require the employee to exhaust paid sick leave benefits before providing exclusion pay, to the extent permitted by law, and may offset payments by the amount an employee receives in other benefit payments. (Please refer to the [Labor Commissioner's COVID-19 Guidance and Resources](#) for information on paid sick leave requirements.). These obligations do not apply if an employer establishes the employee's exposure was not work-related.

This FAQ, which was part of the original list, created a lot of confusion, but the Division has clarified this in the new FAQs by making clear that if the employee is unable

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to work because of his or her COVID symptoms, **or** if the employee cannot work for some reason other than that they might infect somebody else at the workplace, they are not eligible for this paid leave (FAQs 52 and 55). Thus, to be eligible for paid leave under the ETS, these two FAQs make clear that the employee has to test positive for COVID or have been exposed at work, but must not have symptoms that would prevent them from working, and they cannot be contagious. Otherwise, they may be entitled to workers' comp benefits or SDI, but they would not be entitled to paid leave under the ETS.

Another issue that was creating a lot of confusion is that the ETS does not contain an express time limit for the length of potential paid leave, like the FFCRA did for example. The new FAQs address this issue as well by stating that an eligible employee would "typically" be able to receive pay for the full length of a quarantine (up to 14 days in the ETS, but shortened via Executive Order to the return to work criteria issued by CDPH), but that if the employee is unable to return to work 14 days after a single exposure or positive test, they may not be "able and available to work," and therefore would no longer be eligible for paid leave under the ETS (FAQ 53). Again, such an employee may be eligible for workers' comp benefits or SDI, but not paid leave under the ETS. The FAQs expressly state that an employee receiving TDI benefits under the workers' comp system is not eligible for benefits under the ETS (FAQs 50 and 60).

One issue that did not get much clarification is how an employer can show that the employee's exposure was not work related. Keep in mind that when there is an "outbreak"¹ under SB 1189, there is a presumption that an employee's COVID-19-related illness is an occupational injury eligible for comp coverage. In non-outbreak situations, however, there is very little guidance on how an employer is supposed to go about proving that the exposure was not work related, other than a general statement that it would be similar to the type of investigation and evidence that would rebut the presumption under SB 1189 (FAQ 57). Anecdotal evidence is that most comp carriers are denying coverage outside of the outbreak scenario, but employers may want to consult with their labor counsel before denying exclusion pay on this basis. Hopefully, this is an area that will receive further clarification in the future.

Difference Between "Offer" Testing and "Provide" Testing

Another issue that was confusing a lot of employers was that parts of the ETS say that employers have to "offer" COVID testing in certain situations but have to "provide" testing in other situations. This created a belief that to "provide" testing meant that the

¹ An outbreak exists if within 14 days *one* of the following occurs at a specific place of employment: (1) four employees test positive if the employer has 100 employees or fewer; (2) four percent (4%) of the number of employees who reported to the specific place of employment test positive if the employer has more than 100 employees; or (3) a specific place of employment is ordered to close by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent due to a risk of infection of COVID-19.

employer had a mandatory obligation to actually test applicable employees. The new FAQs, however, expressly state that the two terms mean the same thing for purposes of the ETS (FAQ 28). Thus, employers must make the test available to covered employees at no cost to the employee (i.e.; the employer must be paid for the time to go get tested including travel time and reimbursement of travel costs such as mileage or cost of public transportation). Employers can send employees to third-party test centers, including County Health Departments, or can bring testing to the workplace (FAQs 30 and 32). Employers need not obtain documentation that an employee declines or refuses testing (FAQ 31), but it is a best practice to do so.

Vaccines

The new FAQs address vaccines, but only to state that even if employees get vaccinated, the employer must still continue to follow all aspects of the ETS with regard to such employees “for now” (FAQ 24). The Division did state the issue of vaccines will be addressed further in the future. Hopefully, there will be clarification on the issue of requiring vaccines.

“Exposed Workplace”

The FAQs offer several clarifications on how to determine what is the “exposed workplace” for purposes of determining who must receive an offer of testing, what is the exposed area, etc. For example, they make clear that separate non-overlapping shifts can be different workplaces if there is proper cleaning and disinfecting between shifts, and it is well ventilated (FAQ 44). This series of FAQs, 38-46, also illustrate that the main goal of the ETS is to prevent the spread of infection, which ties into the return to work issue and the paid leave issue.

H-2A Housing

The FAQs expressly state that the ETS applies to housing provided to employees working under the H-2A program. The Division says that “Cal/OSHA may set stricter requirements than those set by contract or federal requirements” (FAQ 67).

What This Means for Employers

As stated at the start, this is a very complex and confusing regulation, which is very difficult to summarize. Please take the time to actually read all of the FAQs. The FAQs can be accessed at:

www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html

Employers with questions should contact the attorneys at Barsamian & Moody at (559) 248-2360.

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.