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Cal/OSHA's proposed "Permanent" COVID-19 Regulation

Cal/OSHA has released a *proposed* semi-permanent COVID standard which is expected to be enacted later this year to replace Cal/OSHA's most recent revisions to the COVID-19 Emergency Temporary Standard ("May 2022 ETS"). The May 2022 ETS is effective from May 6, 2022 until December 31, 2022. The semi-permanent standard is expected to take effect on January 1, 2023 and all of its provisions are slated to stay in effect for two (2) years. While this replacement rule follows the May 2022 ETS in many areas, there are some significant changes which we discuss here.

The definition of "**close contact**" will be expanded in accordance with a recent California Department of Public Health ("CDPH") definition update. While previously, any employee within 6 feet of the COVID-19 positive individual for 15 minutes in a 24-hour period was considered to have close contact, the new rule will define close contact as "*sharing the same indoor airspace as a COVID-19 case for a cumulative total of 15 minutes or more over the 24-hour period during the COVID-19 case's infectious period.*" This expansion of close contact, by removing the six feet provision has the potential to significantly increase requirements for contact tracing and administration of testing.

Once a positive case in the work-environment is identified, all employees sharing the same indoor airspace with COVID-19 employee will need to be tested and excluded where required under the rule. This proposed rule does not define "indoor airspace" and it is possible Cal/OSHA, or the CDPH, may revise this proposed language to define or alter this term prior to it taking effect next year.

Additionally, there is a proposed change from the May 2022 ETS **definition of "infectious period"** allowing for a shortened infectious period under certain circumstances. Cal/OSHA will likely make revisions to this as they get feedback from the industries and as things progress throughout the year.

The proposed rule has eliminated **exclusion pay** completely. Unlike the May 2022 ETS, the proposed rule makes no mention of exclusion pay, meaning employers are not required to offer exclusion pay once this rule takes effect next year. Again, this could change significantly before the rule is finalized.

COVID-19 Prevention Program ("CPP") requirements are greatly relaxed. While the May 2022 ETS required employers to include numerous elements in their CPP or integrated into their Illness and Injury Prevention Program ("IIPP"), the proposed rule relaxes those elements in lieu of general requirements that:

- (1) Employees "receive training regarding COVID-19" consistent with Cal/OSHA's existing Injury and Illness Prevention program training requirements;

(2) Employers develop, implement, and maintain effective policies to prevent transmission of COVID-19 by persons who had close contacts;

(3) Employers determine the date and time a COVID-19 case/diagnosis/symptom was last present; and identify/respond to person with COVID-19 symptoms at the workplace.

Theis is also a proposed addition of **record keeping** requirements. Under the proposed rule, employers must maintain a record of COVID-19 cases and close contacts, including employee name and other specific information for two years or more where specified. Employers must also maintain a copy of the COVID Notice provided to employees and their representatives, which we have recommended from the start.

What This Means for Employers:

DO not throw out your COVID policies and CPP just yet. The changes discussed above are just some of the requirements of the proposed semi-permanent COVID rule and these changes may be revised up until the rule is finalized and enacted, which is expected later this year. Employers are encouraged to review the full text of the proposed rule, which can be found [here](#). As of the writing of this article, no hearing dates for this proposed regulation have been scheduled, so there is no indication as to when the agency will finalize this rule. It is important to remember that the May 2022 ETS will stay in effect until December 31, 2022, and the proposed rule is still subject to change, **Employers should maintain their policies consistent with the May 2022 ETS, subject to any updates from Cal/OSHA or the CDPH.** We will keep you posted as updates on the proposed rule become available in the coming months.

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.