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Cal/OSHA's New Emergency Standard on COVID-19 Prevention

Last week, the California Occupational Safety and Health (Cal/OSHA) Standards Board approved an emergency temporary regulation on COVID-19 prevention governing virtually all employers and workplaces in California. The regulation imposes a number of significant requirements, and is expected to take effect as soon as **November 29, 2020**, assuming it is finalized as is, which is expected. While many legal scholars and industry experts argue that the new standard exceeds Cal/OSHA's legal authority, employers should begin taking immediate steps to understand comply with the new standard unless they are willing to be a potential compliance "test" case.

Given the specificity of the new standard, we strongly advise you to carefully review it in its entirety: <https://www.dir.ca.gov/OSHSB/documents/noticeNov2020-COVID-19-Prevention-Emergency.pdf>. In the meantime, we have highlighted the most important requirements for employers to be aware of. Among other things, the new standard requires employers to:

1. Ensure that employees who have tested positive or been ordered to isolate by public health authorities are (1) excluded from the worksite until they have satisfied the return to work criteria (discussed below) and (2) continue to be paid while they are off work. Specifically, the new standard provides that employers shall "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." Unfortunately, it is currently unclear whether, and to what extent, this requirement might overlap with employers' other obligations with respect to COVID-19-related paid sick leave. This requirement also does not appear to be limited to one occurrence, meaning an employee could potentially be excluded from the worksite, with pay, multiple times. There are two limited exceptions, (1) in the case that an employee is unable to work for reasons other than preventing the transmission of COVID-19 to persons at the workplace and (2) where the employer demonstrates the COVID-19 exposure was not work related. There is no guidance on these exceptions yet, so before relying on either exception, we recommend you seek case specific advice.
2. Require certain criteria be met before COVID-19 cases (those who have tested positive or have an order to isolate from public health authorities) can return to work. For cases with symptoms: (1) at least 24-hours must have passed since a fever of 100.4+ has resolved without the use of fever-reducing medications, (2) COVID-19 symptoms must have improved, and (3) at least 10 days have passed since symptoms first appeared. For cases without symptoms: the employee must not return to work until a minimum of 10 days have passed since the date of the specimen collection of their first positive COVID-19 test. If a public health authority issues the order to isolate or quarantine, the employee shall not return to work until either the period of isolation or the quarantine is lifted. If no period is specified,

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then the period shall be 10 days from the time the order to isolate was effective, or 14 days from the time the order to quarantine was effective. Finally, employers cannot require a negative COVID-19 test for an employee to return to work.

3. Prepare and implement a written COVID-19 prevention program, which can be integrated into an employer's existing Injury and Illness Prevention Program (IIPP) or maintained as a separate document. Similar to an IIPP, the requirements for a COVID-19 prevention program are defined by law and include such things as protocols for identifying, evaluating, and communicating with employees about COVID-19-related hazards; training employees; employer obligations for reporting COVID-19 cases and recordkeeping; and excluding COVID-19 cases and return to work criteria. Many insurance carriers have plans for their policy-holders, and Cal/OSHA is supposed to be issuing a model plan in the near future.
4. Notify employees of potential COVID-19 exposure within one business day. Many of these requirements overlap with those already in the CA COVID-19 Employer Playbook, as well as AB 685's notice and reporting requirements which we have previously provided information for. Specifically, the new Cal/OSHA standard requires employers give notice of the potential COVID-19 exposure within one business day to all employees who may have been exposed, their authorized representatives, and independent contractors and other employers who were present during the "high risk exposure period." The high-risk exposure period, as defined in the emergency standard, generally begins two days before onset of symptoms and lasts for 10 days after the symptoms first appeared, and 24 hours have passed with no fever without the use of fever reducing medication and symptoms have improved. The high-risk exposure period for those who never develop symptoms, is defined as two days before the specimen was collected that resulted in the positive test until ten days after the specimen for the positive test was collected. For purposes of this standard, an individual may have been exposed if they were within six feet of a COVID-19 case for a cumulative 15 minutes or greater within a 24-hour period at any time within the high-risk exposure period, regardless of the use of face coverings. While the new standard does not require this notice be written, AB 685 does. In addition, AB 685 identifies a slightly different group who must receive this notice, as it specifies all employees (as well as their exclusive representatives) and employers of subcontracted employees who were at the same worksite, not independent contractors or just those employees who may have been exposed. The new standard makes clear employers must give such notice without revealing any personal identifying information of the COVID-19 case. Such information generally must be kept confidential, with one key exception. The new standard provides that unredacted information and medical records related to a COVID-19 case may be provided upon request to the local health department, California Department of Public Health, the Division, the National Institute for Occupational Safety and Health, or as otherwise required by law. This is important because AB 685 and the new standard require the reporting of such confidential information to the local health department within 48 hours of a COVID-19 outbreak at a worksite (generally three cases). AB 685 only requires employers report the qualifying individual's name,

number, occupation, worksite, business address, and NAICS code. However, the new standard also requires employers report the total number of cases, as well as the hospitalization and/or fatality status. Both AB 685 and the new standard require the employer to continue to give notice to the local health department of any subsequent COVID-19 cases at the workplace.

5. Follow special rules for employer-provided housing and transportation. If an employer provides housing for employees, it will be required to implement priority housing assignments based on individuals who work together from the same family (or who otherwise reside together outside of work), are on the same crew, or are on the same shift. Additionally, the employer must be able to ensure sufficient space in the units to permit social distancing while the employees are in the various units, and is responsible for ensuring the units are cleaned at least once a day. If residents are exposed to COVID-19, the employer must isolate that employee by providing a private bathroom, sleeping area, cooking and eating facility. If the employer provides transportation, employees must be screened before boarding, sit at least three feet apart, and wear face coverings during transportation.
6. Ensure all employees are maintaining a physical distance of at least six feet. The new standard contains two exceptions to this requirement: (1) where the employer can demonstrate that six feet of separation is not possible, and (2) for momentary exposures while employees are in movement. That said, even if the required physical distancing is not possible, employers must still ensure individuals remain as far apart as possible. Further, for fixed locations where physical distancing is not possible, employers must install cleanable solid partitions between employees.
7. Provide face coverings and ensure they are worn by all employees when indoors and when outdoors if less than six feet away from others. The new standard contains very limited exemptions from wearing face coverings (e.g., when an employee is alone in a room, and when eating and drinking, provided employees are at least six feet apart). For employees who cannot wear face coverings due to a medical or mental health condition or disability, or who are hearing-impaired or communicating with a hearing impaired person, they must wear an effective alternative, such as a face shield with a drape on the bottom. But, there is a big caveat regarding employees who do not wear a face covering or face shield for any reason: they must be at least six feet apart from others at all times, unless the unmasked employee is tested at least twice weekly for COVID-19.
8. Implement general testing at the employer's cost. The emergency standard provides testing obligations and requirements that will apply to all employers. In addition, as discussed below, employers who experience COVID-19 "outbreaks" have additional testing responsibilities. First, the regulation provides that if testing is required under any portion of the regulation, the employer shall inform the effected employees of the reason for the COVID-19 testing and the possible consequences of a positive test. Second, when there has been even one COVID-19 case in the workplace, the employer must offer free COVID-19 testing during working hours to all employees who have potential COVID-19 exposure in the

workplace. Finally, employers may not use COVID-19 testing as an alternative to face coverings when face coverings are otherwise required.

9. Conduct additional testing, investigation, correction and notification of outbreaks. The new regulation imposes substantial requirements when there is an “outbreak” in the workplace. This is defined as either: “Multiple COVID-19 Infections and COVID-19 Outbreaks,” which applies to a place of employment that has been identified by a local health department as the location of a COVID-19 outbreak or when there are three or more COVID-19 cases in an exposed workplace within a 14-day period, or “Major COVID-19 Outbreaks,” which applies when there are 20 or more COVID-19 cases in an exposed workplace within a 30-day period. In the case of “Multiple COVID-19 Infections and COVID-19 Outbreaks,” employers shall provide COVID-19 testing to all employees at the exposed workplace during the period of the outbreak or the relevant 14-day period. This testing must be offered at no charge, during employee working hours, and immediately upon being covered by this outbreak definition. Employers must then offer this same testing again one week later for the same employees. After the first two required COVID-19 tests, employers shall provide continuous COVID-19 testing of employees who remain at the workplace at least once per week, or provide testing more frequently if recommended by the local health department. In the case of a “Major COVID-19 Outbreak,” employers shall provide testing for all employees present at the exposed workplace during the relevant 30-day period(s) and who remain at the workplace. This testing must be offered at no charge, during employee working hours, and twice a week or more frequently if recommended by the local health department. In addition to the onerous COVID-19 testing requirements, employers with an outbreak under either of these definitions shall also exclude all COVID-19 cases and employees with a COVID-19 exposure from the workplace, conduct an investigation of the COVID-19 illness, and provide specific notice the local health department within no longer than 48-hours after knowledge of the outbreak. There are also hazard assessment and correction criteria depending on the outbreak definition at play, including, but not limited to assessing updates to ventilation systems, evaluating or halting operations.
10. Comply with reporting, recordkeeping, and access requirements. Employers must report information about COVID-19 cases at the workplace to the local health department whenever required by law, and shall provide any related information requested by the local health department. Additionally, employers must report immediately to the Division any COVID-19-related serious illnesses or death of an employee occurring in a place of employment or in connection with any employment. Employers also must 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 a positive COVID-19 test, and make such information available to employees, authorized employee representatives, or as otherwise required by law, with personal identifying information removed.

This is a rapidly developing area that we are closely tracking. We will continue to bring you up to date information as soon as it is available. In the meantime, all employers should carefully review the new standard in its entirety in order to determine what policies, practices, and procedures need to be implemented to achieve compliance.

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.