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Cal/OSHA Third Revised ETS re COVID

This week the Cal/OSHA Standards Board approved a third updated COVID-19 Emergency Temporary Standard (“ETS”). The new ETS, which will go into effect May 6, 2022, is set to expire December 31, 2022. This third readoption implements some key definition changes and updates to the protocols for cleaning, disinfecting, testing, and returning employees to work. This is an update on some of the changes and what to expect moving forward.

Definitions:

The term “**COVID-19 test**” is updated to allow a test to be both self-administered and self-read *if* another means of independent verification of the test results can be provided. The example provided by Cal/OSHA is where the employee can provide a time-stamped photograph of the results. Of course, there may be other means of independent verification. It is still unclear what the employer’s responsibility to document the independent verification method will be. We are hopeful that Cal/OSHA will release updated FAQs providing additional examples and clarifying the employer’s requirements in obtaining the independent means of verification.

The definition of “**face covering**” is slightly relaxed, removing the requirement that light not pass through the face covering when held up to a light source. Face coverings are still “a solid piece of material without slits, visible holes, or punctures, and must fit snugly over the nose, mouth, and chin with no large gaps on the outside of the face.”

The new version of the ETS provides a wholly new term, “**returned case**,” which is defined as “a COVID-19 case who returned to work [following the return-to work requirements] and did not develop any COVID-19 symptoms after returning.” An individual is only a returned case for 90 days after the initial onset of symptoms, or 90 days after the first positive test if they never developed symptoms. The definition allows for expansion of the 90 days if such period is required under a California Department of Public Health (“CDPH”) regulation or order.

Lastly, the new adoption sees the deletion of the term “**fully vaccinated**.” The ETS no longer distinguishes between fully vaccinated and unvaccinated employees, however vaccination status may still be relevant for return to work criteria under the CDPH, or other local orders or federal mandates.

The term “high-risk exposure period” has been replaced with “**infectious period**”. The new language provides that if the CDPH defines the term differently than indicated in the regulation, then CDPH definition shall apply.

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Cleaning & disinfection procedures:

The general requirement for employers to implement cleaning and disinfecting protocols have been removed.

Face coverings and respirators:

In addition to the definition change for face coverings, the new ETS also removes the vaccination status consideration for employers to provide face coverings and respirators for employee use. Employers must provide a face mask or respirator at the request of an employee or when required by federal, state, or local regulations or order, regardless of vaccination status.

Testing:

This third adoption of the ETS clears up the confusion about the employer obligation to compensate employees for time spent getting tested. The language in the newest version emphatically indicates that “yes,” time spent getting tested must be compensated as time worked.

Previously there were various categories for who the employer needed to make testing available to. The regulation categorized employees based on vaccination status, close contact status and return to work protocols. Under the revised ETS, employers must make COVID-19 testing available at no cost, and during paid time, to all employees who had close contact in the workplace and provide them with information on benefits to which the employee may be entitled under applicable federal, state, or local laws. This includes information about the employer’s obligation to maintain an employee's earnings, wages, seniority, and all other employee rights and benefits, including the employee's right to their former job status, as if the employee had not been removed from their job; or inform the employee of the denial of such protections and the applicable exception to this required exclusion pay.

Close contact testing and testing during a multiple infection or outbreak situation is not required to be provided to “return cases” as the new term is defined.

Employers are now required to make testing available at no cost and during paid time for **all symptomatic employees**. Previously, employers only had to provide this testing to unvaccinated employees.

Where there are **multiple infections or a COVID-19 outbreak**, employers must make testing available at no cost and during paid time to all employees within the exposed group, regardless of vaccination status, except those not present during the 14-day exposure period or employees who are a “returned case” who did not develop symptoms. When dealing with an outbreak or multiple infections there are follow up testing requirements that now apply to employees regardless of vaccination status. These testing requirements apply to employees living in employer provided housing when residents have close contact and when there are three or more cases in 14 days. Employees who had close contact and do not return a negative test within 3 to 5 days following the close contact shall be exclude and follow the return to work requirements.

Testing is required of all employees in an exposed group, regardless of vaccination status for worksites experiencing a **major outbreak**. Employees who had close contact and do not return a negative test within 3 to 5 days following the close contact shall be excluded and follow the return to work requirements.

Social Distancing

During an outbreak, employers must evaluate whether social distancing should be implemented. The new language provides that where 6 feet of distance is not feasible, the employer shall implement as much distance as possible. The employer should be prepared to demonstrate to Cal/OSHA why six feet of separation is not feasible. The requirement to install partitions has been removed.

Exclusion and Return-to-Work Requirements:

The return to work criteria no longer differentiates between vaccination status, a close contact, or a positive test. New language added to the ETS provides that “[e]mployers shall review current CDPH guidance for persons who had close contacts, including any guidance regarding quarantine or other measures to reduce transmission.” This means that employers should follow the ETS and CDPH return-to-work criteria as applicable.

Employer-Provided Housing and Transportation:

The new adoption removed the exception excluding application of the housing and transportation rules when all employees in the household or vehicle are fully vaccinated.

The transportation requirements saw a big change removing the face coverings and respirator requirements and instead directing employers to review CDPH and local health department recommendations regarding face coverings and implement face covering policies that effectively eliminate or minimize transmission in vehicle and to train employees on the CDPH or local health department recommendations and the employer’s own face covering policies. Respirators must still be provided for voluntary use for all employees, regardless of vaccination status.

The cleaning and disinfecting requirements have all but been removed from both the housing and transportation rules. However, employers must continue to assess hazards and implement cleaning and disinfecting protocols to prevent and limit exposure. Employers must continue to provide hand sanitizer and require riders to sanitize their hands before entering and exiting the vehicle.

Finally, the new adoption does not exclude “return cases” from the housing quarantine requirements when an employee has close contact with a COVID case.

What This Means for Employers:

Other than the changes noted above, all other requirements, including exclusion pay remain in effect. Employers are encouraged to review the full text of the updated ETS which can be found [here](#). Employers should be updating their COVID-19 Prevention

Policies in accordance with the requirements of the revised Cal/OSHA ETS, which is set to take effect **May 6, 2022**. Do not hesitate to contact us if you have any questions about implementation of the newly revised ETS or updating your COVID-19 Prevention Policy.

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.