

Cal/OSHA Adopts New COVID-19 Emergency Standards Requiring Immediate Action by Employers in California

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On November 19, 2020, the California Occupational Safety and Health Standards Board unanimously adopted [emergency temporary standards](#) on COVID-19 prevention in the workplace. For much of the pandemic, California's Division of Occupational Safety and Health ("Cal/OSHA") has advised employers to follow its general and industry-specific guidance on various measures to implement to minimize the risk of employees' exposure to COVID-19. However, the new emergency standards will be binding and enforceable against nearly all California employers. The emergency standards will become effective immediately on **November 30, 2020**, if approved as expected by the Office of Administrative Law ("OAL") after the required 10-day review period. Thus, employers must act quickly to ensure they are in compliance with the new standards and the requirement to prepare and implement a written COVID-19 Prevention Program.

Emergency Rulemaking Process

The [Occupational Safety and Health Standards Board](#) ("Standards Board") is comprised of seven members appointed by the Governor and serves as the standards-setting agency for Cal/OSHA. The Standards Board's stated objective is to adopt reasonable and enforceable standards that are at least as effective as federal standards. In furtherance of that goal, the Standards Board may adopt emergency standards that bypass the normal rulemaking public comment period.

Once approved and published, the adopted emergency standards will appear in the new Title 8 sections 3205-3205.4 of the [California Code of Regulations](#). Pursuant to the state's [emergency rulemaking process](#), the emergency standards will remain in effect for 180 days unless renewed (up to 2 times), withdrawn or replaced by a permanent standard. Presumably, Cal/OSHA will move forward with adopting a permanent COVID-19 standard.

Applicability of COVID-19 Emergency Standards

The emergency standards are applicable to most employers in California. The new standards do not apply to employees when covered by Cal/OSHA's [Aerosol Transmissible Diseases standard](#), which applies to work at certain healthcare facilities, laboratories and a limited number of other employers.

Additionally, the new standards do not cover employees who work from home or employers with only one employee if the employee has no contact with others.

COVID-19 Prevention Program

The main requirement of the emergency standards is that employers must prepare, implement, and maintain a written COVID-19 Prevention Program (“CPP”). The CPP appears modeled on the written Injury and Illness Prevention Plan (IIPP) that Cal/OSHA regulations require all California employers to implement and maintain. In fact, the standards state that the CPP may be integrated as part of an employer’s IIPP or maintained in a separate, standalone document.

According to Cal/OSHA, the CPP must provide for the following:

- System for communicating information to employees about COVID-19 prevention procedures, testing, symptoms, and illnesses, including a system for employees to report exposures without fear of retaliation.
- Identification and evaluation of hazards – screening employees for symptoms, identifying workplace conditions and practices that could result in potential exposure.
- Investigating and responding to cases in the workplace – responding immediately to potential exposures by following steps to determine who may have been exposed, providing notice within one business day about potential exposures (similar to the requirements under [AB 685](#)), and offering testing to workers who may have been exposed.
- Correcting COVID-19 hazards – including correcting unsafe conditions and work practices as well as providing effective training and instruction.
- Physical distancing – implementing procedures to ensure workers stay at least six feet apart from other people if possible.
- Face coverings – providing face coverings and ensuring they are worn.
- Adopting site-specific strategies such as changes to the workplace and work schedules and providing personal protective equipment to reduce exposure to the virus.
- Positive COVID-19 case and illness recording requirements and making the CPP accessible to employees and employee representatives.
- Removal of COVID-19 exposed workers and COVID-19 positive workers from the workplace with measures to protect pay and benefits.
- Criteria for employees to return to work after recovering from COVID-19.
- Requirements for testing and notifying public health departments of workplace outbreaks (three or more cases in a workplace in a 14-day period) and major outbreaks (20 or more cases within a 30-day period).
- Specific requirements for infection prevention in employer-provided housing and transportation to and from work.

The bullet points above provide a very cursory summary. The standard is very detailed with numerous, onerous requirements. Thus, while employers may have already implemented a COVID-19 response plan, many requirements likely change or expand significantly the policies or procedures that employers have implemented previously. The following requirements, in particular, should be new to most employers:

- Employers must offer COVID-19 testing at no cost to employees, during their working hours, to all employees who had a potential COVID-19 exposure in the workplace.
- Employers must exclude from the workplace any employees with COVID-19 cases and those who were exposed to COVID-19 until they satisfy certain return-to-work criteria. Employers must continue and maintain the excluded employee's earnings, seniority and benefits while they are off work. As such, this requirement essentially constitutes a new form of paid leave that is available unless: (1) the employee is unable to work for reasons other than protecting persons at the workplace from COVID-19 transmission, or (2) the employer can demonstrate the exposure was not work-related. Additionally, there is no limit on the "leave" in the requirement, meaning an employee could receive it multiple times.
- Employers cannot require a negative COVID-19 test for an employee to return to work.
- Employers must implement certain protocols if there is an outbreak in the workplace, including the following:
 - Providing testing (immediately and 1 week later) to all employees in the exposed workplace during the outbreak period;
 - Excluding all COVID-19 cases and employees with a COVID-19 exposure;
 - Investigating the exposure, reviewing the employer's policies and controls in place and taking corrective action as necessary;
 - Documenting the investigation, review, and corrective action taken; and
 - Notifying the local health department within 48 hours after knowledge of the outbreak.
- Employers must implement additional protocols if there is an outbreak of 20 or more COVID-19 cases within a 30-day period until there are no new cases for a 14-day period, including conducting twice-weekly testing and evaluating whether respiratory protection should be required and whether the employer's operations should cease.

Takeaway

Recognizing the ambiguity in some of the requirements and complications with immediate compliance, Cal/OSHA has stated that it will publish guidance and FAQs soon. However, with the short timeline for implementation and multiple required actions that will be new to the employer and its employees, employers should begin immediately creating and implementing a compliant CPP. Employers with any questions or concerns should consult with experienced employment counsel to ensure they are compliant.

As you are aware, things are changing quickly and there is a lack of clear-cut authority or bright line rules on implementation. This article is not intended to be an unequivocal, one-size fits all guidance, but instead represents our interpretation of where things currently and generally stand. This article does not address the potential impacts of the numerous other local, state and federal orders that have been issued in response to the COVID-19 pandemic, including, without limitation, potential liability should an employee become ill, requirements regarding family leave, sick pay and other issues.

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