



California's New Guidance On Emergency COVID-19 Standard Answers Some Questions But Leaves Employer Uncertainty

Insights

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California Occupational Safety and Health (Cal/OSHA) further updated its COVID-19 Emergency Temporary Standards Frequently Asked Questions late last week in an attempt to provide more clarification and answer questions the agency has received about the COVID-19 Emergency Temporary Standard (ETS) that went into effect November 30, 2020. The update, released on January 8, provides some important clarifications but also leaves some questions unanswered. Below is an overview of some of the important updates and clarifications that all California employers should review.

Exclusion Pay And Benefits

Despite previous rumors to the contrary, the updated FAQs do not eliminate or dramatically limit the obligation to provide exclusion pay. However, the new FAQs do provide some more clarity on exclusion pay and benefits.

Per the ETS, employers shall ensure all COVID-19 cases and exposures are excluded from the workplace until the applicable return-to-work criteria is met. For employees excluded and otherwise able to work, employers shall continue and maintain employees' earnings, seniority, and all other employee rights and benefits, including the employee's right to their former job status as if they had not been removed from their job. Two exceptions apply to this requirement: 1) during a period of time an employee is unable to work for reasons other than protecting persons at the workplace from possible COVID-19 transmission; or 2) if the employer demonstrates the COVID-19 exposure is not work-related.

The new FAQs clarify that if an employee who is "unable to work because of his or her COVID-19 symptoms," they are not eligible for exclusion pay (FAQ # 52). This appears to address situations in which the employee is too ill to work because of their symptoms. Also, if an employee is out for longer than a standard quarantine period, the "extended quarantine period may be an indication that the employee is not able and available to work due to their illness" (FAQ #53). Again, this appears to address situations in which an employee develops significant symptoms or complications that extend beyond the normal quarantine period. Exclusion pay may not be required in such circumstances, but the employee may be eligible for other benefits like temporary disability.

The FAQs also provide examples of being “unable to work because of other reasons” under the first exemption to exclusion pay, including, but not limited to business closure, caring for a family member, disability or vacation (FAQ # 55). The FAQs provide guidance on how an employer “demonstrates” that an exposure is non-work-related under the second exemption to exclusion pay. Such a showing involves “an employer conducting comparable investigations and producing comparable evidence to show it is more likely than not that an employee’s COVID-19 exposure did not occur in the workplace” (FAQ # 56-57).

Though Cal/OSHA makes clear that it may issue a citation or require abatement for a violation of the exclusion pay requirements (FAQ # 58), the FAQs state that, “whether employees or another agency can bring a claim in another forum is outside the scope of Cal/OSHA’s authority.” Therefore, there is continued risk that employees will attempt to bring wage claims for unpaid exclusion pay.

In addition, the FAQs address the interaction between exclusion pay and temporary disability workers’ compensation payments and make clear that an employee cannot receive both workers’ compensation temporary disability benefits for wages and exclusion pay (FAQ # 59-60).

Testing

The ETS imposed some significant testing requirements on employers when there is one COVID-19 case or an outbreak. The FAQs provide some helpful and welcomed clarifications in the area of testing.

Per the ETS, when there has been even just one COVID-19 case in the workplace, employers must “offer COVID-19 testing at no cost to employees during their working hours to all employees who had potential COVID-19 exposure in the workplace.” In the outbreak sections of the ETS, the language is slightly different and states that employers “shall provide COVID-19 testing.” The different verbiage has been a source of confusion as to whether or not Cal/OSHA was requiring employers to mandate testing in the outbreak context.

Fortunately, the new FAQs clarify that “offer” testing and “provide” testing have the same meaning (FAQ #28). Cal/OSHA now appears to interpret this requirement (even in outbreak scenarios) to merely require that the employer offer testing at no cost to the employee. The FAQs further clarify that the employer does not violate the ETS if an employer offers testing and the employee declines or refuses to take the test (and in such a situation, a declination form if not required (FAQ #31). The FAQs also clarify that the requirement that testing be provided “during working hours” merely means that must be compensated for their time and travel expenses, not necessarily during the employee’s normal working hours (FAQ #32). There is also clarification that onsite testing is not required and free testing facilities such as free county facilities may be utilized. (FAQs #29 and #30).

Exposed Workplace/Outbreaks

Per the ETS, “exposed workplace” is defined as any work location, working area, or common area at work used or accessed by a COVID-19 case during the high-risk period, including bathrooms, walkways, hallways, aisles, break or eating areas, and waiting areas. This does not include buildings or facilities not entered by a COVID-19 case. Despite FAQ 39’s guidance, starting January 1, 2021, the ETS expressly incorporated the broader “worksite” definition of AB 685 into its “exposed workplace” definition. Specifically, AB 685 defines “worksite” as “the building, store, facility, agricultural field, or other location where a worker worked during the infectious period.” The term “worksite” however does not apply to buildings, floors, or other locations of the employer that a qualified individual did not enter.

The definition of “exposed workplace” and how an employer determines the “exposed workplace” has been another common source of confusion for employers, particularly in the context of outbreak testing. The new FAQs provide clarification on how an employer determines what part of a workplace is an “exposed workplace” for purposes of determining if an outbreak has occurred and who must be tested but must be examined closely.

The FAQs state that an “exposed workplace” is defined at section 3205(b)(7) and includes “any work location, working area or common area used or accessed by a COVID-19 case during the ‘high-risk period.’” They then go on to state that “for purposes of determining whether an outbreak has occurred, there must be three COVID-19 cases, all of whom worked in, used, or accessed the same ‘work location, working area or common area used or accessed’ in a 14-day period. If one of the three cases is in a different work location within an establishment, an outbreak has not occurred.

Areas a COVID-19 case passed through (i.e., travelled through en route to a work area and did not stop or stopped momentarily while wearing a face covering) are not considered in determining the area of an “exposed workplace.” For example, if all three COVID-19 cases have been in a common area, but one of the cases only passed through while wearing a face covering, an outbreak has not occurred for purposes of the ETS” (FAQ #42).

Though this appears to clarify how to determine an “exposed workplace” for outbreak purposes, there are omissions from the FAQs that employers may want to keep in mind. For example, the definition of exposed workplace only provides for part of the actual definition from the ETS and does not reference the incorporated “worksite” definition from AB 685. Moreover, the FAQ only references the “three cases in 14 days” outbreak scenario and not the “20 cases in 30 days” scenario.

The FAQs do address that employers can separate employees into cohorts to reduce the likelihood of COVID-19 cases occurring in the same work locations/areas (FAQ #43). Also, for employers who have several non-overlapping work shifts at a facility, each shift may be considered as a separate “exposed workplace” if the facility is well-ventilated and the cleaning and disinfection requirements of the ETS are met between or before shift changes (FAQ #44). There is also guidance on how to count the applicable number of COVID-19 cases (FAQs #45 and #46).

Return-to-Work Criteria

The FAQs note the reduced 10- and seven-day quarantine guidelines in the [December 14, 2020 Executive Order](#) and current California Department of Public Health (CDPH) guidelines. They also added a new acceptable method for meeting the return-to-work criteria by allowing for a licensed healthcare professional determination that an employee is not or is no longer a COVID-19 case, in accordance with CDPH or local health department recommendations. (FAQ #48).

Possible Critical Infrastructure Waivers

In addressing critical infrastructure and essential workforces, the ETS does provide for the ability by employers to request a waiver to not exclude employees or bring them back earlier if it would constitute an undue risk to community health and safety. However, the ETS itself failed to provide any detail on the meaning of this term or the process. The new FAQs provide some guidance for employers in this area.

First, the new FAQs state that “an operation must provide goods or services, the interruption of which would cause an undue risk to a community’s health and safety in order to qualify. This exception is narrower than the definition of ‘critical infrastructure,’ though such operations may qualify if there is an adverse impact on a community’s health and safety. A facility must be facing potential staffing shortages...in order to qualify for a waiver” (FAQ # 61).

Second, the FAQs explain the process and information that must be submitted in a written waiver request (FAQ # 62). However, these requirements may be difficult to satisfy for a number of reasons. One of the five criteria the FAQs state is needed to constitute a complete waiver request is a statement that “there are no local or state health officer orders for isolation or quarantine of the excluded employees.”

Finally, the new FAQs state that, in the event of an emergency, “an employer may request a provisional waiver by calling the local district office while it prepares its written request” (FAQ # 62).

Enforcement

As employers work to comply, the FAQs indicate for the first two months that the ETS is in effect – through February 1, 2021 – Cal/OSHA will cite but not assess monetary penalties for violations of the ETS that would not have been considered a violation of the employer’s IIPP or other standard in effect before the ETS (FAQ # 10). However, this will not apply where an employer fails or refused to abate a violation of the ETS identified by Ca/OSH or in the case of imminent hazards.

Physical Distancing

For employers grappling with the physical distancing requirements, the FAQs provide more detail regarding measuring between ‘bodies’ or “breathing zones,” “fixed work locations,” and partitions (FAQ # 16-19). They also clarify that employees who work within six feet of one another are “close contacts,” regardless of partitions (FAQ # 19).

Vaccines

As we navigate through administration of COVID-19 vaccines, the new FAQs provide that, for now, employers must follow the ETS even for employees that have been vaccinated (FAQ # 24). We anticipate this will not be the last we hear of vaccines in this context and will likely be addressed in future revisions to the ETS. Until then, employers can visit our [Vaccine Resource Center For Employers](#) for more information.

What You Should Do Next

Many California employers spent the last month scrambling to implement the new ETS requirements. This guidance provides much-needed guidance on common issues and necessitates immediate action from employers. For those who have already developed protocols and procedures, you should confirm your compliance efforts align with this new guidance. Fisher Phillips can assist employers with these new guidelines and has an updated compliance toolkit available reflecting these changes.

Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, [any attorney in our California offices](#), or any member of our [Post-Pandemic Strategy Group Roster](#). Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate.

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