

CHANGE IS COMING IN CALIFORNIA: TOP 10 REVISIONS TO COVID-19 WORKPLACE SAFETY RULES FOR EMPLOYERS

Insights
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After months of calls for modification to Cal/OSHA's Emergency Temporary Standard (ETS), California is about to adopt significant changes to the standard in light of the changing nature of the COVID-19 pandemic and the proliferation of vaccinations. State officials released [proposed revisions](#) to the ETS for public review on May 7, and Cal/OSHA's Standards Board will vote to adopt the changes on May 20. It is anticipated that the Standards Board will adopt the proposed revisions with no further modifications. Once approved by the Standards Board, the revisions will be submitted to the Office of Administrative Law, which will have 10 calendar days to approve them. The revisions largely make welcomed changes to the ETS, providing more flexibility to employers when employees are fully vaccinated. However, there are a few new requirements that will create new or heightened burdens on employers.

[Ed. Note: In an unexpected turn of events, the California Occupational Safety and Health Standards Board announced on May 20 that it will not move to adopt the proposed revisions to the existing Cal/OSHA COVID-19 Emergency Temporary Standard (ETS). Instead, the Deputy Chief of Cal/OSHA has asked that the Standards Board hold off on voting and allow the state safety agency the opportunity to present a new proposal at a future meeting with a targeted effective date of June 15. Read our full analysis [here](#).]

Overview – What Are The High Points?

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Below is a detailed description of the proposed revisions to the ETS:

- 1. Face Coverings** – Face coverings or masks will no longer be required when all employees in a room are fully vaccinated and asymptomatic. In addition, face coverings will not be required for employees working outdoors when fully vaccinated and asymptomatic.
- 2. Exclusion After Exposure** – [As discussed here](#), fully vaccinated employees without symptoms generally will no longer need to be excluded from the workplace after exposure to COVID-19. This also extends to relief from having to exclude employees as close contacts if they have had COVID-19 within the last 90 days.
- 3. Physical Distancing** – The ETS requirements for physical distancing will come to an end on July 31, 2021. In the meantime, locations at which all employees are fully vaccinated will no longer need to ensure physical distancing.
- 4. Provision of Respirators (N95s) For Voluntary Use** – A new requirement for employers is the obligation (beginning July 31, 2021) to provide “respirators” (N95 masks) to non-vaccinated employees for their voluntary use.
- 5. Notice Requirement and (New) Verbal Follow-Ups** – After providing written notice of a COVID-19 case in the workplace, employers will be required to provide “verbal notice” if they reasonably know that an employee has not received the written notice or has limited literacy in the language in which the written notice was provided.
- 6. Exclusion Pay** – The revisions specify that employees may bring a wage claim to recover unpaid “continued earnings” when excluded from the workplace. The revisions also specify that employees must be paid their regular rate of pay by the next regular pay day.
- 7. (New) Testing for Non-Vaccinated Symptomatic Employees** – Beginning July 31, 2021, employers must make COVID-19 testing available at no cost during paid time to employees with COVID-19 symptoms who are not fully vaccinated.



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8. **Testing Following Workplace Cases** – Employers will be exempted from the obligation to make testing available to employees that are fully vaccinated and asymptomatic or who have had COVID-19 in the last 90 days.
9. **Revisions to Outbreak Requirements** – The requirements that apply when there is an “outbreak” or a “major outbreak” will be revised, in some cases simplifying employer obligations.
10. **Employer-Provided Housing and Transportation Requirements** – Finally, employers providing housing and transportation will have increased flexibility with respect to vaccinated employees.

Changes Raise a Whole Host of Vaccine Questions

The proposed changes to the ETS provide flexibility and relief from some of the requirements of the ETS for employees that are fully vaccinated. However, such changes raise additional questions for employers as there are now increased incentives for employers with respect to vaccinated employees. Can or should you mandate vaccines? Should you encourage vaccines? How to ask about vaccination status and/or document it?

Given that the revisions to the ETS naturally lead to a series of questions about vaccination of employees, we prepared this [summary](#) of vaccine-related considerations for employers.

Detailed Description of Proposed Changes

As they say, the devil is in the details, read on below for a deeper dive into further details of the proposed changes.

Important Definitions

Before diving into the top 10 takeaways for employers, it’s important to understand the new and changed definitions to key terms in the state law, mainly to clarify provisions and make them consistent with other related laws (such as AB 685 passed last year to require written notification of COVID-19 cases and exposure).

- The definition of “**fully vaccinated**” is important for various contexts in the revised ETS. “Fully vaccinated” means the employer has documentation showing that (at least 14 days prior) the person has received their full dose

of the vaccine (either the second dose in a two-dose vaccine or the single dose in a single dose vaccine).

Unfortunately, the revised ETS does not specify what “documentation” showing the employee is vaccinated means. Would a simple declaration or statement by the employee suffice? Or does the employer need to request and obtain a copy or picture of the employee’s vaccination record? Recent guidance from CDPH for private venues and events specifies how a business may verify someone’s vaccination status. But the revised ETS does not specify whether similar documentation may be required in this context. We hope updated FAQs from Cal/OSHA will clarify this issue. As noted above, a summary of this and other vaccine-related considerations for employers may be found [here](#).

- The revised ETS replaces the term “COVID-19 exposure” with the term “**close contact**” throughout, which is more consistent with CDC, CDPH, and other guidance.
- Another revision is the use of the term “**exposed group**” rather than “exposed workplace” to more appropriately focus on the individuals who may have been exposed rather than merely on geographic location.
- The definition of “workplace” is replaced with a definition for “**worksite**” which is more consistent with AB 685’s definition. The revised ETS specifies that this definition is only to be used for the employee notification requirements, bringing it into alignment with the language and requirements of AB 685. The definition of “exposed group” is applicable to the exclusion and other provisions of the ETS.
- Finally, the revised ETS has a new definition for “**respirators**” that will be crucial to other provisions of the ETS (including provision for voluntary use for non-vaccinated employees). A “respirator” is defined as a respiratory protection device approved by NIOSH such as an N95 filtering facepiece respirator.

1. Face Coverings

Below are the new exemptions from the face covering requirement:

- Face coverings do not need to be worn when all persons in a room are fully vaccinated and do not have COVID-19 symptoms.
- Employees who are fully vaccinated do not need to wear a face covering when they are outdoors and do not have any COVID-19 symptoms.

However, these changes are still more restrictive than the recently [updated guidance](#) from the CDC. The federal guidance, issued on May 13, provides that vaccinated people no longer need to wear a mask or physically distance in most settings “except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local businesses and workplace guidance.” [Federal OSHA subsequently instructed employers to follow the updated CDC guidance until it updates its own guidance further.](#)

Even though CDC has eliminated masking and social distancing requirements for vaccinated persons generally, California’s ETS (even as revised in an effort to be more flexible) is more restrictive and will only dispense with face covering requirements if “all persons in the room” are fully vaccinated.

Thus, the face covering exemption will be virtually impossible for any employer with a customer-facing business (a restaurant, grocery store, etc.). The exemption applies only when “all persons” in the room are vaccinated, which would appear to mean more than just employees and would include customers or any other third party. Until we receive further guidance, employers in California should consider maintaining the face covering requirements for public-facing establishments even if all of the employees are vaccinated.

2. Exemption From Exclusion for Vaccinated Employees

As we [recently discussed](#), CDPH issued updated guidance specifying that fully vaccinated employees do not need to be excluded following a COVID-19 exposure as long as they are vaccinated. Cal/OSHA subsequently updated the ETS FAQs to specify adoption of the changes as applied to the ETS.

The revised ETS conforms to these changes (and extends them) as follows:

- “Close contacts” continue to need to be excluded **except** when (1) they were fully vaccinated before the close contact and have no symptoms, and (2) were COVID-19 cases generally in the last 90 days.
- “COVID-19 cases” need to continue to be excluded **except** for persons who were fully vaccinated before they became COVID-19 cases and do not have symptoms “when allowed to remain at the workplace by the local health department.” This is potentially more expansive than the recent CDPH and Cal/OSHA FAQs that applied only to “close contacts”/exposures rather than to COVID-19 cases. However, this expansion may be limited by the language indicating that this is only permitted when permitted by the local public health department. Hopefully, local orders will promptly be updated to reflect these new exceptions related to exclusion of vaccinated employees who are also COVID-19 cases.

3. The End in Sight for Physical Distancing

The revised ETS makes significant changes to the physical distancing requirements. The physical distancing requirements of the ETS will expire on **July 31, 2021**. However, as discussed below, in “outbreak” situations physical distancing will be re-instated until the employer is no longer under the outbreak requirements.

Until July 31, 2021, the revisions provide exemptions from physical distancing requirements for the following:

- Employees required to wear respirators under existing regulations.
- Locations at which employees are fully vaccinated, except for employees who require a reasonable accommodation or exception to vaccination.
- In order for this exemption to apply, the revised ETS requires the employer to provide respirators (N95s) for voluntary use to all such employees who are not vaccinated and test those employees for COVID-19 at least once per week.

The revised ETS does not define “location,” so it is currently unclear whether this includes an entire workplace or merely a particular building, floor, or other location. Hopefully, this is an issue that will be clarified in FAQs.

4. Provision of N95 Respirators for Voluntary Use

Beginning July 31, 2021, employers will be required to provide respirators (N95s) for “voluntary use” to all employees working indoors who are not fully vaccinated. Employers shall encourage their use and shall ensure that employees are provided a respirator of the correct size.

This could pose a logistical challenge for California employers. Even before the COVID-19 pandemic, many California employers had difficulty obtaining N95 respirators in light of the state’s wildfire smoke regulations. That difficulty was only exacerbated under COVID-19 as there was exponential demand for N95 masks. Employers could face challenges in obtaining such respirators for voluntary use by non-vaccinated employees and/or ensure that such respirators are available in the correct size.

In addition, 15 days after the revised ETS goes into effect, employers shall provide such respirators for voluntary use to employees who have not been fully vaccinated when employees are in a vehicle with another person for 15 minutes or more.

5. Revisions to Notice Requirements and New Verbal “Follow-Ups”

The revised ETS makes a number of changes to the notice requirements applicable to employers when there has been a COVID-19 case in the workplace. Most of these changes bring the notice requirements in line with the notice requirements of AB 685. For example, the revisions specify that the notice must be “written” (consistent with AB 685) and must be provided to “all employees at the worksite during the high-risk exposure period.” This latter change is more consistent with the language in AB 685 that requires notice to be provided to employees who were on the “premises” during the “infectious period,” as opposed to the original ETS language that required notice to be provided to employees who vaguely “may have had COVID-19 exposure.”

In addition – like AB 685 – the revised ETS specifies that the written notice may include, but not be limited to, personal service, email, or text message if it can reasonably be anticipated to be received by the employee within one business day.

The revision contains a new **verbal** follow-up notice requirement which will be quite difficult to comply with. Specifically, the revised ETS provides:

If the employer should reasonably know that an employee has not received the notice, or has limited literacy in the language used in the notice, the employer shall provide verbal notice, as soon as practicable, in a language understandable by the employee.

This language raises a number of concerns. First, it is unclear when an employer is expected to “reasonably know” that an employee has not received the notice or has limited literacy in the notice language. Second, it is unclear how an employer is expected to measure whether an employee has such “limited literacy” in the notice language. Third, it is unclear how an employer is to determine a language “understandable” by the employee or how the employer is to ensure that the notice is translated into such a language understandable by the employee.

In addition, there are going to be practical limitations with the ability of employers to provide the required information in verbal format. The language required to be provided in the notice includes an employer’s disinfection plan, which can be complex. Lacking further guidance and to get ahead of this issue, we recommend that employers with a high percentage of non-English speaking employees’ attempt to provide the initial written notice in the employees’ native language, when possible.

6. Exclusion Pay

On the “bad news” front, proposed changes to the exclusion pay provisions of the ETS are not as helpful as other proposed modifications. Most notably, the revisions specifically provide that unpaid exclusion pay wages are “subject to enforcement through procedures available in existing law.” Therefore, plaintiffs’ attorneys will likely argue that this authorizes private lawsuits and even PAGA claims for unpaid exclusion pay.

In addition, the revised ETS provides that wages paid under the exclusion pay provisions must be paid at the employee’s “regular rate of pay.” While this is some improvement in that the current ETS provides no guidance to employers on how to calculate exclusion pay, the term “regular rate of pay” is

not specifically defined, nor is a specific methodology set forth for calculating the regular rate of pay.

Employers may wish to consider utilizing the standard California methodology for determining the regular rate of pay in the workweek for overtime purposes as that is generally the default “regular rate of pay.” However, employers should keep in mind that payments made that qualify as California COVID-19 Supplemental Paid Sick Leave (including retroactive payments) need to be paid pursuant to the specific methodology provided under that law. Hopefully, Cal/OSHA will provide further guidance or FAQs in this regard.

In addition, the revised ETS will provide that wages paid as exclusion pay must be paid no later than the regular pay date for the pay period(s) in which the employee is excluded.

Finally, the revised ETS eliminates some specific exemption language from the exclusion pay requirement that could impact employers. The current ETS contains an exemption for “any period of time where the employee is unable to work for reasons other than protecting persons” from COVID-19 transmission. In a subsequent [FAQ](#), Cal/OSHA indicated that an if employee is out of work (“too sick to work”) for more than a standard quarantine period, that may indicate that the employee is not able and available to work due to illness (and potentially cut off the obligation to continue earnings).

However, the revised ETS would eliminate this exemption language and replace it with language stating that the exclusion pay requirement does not apply “where the employee received disability payments or was covered by workers’ compensation and received temporary disability.” It is unclear whether elimination of the prior exemption language will change Cal/OSHA’s interpretation with respect to employees that are “too sick to work” and potential cutting off of the obligation to provide exclusion pay.

7. New Testing Requirement for Non-Vaccinated Symptomatic Employees

Under the current ETS, employers are required to offer COVID-19 testing when there has been a case in the workplace, as well as additional obligations when there has been an outbreak in the workplace.

The proposed revisions to the ETS provide some important exceptions to the obligations to offer testing, but also adds a **new testing obligation** for California employers. Beginning July 31, 2021, employers will be required to make COVID-19 testing available at no cost to employees with COVID-19 **symptoms** who are not fully vaccinated, during employees' paid time.

8. Testing Following Workplace Cases

First, when there has been one case in the workplace, employers will be required to make testing available to all employees who had a "close contact" with the COVID-19 case in the workplace. The current ETS requires that such testing be offered to all employees who had "potential COVID-19 exposure." This is a welcomed clarification of the language used in the ETS, consistent with CDC and other guidelines use of "close contact."

The revised ETS loosens testing obligations for asymptomatic fully vaccinated employees or those who have previously had COVID-19. Below are exemptions from this testing requirement for the following:

- Employees who were fully vaccinated before the close contact and do not have COVID-19 symptoms.
- Employees who were COVID-19 cases generally in the last 90 days.

9. Revisions to Outbreak Requirements

The current ETS contains a number of specific requirements that apply when there is an "outbreak" (3 or more cases during a 14-day period) and a "major outbreak" (20 or more cases during a 30-day period). For regular "outbreaks," the proposed revisions make the following changes:

- Testing does not have to be made available to asymptomatic employees who were fully vaccinated before the outbreak and employees who were COVID-19 cases generally in the last 90 days.
- Physical distancing and other engineering controls will be reinstated during the outbreak (even if after July 31, 2021).
- The use of MERV-13 or higher efficiency filters if compatible with the ventilation system (which had

previously only been required during “major outbreaks”) will now be required even during regular outbreaks.

With respect to “major outbreaks,” the revised ETS simplifies the requirements by specifying that all of the requirements of a regular “outbreak” (as modified described above) must be followed, plus some additional existing requirements such as determining the need for a respiratory protection program and evaluating halting some or all operations until the COVID-19 hazards have been corrected.

10. Revisions to Employer-Provided Housing and Transportation Requirements

Finally, the proposed revisions also make several changes to the provisions of the ETS that apply to employer-provided housing and employer-provided transportation, many of which provide flexibility with respect to vaccinated employees. Employers who provide housing or transportation and are governed by these provisions will want to review these revisions closely with counsel.

With respect to the employer-provided housing requirements, the main changes include the following:

- The provisions do not apply to housing in which all residents are fully vaccinated.
- Beds must be spaced to allow at least eight feet between the corner of the head of each bed (rather than six feet apart under the current ETS).
- If MERV-13 or higher air filters are not in use, portable or mounted HEPA units shall be used in all sleeping areas in which there are two or more residents who are not fully vaccinated.
- Exemption from quarantine requirements following COVID-19 cases and close contacts is provided for asymptomatic employees who have been fully vaccinated or employees who were COVID-19 cases generally within the last 90 days.

With respect to the employer-provided transportation requirements, the main changes include the following:

- The provisions do not apply to vehicles in which all employees are fully vaccinated.

- Clarification that the provisions do not apply to public transportation.
- A new provision that there must be “one unoccupied seat between each person” **or** the operator and any passenger are separated by three feet in all directions.
- Beginning 15 days after the effective date of the revised ETS, employees who are not fully vaccinated shall be provided with respirators (N95s) for voluntary use and encouraged to use them.

Effective Date and Duration

The Cal/OSHA Standards Board will be considering the revised ETS language on May 20 and is anticipated to approve the proposed language as is with no further additional changes.

Once approved by the Standards Board, the Office of Administrative Law (OAL) will have 10 calendar days to approve the regulation. Because the conclusion of those 10 days falls on a Sunday (before the Monday Memorial Day Holiday) it is anticipated that this new ETS will become effective on **June 1, 2021**, although it is possible that the OAL could approve the regulation sooner.

As a “readoption” of an emergency regulation, the revised ETS would generally be effective for 90 days. However, a series of COVID-19 related Executive Orders would extend this period by an additional 120 days. The [notice document](#) accompanying the revised ETS language indicates that the readoption would be in effect for 180 days (rather than 90) but this may be in error. This is an issue that we hope will be clarified by the Standards Board. Therefore, the revised ETS will likely be in effect until at least the end of the year. However, employers should keep in mind that the Standards Board could still readopt another version of the ETS down the road, extending its duration even further.

Next Steps

California employers should adopt the following series of steps to ensure compliance with the upcoming changes to the ETS:

- Review the [proposed changes](#) to the ETS carefully and with counsel. Review our helpful summary chart [here](#) to assist you in doing so.

- Attend our upcoming complimentary [webinar](#) on May 24 to learn what you need to know about these changes and what you will need to do differently.
- These changes will necessitate some significant changes to your Written COVID-19 Prevention Program (WCPP) and other documents, notices and templates. We are updating a complete document compliance packet for employers. If you are interested in purchasing this packet, contact your Fisher Phillips attorney or the authors of this legal alert.
- Consider how you are going to approach the issue of vaccinated employees. Begin with our [summary](#) of vaccine-related considerations to get you started.
- Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. We will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate.

For further information, contact your Fisher Phillips attorney, the authors of this alert, or any attorney in [our California offices](#).