



# Second Time's the Charm? California Set to Amend Pandemic-Related Workplace Safety Rules

Insights

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After a rollercoaster meeting yesterday where it originally voted down the proposed revisions, Cal/OSHA's Standards Board eventually adopted proposed revisions to the Emergency Temporary Standard (ETS) that will establish COVID-19-related workplace safety rules for California employers. Now, the Standards Board will submit the proposed revised ETS to the Office of Administrative Law, which will have 10 days to review and approve the proposal. If approved, the revised ETS is anticipated to go into effect on or before June 15. What do these revisions to the ETS mean for employers? This Insight summarizes the 10 key revisions employers need to know about, and provides a recommended five-point action plan for employers – including a complimentary webinar on June 8 to review the latest developments.

## Recapping Recent Revisions

In Change is Coming in California: The Top 10 Revisions to COVID-19 Workplace Safety Rules for Employers, we discussed many of the critical changes proposed in the May 7 update, including revised definitions, modifications to face covering requirements, exclusion after exposure, physical distancing, respirators (N95) for voluntary use, testing, notice, exclusion pay, outbreak requirements and employer-provided housing and transportation requirements.

In addition to the proposed changes issued by Cal/OSHA on May 7, the revised ETS includes further proposed revisions, issued on May 28. Though these additional amendments are relatively minor, they include physical distancing options for employers with employees in indoor settings or “outdoor mega events” of over 10,000 participants or spectators. The additional revisions also accelerate the requirement that employers immediately provide testing for symptomatic employees regardless of work-relatedness.

## Summary of Key Revisions

1. **Face Coverings** – Despite two rounds of proposed revisions, the revised ETS does not align with the recent CDC guidance or Governor Newsom's plan to end social distancing and masking for those who are fully vaccinated as of June 15. **This means that most employees must continue masking in the workplace, even after June 15.**

Under the revised ETS, the narrow exceptions for removing masks in the workplace include

where: (1) an employee is alone in a room; (2) all *persons* in a room are fully vaccinated and asymptomatic; (3) employees work outdoors and are fully vaccinated and asymptomatic; or (4) employees have a medical, mental health or disability-related reason and remain socially distant or are fully vaccinated or test weekly at the employer's expense. This means that in nearly all situations for employers with public-facing businesses, vaccinated and unvaccinated employees will need to continue wearing face coverings for now. Additionally, in many other work environments such as employees in open work areas (e.g., cubicles, shared offices), vaccinated and unvaccinated employees will also need to maintain face coverings unless the employer has documentation showing all persons in the room are fully vaccinated (and the persons are asymptomatic).

2. **Employers Must Provide Respirators (N95s) For Voluntary Use to Those Who Are Unvaccinated** – Starting July 31, employers are required to provide “respirators” (N95 masks) to all employees who have not provided documentation showing they are fully vaccinated working indoors or at outdoor “mega events” for their voluntary use. There was much controversy over this requirement. In view of this requirement, employers will need to stock up on N95 masks for eligible employees who may ask to use a respirator.
3. **Certain Exemptions From Exclusion After Exposure and Testing** – 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 who were in close contact if they had COVID-19 within the last 90 days and have remained symptom-free. Additionally, 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.
4. **Physical Distancing** – The general ETS requirements for physical distancing will come to an end on July 31. Until then, employers have two options as to physical distancing for employees working indoors or at outdoor mega events: 1) continue physical distancing except where the employer where the employer can demonstrate distancing is not feasible and requires non-distanced employees to wear respirators; or 2) discontinue physical distancing so long as respirators are provided for voluntary use to those who have not provided documentation that they are fully vaccinated.
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. For employers with a high percentage of non-English speaking employees, it may be best to provide the initial written notice in the employees’ native language, if possible, to address this requirement.
6. **Documentation for “Fully Vaccinated”** – Employers will now be required to have documentation showing a person is “fully vaccinated.” Although there is no definition of “documentation” or current clarification on what documentation will suffice (e.g., signed acknowledgment, confirmation of vaccination card, etc.), Eric Berg from Cal/OSHA stated at the Standards Board

meeting that employers are not required to maintain an actual copy of an employee's vaccine card but can choose to do so. He also indicated that Cal/OSHA will follow up with further clarity and examples of acceptable documentation through updated FAQs.

7. **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.
8. **Testing for Non-Vaccinated Symptomatic Employees** – Employers must make COVID-19 testing available at no cost during paid time to employees with COVID-19 symptoms who are not fully vaccinated.
9. **Revisions to Outbreak Requirements** – The requirements that apply when there is an “outbreak” or a “major outbreak” have been 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 fully vaccinated employees.

In addition to the above, other revisions include modifications to key definitions, a newly imposed training requirement when respirators are provided for voluntary use, and other updates.

Though many of the revisions are welcomed, they do not completely align with the relaxed restrictions seen outside of California and statewide as of June 15. In voting on these proposed revisions, many of the Standards Board members struggled with approving and adopting this version given some of the outdated and misaligned provisions. However, the Board ultimately moved forward with approving the revised version as it contains at least some reprieve for employers and employees.

In addition to approving the revised ETS, the Standards Board voted to create a subcommittee comprised of certain Board members who will be tasked with quickly working directly with Cal/OSHA to draft further revisions to address concerns of the current version of the revised ETS. It is likely we will see further refinements to the regulations in the coming weeks to take into account the positive changes in circumstances as a result of increased vaccination rates and low COVID-19 case rates.

## 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.
- Attend our upcoming complimentary [webinar on June 8](#) to learn what you need to know about these changes and what you will need to do differently.

- These changes will necessitate some changes to your Written COVID-19 Prevention Program (WCPP) and other documents, notices and templates. Fisher Phillips is updating its compliance packet for employers. If you are interested in purchasing a 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 are continuing to monitor the rapidly developing COVID-19 situation and will provide updates as appropriate.

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

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