



# Third Time's the Charm?... And We Mean it This Time

*CALIFORNIA MOVES CLOSER TO FINAL AMENDMENTS TO COVID-19 WORKPLACE SAFETY RULES*

Insights

6.14.21

Employers monitoring proposed changes to Cal/OSHA's Emergency Temporary Standard (ETS) in recent weeks likely have whiplash from trying to keep up with the back-and-forth slew of developments. However, it appears we are close to final resolution. On Friday, June 11, Cal/OSHA released a third – and hopefully final – set of proposed revisions. The proposed changes closely align with updated guidance from CDPH/CDC, particularly regarding face coverings. The much-publicized June 15 “reopening” of California and mask guidance from the CDPH generally govern public interactions and customers, whereas the ETS governs how a business treats its employees with respect to face coverings and other workplace safety considerations. Thankfully, the revised ETS will largely track the CDC/CDPH guidance and generally allow fully vaccinated employees to remove face coverings, regardless of whether others at the workplace have been vaccinated. The revised ETS will also make several other changes that employers will have to implement in short order. What are the 10 key revisions you need to know about?

## How We Got Here – and Where We're Headed

Cal/OSHA's original ETS went into effect in November 2020. But in the last month, we have seen a flurry of activity as Cal/OSHA contemplates changes to the original set of workplace safety rules:

- On May 7, Cal/OSHA released proposed changes to the ETS. As we discussed previously, this proposal included revised definitions, modifications to face covering requirements, exclusion after exposure, physical distancing, respirators (N95s) for voluntary use, testing, notice, exclusion pay, outbreak requirements, and employer-provided housing and transportation requirements.
- The proposed revisions were subject to significant objections, mostly related to the provision that employees could remove face coverings only when “everyone in the room” was fully vaccinated. The Cal/OSHA Standards Board was scheduled to vote on the proposed changes on May 20, but Cal/OSHA asked the Board to hold off at the last minute so they could further amend the ETS.
- Cal/OSHA released a second version of proposed amendments to the ETS on May 28. However, this proposal still had the mask provision only allowing face coverings to be removed only if “everyone in the room” is fully vaccinated. During a rollercoaster meeting on June 3, the Board first rejected, but then adopted, the proposed revisions.

- These changes were scheduled to go into effect by June 14. However, again at the last minute, the Board scheduled a “special meeting” on June 9 where it voted to withdraw the previously approved revisions.
- Cal/OSHA released a third – and hopefully final – set of proposed revisions to the ETS on June 11. The Board is scheduled to approve the proposed changes on June 17.
- The revisions would then go to the Office of Administrative Law (OAL), which would have 10 days to approve them. Therefore, the revised rules would normally be effective on or before June 28.
- However, Governor Newsom has stated his intention to sign an Executive Order making some or all of the revised ETS effective as soon as approved by the Board on June 17.

## Summary of 10 Key Revisions in The Proposed Revised ETS

Here are the top 10 key revisions that all California employers need to know about.

1. **Face Coverings** – After three attempts, the revised ETS will align with CDPH/CDC guidance. **Employees who are fully vaccinated will no longer need to wear face coverings.** Face coverings only need to be provided and worn by employees who are not fully vaccinated when indoors and in vehicles. However, the revised ETS language also specifically states that employers must allow fully vaccinated employees to wear face coverings without fear of retaliation.
2. **Employers Must Provide Respirators (N95s) for Voluntary Use to Those Who Are Unvaccinated – But Only Upon Request** – Upon request, employers will be required to provide “respirators” (N95 masks) for voluntary use to all employees who are not fully vaccinated and who are working indoors or in vehicles with more than one person.

This provision has been controversial as employers have expressed concern about the availability of N95s. The revised ETS makes an improvement from previous proposed revisions as respirators will now only need to be provided **“upon request.”** However, further clarification is needed from Cal/OSHA to specify the time period in which employers must provide such respirators and the contours of this requirement. In addition, this will still be a significant burden for employers to ensure that they have such respirators on hand to comply with requests from unvaccinated employees. Moreover, this requirement will go into effect **immediately** as soon as the revised ETS is effective (as opposed to July 31 under previous proposals).

3. **Documentation for “Fully Vaccinated”** – Employers will be required to “have documented” that a person is fully vaccinated. There is still uncertainty regarding whether this means that an employer must review actual vaccine cards of employees or can rely upon employee self-certification. Cal/OSHA has stated that it will provide additional clarification through updated FAQs. Based on this language and previous comments from Cal/OSHA, it does not appear that employers will be required to maintain an actual copy of an employee’s vaccine card but may choose to do so.

The revised ETS also adds that, for persons vaccinated outside the United States, a vaccine will be valid if listed for emergency use by the World Health Organization (WHO).

4. **Physical Distancing** – The revised ETS eliminates physical distancing requirements **immediately** upon the effective date of the revisions. This is an improvement over previous drafts of the proposal, which would have continued physical distancing requirements until July 31. However, employers that experience an “outbreak” will need to evaluate whether to implement physical distancing requirements.
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. **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.
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.

## **When Will the Revised ETS Take Effect?**

The Cal/OSHA Standards Board is scheduled to vote on the proposed revisions to the ETS on June 17. The revisions would then go to the Office of Administrative Law (OAL), who would have 10 days to approve them. Therefore, the revised rules would normally be effective on or before June 28.

However, Governor Newsom recently indicated that he would sign an Executive Order to make some or all of the ETS effective as soon as approved by the Board on June 17. He was quoted as saying, “If they adopt the guidelines they published [June 11], we’ll codify that with an executive order to make that clear on [June 17].

It remains to be seen if the promised action by the governor will make the entire revised ETS effective sooner, or just the provision that says fully vaccinated workers do not need to wear face coverings. We’ll keep you posted on further developments.

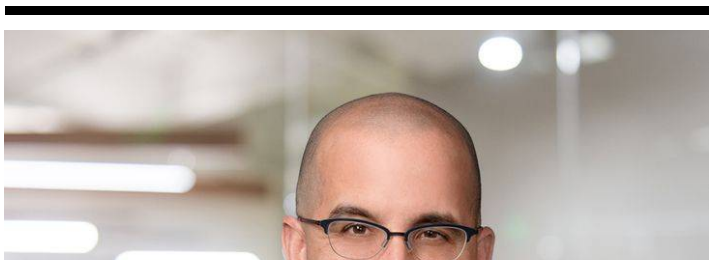
## **Next Steps**

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 Friday, June 18 to learn what you need to know about these changes and what you will need to do differently. Stay tuned for registration details.
- 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.

## ***Related People***





**Benjamin M. Ebbink**

Partner

916.210.0400

Email



**Hannah Sweiss**

Partner

818.230.4255

Email

## ***Service Focus***

Workplace Safety and Catastrophe Management

## ***Trending***

COVID-19/Vaccine Resource Center

## ***Related Offices***

Irvine

Los Angeles

Sacramento

San Diego

San Francisco

Woodland Hills