

HERE WE GO AGAIN – TOP 10 THINGS EMPLOYERS NEED TO KNOW AS CAL/OSHA RAMPS UP EMERGENCY COVID-19 WORKPLACE RULES

Insights
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The Cal/OSHA Standards Board just voted to “re-adopt” the COVID-19 Emergency Temporary Standards (ETS) for a second time – but this latest move introduces some significant changes for California employers, including a return of COVID-19 testing, social distancing rules, and face covering requirements for fully vaccinated employees in certain circumstances. The December 16 vote means the new ETS will be in effect from January 14, 2022 through the middle of April. What are the top ten things California employers need to know about the new ETS?

10 Key Revisions in California’s Revised ETS

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

1. **Revised Definitions:** First up, Cal/OSHA has changed a number of relevant definitions. It’s important to review these new definitions to ensure that you are complying with the most up-to-date ETS requirements:
 - **“Covid-19 Test”** is now expanded beyond viral tests to include home tests, over-the-counter tests, and point-for-care tests. Importantly, a test cannot be self-administered and self-read unless the employer or an authorized telehealth provider observes.
 - **“Face coverings”** was clarified to require fabrics that do not allow light pass through when held up to a light source. Masks must fit snugly over the nose, mouth, and chin with no large gaps on the outside of the face.

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Additionally, face coverings with a clear plastic panel may be used to facilitate communication with people who are deaf or hard of hearing or need to see a speaker's mouth or facial expressions to understand speech or sign language.

- **"Fully vaccinated"** has been expanded to include vaccines administered as part of a clinical trial. It does not yet change the definition of "fully vaccinated" to require booster shots.
 - **"Worksite"** was clarified to not include locations where the worker worked by themselves without exposure to other employees, or to a worker's personal residence or alternative work location chosen by the worker when working remotely.
2. **Screening:** Another change made to the ETS relates to screening of employees for COVID-19 symptoms. Just as with early versions of the ETS, employers must have a Written COVID-19 Prevention Program that includes policies for identifying and evaluating COVID-19 hazards in the workplace. If the employer conducts screening indoors at the workplace, face coverings must now be worn by both screeners and employees, **regardless of vaccination status**. This is a change from the previous version of the ETS where fully vaccinated employees did not need to wear a mask during screening.
 3. **Post Exposure Notification:** Just as before, employers are required to provide notice of a potential COVID-19 exposure to all employees. The re-adoption clarified that this notice must be provided to "all employees who were on the premises at the same worksite as the COVID-19 case during the high-risk exposure period." The notice also should be in the manner the employer normally uses to communicate employment-related information which means employers should utilize whatever methods they typically use to communication whether that's postings, email, or even text messages.
 4. **Post-Exposure Testing:** The re-adoption requires that post-exposure testing be made available to asymptomatic fully vaccinated employees. Previously, employers were not required to provide testing for fully vaccinated employees unless they experienced COVID-19 symptoms.

5. Exclusion of COVID-19 Cases and Close Contacts: One of the biggest changes in the re-adoption is the exclusion of COVID-19 cases and close contacts. Asymptomatic fully vaccinated employees still do not need to be excluded following a close contact, but only if they wear a **face covering** and maintain **six feet of distance** from others for **14 days** following the close contact. The same requirement – face covering and social distancing – applies for employees who are not excluded following a close contact because they have natural immunity. If an employee is not excluded following a close contact because they are fully vaccinated or have natural immunity, employers must provide the employee with information about any applicable precautions recommended by CDPH for persons with close contacts.

Employers have raised concerns that maintaining and enforcing social distancing and face covering requirements on an individual employee-by-employee basis is not practical. You could be faced with some employees who are required to social distance while others are not, changing on an almost-daily basis. For now, however, employers must do their best to comply with this requirement.

6. Return to Work Following Close Contacts: Under the re-adoption, employees who had a close contact but never developed symptoms may return to work after 14 days unless one of the following applies:

- 10 days have passed since the close contact and the person wears a face covering and maintains six feet of distance from others for 14 days; or
- Seven days have passed since the close contact, the person tests negative at least five days after the close contact, and the person wears a face covering and maintains six feet of distance from others for 14 days. The new ability to return after seven days with a negative test reflects recently updated CDPH guidance.

In earlier versions of the ETS, only essential critical infrastructure workers including healthcare workers, emergency response workers, and social service workers were able to return to work seven days after a close contact with a negative test at least five days after the close contact. The new guidance applies to all employees as long as the employee wears a face covering and

maintains six feet of social distance for 14 days. This change also reflects recently updated guidance from the CDPH allowing an earlier return with a negative test and social distancing/face coverings.

7. Multiple COVID-19 Infections and COVID-19 Outbreaks:

Just as in the previous ETS, an outbreak is defined as three or more employees COVID-19 cases within the exposed group. Previously, employers did not have to make testing available to fully vaccinated employees if they did not exhibit symptoms. Now, if a company faces multiple COVID-19 infections or a COVID-19 outbreak, the employer must make testing available to employees in the exposed group, even if they are **fully vaccinated and asymptomatic**.

8. Employer-Provided Housing: The re-adoption includes additional requirements for employers who provide housing to their employees. The previous ETS included ventilation requirements. Now, If MERV 13 or higher filters are not used, HEPA filtration units shall be used, to the extent feasible, in all sleeping areas. This is a change from the previous versions of the ETS, where HEPA filtration units were only applied in sleeping areas where two or more residents were not fully vaccinated. Also, employers must now test all residents of employer-provided housing in which there were three or more COVID-19 cases in 14 days. Additionally, employers must now quarantine even fully vaccinated asymptomatic residents following a close contact.

9. Employer-Provided Transportation: Employers who provide transportation must provide face coverings to all employees, even those who are **fully vaccinated**.

10. Effective Date of Revised ETS – And Possible

Continuation: The second re-adoption of the ETS will be effective on January 14, 2022 and will be in effect for 90 days. However, just hours after the Standards Board voted to readopt the ETS, Governor Newsom signed an [Executive Order](#) that gives the Board the authority to readopt the ETS for a third time if needed. Although not yet guaranteed, this Executive Order gives the Board the authority to adopt the ETS another time – running from mid-April to the end of 2022. Needless to say, California employers could be dealing with the ETS for quite some time.

What Should You Do?

In the meantime, employers should adopt the following steps to ensure compliance with the upcoming changes:

- Review the changes to the ETS carefully and with your employment law counsel.
- Revise your Written COVID-19 Prevention Program (WCPP) and other related documents. Fisher Phillips is updating its compliance packet for employers and will have it prepared and ready for employers in the coming days. If you are interested in purchasing a packet, contact your Fisher Phillips attorney or the authors of this legal alert.

We will continue to monitor this situation and provide updates as warranted. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have questions, visit our [Vaccine Resource Center for Employers](#) or contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our [FP Vaccine Subcommittee](#).