

# TOP 10 CHANGES CALIFORNIA EMPLOYERS NEED TO PREPARE FOR AS THIRD COVID-19 EMERGENCY RULE ABOUT TO TAKE EFFECT

Insights  
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California workplace safety officials just approved a third round of changes to the state's COVID-19 Emergency Temporary Standard, and while many of them conform to recent guidance that have already been incorporated into current rules, there are 10 significant changes California employers must prepare for. Significantly, however, the changes to the ETS that were just approved today by the Cal/OSHA Standards Board do not alter your obligation to pay "exclusion pay" to employees who have been excluded from the workplace as a COVID-19 case or a close contact. While it may feel that the pandemic is in the rearview mirror, these new ETS provisions – set to take effect on May 6 – will be with us for quite some time, likely through the end of 2022. This Insight will review the top 10 changes for employers – [and those wanting to take a deeper dive can sign up for a complimentary webinar on April 29 where we'll offer further insights in an interactive basis.](#)

## Effective Date and Duration

As noted above, the Cal/OSHA Standards Board approved the proposed ETS language earlier today. Due to an [Executive Order](#) previously signed by Governor Newsom, the third readoption of the ETS will be effective from May 6 – the date the current ETS is set to expire – through December 31, 2022.

What happens after that is a bit speculative at this point. Theoretically, the governor could authorize Cal/OSHA to adopt the ETS for a fourth time if necessary. However, it seems more likely that, following the ETS, Cal/OSHA will

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move to adopt a permanent regulation aimed at airborne infectious diseases (that includes COVID-19 and other diseases).

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## What Has NOT Changed: Exclusion Pay

Employers had hoped that the third readoption would signal an end to the obligation to provide exclusion pay for employees that have been excluded as COVID-19 cases or close contacts – especially since California has brought back COVID-19 Supplemental Paid Sick Leave. However, the third adoption retains the same exclusion pay requirement – meaning you will continue to have to pay employees that have been excluded from work unless an exception applies.

### 1. Key Definitional Changes Will Lead to Changed Practices

Some of the key definitions of terms used throughout the ETS have been altered in such a way that you may need to change some of your practices.

- **COVID-19 Test** – The definition of “COVID-19 test” has been amended to provide that, to meet the return-to-work criteria, a test may be both self-administered and self-read **only if** another means of independent verification of the results can be provided (such as a time-stamped photograph of the results).
- **Face Coverings** – The definition of “face coverings” has been amended to delete the requirement that light does not pass through the mask when it is held up to a light source. This is an improvement as employers had expressed concern that even some N95 masks could not meet this requirement.
- **Fully Vaccinated** – The definition of “fully vaccinated” has been deleted. This is largely in response to the fact that the face covering provisions of the ETS no longer make a distinction between fully vaccinated employees and unvaccinated employees. However, you should keep in mind that vaccination status may still be relevant for other purposes, including under local public health orders.
- **Returned Case** – The new language contains a new defined term of “returned case” to largely describe employees who previously had COVID-19 and now have

natural immunity. "Returned case" is defined to mean a COVID-19 case who returned to work and did not develop any COVID-19 symptoms after returning. A person shall only be considered a "returned case" for 90 days after the initial onset of symptoms or the first positive test (if no symptoms developed). If a period of longer than 90 days is recovered by CDPH, that period shall apply.

## 2. More Testing of Symptomatic Employees

Under the current ETS, employers only need to make testing available to those employees with COVID-19 symptoms who are not fully vaccinated. The new language eliminates this limitation, meaning you will have to offer testing to *all* employees with COVID-19 symptoms ***regardless of vaccination status***. This could significantly increase testing costs, so you should have a plan in place to comply with this testing obligation.

## 3. Respirators Now Must Be Offered to All Workers

The current ETS requires employers to provide respirators for voluntary use to all unvaccinated employees upon request. The new language eliminates the linkage to unvaccinated employees. Therefore, you will be required to provide respirators upon request to all employees, regardless of vaccination status.

## 4. Face Coverings No Longer Mandatory for Unvaccinated Workers

The new language conforms the ETS to recent developments regarding face coverings. After CDPH changed its face covering guidance to no longer require masks indoors regardless of vaccination status, Governor Newsom issued an [Executive Order](#) striking the ETS language that required employers to provide and ensure face coverings were worn by unvaccinated employees. The new amended ETS language reflects these changes.

You should keep in mind that other face covering provisions of the ETS remain in effect. This includes language that allows employees to voluntarily wear face coverings unless it would create a safety hazard.

The new language also deletes the requirement that employees who are exempted from any applicable face

covering requirement (such as returning to work following a case or close contact) maintain six feet of social distance from others or be tested weekly. Now the language will merely require such employees to be tested at least once a week.

## 5. Cleaning and Disinfection Rules Eliminated

The current ETS requires employers to implement specified cleaning and disinfection procedures, including regularly cleaning frequently touched surfaces and objects. The new language eliminates these requirements in their entirety.

## 6. Exclusion and Return-to-Work Criteria Streamlined – But Stay Tuned for More

The new language generally eliminates any specific language in the ETS regarding “close contacts” and instead merely cross-references CDPH guidance, simply requiring you to review current guidance and develop policies to prevent transmission by close contacts. It also deletes specific return-to-work criteria for close contacts, meaning you will simply follow the current CDPH and/or local quarantine guidance.

But more changes could be afoot in the near future. On April 6, CDPH released revised Isolation/Quarantine [guidance](#) that states that all individuals who are asymptomatic close contacts do not need to quarantine as long as they test within three to five days after their last exposure. At this time, Cal/OSHA had not yet incorporated the revised CDPH guidance into its FAQs and other materials, but we expect them to do so shortly. For now, you should be sure to check local public health orders, as several counties have indicated that they will not be following the new CDPH guidance and instead continue to insist that unvaccinated individuals quarantine for five days after a close contact, consistent with CDC guidance.

The elimination of specific language regarding close contacts is generally a positive improvement. By cross-referencing to current CDPH guidance, this will allow any changes to CDPH guidance to automatically apply to the ETS and will avoid confusion in the ETS regarding obsolete language.

With respect to COVID-19 cases, the new changes delete the current language in the ETS and instead provide the following (which generally conform to current CDPH guidance):

- COVID-19 cases, regardless of vaccination status or previous infection, who do not develop symptoms or whose symptoms are resolving, shall not return to work until (1) at least five days have passed, (2) at least 24 hours have passed without fever, and (3) a negative test is obtained on the fifth day or later (10 days if the employee is unable or chooses not to test).
- COVID-19 cases, regardless of vaccination status of previous infection, whose symptoms are **not resolving** may not return to work until (1) at least 24 hours have passed without fever, and (2) symptoms are resolving or 10 days have passed since symptoms began.
- Regardless of vaccination status, previous infection, or lack of symptoms, a COVID-19 case shall wear a face covering in the workplace until 10 days have passed since symptoms began or the date of their first positive test.

## 7. New Obligations if COVID-19 Outbreaks Occur

The new changes to the ETS section on multiple COVID-19 infections and outbreaks generally make conforming changes to reflect the amendments to the ETS described above. However, the new language also makes the following changes:

- During an outbreak, employees who had close contacts shall have a negative COVID-19 test taken within three and five days after the close contact or shall be excluded and follow the return-to-work criteria of the ETS.
- During an outbreak, an employer shall evaluate whether to implement social distancing. Where six feet of social distancing is not feasible, the employer shall evaluate implementing as much distance as possible between persons (as opposed to the current language which requires consideration of the use of cleanable solid partitions).

## 8. Testing Required After Major Outbreaks

The changes to the ETS “major outbreak” requirement generally conform to the changes noted above. There is also one notable change, however. Under the current ETS language, an employer must make COVID-19 testing *available* to all employees in the exposed group at least twice a week during a major outbreak. This language always caused a bit of confusion...while employers needed to make testing available, do they *have to* test? The new language clarifies that employers are *required* to do so in such situations. Employees in the exposed group shall now be tested or shall be excluded and follow the return-to-work requirements of the ETS.

## **9. Employer-Provided Housing and Transportation Obligations All but Eliminated**

The new language eliminates the requirement of employers to ensure that employer-provided housing is cleaned and disinfected to prevent the spread of COVID-19. The language also eliminates an exemption for exclusion requirements following a close contact for employees that previously had COVID-19 in the prior 90 days.

Similarly, the new language eliminates cleaning and disinfection requirements and, in lieu of face covering requirements, requires you to review CDPH and local health department recommendations and implement face covering policies that effectively eliminate or minimize transmission in vehicles.

## **10. Testing After Exposure Slightly Changed**

Under the current ETS, an employer is generally required to make testing available to all employees who had a close contact to a COVID-19 case in the workplace with an exception for employees that previously had COVID-19 within the last 90 days. The new language simply replaces this exception language with the new term “returned cases” described above.

## **Other ETS Requirements Remain in Effect**

You should keep in mind that, other than the changes discussed above, the rest of the ETS will remain in effect as well. This includes notification requirements following a COVID-19 case in the workplace and the obligation to maintain a Written COVID-19 Prevention Program.

## Next Steps – and Complimentary Webinar

You should review these changes closely to make necessary operational changes to comply by May 6. This will likely require you to make changes to your Written COVID-19 Prevention Program and other pandemic workplace policies.

If you want to learn more, [you should sign up an attend our complimentary webinar on April 29](#) to dive deeper into all of these changes, sort of your next steps for compliance, and to get answers to your most pressing questions during our interactive session.

We will monitor developments related to these changes and provide updates as warranted, so make sure that you are subscribed to [Fisher Phillips' Insights](#) to get the most up-to-date information direct to your inbox. If you have further questions on how to comply, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in any one of [our six California offices](#).