



California's New Close Contact and Infectious Period Definitions Have Far-Reaching Pandemic Implications for Employers

Insights

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California public health officials recently revised the definitions of “close contact” and “infectious period” that appear in the state’s pandemic-related rules – and the new broader standards might catch some employers by surprise. The June 8 “State Public Health Officer Order,” issued by the California Department of Public Health (CDPH), change the way employers must comply with the Cal/OSHA Emergency Temporary Standard (ETS) in some unanticipated ways. For example, while we have all become accustomed to “close contact” meaning six feet/15 minutes/during a 24-hour period, the new standard includes someone “sharing the same indoor airspace” – a potentially much broader standard. What do you need to know about these revisions and how they impact California workplaces and your obligations as an employer?

Recap of Cal/OSHA’s ETS

The majority of California workplaces are subject to Cal/ ETS that first went into effect in November 2020. The current version of the ETS is set to expire December 31, 2022. The ETS imposes a wide range of employer obligations when there is a COVID-19 case in the workplace. Two key definitions that dictate an employer’s response to a COVID-19 case are “close contact” and “infectious period.”

Close Contact and Infectious Period Definitions

“Close contact” and “infectious period” are both defined in the ETS, but both definitions allow for a change in definition by regulation or order of the CDPH and in such circumstance, the CDPH definition shall apply.

Old Definitions

- Until June 8, “close contact” was defined in the ETS as being within ***“six feet”*** of a COVID-19 case for a cumulative total of 15 minutes or greater in any 24-hour period within or overlapping with the infectious period.
- Previously, “infectious period” was defined as:

(A) For COVID-19 cases who develop symptoms, from two days before they first develop symptoms until all of the following are true: it has been 10 days since symptoms first appeared; 24 hours have passed with no fever, without the use of fever-reducing medications; and symptoms have improved.

(B) For COVID-19 cases who never develop symptoms, from two days before until 10 days after the specimen for their first positive test for COVID-19 was collected.

New Definitions

- **“Close contact”** is now defined as someone ***“sharing the same indoor airspace”*** (e.g., home, clinic waiting room, airplane etc.) for a cumulative total of 15 minutes or more over a 24-hour period (for example, three individual five-minute exposures for a total of 15 minutes) during an infected person’s (laboratory-confirmed or a clinical diagnosis) infectious period.
- **“Infectious Period”** is now defined as:
 - For symptomatic infected persons, two days before the infected person had any symptoms through Day 10 after symptoms first appeared (or through Days 5-10 if testing negative on Day 5 or later), and 24 hours have passed with no fever, without the use of fever-reducing medications, and symptoms have improved, OR
 - For asymptomatic infected persons, two days before the positive specimen collection date through Day 10 after positive specimen collection date (or through Days 5-10 if testing negative on Day 5 or later) after specimen collection date for their first positive COVID-19 test.

For the purposes of identifying close contacts and exposures, infected persons who test negative on or after Day 5 and end isolation are no longer considered to be within their infectious period. Such persons should continue to follow CDPH isolation recommendations, including wearing a well-fitting face mask through Day 10.

The Department of Industrial Relations has confirmed that the new June 8th definitions are incorporated into the ETS:

Q: What impact does the CDPH’s updated definitions for “close contact” and “infectious period” have on the 3rd readoption of the ETS?

A: CDPH’s new definitions now apply to the ETS because the 3rd readoption states that its definitions of “close contact” and “infectious period” will change if CDPH changes its definition of those terms by regulation or order. The CDPH definitions can be found in the State Public Health Officer Order.

Why Does This All Matter?

Why do these new changes in definitions matter? While the change to infectious period is helpful since it considers testing when looking at infectious period, the revised close contact definition is more problematic since employers now need to evaluate “shared airspace” when evaluating, testing, exclusion, etc.

Under the Cal/OSHA ETS, the definition of “close contact” is crucial to a whole host of employer obligations and considerations. including the following:

exposure and consideration, including the following:

- Determining who was a “close contact” for determining who may need to be excluded from the workplace following an exposure;
- Providing written notice of potential exposure to “close contacts;” and
- In an outbreak situation, providing testing to “close contacts” or excluding them from the workplace until return-to-work criteria have been met.

Unanswered Questions Remain

CDPH has issued updated FAQs that appear to provide some flexibility when using this new definition of “close contact,” particularly for large indoor airspaces such as warehouses or shopping centers. However, Cal/OSHA has not yet indicated whether this flexibility is incorporated into the ETS or issued revised FAQs that reflect the flexibility contained in those CDPH FAQs.

For example, the updated CDPH FAQs state that, when responding to a potential exposure, entities may “prioritize” the response by:

- “Identifying close contacts who may be considered ‘high-risk contacts’ based on their **proximity** to the case in the setting, the duration or intensity of their exposure, and/or their greater risk of severe illness or death from an exposure.”
- “Determining any smaller spaces within the larger indoor setting for the purposes of assessing potential exposure. For example, individual rooms, waiting areas, bathrooms, or break or eating areas within larger areas could be identified as the shared airspace area. When a larger indoor space cannot be easily divided into smaller discrete spaces, then **close contacts may be determined based on proximity to the positive case**, particularly in high-risk settings where close contacts might be considered for quarantine, cohorting, or work exclusion. Viral particles are less likely to concentrate in larger indoor spaces (e.g., department store or indoor shopping mall, or warehouse, gymnasium) so **only those closer to the infectious person or in a more enclosed shared airspace would be considered at great enough risk of becoming infected to be called a close contact.**”

Continued use of terms like “proximity” and “closer to the infectious person” in the CDPH FAQs would appear to indicate that entities such as employers could continue to reasonably prioritize those who were closest to the exposed person for compliance with the myriad ETS requirements following a potential exposure. But things are far from certain yet. Apart from the revised FAQ noted above that indicates that the new CDPH definition applies to the ETS, Cal/OSHA has not provided any indication as to whether this additional flexibility set forth by CDPH will apply to the ETS as well. Hopefully, this is something Cal/OSHA clarifies as soon as possible.

What to Do Next?

These changes will require you to evaluate revisions that need to be made to your COVID-19 case investigation process, exclusion, testing, notices, your written COVID-19 prevention program, and

investigation process, exclusion, testing, notices, your written COVID-19 prevention program, and various other aspects to comply with the Cal/OSHA ETS. We will keep you posted if Cal/OSHA provides any further clarification on the impact of these new definitions, especially if they provide any of the flexibility provided for in the updated CDPH FAQs discussed above.

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. If you have further questions on how to comply, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in any one of our six California offices.

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