



Think the Cal/OSHA ETS Will Expire at the End of the Year? Think Again!

Insights

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After a wild and bumpy ride of dealing with the Cal/OSHA COVID-19 Emergency Temporary Standard (ETS), most California employers were relieved that the ETS was set to expire at the end of this year. However, last-minute debate at the Cal/OSHA Standards Board over a proposed two-year COVID-19 standard makes it likely that the ETS will remain in effect until as late as mid-February – meaning California employers will be bound by the ETS (including its “exclusion pay” requirements) longer than anticipated. What do employers need to know to make sure they are still in compliance with the ETS?

Transition May Not Be as Seamless as We Hoped

Since fall 2020, California employers have had to comply with the everchanging ETS. As you know, the ETS has been “readopted” several times, bringing constant changes to COVID-19 protocols in the workplace. As an emergency regulation, an ETS can typically only be readopted twice. However, given the unprecedented nature of COVID-19, Governor Gavin Newsom took the extraordinary step of issuing an Executive Order that authorized the ETS to be readopted for a third time, effective through the end of 2022.

As we [reported this summer](#), the Cal/OSHA Standards Board has been working for months on a non-emergency COVID-19 standard that would replace the current ETS after it expires. This new standard would be in effect for two years.

Given the monthslong planning process, we hoped we would see an orderly and seamless transition between expiration of the ETS (on December 31, 2022) and the effective date of the non-emergency standard (January 1, 2023). It now seems that may not be the case.

A More Flexible Approach is Expected

The proposed non-emergency standard generally provides a more flexible approach for employers in addressing COVID-19 in the workplace as part of their regular Injury and Illness Prevention Program (IIPP). Importantly for employers, each proposed draft of the non-emergency standard has removed the requirement for employers to provide “exclusion pay” for employees absent from the workplace due to COVID infection or exposure (although other paid leave requirements may exist). The most recent proposed language for the non-emergency standard is available [here](#).

As discussed above, we anticipated that the Cal/OSHA Standards Board would complete their work on the non-emergency standard well before the end of the year, leaving plenty of time for the regulation to undergo administrative review and go into effect on January 1. However, ongoing debate over whether to keep “exclusion pay” in the standard has thrown an unexpected kink into the process and the timing.

Labor advocates have long expressed their opposition to any non-emergency standard that did not include exclusion pay. Thus far, Cal/OSHA and the Cal/OSHA Standards Board has held the line and each version of the proposal has removed the exclusion pay requirement.

However, at the last meeting of the Cal/OSHA Standards Board in October, four of the seven Board members echoed the concerns of labor and essentially “demanded” that exclusion pay be added to the standard. It remains to be seen whether Cal/OSHA will respond by revising the language — but one way or the other, this continued debate and delay means that the Board will not vote to adopt the non-emergency standard until their December 15 meeting.

Timing is Everything – Why This is Important

Even after the Board approves a non-emergency standard on December 15 (with or without exclusion pay) it still needs to be reviewed by the Office of Administrative Law (OAL) and filed with the Secretary of State before it takes effect.

Here is where an arcane administrative process could result in continued operation of the ETS beyond the end of the year.

According to the Board, the non-emergency regulation is considered a “certificate of compliance” rulemaking. This generally refers to the process in which an emergency regulation — in this case the ETS — becomes a “permanent” regulation when the Board adopts a non-emergency standard while the emergency standard is in effect.

Here’s the kicker – when an agency submits a “certificate of compliance” to OAL, **the emergency regulation stays in effect during OAL’s review**. If a “certificate of compliance” is submitted, the maximum time period for OAL review is 30 “working” days (although OAL may act earlier).

Because the Board’s final approval of the non-emergency standard will be last minute, these arcane administrative rules will likely come into play.

If the Board approves the non-emergency standard on December 15, it is likely that the “certificate of compliance” will be submitted to OAL shortly thereafter and before expiration of the ETS. OAL will then have up to 30 “working” days (weekdays, not including weekends) to approve the regulation and file it with the Secretary of State.

And remember – **the ETS remains in effect while OAL is undertaking their review** even if this extends beyond the original December 31 expiration date of the ETS. Therefore, if the OAL takes 30 days to review and approve the non-emergency standard, the ETS could remain in effect until mid-February. Even if OAL acts sooner (as it can), it seems inevitable that the ETS will remain in effect beyond December 31 into January.

What Should an Employer Do?

Given that the ETS may remain in effect through the new year, employers must keep their COVID-19 protocols in place until the non-emergency regulation goes into effect. Employers should continue to identify, evaluate, and correct COVID-19 hazards in the workplace. This means that contract tracing, reporting outbreaks, individual notice requirements, and exclusion pay from the ETS may be here to stay a little bit longer than we anticipated.

Conclusion

There's still a lot up in the air for California employers. In theory, Cal/OSHA still has time to release revised proposed language in time for the Board to consider at its December 15 meeting. Employers are waiting with bated breath to see if Cal/OSHA buckles to the pressure from labor groups and adds exclusion pay back into the mix.

California employers will need to watch developments closely to see if the proposed language changes further. As discussed above, due to the procedural requirements of the law, the ETS will likely remain in effect into 2023. California employers will need to be prepared to continue to comply with the ETS beyond the end of the year and be prepared to pivot to comply with the non-emergency regulation thereafter.

We will continue to monitor developments and issue updates as warranted. As always, Fisher Phillips will be ready to assist employers in complying with the non-emergency regulation (whenever it goes into effect) with compliance documents and templates.

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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