

THE CAL/OSHA FANTASTIC VOYAGE CONTINUES – COME ALONG AND RIDE WITH THE 10 BIGGEST CHANGES IN THE PERMANENT COVID-19 REGULATION

Insights
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As we near the end of the Cal/OSHA COVID-19 Emergency Temporary Standard (ETS), Cal/OSHA has promised a new COVID-19 workplace regulation in its place. On December 15, the agency's Standards Board will be voting to approve a "permanent" regulation that will replace the ETS and be in effect for two years. So what do California employers need to know about this forthcoming permanent regulation? Your first step: Read on for a comprehensive "deep dive" including the top 10 changes you need to know about to prepare. After that: [Register for FP's complimentary webinar on January 4](#) so you can engage with our firm's leaders in this area and make sure you are ready.

First Things First: How Long Will This "Permanent" Regulation Be In Effect?

The [permanent regulation](#) will be effective upon approval by the Office of Administrative Law (OAL) and filing with the Secretary of State. As we discussed recently [here](#), the exact effective date is a bit uncertain at this point and will depend on how quickly OAL can complete its review. It is possible that the ETS will continue to be in effect for a few weeks into 2023 until the permanent regulation is effective.

Once enshrined, the permanent regulation will be in effect for two years from the effective date. However, employers must maintain specific records for three years after the effective date.

1. As Always, There are Important Definition Changes

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The permanent regulation makes a few key changes to terms that employers are used to dealing with in relation to COVID-19. These changes are consistent with recent updates made by the California Department of Public Health (CDPH) and the regulation will continue to defer to future agency definition changes in key areas in the future. Given this flexibility, employers should regularly review the most [up-to-date guidance](#) from CDPH for the current definitions for the following terms:

- **“Close Contacts”** – the permanent regulation incorporates the [most recent CDPH definition](#) of close contacts, which now has different standards depending on cubic feet of the work location:
 - For indoor spaces of 400,000 or fewer cubic feet per floor, a close contact is anyone sharing the same indoor airspace for 15 minutes or more over a 24-hour period.
 - For indoor spaces of greater than 400,000 cubic feet per floor, a close contact is being within six feet of the COVID-19 case for 15 minutes over a 24-hour period.
 - The permanent regulation (like the ETS) provides that if CDPH changes the definition of “close contact” in the future by regulation or order, the new definition will apply to the Cal/OSHA regulation automatically.
- **“Infectious Period”**
 - For COVID-19 cases with symptoms, from two days before the onset of symptoms until 10 days have passed (or five days if the employee tests negative on day five or later) and 24 hours have passed without a fever.
 - For COVID-19 cases without symptoms, from two days before test specimen was collected through 10 days (or through day five if the employee tests negative on day five or later).
- **“Returned Case”**
 - The permanent regulation changes the previous definition that had been used under the ETS to now only include a 30-day period (rather than a 90-day period) following the onset of symptoms or a positive test.

2. Make Time to Update Your IIPP

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The permanent regulation provides that COVID-19 is a workplace hazard and shall be addressed as part of an employer's required Injury and Illness Prevention Program (IIPP). Employers can choose whether to incorporate their COVID-19 procedures in the written IIPP or maintain a separate document. As many employers know, the most common Cal/OSHA citation is related to the IIPP, so you want to make sure you either update your IIPP or create an addendum that covers the COVID-19 procedures.

3. You Will Need to Train Your Employees

The permanent regulation also provides that employees shall receive training regarding COVID-19 in accordance with the regular standards for training under the general IIPP regulation. The IIPP regulations require training be provided when the program is first established, to all new employees, or when there is a new hazard. Due to the significant changes between the ETS and the permanent regulation and the incorporation of COVID-19 as a hazard within the IIPP, it is therefore likely required for employers to train employees on the requirements of the new regulation.

4. The Permanent Regulation Eliminates Daily Screening

While employees may have gotten used to confirming that they have no COVID-19 symptoms, the permanent regulation does away with the daily symptom check. Unlike the ETS, the permanent regulation does not require employers to develop and implement a process for screening employees for COVID-19 symptoms. Instead, the permanent regulation does provide that employees shall be encouraged to report COVID-19 symptoms and to stay home when ill.

5. Exclusion Pay Is Eliminated!

Unlike the ETS, the permanent regulation does not require employers to continue to maintain an excluded employee's earnings and benefits (exclusion pay). This has been a controversial subject of discussion at the Cal/OSHA Standards Board as labor advocates were pushing hard to add an exclusion pay requirement to the permanent regulation. However, it appears that the proposal that will be voted on at the December 15 meeting **will not** include exclusion pay.

Employers should still be aware of other federal, state, or local laws that may provide paid time off for employees

under these circumstances, as well as any employer policies or collective bargaining agreement provisions that may provide for paid leave.

6. The New Year Will See New Notice Requirements

The permanent regulation requires employers to notify employees and independent contractors who had a close contact, as well as any employer with an employee who had a close contact. Notice shall be provided “as soon as possible” and in no case longer than the time required to ensure that any exclusion requirements are met.

Workplace Notice of COVID-19 Cases

However, when it comes to the required notice to all employees at a worksite where a COVID-19 case was present, there is some much needed flexibility. The previous ETS required employers to provide written notice to all employees present at a worksite during the infectious period of a COVID-19 case. However, legislation effective January 1, 2023 ([AB 2693](#)) authorizes employers to display a workplace notice in lieu of individual notification.

This notice must be posted within one business day and must be posted for at least 15 days. If the employer posts other workplace notices on an existing employee portal, the notice shall be posted on the employee portal. The notice must be in English and the language understood by the majority of employees.

As an alternative to this workplace notice, an employer may provide individualized written notice. Employers must also continue to provide notice of COVID-19 cases and close contacts to exclusive representatives (labor unions).

The permanent regulation defers to these statutory notice requirements for the content and form of these notices, meaning employers will have the option of providing a workplace posting or providing individual notice in writing.

7. The Permanent Regulation Changes the Recordkeeping and Reporting Requirements

The permanent regulation deletes previous requirements that employers had to report information about COVID-19 cases and outbreaks to local public health departments. While this reporting is not part of the Cal/OSHA permanent regulation, local public health orders may require such

reporting. In addition, major outbreaks must be reported to Cal/OSHA (a new requirement).

Employers are required to keep a record of and track all COVID-19 cases with the employee's name, contact information, occupation, location where the employee worked, the date of the last day at the workplace, and the date of the positive test or diagnosis. Such records must be kept during the duration of the regulation (two years). The permanent regulation no longer requires employers to keep records of close contacts.

In addition, employers must retain records of notices of COVID-19 cases required by the permanent regulation or the Labor Code, and must maintain such records for three years after the effective date of the regulation.

Personal identifying information on COVID-19 cases or employees with symptoms (and any employee medical records) must be kept confidential. Unredacted information shall be provided to local public health departments, CDPH, Cal/OSHA and NIOSH immediately upon request.

8. Changes to Outbreak Protocols

The permanent regulation provisions applicable to outbreaks and major outbreaks are now collapsed into one section. These requirements include making immediate testing available to employees in the exposed group (and weekly thereafter) during an outbreak and mandating required twice weekly testing during a major outbreak. The permanent regulation also makes the following notable changes:

- The outbreak and major outbreak requirements apply until there are **"one or fewer"** new COVID-19 cases detected in the exposed group for a 14-day period. This is an improvement over the ETS, which applied the outbreak requirements until there were "no" new cases.
- The permanent regulation contains a new reporting requirement that was not contained in the ETS. Specifically, an employer is required to report a major outbreak to Cal/OSHA, but the permanent regulation does not specify a time period for doing so.
- The ETS required employers in an outbreak scenario to merely "evaluate" whether to use HEPA air filters. However, the permanent regulation now specifically

requires the employer to use HEPA filters in indoor areas occupied by employees for extended periods, where ventilation is inadequate to reduce the risk of transmission.

9. Changes to Employer-Provided Housing

The employer-provided housing provisions of the permanent regulation are largely the same as those previously contained in the ETS. One notable change is that, under the ETS, an employer was required to prioritize housing unit assignments according to specified criteria. The permanent regulation now merely provides that, to the extent feasible, employers shall assign employee housing to cohorts that travel and work together, separate from other workers. To the extent feasible, residents who usually maintain a household together shall be housed in a single housing unit without other persons.

10. Many of the Employer-Provided transportation Requirements Are Removed

Finally, the permanent regulation largely eliminates most of the specific employer-provided transportation requirements and instead merely directs employers to comply with the general regulation requirements within a vehicle. The permanent regulation provides that, to the extent feasible, employers shall assign transportation such that cohorts travel and work together, separate from other households. To the extent feasible, employees who usually maintain a household together shall travel together.

What's Staying the Same?

There are a number of requirements and obligations that are largely remaining the same under the permanent new rule.

Exclusion and Return-to-Work Requirements Remain Based On CDPH Updates

As employers know, the exclusion and return-to-work requirements have changed quite a few times over the last two years. The permanent regulation provides that if an order to isolate, quarantine, or exclude an employee is issued by a local or state health official, the employee shall not return to work until the period of isolation or quarantine is completed or the order is lifted.

Upon excluding an employee as a COVID-case or a close contact, the employer is required to give the employee information regarding COVID-19-related benefits to which the employee may be entitled under applicable federal, state, or local laws. This includes any benefits available under legally mandated sick leave (if applicable), workers' compensation law, local government requirements, the employer's own leave policies, and leave guaranteed by contract.

COVID-19 Cases

The regulation requires employers to immediately exclude from the workplace all COVID-19 cases.

COVID-19 Cases w/o Symptoms

COVID-19 cases who do not develop symptoms shall not return to work during the "infectious period" as that term is defined in the permanent regulation or as may be amended by CDPH.

For COVID-19 cases without symptoms, the current definition of "infectious period" is from two days before the positive test through 10 days (or through **day five** if the employee tests negative on day five or later).

COVID-19 Cases with Symptoms

COVID-19 cases who develop symptoms shall not return to work during the shorter of the following:

- The "infectious period." For COVID-19 cases with symptoms, the current definition of "infectious period" is from two days before the onset of symptoms until (1) 10 days have passed since symptoms first appeared (or **five days** if the employee tests negative on day five or later), and (2) 24 hours have passed with no fever without medication and symptoms have improved.
- Through 10 days after the onset of symptoms and at least 24 hours have passed since a fever of 100.4 degrees or higher has resolved without the use of medication.

Face Coverings

Regardless of vaccination status, previous infection, or lack of symptoms, all COVID-19 cases shall wear a face covering

in the workplace until 10 days have passed since the date symptoms began or the date of their first positive test.

COVID-19 Close Contacts

For return to work of close contacts, the permanent regulation defers to CDPH guidance and requires employers to review the CDPH guidance applicable at the given time for persons who had close contacts. Therefore, employers should monitor and follow any applicable CDPH guidance for close contacts.

The [latest guidance](#) from Cal/OSHA and CDPH provides as follows:

- Asymptomatic close contacts do not need to be excluded if they test within three to five days after their last close contact.
- Close contacts with symptoms must be excluded and test as soon as possible. Exclusion must continue until test results are obtained. If the employee is unable to test or chooses not to test, exclusion must continue for 10 days.

Face Coverings

Regardless of vaccination status, previous infection, or lack of symptoms, close contacts must wear face coverings in the workplace for a total of 10 days after the close contact.

Employers Must Still Make Testing Available to Close Contacts

Employers are required to make COVID-19 tests available at no cost to all employees who had a close contact in the workplace (with the exception of returned cases).

Rules About Face Coverings and Respirators Stay Mostly the Same

The face covering requirements are generally similar to the requirements under the previous ETS. An employer may not prevent an employee from wearing a face covering when not required, unless it would create a safety hazard.

Face coverings are generally not required to be worn indoors. However, employers are required to provide face coverings and ensure they are worn when required by a CDPH regulation or order. Employers should also be aware

of any local public health orders that require face coverings to be worn indoors. The following exceptions apply when face coverings are required:

- When an employee is alone in a room or vehicle.
- When eating or drinking, provided employees are at least six feet apart and air filtration has been maximized to the extent possible.
- While employees are wearing respirators.
- During specific tasks which cannot feasibly be performed with a face covering.

The permanent regulation also exempts employees who cannot wear face coverings due to a medical or mental health condition or disability, or who are hearing impaired or communicating with a hearing-impaired person. Such employees must wear an effective non-restrictive alternative. However, unlike the ETS, such employees do not need to be tested.

Like the ETS, the permanent regulation requires employers to provide respirators to employees for voluntary use, upon request.

Ventilation Requirements Remain

The permanent regulation requires employers to review CDPH and Cal/OSHA guidance on ventilation and to “develop, implement and maintain” effective methods to prevent transmission of COVID-19 that include one or more of the following:

- Maximizing the supply of outside air to the extent feasible without creating additional hazards,
- Filtering air through MERV-13 or higher filters, or the highest level of filtration compatible with the existing ventilation system.
- Using HEPA filters indoors where ventilation is inadequate to reduce the risk of transmission.

Next Steps

California employers should be preparing to comply with the requirements of the new permanent regulation. As

discussed above, the precise effective date of the permanent regulation is a little unclear and depends on how quickly OAL reviews and approves the regulation after it is approved on December 15. We will continue to monitor developments and keep you posted.

In addition, employers should note the following:

- Fisher Phillips is currently developing a compliance packet of documents and templates for compliance with the permanent regulation. This new compliance packet for the new permanent regulation will be available soon.
- [Join us for a complimentary webinar on January 4, 2023](#), as we will walk through all of these requirements in greater detail. This will be a good way to start off 2023 on the right foot and make sure you are compliant with the new requirements. [You can register for the webinar here](#).

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](#).