

Cal/OSHA Adopts Emergency COVID-19 Prevention Regulation

INTRODUCTION

In response to the recent surge in COVID-19 cases throughout California, Cal/OSHA adopted temporary emergency standards aimed at employers, the intent of which is to provide greater protection to workers in the workplace from health hazards related to COVID-19. The regulation went into effect statewide on November 30, 2020. Most California employers are required to implement and follow the new standards, with a few noted exceptions.

In short summary, the new emergency regulation focuses upon the following key employer responsibilities and obligations within the workplace:

- Creation of a detailed, written COVID-19 Prevention Plan
- Implementation of COVID-19 prevention methods (including physical distancing, mask usage and compliant air filtration systems)
- Specific methodology for identifying and correcting COVID-19 hazards
- Reporting obligations of COVID-19 workplace incidents to health agencies
- Required protocol for handling workers infected with, or exposed to COVID-19
- Delineated 'return-to-work following quarantine' criteria

The new emergency standards (Title 8, Division 1, Chapter 4, subchapter 7 – *General Industry Safety Orders*) are divided into the following sections:

- COVID-19 Prevention [3205]
- Multiple COVID-19 Infections and COVID-19 Outbreaks [3205.1]
- Major COVID-19 Outbreaks [§ 3205.2]
- Prevention in Employer Provided Housing [3205.3]
- COVID-19 Prevention in Employer-Provided Transportation to and From Work [§ 3205.4]

An overview of each of the sections is set forth, below. Those interested in reviewing the emergency regulation and its mandatory requirements are encouraged to access the full text at this link [here](#).

COVID-19 Written Prevention Plan

Employers should promptly review its existing Cal/OSHA COVID-19 prevention plans as well as its current Injury and Illness Prevention Program, and, either by integration into those existing plans, or by placing in a separate and readily identifiable document, prepare a **written** COVID-19 Prevention Plan (Plan) including appropriate policies and procedures to ensure adherence with this emergency regulation. A summary of the requirements for the Plan includes:

- **A system for communicating to employees:** The employer shall, together with employees' participation and input, develop/implement and notify each employee of its current as well as new COVID-19 policies and procedures to include the manner in which to report to the employer (without fear of reprisal) COVID-19 symptoms and possible exposure; policies and procedures for accommodating those with medical or other conditions that put them at increased risk of severe COVID-19 illness; information about access to COVID-19 testing.

- **Procedures for identifying and evaluating COVID-19 hazards:** The employer shall develop and implement plans for screening procedures for employees; a process to promptly respond to employees with COVID-19 symptoms to prevent reduce the risk of transmission in the workplace; a method to identify potential COVID-19 hazards and hazard locations workplace suspected by employer and/or employees (including close contact locations such as work desk, bathrooms, hallways, breakrooms, and common areas); maximizing the existing indoor workplace ventilation system by increasing filtration efficiency and maximizing the flow of outdoor air into the work space; evaluating existing COVID-19 prevention controls at the workplace, adding additional or different controls where appropriate; conducting periodic inspections to identify unhealthy conditions and work practices and procedures related to COVID-19, and ensure compliance with its COVID-19 policies and procedures.
- **Procedures for Investigating and Responding to COVID-19 cases in the workplace:**

Employers shall have in place an effective procedure to – (a) investigate and verify workplace COVID-19 case status, (b) receive information regarding test results and the onset of symptoms and, (c) identify and record COVID-19 cases.

Employers shall also take the following actions when there has been a COVID-19 case in the workplace – (d) determine the date and time the COVID-19 case was last present in the workplace and to the extent possible, the date of the positive COVID-19 test and/or diagnosis, and additionally, the date the COVID-19 case first had one or more symptoms; (e) through contact tracing, determine who in the workforce onsite may have had COVID-19 exposure; (f) give broad notification (per AB 685) of the potential COVID-19 exposure within one business day (without revealing personal identifying information of the affected individual) to all employees and individuals (including third parties visiting the workplace) who may have had exposure, and (g) for such potentially exposed individuals, the employer must offer COVID-19 testing to all such individuals at no cost, and provide employees who have been exposed with next options and information on work absence benefits (see below).

- **Procedures for correcting COVID-19 hazards:** The employer's Plan must provide for the implementation of effective policies and procedures for correcting COVID-19 related hazards identified during an investigation after learning of a COVID-19 case and/or health and safety concerns raised by employees.
- **Training and Instruction:** The employer must include policies in the Plan for the effective training and instruction to employees that include the following:
 - Describing the employer's COVID-19 Plan
 - The benefits that are available to employees in the event of a COVID-19 infection, including any benefits available under workers' compensation laws, the federal Families First Coronavirus Response Act, Labor Code sections 248.1 (COVID-19 supplemental paid sick leave) and 248.5 (penalties for non-adherence), Labor Code sections 3212.86 through 3212.90 (requirements entailing a rebuttable presumption that certain employee's COVID-19 exposure occurred in the workplace), Local governmental requirements, employer's own leave policies, and leave guaranteed by contract. This provision is designed in part to persuade employees to report COVID-19 exposure and positive test results.
 - Methods on how the virus may be transmitted in the workplace (e.g., an infected employee who sneezes, coughs, or vocalizes); touching a contaminated object then touching one's eyes, nose and mouth; the fact that an infectious person might display no symptoms while in the workplace; methods on how to best prevent COVID-19 exposure in the workplace (social distancing, use of face covering, and frequent hand washing guidelines), procedures and rules for enforcing social distancing and face covering requirements), and guidelines pertaining to avoidance of entering the workplace if a COVID-19 test should the employee already has symptoms.
 - Alternatives when face coverings are not possible, or when respirators are required.
- **Engineering controls, administrative controls and personal protective equipment:**

Provisions speak to:

- Employer's duty to install solid partitions or other physical barriers between working stations when physical distancing is not possible.
- Maximization of outside air flow when feasible
- Employers responsibility to implement cleaning and disinfecting procedures, with focus upon frequently touched surface objects (e.g., doorknobs, equipment, tools, handrails, elevator buttons and bathroom surfaces), particularly in areas and surfaces used by a COVID-19 case during the high-risk exposure period.
- Drafting policies and procedures for prohibiting the sharing of commonly used items (e.g., phones, headsets, tools, desks) and where such prohibition is not feasible, ensuring that sharing of commonly used items is kept to a minimum. Clean and disinfect shared items and equipment between uses by different individuals.

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- Employer's responsibility to provide employees with appropriate personal protective equipment (PPE) to prevent exposure to COVID-19 hazards, such as gloves, safety goggles and face shields. The employer shall also evaluate the need for respiratory protection (e.g., N95's), and if it is determined that such equipment is required, the employer shall create a respiratory protection program which will include fit testing, and a medical test to clear an employee's use of such gear.
 - **Reporting obligations, recordkeeping, and access:** The employer must adopt strict procedures for recordkeeping and tracking of all COVID-19 cases within the workplace, including the procedures for notifying the Department of Public Health (DPH) of any COVID-19 cases at the workplace. The employer is also responsible for notifying DPH of any COVID-19 related serious illness or death, and shall maintain records of the steps taken to implement its written COVID-19 Prevention Plan. The employer shall make its written Plan available at the workplace for viewing by employees.
 - **Exclusion of COVID-19 cases:** This subsection of this emergency regulation is designed to limit transmission of COVID-19 in the workplace.
 - Employers must ensure that COVID-19 cases are excluded from the workplace until return-to-work requirements (below) are met. This subsection requires that, and consistent with the Center for Disease Control COVID-19 guidelines, employers shall require that exposed employees be excluded (quarantined) from the workplace for 14 days after the last known exposure to a COVID-19 case. The requirement includes that the employer allow employees so excluded from the workplace to maintain their earnings, seniority and all other employee rights and benefits, including the right to return to his/her former job status, thus a "protected leave" similar to that under the ADA and other such similar protections. Employers may use employer-provided employee sick leave benefits for this purpose.
 - **Return to work criteria:** The regulation mandates that an employer include in its Plan a requirement that COVID-19 cases with COVID-19 symptoms shall not return to the workplace until at least 24 hours have passed since a fever of 100.4 or higher has resolved, symptoms have improved, and at least 10 days have passed since COVID-19 symptoms first appeared. Additionally, COVID-19 cases who test positive but never develop COVID-19 symptoms are not to return to the workplace until a minimum of 10 days have passed since the date of their first positive COVID-19 test. Note, however, the regulation does not require a negative COVID-19 test be taken prior to an employee returning to the workplace as all other provisions of quarantine are first met.

Multiple COVID-19 Infections and COVID-19 Outbreaks

In addition to drafting and maintaining a written COVID-19 Prevention Plan, the regulation also requires that an employer take additional steps to those otherwise stated previously in the instance that there are: (a) three or more COVID-19 cases ("outbreak") in an exposed workplace *within a 14-day period*, or (b) if the local health department has identified the workplace as the location of a COVID-19 outbreak. Such additional steps include:

1. Provision of free COVID-19 testing to all workplace employees (employees absent from the workplace during the times of the outbreak are excluded), and;
2. Specific testing requirements, including follow up testing at specified intervals are delineated as well.

Bearing in mind that an employer must follow with great diligence those requirements stated previously regarding exclusion of COVID-19 cases from the workplace and investigation of workplace COVID-19 cases, in the specific instance of a COVID-19 outbreak, the employer's investigation previously outlined must now also include a thorough review of unabated COVID-19 hazards, including a re-examination of its existing employee leave policies and practices, testing policies, sufficiency of outdoor air flow into the workplace and workplace filtration, and whether its social distancing policies must be adjusted. This re-examination of its policies and practices must be updated every 30 days that the outbreak continues, and the employer must implement changes to its Plan based up each review where such changes are deemed necessary and appropriate.

- **Notifications to the local health department:** In the instance of a COVID-19 outbreak (i.e., three or more cases) in the workplace, the employer should contact the local health department immediately, but in any event no longer than 48 hours after the employer, through the exercise of reasonable diligence, learns of the outbreak. There is a listing in the regulation of the required information that the employer must provide to the health department, including the total number of cases in the outbreak, identifying information of the affected employees, and other information as requested.

Major COVID-19 Outbreaks

In the instance when there are 20 or more COVID-19 cases in an exposed workplace *within a 30-day period*, the following provisions shall apply until there are no new COVID-19 cases detected in the workplace for a 14-day period;

1. Employers shall provide twice a week free COVID-19 testing to all employees present at the workplace during the relevant 30-day period and who remain at the workplace.
2. Employees shall ensure that COVID-19 cases and employees who are so exposed are excluded from the workplace pursuant to the quarantine requirements so stated previously.

3. More stringent safety protocol than previously mentioned is mandated in the instance of a major COVID-19 outbreak, including re-investigation of the workplace, hazard corrections, re-analyzing engineering controls and a review and modification of workplace protection protocol as deemed necessary.
4. Employer shall notify the local health department as required for any outbreak of COVID-19 in the workplace.

Prevention in Employer-Provided Housing

Prevention in Employer-Provided Transportation to and from Work

The new regulation sets forth a multitude of safety requirements in instances where the employer provides housing [§ 3205.3] to-and-from work transportation [§ 3205.4]

to employees. The reader is encouraged to review the requirements set forth in these sections of the regulation should either both these circumstances exist to ensure full compliance with these provisions.

Final Takeaway

A reading of the new COVID-19 emergency regulation makes it abundantly clear that California state and local officials are taking the current (and largest to date) surge in COVID-19 cases in a most resolute fashion and the resulting requirements for workplace safety and health protocols to an extreme level. In several instances, the mandated requirements place such great onus upon the employer towards the health and safety of its employees that it might be said that the employer assumes a near caregiver-like responsibility towards its workplace employees.

In addition to the suggestion that the employer carefully revisit its current Injury and Illness Prevention Program, employers may, wherever appropriate, augment that program by creating an additional written COVID-19 Plan that addresses workplace hazard identification, evaluation and correction; periodic investigations, and in the instance of COVID-19 outbreaks, more in-depth additional investigations; employee COVID-19 prevention training; physical distancing, hygiene and face covering requirements; administrative and engineering controls, reporting and recordkeeping, and return-to-work criteria. Atop all this, the employer may come to terms with the daily prospect that its workplace could suffer an immediate reduction of on-site employees through an exposure to a multiple or major COVID-19 outbreak, which could require expulsion of several from the workplace all at once, for a lengthy period of time.

There is also the looming prospect that should an employer inadvertently fail to adhere to the letter of the regulation, it could face deficiency notices and penalties from state or local agencies whom we can expect will order its agents to conduct workplace inspections for Plan compliance, and who will be trained to identify any deficiencies and violations.

The best advice one might give to employers in these particularly onerous times is for each to initiate a review of this newly enacted emergency COVID-19 regulation, focusing carefully upon those requirements that apply to its specific workplace environment. The employer should ensure that it has a written COVID-19 Plan in place, goes to great lengths to adhere to the Plan, and together with its team of employees, maintain safe and common sense workplace health practices while exercising vigilance and providing healthy doses of patience and thoughtfulness towards the workplace environment until such time that the virus is finally behind us.

Nelson Hardiman stands ready to provide additional information on the regulation as necessary. In the interim and given the enormity of the burden this emergency regulation places upon employers, feel free to contact your regular Nelson Hardiman contact or the author of this Client Alert, [Alan J. Sedley](#), should you have any questions or concerns.

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