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PH COVID-19 Client Alert Series: Cal/OSHA Emergency COVID-19 Regulations Are Now In Effect: Employers Should Review (and Likely Augment) COVID-19 Policies and Procedures

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I. Introduction

On November 20, the California Occupational Safety and Health Standards Board—despite significant objections by employers—unanimously adopted [emergency temporary standards](#) that require employers to take wide-ranging steps to protect employees from hazards stemming from the COVID-19 pandemic. The California Office of Administrative Law (“OAL”) approved the new regulations on November 30, 2020. The new regulations are now in effect. They will expire in 180 days, unless readopted thereafter for up to two consecutive 90-day periods.

The new standards contain many different requirements. Although the California Division of Occupational Safety & Health (“Cal/OSHA”) tacitly acknowledged the difficulty in complying with the emergency regulations, it intends to enforce them.¹ Given their immediate effect, it is critical that employers review and take steps to comply with the new regulations.

II. New Regulations Go Beyond Guidance Issued to Date

While Cal/OSHA previously issued guidance regarding steps employers should take to keep employees safe during the COVID-19 pandemic, the new regulations are the most detailed requirements yet promulgated in California for general workplaces.² A critical aspect to note is that the new regulations:

- **Represent specific compliance standards to which Cal/OSHA can hold employers accountable in an enforcement action;** Cal/OSHA no longer needs to seek enforcement pursuant to existing, more general, standards.³
- Require employers to take steps with respect to COVID-19 hazard assessment and prevention, respond to instances of multiple COVID-19 infections and “outbreaks” in the workplace (including required COVID-19 testing of employees), and be prepared to address COVID-19

prevention in employer-provided housing and employer-provided transportation to and from work.

- Augment the powers granted to Cal/OSHA through Assembly Bill 685 (Reyes), which specifically permits Cal/OSHA to issue an “Order Prohibiting Use” to shut down an entire worksite, or area of worksite, in the event of an imminent hazard related to COVID-19 and expedites Cal/OSHA’s ability to, and timeline for, issuing citations.

Salient requirements of the regulations are briefly summarized below, but employers should conduct a detailed review of the regulations and contact a Paul Hastings attorney with any questions.

A. *Written COVID-19 Prevention Program*

All employers are required to “establish, implement, and maintain an effective, written COVID-19 Prevention Program.”⁴ It must include:

1. System for Communications about COVID-19

The new standards require employers to communicate with employees on specific topics, including:

- Reporting COVID-19 symptoms, possible exposures, and possible hazards in the workplace;
- Policies and procedures for accommodating employees who have medical or other conditions that put them at increased risk of severe COVID-19 illness;
- Access to COVID-19 testing;
- COVID-19 hazards and the employer’s COVID-19 policies and procedures⁵

2. Identify and Evaluate COVID-19 Hazards

In general, all employers have an obligation to identify, evaluate, mitigate, and respond to hazards in the workplace, including with respect to COVID-19. The new safety standards *directly* require that employers perform a hazards analysis for COVID-19, as employers must:

- Develop a process to screen employees for COVID-19 symptoms (which can include self-screening at home prior to reporting to work);
- Conduct a workplace-specific evaluation of potential COVID-19 hazards, which shall consider how employees move, interact, and enter and exit the workplace, as well as during various activities and processes that could potentially expose employees to COVID-19 hazards;
- Evaluate the HVAC system and undertake adjustments to maximize the quantity of outdoor air or increase filtration efficiency;
- Evaluate existing COVID-19 prevention controls for potential improvement or need for additional or different controls;
- Conduct periodic inspections to ensure that the policies and procedures are appropriately implemented, effective, and adjusted or revised, as necessary.

Given that Cal/OSHA is focusing enforcement activities on the pandemic, recordkeeping of the actions taken to identify, evaluate, and respond to hazards is advisable.

3. Investigating & Responding to COVID-19 Cases

Employers must implement procedures for investigating COVID-19 cases in the workplace, including a procedure for verifying cases, collecting information (e.g., date of symptom onset, last day the person was in the workplace, date of diagnosis), and contact tracing to determine potential exposure to others.

Part of the response must also include providing notice of potential COVID-19 exposure—*within one business day*—to those who may have been exposed.⁶ However, personal medical information must be kept confidential; notices must continue to comply with HIPAA and an employer must not reveal personal identifying information of the person diagnosed with COVID-19.

The standard also takes the significant step of requiring employers to offer COVID-19 testing, at no cost to employees and during their working hours, if they have had a potential exposure in the workplace.

4. Correction of COVID-19 Hazards

Part of ensuring that a workplace is safe and healthy means implementing policies and procedures that ensure a meaningful response to hazards as they are identified, including the timely correction of unsafe or unhealthy conditions. The new standards reiterate this obligation in the context of COVID-19 prevention. Failing to meaningfully identify and correct hazards may be used by Cal/OSHA as direct evidence that an employer's response plan is ineffective and that penalties may be warranted.

5. Training

The new standards require employers to provide training and instruction on a variety of topics specific to the COVID-19 pandemic, including information regarding the employer's COVID-19 policies and procedures; how COVID-19 spreads and methods to prevent the spread; symptoms and the importance of not coming to work when experiencing them; and COVID-19-related benefits to which the employee may be entitled under applicable federal, state, or local laws.

6. Physical Distancing

The standard requires that employees must be separated by at least six feet, *unless the employer can demonstrate that such separation is not possible*. As a result, physical distancing arrangements may be dictated by specific floor plans, equipment, or business needs within the worksite.

7. Face Coverings

Employers are required to provide face coverings and ensure that they are properly worn by employees. Employers must also take steps to minimize exposure for employees from any person not wearing a face covering (such as a member of the public). Face coverings may be removed only in certain situations.⁷

8. Engineering, Administrative, and Personal Protective Equipment Controls

An employer is generally required to respond to workplace hazards according to the hierarchy of controls.⁸ The new standards also require employers to take similar steps, but with respect to COVID-19. For example, where appropriate six-foot social distancing is not possible, employers must consider engineering controls, such as installing partitions that effectively reduce aerosol transmission between individuals and evaluating ventilation systems to maximize the quantity of outside air.

Administrative controls, including disinfection and cleaning protocols, prohibition on shared personal protective equipment (PPE) or other items, and availability of appropriate handwashing facilities, should be considered and implemented.

Lastly, employers must, like for other hazards, evaluate the need for PPE (e.g., gloves, goggles). Significantly, the new standard directs employers to consider—but not specifically require—the use of respiratory protection (i.e., respirators in accordance with 8 Cal. Code of Regs. § 5144) when physical distancing is not feasible. It would be prudent to document those considerations.

9. Reporting and Recordkeeping

Employers must follow recordkeeping and reporting requirements. This not only includes the immediate report to Cal/OSHA of any COVID-19 case that results in the hospitalization or death of any employee,⁹ but also keeping OSHA 300 Logs and records of the steps taken to comply with the regulation.

10. Exclusion of COVID-19 Cases

Employers must take steps to ensure that COVID-19 cases are excluded from the workplace until return-to-work requirements are met (which are generally consistent with current guidelines set forth by the Centers for Disease Control and Prevention (CDC)). Employers must also exclude employees that have had a COVID-19 exposure from the workplace for 14 days after their last known exposure.

Significantly, Cal/OSHA directs that employers allow employees excluded from work to maintain their earnings, seniority, and all other employee rights and benefits (unless the employer can demonstrate that the exposure keeping the employee out of work is not work-related). Although Cal/OSHA does not typically have authority over areas with respect to pay and employee benefits outside of health and safety, OAL nevertheless approved this provision. As a result, it is significant that Cal/OSHA may now demand information regarding benefits in any enforcement investigation, even if that is outside their normal purview.

11. Return to Work Criteria

The standard adopts the same return-to-work criteria as the CDC. Specifically, COVID-19 cases may not return to work until:

- The employee has been fever free (100.4 degrees F or higher) for at least 24 hours without the use of fever-reducing medications;
- Other COVID-19 symptoms have improved; and
- At least 10 days have passed since COVID-19 symptoms first appeared.

Those employees who tested positive but never developed symptoms, may return to work after a minimum of ten days have passed since the date of their positive COVID-19 test.

Cal/OSHA does not, however, require a negative test to return to work.

B. Response to Multiple Infections & Outbreaks

Significantly, the new regulations provide specific requirements in the event a workplace suffers from multiple COVID-19 infections or an “outbreak.” An “outbreak” is currently considered (by both the regulations and the California Department of Public Health) to exist if there are three or more COVID-19

cases within a 14-day period. In the event of an “outbreak,” the employer must report to the local public health agency and is *required to provide testing to all employees at the workplace* (except for those who were not present during the period of the outbreak). Testing must continue on a weekly basis until 14 days pass without a new positive case.

A “major outbreak” exists when there are 20 or more COVID-19 cases in a 30-day period. In such instances, employers must provide testing at least *twice weekly* until there are no new cases detected in a 14-day period. In the event of an outbreak or major outbreak, significant investigation and hazard corrective action may be warranted beyond that specified in Section A, above.¹⁰

C. Requirements for Employer-Provided Housing & Transportation

Lastly, the new regulations provide specific requirements for employer-provided housing and transportation to and from work. Considerations include how to prioritize assignment of housing and transportation, cleaning and disinfection, physical distancing, and the use of face coverings.

III. Conclusion

Cal/OSHA’s emergency regulations are now in effect and contain detailed and extensive requirements that represent new regulatory burdens and requirements for employers.

We anticipate that Cal/OSHA is likely to take enforcement action based on the new standards, although the agency does pledge to work with employers given the extent and scope of the requirements. In addition to potential agency enforcement, employers should anticipate that the plaintiffs’ bar may contend that the new regulations may be relied upon to establish the standard of care in tort cases or as the basis for bringing claims pursuant to California’s Private Attorneys General Act (“PAGA”).

As a result, employers need to critically review (and likely augment) their existing COVID-19 policies and procedures.

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- ¹ At the Standards Board meeting, Cal/OSHA Chief Doug Parker indicated that Cal/OSHA would consider “good faith” efforts on the part of employers and offer compliance assistance. Cal/OSHA also anticipates convening stakeholder meetings to review and solicit feedback on the regulations.
 - ² The new standards do *not* apply to workplaces covered by Cal/OSHA’s aerosol transmissible disease (“ATD”) standard. See 8 Cal. Code of Regs. § 5199 (specifying the ATD standard is only applicable to certain places of employment, such as hospitals, skilled nursing facilities, home health care, paramedic and emergency medical services, etc.).
 - ³ For example, safety standards implicated by the COVID-19 pandemic include the Injury & Illness Prevention Program (§ 3203), sanitation (§ 3366), respiratory protection (§ 5144), and personal protective equipment (§ 3380).
 - ⁴ See 8 Cal. Code of Regs. § 3205(c); the COVID-19 Prevention Program may be a standalone document, or it may be integrated into an employer’s existing Injury & Illness Prevention Program (which is an independent requirement of employers pursuant to 8 Cal. Code of Regs. § 3203).
 - ⁵ Such information also must be communicated to other employers, persons, and entities within or in contact with the employer’s workplace.
 - ⁶ Notice should be given in accordance with the requirements of AB 685, which takes effect on January 1, 2021.
 - ⁷ For example, the standard permits face coverings to be removed when (a) an employee is alone in a room; (b) eating and drinking at the workplace, provided employees are at least six feet apart; (c) employees are wearing respiratory protection in accordance with other safety standards; (d) employees cannot wear face coverings due to a medical or mental health condition or disability or are hearing-impaired or communicating with a hearing-impaired person; or (e) a specific task cannot feasibly be performed while wearing the face covering.
 - ⁸ In other words, an employer must first attempt to eliminate hazards from the workplace (e.g., remove dangerous equipment), and then proceed to engineering hazards out of the workplace (e.g., place a guard or shield to prevent access to dangerous moving parts of equipment). If the hazard still exists, establishing administrative controls (e.g., limiting the amount of time an employee is exposed to a hazard), is required, prior to considering, providing, and implementing personal protective equipment (e.g., hard hats, respirators) to protect against a hazard.
 - ⁹ Cal/OSHA requires reporting of serious illnesses or death, as defined under 8 Cal. Code of Regs. § 330(h).
 - ¹⁰ For example, employers are required to more critically evaluate ventilation systems and consider the use of High Efficiency Particulate Air (“HEPA”) filtration units, and the need for a respiratory protection program, or whether to halt some or all operations in the workplace.