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New Year, New California COVID-19 Rules: Masking, Testing, and Exclusion Requirements

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As it did once before in June 2021, the California Occupational Safety and Health Standards Board (“OSHAB”) has re-adopted, with revisions, California’s emergency temporary standard (“ETS”) for COVID-19. The revisions to the ETS take effect on January 14, 2022. Although much of the standard remains the same, there are critical changes—most notably with respect to face coverings, who must be offered testing following a close contact exposure, and criteria for returning to the workplace following an exposure or confirmed/presumed case of COVID-19—that employers should carefully evaluate and take steps to implement.

California ETS Background

California initially adopted the ETS in November 2020, and readopted the standard in June 2021.¹ The revisions to take effect January 14, 2022 largely implement changes to ensure that the ETS is consistent with the latest requirements and recommendations from the California Department of Public Health (“CDPH”). As a result, much of the ETS remains unchanged since June 2021, as employers continue to be required to establish, implement, and maintain a COVID-19 Prevention Program that includes particular elements (*e.g.*, information specific to identifying and evaluating employee exposures to COVID-19 hazards, implementing effective policies and procedures to correct unsafe or unhealthy conditions, *etc.*). Employers must also provide effective training and instruction to employees regarding how COVID-19 is spread, infection prevention techniques, and information regarding COVID-19-related pay and benefits that affected employees may be entitled to under applicable law.

Critical Revisions to California’s ETS

The revisions to the ETS include a number of critical updates, described below.

Face Coverings

California has aligned with federal OSHA on its definition of a “face covering.” Under the revised ETS, a face covering now includes surgical masks, medical procedure masks, a respirator² worn voluntarily, or a “tightly woven fabric or non-woven material of at least two layers (*i.e.*, fabrics that do not let light pass through when held up to a light source).”³ Notably, if a gaiter is worn, it must have two layers of fabric, or be folded to make two layers. Scarfs, ski masks, balaclavas, bandanas, turtlenecks, collars, or single layers of fabric do not qualify as face coverings.

The ETS obligates employers to provide face coverings for employees who are not fully vaccinated, as well as all employees regardless of vaccination status when face coverings are required by CDPH (note:

due to the recent surge, current public health guidance from CDPH requires universal masking indoors through at least February 15, 2022⁴). As a result, employers should ensure that the face coverings they provide meet the performance standard included in the revised definition.

Additionally, in circumstances where employees are exempt from wearing a face covering due to a medical or mental health condition or disability, and the employee cannot wear a non-restrictive alternative (*e.g.*, a face shield with a drape), the ETS requires that the employee maintain social distance from others and that the employee either be fully vaccinated or tested at least weekly.

Testing

The ETS also makes important revisions to the testing requirements. First, the ETS requires employers to make COVID-19 testing available to employees, during paid time and at no cost, if they had a close contact exposure *in the workplace*.⁵ The prior version of the ETS provided an exception for employees who were fully vaccinated and did not have symptoms. Now, given the prevalence of breakthrough infections, employers are obligated to make COVID-19 testing available to all employees with a close contact, regardless of vaccination status. During outbreaks, testing must now be made available to fully vaccinated, asymptomatic employees as well.

Second, the definition of a “COVID-19 test” has been clarified to specify that only certain types of tests may be used. For example, the definition *includes* employee self-administered tests that are processed by a laboratory (*i.e.*, the employee collects the sample, and then mails or submits the sample to a certified laboratory for analysis and results) meet the definition and may be used to comply with the testing requirements under the standard. By contrast, the definition now *excludes* tests that are both self-administered **and** self-read by the employee (*i.e.*, the employee collects the sample, follows the test direction, and interprets the results, such as with many over-the-counter tests), *unless* the test collection and processing are done or observed by the employer or authorized telehealth proctor. Employers wishing to rely on self-administered and self-read tests must ensure that appropriate proctoring protocols are in place.

Exclusion from Work / Return to Work

Given the Omicron surge, and revisions to [Centers for Disease Control \(“CDC”\) guidance](#) and [CDPH guidance](#), the ETS also includes changes to the standards for excluding employees from work due to a close contact exposure and for permitting employees to return to work.

Under the revised ETS, close contacts must be excluded from work unless they: (1) are fully vaccinated⁶ and do not have symptoms; or (2) had COVID-19 in the last 90 days and have no symptoms. Such employees may continue to come to work, but they must wear a face covering for 14 days and maintain at least six feet of social distance. Such employees must also be provided with CDPH information and guidance on applicable precautions to take following exposure.

The ETS also includes revised standards for when an employee who had a close contact may return to work. However, those standards are already out of date and do not align with recent CDPH guidance, which is described below.⁷ Despite the inconsistency, Executive Order N-84-20,⁸ which Governor Newsom issued on December 14, 2020, provides that any CDPH recommendations regarding isolation and quarantine periods override those set forth in the ETS, as do the requirements of the local health department with jurisdiction over the workplace, to the extent that the ETS requirements include a longer time period. CalOSHA has acknowledged that the CDPH guidance governs.⁹

As a result, the CDPH's isolation and quarantine guidance for close contacts and positive cases, which was developed in light of additional knowledge and understanding of the current surge and Omicron variant, currently applies, as follows:

For those who test positive for COVID-19, regardless of vaccination status:

- Excluded from the workplace for at least 5 days;¹⁰
- Isolation can end and the employee can return to work after day 5 if symptoms are not present or "resolving," and a specimen collected on day 5 or later tests negative;
 - If the employee has a fever, isolation must continue and the employee may not return until the fever resolves;
 - If symptoms are not "resolving," the employee may not return to work until symptoms are resolving or until day 10 after the positive test;
- The employee must wear a face covering for a total of 10 days after the positive test, regardless of the return to work date.

For those with close contact exposure:

- Unvaccinated or vaccinated and booster-eligible, but have not yet received a booster:
 - Excluded from work (quarantine) for at least 5 days after close contact;
 - Get a test on Day 5;
 - Quarantine can end and employee can return to the workplace if asymptomatic AND test is negative;
 - If unable/unwilling to test and asymptomatic, can return to work after Day 10;
- Boosted or fully vaccinated but not booster-eligible:
 - No need to quarantine if wearing a face covering for 10 days after exposure;
 - Get a test on Day 5;
 - If tests are not available, a face covering must be worn for 14 days and social distance must be maintained.

The revised ETS did not change the pay requirements. Accordingly, employers must continue to maintain an employee's earnings, wages, seniority, and all other employee rights and benefits, including the employee's right to their former job status, as if the employee had not been removed from their job *unless* the employee received disability or workers' compensation benefits, or the employer can demonstrate that the close contact is not work-related. Employers may use employer-provided employee sick leave for this purpose to the extent permitted by law. Wages due under this subsection are subject to existing wage payment obligations and must be paid at the employee's regular rate of pay no later than the regular pay day for the pay period(s) in which the employee is excluded.

Conclusion

As the Omicron variant continues to surge and with cases in California spiking, there will be a continued and renewed focus on COVID-19 compliance. As a result, employers should continue to be vigilant and nimble in responding to the ever-evolving pandemic and related requirements, standards, and guidance, including those issued by county and city health departments.

Additionally, further revisions to the ETS may potentially be forthcoming. The federal emergency temporary standard is currently under review by the United States Supreme Court. If upheld, CalOSHA may yet further revise its ETS to ensure its program is at least as effective and rigorous as the federal standard, as California's ETS currently does not include a "vaccinate or test" standard and other measures. Further, if the Supreme Court stays the federal mandate, CalOSHA's requirements will continue to apply.

Regardless of future revisions, employers should critically review their current policies and procedures, make any necessary updates, and communicate any changes to ensure compliance by January 14, 2022.

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¹ See our prior alerts regarding California's ETS for [November 2020](https://www.paulhastings.com/insights/client-alerts/ph-covid-19-client-alert-series-calosha-emergency-covid-19-regulations-are-now-in-effect-employers-should-review-and-likely-augment-covid-19-policies-and-procedures) and [June 2021](https://www.paulhastings.com/insights/client-alerts/cal-oshas-covid-19-standards-now-aligned-to-public-health-guidance).

² A respirator is distinct from a face covering or mask. Respirators provided for voluntary use are typically filtering facepiece respirators, such as N95s.

³ Cal. Code Regs. § 3205(b)(8). The ETS also includes "clear face coverings or cloth face coverings with a clear plastic panel that, despite the non-cloth material allowing light to pass through, otherwise meet this definition and which may be used to facilitate communication with people who are deaf or hard-of-hearing or others who need to see a speaker's mouth or facial expressions to understand speech or sign language respectively." *Id.*

⁴ See [guidance for face coverings \(ca.gov\)](#).

⁵ Cal. Code Regs. § 3205(c)(3)(B)(5). Employers are not required to pay for testing for those employees who have had a close contact exposure outside of work (e.g., to a friend or relative in a social situation).

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- ⁶ The definition of “fully vaccinated” does *not* include booster shots. A person is “fully vaccinated” two weeks after completing primary vaccination (e.g., two weeks after the single vaccination for the Janssen/Johnson & Johnson vaccine, or two weeks after the completion of a two-dose series vaccine, such as Pfizer or Moderna).
- ⁷ See <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-on-Isolation-and-Quarantine-for-COVID-19-Contact-Tracing.aspx>.
- ⁸ [CAP14-20201214134347](#).
- ⁹ See [COVID-19 Emergency Temporary Standards Frequently Asked Questions \(ca.gov\)](#).
- ¹⁰ The date of onset of symptoms or positive test is considered to be “Day 0.”