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Navigating Workplace Safety Under Cal/OSHA's New Stricter COVID-19 Emergency Temporary Standard

On November 19, California's Division of Occupational Safety and Health, better known as Cal/OSHA, issued an [emergency temporary standard](#) ("ETS") addressing further protections for workers from COVID-19 in the workplace. Following approval by the Office of Administrative Law, the ETS went into effect on November 30 and will last for 180 days unless otherwise extended.

The ETS applies to all employers in California with the exception of (1) single-employee businesses where the employee has no contact with other people, (2) businesses where employees are working remotely, and (3) businesses that are already covered by Cal/OSHA's Aerosol Transmissible Diseases standard, such as hospitals, skilled nursing facilities, clinics, medical offices, and other specific health care businesses.

Almost immediately, the Department of Industrial Relations published [Frequently Asked Questions](#) ("FAQ"), which clarify some issues for employers. For example, where an employee is splitting their time between the workplace and home, the ETS does not apply to employees when they work from home.

California joins Michigan, Oregon and Virginia in publishing a state-specific ETS, each of which varies in content and complexity. During his campaign, President-elect Joe Biden also indicated that issuing a federal ETS would be a priority for him if elected, so it's possible that employers will see something from OSHA as well in the next few months. It is also likely that any federal ETS published next year draws from one or more state version in setting its guidance.

In California, that guidance provides stricter safety requirements for employers to navigate in the workplace. Here are some important takeaways:

1. [Develop a Written COVID-19 Prevention Program](#). Employers must develop a written COVID-19 Prevention Program, either as a separate document or as part of an existing Injury and Illness Prevention Program ("IIPP"). This written program must encompass certain criteria, including the identification, evaluation and correction of COVID-19 hazards, the scope of a COVID-19 investigation, the requirements for physical distancing, face coverings, other engineering and administrative controls, recordkeeping and reporting, and return-to-work criteria.

2. Investigate, Notify and Offer Testing. Upon a positive case of COVID-19 in the workplace, employers must determine when the COVID-19 case was last in the workplace, and if possible the date of testing and onset of symptoms. Employers must also assess which individuals in the workplace may have been exposed to COVID-19 and notify any employees, independent contractors or any other persons present of any potential exposure. Notably, this notification must be made within one business day of a potential exposure. Employers must also offer testing to potentially exposed employees at no cost to the employees and during working hours through the employer, local health department, a health plan, or at a community testing center.
3. Exclude Exposed Employees. Employers must also ensure that employees who test positive for COVID-19 are immediately excluded from the workplace until certain requirements are met. Specifically, employees who test positive for COVID-19 and are showing symptoms must not return to work until (a) at least 24 hours have passed since a fever of 100.4 or higher has resolved without the use of fever-reducing medications, (b) COVID-19 symptoms have improved, and (c) at least 10 days have passed since COVID-19 symptoms first appeared. Employees who test positive but never showed symptoms of the virus must wait a minimum of 10 days before returning to work. If an employee has not tested positive for COVID-19 but was exposed to COVID-19 in the workplace, employers must exclude them for 14 days following the last known exposure at work. A negative COVID-19 test is not required for an employee to return to work.
4. Implement New Paid Time Off for Employees. In the event employees are excluded from work due to COVID-19, employers must continue the employee's earnings, seniority, and all other rights and benefits of employment, including the employee's right to reinstatement. This requirement does not apply where an employer can prove that the COVID-19 exposure is not work-related, or for any period of time the employee is unable to work for reasons other than protecting co-workers from possible COVID-19 transmission.
5. Training. Employers must conduct training on multiple COVID-19 topics, including the company's policies and procedures, benefits to which employees may be entitled, information regarding the transmission of COVID-19, the importance of physical distancing, instructions on controls to mitigate the spread, the importance of frequent hand washing and face coverings, and when to stay home from work. Employers should keep a training roster with the date, employee name and employee signature for the company's records.
6. Track and Record COVID-19 Cases. Employers must track and record all COVID-19 cases with the employee name, contact information, occupation, location where the employee worked, the date of the last day at the workplace, and the date of a positive COVID-19 test. This information must be made available to employees and any authorized individuals, such as union representatives, upon request with personal identifying information removed.
7. Outbreaks. If an outbreak occurs, the ETS requires additional testing, investigation, correction, and notification to the local health department. Outbreaks are defined as either "multiple" with 3 or more COVID-19 cases within a 14-day period, or "major" with 20 or more COVID-19 cases within a 30-day period.

8. Employer-Provided Housing and Transportation. Employers who provide housing for employees are required to follow certain safety standards, including ensuring housing units are cleaned at least once a day, providing six feet of distancing between residents in housing units, and positioning beds so that the head of one bed is next to the foot of the next. Employers who provide transportation must implement processes to screen riders before boarding, as well as to ensure physical distancing and face coverings while riding on shared transportation.

Take note, if employers were unable to comply with the ETS by the effective date, Cal/OSHA has indicated enforcement personnel will consider any good-faith efforts made by employers in working toward compliance. This may include, for example, showing the employer started its COVID-19 Prevention Program but did not have time to complete it before November 30. However, the agency has indicated some aspects of the new ETS are essential, such as eliminating hazards and implementing testing requirements during an outbreak. Noncompliance with such requirements will likely be met with tougher scrutiny.

If you would like to discuss the new ETS, how to handle an exposure or an outbreak, need a written COVID-19 Prevention Program, or need assistance in developing an employee training course, please contact your Kutak Rock attorney or any of the attorneys in the [OSHA Compliance & Defense Practice](#) or [Employment Law Group](#), and we would be happy to discuss this with you.

