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Client Alert

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CAL/OSHA REVISES COVID-19 WORKPLACE REGULATIONS

Last Fall the Standards Board of California's Division of Occupational Safety and Health (Cal/OSHA) implemented a set of emergency temporary standards (ETS) in response to the pandemic. In early June, the Board voted to adopt proposed revisions to the ETS, and revised regulations were approved on June 17, 2021. Ordinarily, the Office of Administrative Law would have ten days to approve these regulations, making them effective within ten days, by June 28, 2021. However, immediately upon being approved on June 17th, Governor Newsom issued an executive order waiving this 10-day review period. The new rules will therefore take effect as soon as they are filed with the California secretary of state.

The latest ETS includes the following workplace safety rules aimed at minimizing transmission of COVID-19 in the workplace:

Written COVID-19 Prevention Program

All employers are required to have a written COVID-19 prevention program (which can either be integrated into the employer's Injury and Illness Prevention Program or maintained in a separate document). The program must address: (1) A system for communicating; (2) Identification and evaluation of COVID-19 hazards; (3) Investigating and responding to COVID-19 cases in the workplace; (4) Correction of COVID-19 hazards; (5) Training and instruction; (6) Face coverings; (7) Other engineering controls, administrative controls, and personal protective equipment; (8) Reporting, recordkeeping, and access; (9) Exclusion of COVID-19 cases and employees who had a close contact; and (10) Return to work criteria.

Face Coverings

Unvaccinated employees must wear face coverings when indoors and when in vehicles with others. Employees in certain indoor settings, including public transit, K-12 schools, health care and long-term care settings, must wear face coverings regardless of their vaccination status so long as doing so is mandated by order of the California department of Public Health.

Face coverings are not required outdoors, except in the event of an "outbreak" (3 or more cases in an exposed group of employees) when six feet of distance cannot be maintained. However, employers are required to notify employees that face coverings are recommended for unvaccinated individuals when six feet of physical distancing cannot be maintained.

Vaccinated employees are not required to wear a face covering in the workplace, whether indoors or outside.

Employers must provide N95 masks: (1) to employees "upon request" as soon as possible and (2) to any employees exposed in a "major outbreak" (20 or more cases in an exposed group of employees) for voluntary use. A list of vendors who sell N95 masks can be found here: <https://www.dir.ca.gov/dosh/wildfire/List-of-N95-Vendors.pdf>

Vaccines

Employers must record the vaccination status for employees who do not wear a face covering indoors and must keep this record confidential. To satisfy this requirement, employers can request a copy of an employee's vaccine card or other health document reflecting their vaccination status. Alternatively, employers can choose to maintain a record of the employees who presented proof of vaccination, without keeping the supporting documentation. Another option is to simply maintain a record of employees who self-attested that they have been vaccinated.

The ETS does not preclude employers from requiring all employees to wear face coverings in lieu of having a vaccination documentation process.

Vaccines for employees who were vaccinated abroad will be deemed valid so long as the vaccines that were administered have been identified for emergency use by the World Health Organization.

Physical Distancing

The revised guidelines remove previously mandated physical distancing requirements in the workplace, regardless of vaccination status. However, in the event of an outbreak, employers must evaluate whether it is necessary to implement physical distancing and barriers onsite. In the case of a major outbreak, employers are required to implement physical distancing and barriers in the workplace.

Testing

Employers are obligated to offer no-cost testing to employees during paid time to:

- Symptomatic¹ unvaccinated employees, regardless of whether there is a known exposure;
- Unvaccinated employees after an exposure;
- Vaccinated employees after an exposure if they develop symptoms;
- Unvaccinated employees in an outbreak; and
- All employees in a major outbreak.

Vaccinated employees without symptoms do not need to be tested or quarantined after close contact with COVID-19 cases unless they are symptomatic.

Notice of COVID-19 in the Workplace

Employers must circulate written notice of a COVID-19 case in the workplace within one business day of the notice of potential exposure. If the employer has reasonable notice that a particular employee either did not receive this written notice or has limited literacy in the language of the written notice, the employer must provide affected employees with verbal notice.

Vaccinated workers (and those who had COVID-19 within the last 90 days) who exhibit no COVID-19 symptoms do not need to be excluded from the worksite following an exposure. However, those who have been excluded have the right to bring a wage claim to recover "continued earnings" for the period of the exclusion.

¹ Under the ETS, COVID-19 symptoms means fever of 100.4 degrees Fahrenheit or higher, chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, or diarrhea, unless a licensed health care professional determines the person's symptoms were caused by a known condition other than COVID-19.

Unvaccinated workers experiencing symptoms of COVID-19 will need to have testing made available at no cost.

Outbreak Obligations

Employers must notify local public health agencies of outbreaks within 48 hours of becoming aware of the number of cases that meets the definition of an outbreak. The employer must also notify the local public health agency in the jurisdiction of the worksite of the names, phone number, occupation, and worksite of employees who may have COVID-19 or who are under a COVID-19 isolation order from a public health official. Employers must also report the business address and NAICS industry code of the worksite where the infected or quarantined individuals work. An employer that has an outbreak subject to these provisions must continue to give notice to the local health department of any subsequent laboratory-confirmed cases of COVID-19 at the worksite.

Recommendations

Employers should be sure to familiarize themselves with the latest ETS and ensure that they comply with each of the regulations. This includes updating your return-to-work policies and/or your written COVID-19 workplace protocols.

As a reminder, employers are permitted to implement mandatory vaccination policies at work, so long as the employer does not discriminate against employees on the basis of a protected characteristic, provides reasonable accommodations related to disability or sincerely-held religious beliefs, and does not retaliate against anyone for engaging in a protected activity.