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Cal/OSHA Approves Third and Final Readoption of COVID-19 Prevention Emergency Temporary Standards Through Year End

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Since November 2020, California employers have struggled to comply with burdensome requirements under the Cal/OSHA COVID-19 Prevention Emergency Temporary Standards (ETS), which initially went into effect on November 30, 2020. The ETS were initially revised and readopted on June 17, 2021, with a second round of revisions and readoption on December 16, 2021. The Occupational Safety and Health Standards Board (Board) voted to adopt the third and final revision and readoption of the ETS (Third Revised ETS), which is expected to take effect on or before May 6 once the Office of Administrative Law reviews and files with the secretary of state. Under Governor Newsom's Executive Order N-23-21, the Third Revised ETS may only extend through December 31. Upon expiration of the Third Revised ETS, the Board is expected to implement permanent standards going forward.

Summary of Key Changes

Although the Third Revised ETS reflects relatively fewer changes than previous readoptions, some of the changes are significant:

- Eliminates any distinction on the basis of vaccination status, including for enforcement of facial covering and testing requirements.
- Expands no-cost testing requirements to all symptomatic employees, regardless of vaccination status or whether COVID-19 exposure was allegedly work related.
- Allows employees to present self-administered and self-read tests when required.
- Creates limited exemptions to testing requirements for "returned cases," or for those previously infected with COVID-19 and have returned to work for up to 90 days following an employee's initial test or onset of symptoms.
- Eliminates physical distancing requirements (except during periods of major outbreak) and physical partition requirements.
- Defers to California Department of Public Health (CDPH) guidance for exclusion and return-to-work criteria for

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close contact with COVID-19.

- Revises return-to-work criteria, regardless of vaccination status.
- Eliminates cleaning and disinfecting procedures.

Further Explanation of Third Revised ETS

- **Vaccination Status**
  - The Third Revised ETS eliminate the term “fully vaccinated,” and therefore no longer distinguish between employees on the basis of vaccination status.

- **Face Coverings**
  - The Third Revised ETS essentially eliminate all face covering requirements regardless of vaccination status. However, face coverings are still required in the following scenarios:

    1. When required by the CDPH;
    2. For 10 days following an employee’s first positive test (for asymptomatic employees) or after an employee first develops symptoms; and
    3. For all indoor employees in the exposed group during an outbreak or major outbreak, or outdoor employees in the exposed group who cannot maintain physical distancing.

  - The revised definition of “face covering” eliminates the previous “light test” requirement, which prohibited masks with fabrics that let light pass through.
  - Employees who are exempt from wearing facial coverings (such as due to disability) are no longer required to socially distance, but they must continue to undergo weekly no-cost testing.

- **Respirators**
  - Employers must provide both training and instruction to employees on proper wear and seal checks when providing respirators for voluntary use (whereas the previous standards only required instruction).

- **Definitions**

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- The Third Revised ETS now use the term “infectious period” (instead of “high-risk exposure period”) when referring to the two-day period prior to an employee developing symptoms or testing positive. This change has no practical effect, but instead appears to be an attempt to align with CDPH regulations.

- The Third Revised ETS add a new term for a “returned case,” or any person who returns to work and does not develop COVID-19 symptoms for a period 90 days after the initial onset of COVID-19 symptoms, or after an initial positive test (for asymptomatic employees), unless another period of time is otherwise ordered by the CDPH.

- **Physical Distancing**

  - The Third Revised ETS eliminate physical distancing requirements except during periods of outbreak and major outbreak for employees in the exposed group.

  - The Third Revised ETS also eliminate all physical partition requirements, even where physical distancing cannot be maintained during periods of outbreak and major outbreak.

- **Cleaning and Disinfecting Procedures**

  - The Third Revised ETS remove all cleaning and disinfecting procedures.

- **Exclusion From the Workplace**

  - The Third Revised ETS eliminate all previous exclusion criteria for close contacts and instead defer to CDPH guidance, along with a new requirement for employers to develop, implement, and maintain policies to prevent transmission of COVID-19 by those with close COVID-19 contact.

- **Return-to-Work Criteria**

  - The Third Revised ETS distinguish return-to-work criteria on the basis of an employee’s symptoms, as opposed to the previous standards, which largely focused on vaccination status.

    - For COVID-19 cases whose symptoms are resolving or no symptoms:

      - Five (5) days have passed from date that symptoms began or the employee’s initial positive test;

      - Twenty-four (24) hours have passed since a fever has resolved without use of fever reducing medication;

      - An employee presents a negative COVID-19 test collected on fifth day or later; and

- If the employee cannot test or the employer does not require a test, the employee must be excluded for 10 days.

  - For COVID-19 cases whose symptoms are not resolving:

    - Twenty-four (24) hours have passed since a fever has resolved without use of fever reducing medication; and

    - Symptoms are resolving or 10 days have passed since symptoms first began.

  - Following close contact with COVID-19:

    - Defer to exclusion/return-to-work criteria ordered by local or state health officials.

- As noted above, employees must wear a face covering until 10 days have passed from either the first positive test (for asymptomatic employees) or from when symptoms first developed regardless of vaccination status or prior infection.

- **Testing**

  - Employees may now present self-administered and self-read COVID-19 tests when required if accompanied by another means of independent verification of the results, such as a time-stamped photograph. Previously, employees could only provide negative results from a test that was not self-administered or self-read unless observed by the employer or authorized telehealth proctor.

  - The Third Revised ETS further expand testing obligations by requiring no-cost testing during paid time to all symptomatic employees regardless of vaccination status and regardless of whether the employee claims that exposure was work related. Previously, employers were only required to provide no-cost testing to asymptomatic employees who were not fully vaccinated.

  - Employers do not need to provide testing to “returned cases” (*e.g.*, those who returned to work and do not develop COVID-19 symptoms for 90 days) following close contact with COVID-19 in the workplace, including during an outbreak. However, there is no such exception for “returned cases” during a major outbreak.

  - Employers must provide testing to all employees in the exposed group during a major outbreak (whereas the previous standards only required employers to make testing available).

- **Outbreaks**

  - Outbreak (*e.g.*, three or more COVID-19 cases in an exposed group within a 14-day period).

    - Employers must continue to provide no-cost testing to all employees in the exposed group, regardless of

vaccination status, with an exception for “returned cases.” As a reminder, employers must provide testing immediately upon outbreak, then again one week later during an outbreak.

    - Employers must now specifically provide testing to employees with close contact during an outbreak within three to five days following the close contact or exclude close contact employees from the workplace until the return-to-work criteria is satisfied.

- Major outbreak (*e.g.*, 20 or more COVID-19 cases in an exposed group within a 30-day period).

    - Employers must provide testing to employees with close contact during a major outbreak (no timeframe is indicated) or exclude those employees from the workplace until the return-to-work criteria is satisfied.

Updated FAQs

Consistent with prior readoptions, Cal/OSHA is expected to update its FAQs and other resources to specifically address the changes in the Third Revised ETS. As such, California employers are encouraged to monitor the Cal/OSHA website for further updates, including any updated model COVID-19 Prevention Program. As with the prior readoptions, California employers should consult with legal counsel, while implementing updates to their COVID-19 practices, and assess potential overlap with applicable local ordinances or other legal compliance obligations.

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