

Cal/OSHA's Emergency Standard

On November 19, 2020, the California Occupational Safety and Health Standards Board, the standards-setting agency of the California Division of Occupational Safety and Health (Cal/OSHA), adopted an emergency standard regarding COVID-19 prevention in the workplace. After submission of the proposed final rule to the Office of Administrative Law, final approval was issued November 30, 2020.

The emergency standard imparts significant new requirements on California employers. Employers are now most notably obligated to prepare “written COVID-19 Prevention Program(s),” notify employees and third parties of potential COVID-19 exposure, provide protective face coverings, and offer to test and/or test employees for COVID-19 under particular circumstances. Employers must also provide paid time off to those employees whom employers must exclude from the workplace because they fall within the definitions of “COVID-19 cases” or employees with “COVID-19 exposure.”

To comply with new guidance, employers must exclude anyone deemed a “COVID-19 case” from the workplace. The emergency standard defines a “COVID-19 case” as: “a person who (1) has a positive ‘COVID-19 test’ as defined [by the emergency standard]; (2) is subject to a COVID-19-related order to isolate issued by a local or state health official; or (3) has died due to COVID-19” Employers also must “exclude employees with COVID-19 exposure from the workplace for 14 days after the last known COVID-19 exposure to a COVID-19 case.”

The emergency standard defines “COVID-19 exposure” as “being within six feet of a COVID-19 case for a cumulative total of 15 minutes or greater in any 24-hour period within or overlapping with the ‘high-risk exposure period.’” For individuals who develop COVID-19 symptoms, the high-risk exposure period is defined as spanning “from two days before they first develop symptoms until 10 days after symptoms first appeared, and 24 hours have passed with no fever, without the use of fever-reducing medications, and symptoms have improved.” For individuals who test positive but are asymptomatic, the high-risk exposure period is “from two days before until 10 days after the specimen for their first positive test for COVID-19 was collected.”

Employers are not required to exclude employees “who have not been excluded or isolated by the local health department . . . if they are temporarily

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reassigned to work where they do not have contact with other persons until the return to work requirements . . . are met.”

Importantly, during the course of covered exclusions, California employers must “continue and maintain an employee’s earnings, 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.” The final rule identifies two exceptions to the “maintain earnings, rights, and benefits” standard. First, employers are not required to provide paid time off for “any period of time during which the employee is unable to work for reasons other than protecting persons at the workplace from possible COVID-19 transmission.” Second, employers are not required to provide time off “where the employer demonstrates that the COVID-19 exposure is not work related.”

Employers must also provide employees with “[i]nformation regarding COVID-19-related benefits to which the employee[s] may be entitled under applicable federal, state, or local laws. This includes any benefits available under workers’ compensation law, the federal Families First Coronavirus Response Act, Labor Code sections 248.1 and 248.5, Labor Code sections 3212.86 through 3212.88, local governmental requirements, the employer’s own leave policies, and leave guaranteed by contract.”

An employee who falls within the definition of a COVID-19 case or exposure may not return to work until at least 24 hours have passed since a fever of 100.4 or higher has resolved without the use of fever-reducing medications, COVID-19 symptoms have improved, and at least 10 days have passed since COVID-19 symptoms first appeared.

An asymptomatic employee (who tested positive for COVID-19) “shall not return to work until a minimum of 10 days have passed since the date of specimen collection of their first positive COVID-19 test.”

If a state or local health official issues an order to isolate or quarantine, “the employee shall not return to work until the period of isolation or quarantine is completed or the order is lifted.” If the order does not specify a duration of isolation/quarantine, “then the period shall be 10 days from the time the order to isolate was effective, or 14 days from the time the order to quarantine was effective.”

The California Department of Public Health has also stated that employers **cannot condition reinstatement on a negative COVID-19 test** because of the potential for discrimination against employees who test positive. According to the California Department of Public Health Updated COVID-19 Testing Guidance issued on September 22, 2020, this position is premised on the explanation that, “because tests can remain positive long after an individual is no longer infectious, proof of a negative test should not be required prior to returning to the workplace after documented COVID infection.”

An employee may return to work before s/he meets the return to work criteria if Cal/OSHA gives permission, but only under certain limited circumstances. According to the final rule, “if there are no violations of local or

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state health officer orders for isolation or quarantine, Cal/OSHA may, upon request, allow employees to return to work on the basis that the removal of an employee would create undue risk to a community's health and safety. In such cases, the employer shall develop, implement, and maintain effective control measures to prevent transmission in the workplace including providing isolation for the employee at the workplace and, if isolation is not possible, the use of respiratory protection in the workplace.”

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