

COVID-19 – and its workplace rules – still with us

By Dan Eaton

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Happy New Year!

On Dec. 15, the California Occupational Safety and Health Standards Board (OSHSB) voted to replace the COVID-19 Emergency Temporary Standards (ETS) with COVID-19 Prevention Non-Emergency Regulations. Cal/OSHA has posted a guide for employers about the new rules.

Once the Office of Administrative Law completes its review and approval later this month, most of the new regulations will be in effect for two years, with the recordkeeping requirements in effect for three years. The existing ETS remain in effect until the changes are approved.



(San Diego Union-Tribune)

Highlights

Employers must provide face coverings in those workplaces in which the California Department of Public Health's (CDPH) latest guidance requires them. CDPH guidance currently requires masking only in healthcare settings, long-term care settings, and adult and senior care facilities. All employers must continue to allow their employees to wear face coverings.

Employers must make COVID-19 testing available at no cost and during paid time to employees following exposure to a close contact.

OSHSB redefined "close contact" in terms of the size of the workplace. In indoor spaces of 400,000 or fewer cubic feet per floor, a close contact is defined as sharing the same indoor space as someone with COVID-19 for a cumulative total of at least 15 minutes over a 24-hour period during the infected individual's infectious period. For indoor spaces greater than 400,000 cubic feet per floor, a close contact means being within six feet of the infected individual for a cumulative total of 15 minutes or more over a 24-hour period. "Offices, suites, rooms, waiting areas, break or eating areas, bathrooms, or other spaces" separated by floor-to-ceiling walls are considered distinct indoor spaces.

Employers must continue to exclude those with COVID-19 from the workplace until they are no longer infectious and must maintain policies to prevent transmission after close contact.

OSHSB drops requirement to continue to pay excluded workers

Employers will no longer have to pay employees while they are excluded from work due to COVID-19 infection or exposure. Instead, an employer that excludes such employees from the workplace will have to inform them of COVID-19-related benefits to which they may be entitled. That may include benefits available under legally mandated sick leave, if applicable, workers' compensation law, local government requirements, the employer's own leave policies, and leave guaranteed by contract.

According to an Associated Press article published in the Union-Tribune after the OSHSB action, this change was made “in part because the rule has become harder to enforce. Only people who caught the virus while at work are eligible to keep getting paid. But the coronavirus is now so widespread that it’s much harder to tell where someone got sick.”

The state legislature mandated COVID-19 supplemental paid sick leave through December 31, 2022. According to the AP report, “it’s not clear if lawmakers will extend it in 2023.”

The new regulations allow employers to incorporate their COVID-19 prevention policies into their general Injury and Illness Prevention Plan rather than having a COVID-19-specific standalone plan.

Robert Moutrie of the California Chamber of Commerce urged OSHSB to drop COVID-19 regulations altogether. He cited Governor Gavin Newsom’s stated intention to end the coronavirus emergency declaration in February and all related executive orders. That plea went unheeded.

Silver lining in move from emergency temporary standards to non-emergency regulations

As Moutrie commented in a post after the vote, OSHSB’s most recent action means “the California business community should see a slowing of the rate of change for the COVID-19 regulation. Over the last few years, the COVID-19 regulation’s text (as well as the related FAQs and CDPH guidance) have been a fast-moving target, with tweaks and updates every few months. The frequent changes have pushed human resources professionals, attorneys, and particularly small business owners into a frenzied state of constant catch-up.” OSHSB says it is working on a permanent rule.

Regulators and lawmakers, then, appear to be building a durable legal framework to address COVID-19 rather than adopting temporary measures to address a temporary problem. This new approach to addressing a coronavirus that from its inception has been moving faster than the speed of law is at once welcome and deeply depressing.

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