

Cal/OSHA Readopts and Revises the COVID-19 ETS for a Second Time

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PRACTICES OSHA, Employment Litigation, Labor and Employment, Litigation

On Dec. 16, California's Occupational Safety and Health Standards Board ("Board") voted to readopt the COVID-19 Prevention Emergency Temporary Standards ("ETS") for the second time, but with some significant revisions. The revised ETS will become effective on Jan. 14, 2022 and expire on April 14, 2022.¹ Noteworthy revisions of the readopted ETS include the following:

Revised Definitions:

- **COVID-19 test:** Under the revised ETS, testing cannot be both self-administered and self-read unless observed by the employer or an authorized telehealth proctor. Essentially, this prohibits an employee from taking an at-home/over-the-counter test and self-reporting the results to their employer. However, "observed" is not defined, which could allow for some interpretation as to how an employer can properly observe this process (e.g., through FaceTime, etc.)
- **Face coverings:** The definition of "face covering" continues to include surgical masks, a medical procedure mask, a voluntary respirator, or a tightly woven fabric or non-woven material of at least two layers. Under the new definition, gaiters are now allowed, provided they have two layers of fabric or are folded to make two layers. Face coverings must also not have any slits, visible holes, or punctures, and must be worn with no large gaps on the outside of the face. Further, a "light test" requirement was added, meaning that light must not pass through the fabric of a face covering when held up to a light source. For employees who are deaf, hard-of-hearing or who need to see a speaker's mouth or facial expressions to understand speech or sign language, clear face coverings or cloth face coverings with a clear plastic panel are allowed, despite the "light test" requirement.
- **Fully vaccinated:** The more detailed definition now specifies that "fully vaccinated" means two weeks past completion of a primary COVID-19 vaccine (with at least the minimum recommended interval between doses, if applicable), or two weeks past a second dose of any combination of two doses of a COVID-19 vaccine (so long as the second dose was not received earlier than 17 days after the first dose). If certain conditions are met, persons who received the COVID-19 vaccine as part of a clinical trial will be considered fully vaccinated under the revised ETS.
- **Worksite:** The revised ETS clarifies that "worksite" does not include locations where the employee works alone (without exposure to other employees), the employee's home or "alterative work location" chosen by the employee when working remotely.

Face Coverings During Symptom Screening Regardless of Vaccination Status: For employers who conduct COVID-19 screenings indoors at the workplace, the revised ETS requires that screeners and employees wear face coverings during screening, *regardless of their vaccination status*. In the previous version of the ETS, fully vaccinated employees were not required to wear a face covering during screening.

Testing for All Close Contacts Regardless of Vaccination Status: Previously, employers needed to offer COVID-19 testing, at no cost and during paid time, only to *unvaccinated* employees who had a close contact in the workplace. The revised ETS requires employers to offer free COVID-19 testing during paid time off to all employees who had a close contact in the workplace, *regardless of their vaccination status*.

Vaccination or Testing of Employees Exempt From Face Covering Requirement: The ETS provides that the employer shall provide face coverings and ensure that they are worn by employees when required by orders from the California Department of Public Health (“CDPH”), which currently requires masks for all in indoor public settings, regardless of vaccination status, until Jan. 15, 2022 ([Guidance for the Use of Face Coverings](#)). In instances where employees are exempt from face coverings and unable to wear a non-restrictive face covering (i.e., face shield) due to a medical condition, mental health condition, or disability, such employees must be at least six feet apart from all other persons and either fully vaccinated or tested at least weekly, during paid time and at no cost to the employees.

No Exclusion of Asymptomatic Close Contacts: Employers are still required to exclude employees from the workplace following a close contact with a COVID-19 case until return-to-work requirements are met. However, so long as employees are asymptomatic, wear a face covering and maintain six feet of distance from others for 14 days following the close contact, the revised ETS does not require exclusion for the employees listed below:

- Fully vaccinated employees; or
- Employees who have recovered from a COVID-19 infection within the past 90 days, beginning at either at the initial onset of COVID-19 symptoms or after the first positive test.

If an employee is not excluded following a close contact because he or she is fully vaccinated or has recovered from COVID-19 within the past 90 days, the employer must provide the employee with information about any applicable precautions recommended by the CDPH for persons with close contact.

Return to Work: Asymptomatic employees who had a close contact may return to work **after 14 days**, unless one of the following exceptions apply:

- 10 days have passed since the last known contact and the employee wears a face covering and maintains six feet of distance from others while at the workplace for 14 days following the close contact; or
- 7 days have passed since the last known contact and the employee tested negative for COVID-19, at least 5 days **after** the last known contact, and the employee wears a face covering and maintains six feet of distance from others while at the workplace for 14 days following the close contact. Under the previous ETS, this 7-day option was limited to “essential critical infrastructure workers” (i.e., health care workers) due to staffing shortages.

Testing During Outbreak Regardless of Vaccination Status: During an outbreak (3 or more employee COVID-19 cases within the exposed group), employers are now required to make COVID-19 testing available at no cost, during the employees’ paid time, *regardless of their vaccination status*.

Next Steps:

Employers should revisit their workplace COVID-19 safety policies and revise their policies as required by the readopted ETS, to be compliant by Jan. 14, 2022. Employers should also monitor the status of the federal OSHA COVID-19 Vaccination/Testing ETS for whether California adopts the federal standard or modifies its own ETS based on the federal standard.

¹ While California's Government Code section 11346.1(h) only permits two readoptions of an emergency regulation, Governor Gavin Newsom issued an executive order ([EXECUTIVE ORDER N-23-21](#)) on Dec. 16, 2021 waiving this limitation and permitting a third readoption of the ETS, so long as the third readoption does not extend beyond Dec. 31, 2022.