

## The Top 9 Things Employers Need To Know About Cal/OSHA's New Emergency COVID-19 Standard

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The Cal/OSHA Standards Board just adopted an emergency standard related to COVID-19 prevention in the workplace, imposing some significant requirements on California employers. ***Most notably, the new rule finalized yesterday provides that employees excluded from work for having or being exposed to COVID-19 must continue to be paid while they are off work.***

Employers do not have a lot of time to comply with the new mandates. Following adoption of the emergency proposal, the Standards Board will submit the language to the Office of Administrative Law, which will have 10 days to review and approve the proposal. Therefore, this complex new standard may be in effect by as soon as **November 29**.

The emergency regulation will be in effect for 180 days, and can be extended. It is anticipated that Cal/OSHA will move forward with regular and permanent rulemaking on this topic during this period of time.

This new standard will require California employers to take immediate action on many COVID-19 fronts. So what do California employers need to know? Here are the top nine takeaways for California employers – including specific recommendations about what you need to do in response to each new obligation.

### The Basics: Who's Covered? And Who's Excluded?

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Over the past several months, Cal/OSHA has published several general and industry-specific “guidance” documents related to COVID-19. However, yesterday’s step represents the most significant formal rulemaking action by Cal/OSHA to adopt a standard that will be binding and enforceable against California employers.

The new emergency standard applies to all employees and places of employment. However, it does not apply to the following:

- Places of employment with one employee who does not have contact with other persons.
- Employees working from home.
- Employees already covered by Cal/OSHA’s aerosol transmission standard (applicable generally to certain health care facilities, laboratories and others).

### 1. Written COVID-19 Prevention Program

The emergency standard requires California employers to prepare, implement, and maintain a Written COVID-19 Prevention Program (WCPP) similar to Injury and Illness Prevention Programs (IIPP) required by Title 8 of the California Code of Regulations section 3203. Indeed, the standard provides that the newly required WCPP may be integrated into an employer’s existing IIPP or maintained in a separate document.

The required elements as outlined by Emergency Standard for WPPs include the following:

1. 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. Physical Distancing;
7. Face coverings;
8. Other engineering controls, administrative controls, and personal protective equipment;
9. Reporting, recordkeeping, and access;
10. Exclusion of COVID-19 cases; and
11. Return to work criteria.



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Many California workplaces have already implemented COVID-19 plans fulfilling previous requirements to reopen. For months, we have advised California employers to develop and implement a written COVID-19-specific addendum into their IPPs, which the emergency standard now requires. However, the new WCPP requirements will likely take considerable time and effort to amend even those existing plans to ensure compliance.

Although several WCPP elements mirror IPPs, many requirements significantly change or expand what businesses likely have encountered or implemented previously. For example, paragraph 1 (system for communicating) requires employers to “describe procedures or policies for accommodating employees with medical or other conditions that put them at increased risk of severe COVID-19 illness.” Under paragraph 2, employers with indoor locations must “evaluate how to maximize the quantity of outdoor air and whether it is possible to increase filtration efficiency to the highest level compatible with the existing ventilation system.” Under paragraph 3, employers must “offer COVID-19 testing at no cost to employees during their working hours to all employees who had potential COVID-19 exposure in the workplace.” And for personal protective equipment, employers must “evaluate the need for respiratory protection in accordance with section 5144 [Respiratory Protection] when the physical distancing requirements...are not feasible or are not maintained,” indicating that many employers not familiar with (or previously subject to) section 5144, must evaluate and potentially implement the use of respirators.

***What You Should Do Next* – Employers without current COVID-19 plans should act quickly to develop a compliant WCPP, and implement effective new procedures addressing the requisite elements. Employers with existing COVID-19 plans will want to thoroughly assess such plans to determine the steps needed to cure deficiencies. Additionally, all employers should continue to follow this rapidly developing COVID-19 situation regardless of the planning stage. For further information or assistance in preparing a WCPP, contact your Fisher Phillips attorney, any attorney in our California offices, or any member of our COVID-19 Taskforce.**

### **2. Notice of Potential COVID-19 Exposure and Cases**

In responding to COVID-19 cases (as defined below), employers must meet several notice requirements laid out in the new standard. Many of these requirements overlap with those already in the CA COVID-19 Employer Playbook, as well as AB 685's notice and reporting requirements described in more detail here.

Specifically, the new standard requires employers give notice of the potential COVID-19 exposure **within one business day** to all employees who may have been exposed, their authorized representatives, and independent contractors and other employers who were present during the high risk exposure period. The high-risk exposure period generally begins 48 hours before onset of symptoms or specimen for the positive test.



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While the new standard does not require this notice be written, AB 685 does. In addition, AB 685 identifies a slightly different group who must receive this notice, as it specifies all employees (as well as their exclusive representatives) and employers of subcontracted employees who were on premises at the same worksite, not independent contractors or just those employees who may have been exposed.

The new standard makes clear employers must give such notice without revealing any personal identifying information of the COVID-19 case. Such information generally must be kept confidential, with one key exception. The new standard makes clear that unredacted information and medical records related to a COVID-19 case may be provided upon request to the local health department, CDPH, the Division, the NIOSH, or as otherwise required by law.

This is important because AB 685 and the new standard require the reporting of such confidential information to the local health department **within 48 hours** of a COVID-19 outbreak at a worksite (generally three cases). AB 685 only requires employers report the qualifying individual's name, number, occupation, worksite, business address, and NAICS code. However, the new standard also requires employers report the total number of cases, as well as the hospitalization and/or fatality status. Both AB 685 and the new standard require the employer to continue to give notice to the local health department of any subsequent COVID-19 cases at the workplace.

In addition to these reporting obligations, the new standard requires employers to report to the Division any COVID-19 related serious illnesses or deaths that occur in the workplace or in connection with employment. Employers must also ensure they are recording and tracking the appropriate information for all COVID-19 cases in accordance with this new standard.

Related to AB 685's other requirement to notify all employees, their exclusive representatives, and employers of subcontracted employees of the disinfection and safety plan, the new standard similarly requires employers to inform their employees and their authorized employee representatives of COVID-19 cleaning and disinfection protocols.

***What You Should Do Next*** - Due to the prompt notice and reporting required by the new standard, employers should consider preparing to comply by developing template notices that they may customize when COVID-19 cases arise in the workplace to help ensure they are able to meet the tight deadlines. For assistance in preparing such notices, contact your Fisher Phillips attorney, any attorney in our California offices, or any member of our COVID-19 Taskforce. Fisher Phillips has prepared sample notices and can work with you to tailor to your particular workplace.

### 3. Physical Distancing



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The new standard provides that all employees shall be separated from each other by at least six feet. There are two exceptions to this requirement: (1) where the employer can demonstrate that six feet of separation is not possible, and (2) momentary exposures while employees are in movement.

If the employer demonstrates that it is not possible to maintain a distance of at least six feet, individuals shall be as far apart as possible. Also, the standard provides that at fixed work locations where it is not possible to maintain physical distancing, the employer shall install "cleanable solid partitions" that reduce transmissions between employees.

The standard specifies that other methods of physical distancing include telework or other remote work arrangements, reducing the number of persons in an area at one time, staggered arrival and departure, and adjusted work processes. Additionally, the standard requires employers to implement various cleaning and disinfecting procedures.

***What You Should Do Next* – Many California employers have already adopted physical distancing requirements at the workplace, often in response to local public health orders. Employers should review their current physical layout to ensure they are meeting the required physical distancing standards. Employers should consider a variety of methods of physical distancing (such as staggered schedules) where maintaining physical distance creates feasibility challenges.**

### 4. Face Coverings And Personal Protective Equipment (PPE)

The emergency standard requires employers to provide face coverings and ensure that they are worn by employees over the nose and mouth when indoors, when outdoors and less than six feet away from another person, or when required by public health authorities. The standard also specifies that face shields are not a replacement for face coverings, although they may be worn together for additional protection.

Moreover, an employer is prohibited from **preventing** an employee from wearing a face covering when not required, unless it would create a safety hazard.

The standard does provide exemptions from wearing face coverings as follows:

- When an employee is alone in a room.
- While eating and drinking, provided employees are at least six feet apart.
- For employees wearing respiratory protection.
- Employees who cannot wear face coverings due to a medical or mental health condition or disability, or who are hearing-impaired or communicating with a hearing impaired person (but they must wear an effective alternative, such as a face shield with a drape on the bottom).



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- Specific tasks that cannot feasibly be performed with a face covering.

But, there is a big caveat regarding employees who do not wear a face covering or face shield for any reason. They must be at least six feet apart from others unless the unmasked employee is tested at least twice weekly for COVID-19.

Unfortunately, the emergency standard is silent regarding whether employees can bring their own face coverings to use at the workplace (which is becoming increasingly common). Hopefully, this issue will be addressed in future guidance or permanent rulemaking. For now, the standard is ambiguous on this point.

Regarding personal protective equipment, the emergency standard requires employers to evaluate the need for personal protective equipment to prevent exposure to COVID-19 hazards, such as gloves, goggles, and face shields, and provide such personal protective equipment as needed.

***What You Should Do Next – If you have not already done so, you should immediately implement a face covering requirement where applicable and communicate this requirement to your employees. Any employee who indicates the need for an exemption from such a requirement should be evaluated on an individual basis. Where an exemption exists, you should ensure that unmasked employees can be six feet apart from others at all times or be tested twice weekly for COVID-19. Finally, you should review whether additional personal protective equipment is needed.***

### **5. Exclusion Of COVID-19 Cases – And NEW Paid Time Off Requirement**

The new standard requires employers to ensure that “COVID-19 cases” (those who have tested positive or have an order to isolate from public health authorities) are excluded from the worksite until they have satisfied the return to work criteria (discussed below).

*COVID Exposures* – What about employees who may not have COVID-19 but may have been exposed? The emergency regulation requires for employees with COVID-19 exposure to be excluded from the worksite for 14 days after the last known exposure. However, employees need not be excluded from the worksite by the employer (as long as the local health department has not isolated them) if they are temporarily reassigned to work where they do not have contact with other persons.

*Paid Time Off* – The new emergency standard also has a staggering new mandate that employees excluded from work must continue to be paid while they are off work. The regulation provides that employers shall “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.”



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While California recently mandated COVID-19 supplemental paid sick leave for employers with 500 or more employees (with the enactment of AB 1867), it is unclear what authority, if any, Cal/OSHA has to mandate what is essentially a paid time off requirement. This requirement also does not appear to be limited to one occurrence, meaning an employee could potentially be excluded from the worksite multiple times. The employer is required to maintain earnings and benefits during each period of time.

There are two potential exemptions to this “maintained earnings” requirement:

- The requirement does not apply to any period of time during which the employee is unable to work for reasons other than protecting persons at the workplace from COVID-19 transmission.

The requirement does not apply where the employer “demonstrates” that the COVID-19 exposure is not work-related. However, the regulation does not specify what it means to “demonstrate” that the exposure is not work-related, or to whom this demonstration must be presented.

Employers are also required to provide any employees excluded from the worksite with information on the benefit entitlements.

***What You Should Do Next*** – You should immediately work to develop protocols and processes to exclude employees from the worksite who are COVID-19 cases or who may have been exposed. The requirement to continue to provide pay and benefits is significant and controversial. There could be legal challenges questioning the authority of Cal/OSHA to mandate such a requirement. However, in the meantime, it is best to work closely with employment counsel to evaluate whether such a requirement applies, and whether either of the above-described exemptions from this requirement are satisfied.

### 6. General Testing Requirements

The emergency standard provides testing obligations and requirements that will apply to all employers. *In addition, as discussed below, employers who experience COVID-19 “outbreaks” have additional testing responsibilities.*

First, the regulation provides that if testing is required under any portion of the regulation, the employer shall inform the effected employees of the reason for the COVID-19 testing and the possible consequences of a positive test.

Second, when there has been even one COVID-19 case in the workplace, the employer must offer free COVID-19 testing during working hours to all employees who have potential COVID-19 exposure in the workplace.



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Finally, employers may not use COVID-19 testing as an alternative to face coverings when face coverings are otherwise required.

***What You Should Do Next*** – Employers should develop a system for complying with the new testing requirements of the rule, including establishing a relationship with a provider of COVID-19 testing. Employers should also prepare the notice requirement to employees who are tested, explaining the reason for the testing and the possible consequences of a positive test.

### 7. Return-To-Work Criteria

The emergency standard sets forth the criteria that must be satisfied before COVID-19 cases (those who have tested positive or have an order to isolate from public health authorities) can return to work.

*COVID-19 Cases with Symptoms* – Employees who are COVID-19 cases with symptoms shall not return to work until:

- At least 24 hours have passed since a fever of 100.4+ has resolved without the use of fever-reducing medications;
- COVID-19 symptoms have improved; and
- At least 10 days have passed since symptoms first appeared.

*COVID-19 Cases Without Symptoms* – COVID-19 cases who tested positive but never developed symptoms 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.

*Orders to Isolate or Quarantine* – If a public health authority issues the order to isolate or quarantine, the employee shall not return to work until either period of isolation or quarantine is lifted. If no period is specified, 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.

Most significantly, the emergency standard provides that a negative COVID-19 test **shall not be required** for an employee to return to work. Therefore, California employers will not be permitted to insist that COVID-19 cases take a test before returning to the job.

***What You Should Do Next*** – Employers should develop a protocol for ensuring that employees who have been excluded from work due to COVID-19 are allowed to return when the aforementioned criteria are satisfied. Employers should communicate these return to work criteria to employees, including at the time employees are excluded due to COVID-19 cases or exposure, and develop a system for requiring employees to confirm that the return to work criteria have been satisfied.





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### 8. Outbreaks

We've already seen "outbreak" definitions and requirements set forth in other CA COVID-19 related laws and guidance such as AB 685, SB 1159, Employer's Playbook and local orders. The new regulation adds yet another twist to this, imposing substantial testing, investigation, correction and notification requirements on employers when there is an "outbreak" in the workplace. This is defined as either: **"Multiple COVID-19 Infections and COVID-19 Outbreaks,"** which applies to a place of employment that has been identified by a local health department as the location of a COVID-19 outbreak or when there are three or more COVID-19 cases in an exposed workplace within a 14-day period, or **"Major COVID-19 Outbreaks,"** which applies when there are 20 or more COVID-19 cases in an exposed workplace within a 30-day period.

*COVID-19 "Outbreak" Testing Requirements* – Under the *Multiple COVID-19 Infections and COVID-19 Outbreaks* scenario, employers shall provide COVID-19 testing to all employees at the exposed workplace during the period of the outbreak or the relevant 14-day period. This testing must be offered at no charge, during employee working hours, and *immediately* upon being covered by this outbreak definition. Employers must then offer this same testing again one week later for the same employees. After the first two required COVID-19 tests, employers shall provide *continuous* COVID-19 testing of employees who remain at the workplace at least once per week, or provide testing more frequently if recommended by the local health department.

If a *"Major COVID-19 Outbreak"* occurs, employers shall provide testing for all employees present at the exposed workplace during the relevant 30-day period(s) and who remain at the workplace. This testing must be offered at no charge, during employee working hours, and twice a week or more frequently if recommended by the local health department.

In addition to the onerous COVID-19 testing requirements, employers with an outbreak under either of these definitions shall also exclude all COVID-19 cases and employees with a COVID-19 exposure, conduct an investigation of the COVID-19 illness, and provide specific notice the local health department within no longer than 48-hours after knowledge of the outbreak. There are also hazard assessment and correction criteria depending on the outbreak definition at play, including, but not limited to assessing updates to ventilation systems, evaluating halting operations.

If one of the two outbreak definitions is met, the requirements of the particular outbreak apply until there are no new COVID-19 cases detected in a workplace for a 14-day period.

***What You Should Do Next* – You should evaluate all the requirements imposed when an outbreak occurs and have protocols for testing, employee exclusion, investigation, assessment, correction and notice in place and ready to go if needed.**



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### 9. Employer-Provided Housing And Transportation

The emergency regulation also provides some special rules for employers that provide housing and transportation to employees. These provisions will apply most commonly to agriculture, but will also potentially apply to any business (such as certain hospitality employers) that provide housing and/or transportation to their workers.

If you provide housing for employees, you will be required to implement priority housing assignments based on individuals who work together on the same crew or shift. Additionally, you must be able to ensure sufficient space in the units to permit social distancing while the employees are in the various units, and you are responsible for ensuring the units are cleaned at least once a day. If residents are exposed to COVID-19, you must isolate that employee by providing a private bathroom, sleeping area, cooking and eating facility.

If you provide transportation, employees must be screened before boarding, sit at least three feet apart, and wear face coverings during transportation.

***What You Should Do Next* – Employers in industries that provide employee housing or transportation should carefully review the provisions of the new standard that apply to the provision of those benefits. Many of these requirements will necessitate the purchase of equipment or other investments that will be costly to implement.**

#### Next Steps

California employers will need to take immediate heed of these new requirements. While some of the emergency standard provisions reflect public health orders or previous Cal/OSHA voluntary guidance that many employers are already following, there are many specific requirements that are new and significant.

Unfortunately, there is not a lot of time for California employers to act. As discussed above, this new standard may go into effect as early as November 29. And as a formal Cal/OSHA emergency standard, the stakes for compliance are now much higher. Cal/OSHA may now cite and pursue significant civil penalties against an employer who does not comply with the new requirements.

For further information, contact your Fisher Phillips attorney, any attorney in our California offices, or any member of our Post-Pandemic Strategy Group Roster.

#### Complimentary Compliance Webinar



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In addition, Fisher Phillips will be hosting an informative compliance webinar for employers to educate them on these significant new requirements and steps they should immediately undertake to ensure compliance. The webinar will be held on November 24 and repeated on November 30. Click on the links to register for either of these events.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For a more thorough analysis of the many issues you may encounter from a labor and employment perspective, we recommend you review our FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers and our FP Resource Center For Employers.

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*This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*