

## Employment & Labor Law Alert

June 17, 2021 Update

# Returning to In-Person Work: What California Employers Need to Know

California Gov. Gavin Newsom signed an executive order on June 17 to immediately enact the California Division of Occupational Safety and Health's (Cal/OSHA) updated COVID-19 Prevention Emergency Temporary Standards (ETS). The revised guidance, which the Occupational Safety and Health Standards Board voted to adopt earlier the same day, represents the most up-to-date state public health directives on COVID-19.

After more than a year spent in COVID-19 pandemic lockdown—though it really feels like much longer—hospitalization rates are continuing to decline and the number of vaccinations is increasing across California. But precautions still need to be taken. The nation fell short of President Biden's stated goal of having 70% of all adults in the United States receive at least one vaccine shot by July 4, according to Centers for Disease Control and Prevention (CDC) data, and variants of the virus continue to raise questions about vaccine effectiveness.

As employers begin considering the logistics of bringing employees back to in-person, on-site work, the biggest question on employers' minds these days is: "What does the most up-to-date guidance say?"

The following is a nonexhaustive list of issues and items to consider before, during and after reopening—from employees' vaccination status to the need for face coverings and physical distancing to areas of potential liability.



## Vaccination Status

### When is someone considered fully vaccinated?

The California Department of Public Health (CDPH) released updated "[COVID-19 Public Health Recommendations for Fully Vaccinated People](#)." The May 3 guidance states that individuals are considered fully vaccinated for COVID-19 two weeks or more after they have received the second dose of Pfizer-BioNTech or Moderna vaccines' two-dose series, or two weeks or more after they have received the single-dose Johnson & Johnson/Janssen vaccine.

Exactly how long the vaccine protection lasts and how much the vaccines protect against emerging COVID-19 variants remain up in the air, however. Employers should continue to deploy prevention measures (e.g., social distancing and masks) for everyone, regardless of vaccination status, according to the guidance.

And because information continues to evolve, employers should keep monitoring developments in federal, state and county COVID-19 guidance.

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**Are employees still required to quarantine before returning to in-person work if they are not fully vaccinated?**

Employees who are not fully vaccinated may not return to work in person if they have COVID-19 or have been exposed to COVID-19. Exposed employees who do not develop COVID-19 symptoms may return to work after 10 days have passed since the date of their last known exposure, although a 14-day quarantine period is recommended, according to the [Cal/OSHA COVID-19 ETS](#) updated on May 7.

Health care, emergency response and social services workers who have been exposed to COVID-19 may return to work after seven days with a negative test result in situations where there is a critical staffing shortage, per the ETS.

**Are there situations where fully vaccinated employees may not return to work?**

Fully vaccinated employees are not allowed to return to work in person if they have COVID-19 or have been exposed to COVID-19 and are exhibiting COVID-19 symptoms. Fully vaccinated employees who have been exposed to COVID-19 but are asymptomatic may return to work on-site, according to the ETS.

**Is documentation required for a fully vaccinated employee to work without a face covering indoors?**

Yes. Vaccination status now must be documented by California employers, according to the June 17 Cal/OSHA updates. The employer must record the vaccination status for any employee not wearing a face covering indoors, and this record must be kept confidential. The updates do not specify a particular method, however. Acceptable documentation options include:

- Employees provide proof of vaccination, such as their vaccine card, an image of their vaccine card or a health care document showing vaccination status, and the employer maintains a copy.
- Employees provide proof of vaccination, and the employer maintains a record of the employees who presented proof, but not the vaccine record itself.
- Employees self-attest to vaccination status, and the employer maintains a record of who self-attested.

It's also important to note that nothing in the updated ETS prevents an employer from requiring all employees to wear a face covering instead of having a documentation process.

Under federal guidance from the [Equal Employment Opportunity Commission \(EEOC\)](#), the vaccine mandate is subject to exceptions for those employees who require accommodations for a disability or a sincerely held religious belief.

In addition, California's Department of Fair Employment and Housing's (DFEH) "[Employment Information on COVID-19](#)" indicates that if an employer chooses to require or encourage its employees to receive one of the available FDA-approved COVID-19 vaccinations, it must do so in compliance with the Fair Housing and Employment Act (FHEA), which prohibits discrimination against or harassment of employees based on a protected characteristic, such as disability, perceived disability or religion. In the context of the vaccine requirement, an employer must provide reasonable accommodations related to an employee's known disability or sincerely held religious belief or practice and may not retaliate against any employee for engaging in protected activities, including requesting a reasonable accommodation.

The DFEH COVID-19 FAQs indicate that providing reasonable accommodations requires engaging in an interactive process with an employee who objects to receiving the vaccine in order to determine the appropriate reasonable accommodation. Some examples of potential accommodations include working from home or worksite safeguards and procedures that might allow the employee to work on-site without endangering the employee or others. In the case of an employee who objects to receiving the vaccine for religious reasons, the reasonable accommodation cannot be one that results in segregating the employee from other employees or the public—unless the objecting employee specifically requests it.

In both cases, if the employer can show that an accommodation poses an undue hardship, it may exclude the employee from the workplace.

With COVID-19 guidance and regulations for employers continuing to evolve in California and at the federal level, employers should monitor state and federal COVID-19 websites for updates.

### **Can all of an employer's employees return to work at once?**

Probably not—and employers should consider whether they want them to do so, for a host of practical considerations.

[California's occupancy guidelines](#) emphasize increased ventilation to stop the spread of COVID-19. The state advises providing fresh-air ventilation to the spaces with the highest density of occupants and spaces where occupants may be unmasked. Where ventilation cannot be increased, employers should limit occupancy.

### **Do vaccinated employees need to wear masks at the workplace?**

[The CDC announced](#) on May 13 that fully vaccinated individuals do not need to wear a mask outdoors and can largely resume activities without wearing a mask except where required by federal, state and local laws and workplace guidance.

California employers can relax their mask-wearing policies in many circumstances. Under the June 17 Cal/OSHA ETS updates, employees are not required to wear face coverings outdoors (except during outbreaks), regardless of their vaccination status, although employees must be trained on [CDPH recommendations for outdoor use of face coverings](#).

Employers may allow fully vaccinated employees to forgo wearing face coverings indoors, but they must document their vaccination status. [CDPH guidance](#) that took effect on June 15 states that everyone must wear face coverings regardless of vaccination status in settings including:

- On public transportation, including airplanes, ships, ferries, trains, subways, buses, taxis and rideshares, and in transportation hubs such as airports, bus terminals, marinas, train stations, seaports and subway stations
- Indoors at K-12 schools, child care facilities and other youth settings—although updated guidance is expected
- Health care settings, including long-term care facilities
- State and local correctional facilities and detention centers
- Homeless and emergency shelters

During outbreaks, all employees must wear face coverings indoors and outdoors when six feet of physical distancing cannot be maintained, regardless of vaccination status.

In addition, employers may not retaliate against employees for wearing face coverings when they are not required, according to the updated Cal/OSHA ETS.

### **What if an employee refuses to state their vaccination status?**

An employee has the right to decline to state whether they are vaccinated. In that case, the employer must treat the employee as unvaccinated and may not take disciplinary or discriminatory action against the employee, per the ETS.

### **What about physical distancing measures?**

California employers are no longer required to enforce physical distancing or barrier requirements in the workplace, regardless of employee vaccination status. Exceptions include:

- An outbreak (three or more cases in an exposed group of employees), during which employers must evaluate whether it is necessary to implement physical distancing and barriers
- A major outbreak (20 or more cases in an exposed group of employees), during which employers must implement physical distancing and barriers

However, employers may continue implementing more protective measures than are required, including the use of physical distancing and barriers, according to the June 17 Cal/OSHA ETS. Employers must also protect employees by evaluating ventilation systems to maximize outdoor air and increase filtration efficiency and evaluating the use of additional air-cleaning systems.

### **What are the testing requirements under the updated ETS?**

Employers must offer testing at no cost during paid time to:

- Symptomatic unvaccinated employees, regardless of whether there is a known exposure
- Unvaccinated employees after an exposure

- Vaccinated employees after an exposure if they develop symptoms
- Unvaccinated employees during an outbreak
- All employees during a major outbreak

## Outbreaks in the Workplace

### **What is considered to be a COVID-19 outbreak in the workplace?**

An outbreak is three or more COVID-19 cases in a workplace within a 14-day period or as identified by a local health department.

A major outbreak is 20 or more COVID-19 cases in a workplace within a 30-day period, according to the California Department of Industrial Relations' updated guidance, "[COVID-19 Emergency Temporary Standards Frequently Asked Questions](#)."

### **How should employers handle a COVID-19 outbreak in the workplace?**

An employer must immediately provide testing to all employees in the exposed workplace and exclude positive cases and exposures from work, repeat the testing one week later, and continue testing employees at least weekly until the workplace no longer qualifies as experiencing an outbreak.

For major outbreaks, employers must provide testing to all employees in the exposed workplace at least twice weekly and exclude positive cases and exposures until there are no new cases detected for a 14-day period, implement mechanical ventilation system changes to increase filtration efficiency, evaluate whether air-filtration units are needed in poorly ventilated areas, determine the need for a respiratory protection program or changes to an existing respiratory protection program to address COVID-19 hazards, and consider halting all or part of operations in order to control the virus.

## Employee Training and Work Policies

### **What return-to-work training should employers provide?**

Since this is a new situation for employers and their employees, employers need to implement COVID-19-focused training. The good news is that much of the required training is fairly intuitive.

According to the "[COVID-19 Emergency Temporary Standards Frequently Asked Questions](#)," employee training must include:

- Employer policies and procedures to protect employees from COVID-19 hazards
- Benefits information for employees affected by COVID-19, including paid sick leave and workers' compensation, which can be found on the [California Department of Industrial Relations' COVID-19 website](#)
- The importance of physical distancing, wearing face coverings, frequent handwashing and/or use of hand sanitizer
- The infectious nature of COVID-19, how it is transmitted, its symptoms and the importance of getting tested
- The importance of not coming to work, and of getting tested, if an employee has symptoms

### **Do employers need to have written policies in place regarding returning to in-person work?**

Yes. Under California's ETS, employers must develop a written COVID-19 prevention program or ensure its elements are included in an existing injury and illness prevention program. These elements include:

- Explanation of the employer's COVID-19 prevention procedures
- How to identify, evaluate and correct COVID-19 hazards
- COVID-19 testing protocols
- Procedures to investigate and respond to COVID-19 cases in the workplace
- Return-to-work criteria
- Reporting and record-keeping procedures

Cal/OSHA also offers on its website a [Model COVID-19 Prevention Program](#) that employers may opt to use.

### **How quickly must employers implement the new provisions of the June 17 Cal/OSHA ETS?**

Employers should implement the June 17 ETS "as soon as possible," the revised ETS FAQs state. For those unable to implement the ETS immediately, the employer must implement or retain alternative controls to ensure employees' health. If an employer continues to comply with the November 2020 ETS while implementing the



revisions, Cal/OSHA will not cite the employer, according to the revised ETS FAQs.

Further, with respect to face coverings, employers can comply with the June 17 updated ETS by requiring face coverings for all employees while gathering the required documentation to allow fully vaccinated persons to go without face coverings.

If an employer is unable to provide approved respirators immediately, it must take alternative measures to protect unvaccinated employees until approved respirators are available.

### State Resources

#### **Is guidance available on the logistics of bringing employees back on-site?**

Yes. California has set up websites dedicated to helping businesses reopen and bring employees back to work on-site that address the needs of various industries and workplace types.

The state’s website, [Blueprint for a Safer Economy](#), provides industry-specific guidance for creating safe environments for employees and customers.

Safety requirements also vary by workplace type, from office space to retail center to industrial site. Employer guidelines should address various issues, including the use and/or rearrangement of common areas and meeting rooms, when face masks should be worn, when and where visitors are permitted, and employee self-screening requirements.

California’s [COVID-19 Employer Portal](#) is a tool that generates a road map, customizable by county and industry, to ensure safe and compliant workplace reopening and operations.

General COVID-19 resources are also offered by the [California Department of Public Health](#), [Centers for Disease Control and Prevention \(CDC\)](#) and the [World Health Organization](#).

### How Loeb Can Help

Loeb & Loeb’s Employment & Labor Law team can help employers determine their obligations and advise on compliance with the local and county health guidance. We can also assist with preparing return-to-work protocols, vaccination policies, communications with employees and record-keeping.

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### Related Professionals

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