

Employment & Labor Law Alert

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Extended Cal/OSHA ETS Takes Effect Jan. 14, Includes Revised Rules for Fully Vaccinated Workers

The California Division of Occupational Safety and Health (Cal/OSHA) Standards Board readopted the Cal/OSHA COVID-19 Prevention Emergency Temporary Standards (ETS) on Dec. 16. Among its modifications, the [revised ETS](#) includes new rules for fully vaccinated employees.

The ETS adopted by the seven-member safety board, Cal/OSHA's policymaking arm, takes effect on Jan. 14, following the expected approval by the Office of Administrative Law. The ETS is set to expire on April 14, 2022. It applies to most California workers who are not already covered by the Aerosol Transmissible Diseases standard.

The safety board's adoption of the revised ETS came a day after the state reinstated the requirement that all fully vaccinated and non-fully vaccinated people must wear masks indoors (presently, effective through Jan. 15) in an effort to slow the spread of the virus, including its latest iteration known as the omicron variant.

Here are some of the key revisions set forth in the ETS:

Fully Vaccinated, Asymptomatic Close Contacts Do Not Have To Quarantine, But Must Mask and Social Distance To Return to the Office

The updated ETS requires asymptomatic, fully vaccinated employees in California to be barred from the workplace (until certain requirements are met) if they come in close contact with someone infected with the virus, unless they wear a permissible face covering and maintain 6 feet of



social distance from others in the workplace for 14 days following the last date of close contact. To be clear, this exception applies to those employees who were fully vaccinated prior to the close contact.

Likewise, those close-contact employees who (a) returned to work after contracting COVID-19 and have remained asymptomatic after recovery do not need to be excluded from the workplace for 90 days after the initial onset of COVID-19 symptoms, and (b) those who were asymptomatic COVID-19 cases and never developed symptoms do not need to be excluded from the workplace for 90 days after the first positive test. However, these returns are permissible only if the individuals wear a permissible face covering and social distance in the workplace for 14 days after the last date of close contact.

If employers choose to except employees from exclusion from the workplace as permitted above, the employer has to provide the employees with information about any applicable precautions recommended by the California Department of Public Health.

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New Quarantine Requirements for Non-Fully Vaccinated, Asymptomatic Close Contact Employees, Including Modified 10-Day and New Seven-Day Alternatives

Those non-fully vaccinated employees who had a close contact but never developed any COVID-19 symptoms may return to work after 10 days (rather than the required 14 days) since the last known close contact; however, now, if they return after a 10-day quarantine, they have to wear a permissible face covering and social distance 6 feet from others while at the workplace for 14 days following the last date of close contact.

The revised ETS also newly permits a seven-day quarantine (since the last known close contact) for non-fully vaccinated individuals if they (a) test negative for COVID-19 at least five days after the last known close contact and (b) wear a permissible face covering and social distance 6 feet from others while at the workplace for 14 days after the last date of close contact.

Employer-Provided Housing Testing and Quarantine Requirements Amplified

Previously, close-contact employees (whether fully vaccinated or not) who developed symptoms were not permitted to return to the office unless (1) they tested negative for COVID-19 using a PCR test taken after the onset of symptoms, (2) at least 10 days had passed since the last known close contact and (3) they were symptom-free for at least 24 hours without using fever-reducing medications. These requirements have been eschewed.

Now, per the revised ETS, symptomatic close-contact employees can return to work if all of the following are true: (a) at least 24 hours have passed since a fever of 100.4 degrees has resolved without the use of fever-reducing medications; (b) COVID-19 symptoms have improved; and (c) at least 10 days have passed since COVID-19 symptoms first appeared. Notably, a negative PCR test is no longer required. These are the same return-to-work requirements for symptomatic COVID-19 cases.

Employer-Provided Transportation Face Covering Requirements Extended to Fully Vaccinated

Previously, employers were required only to provide COVID-19 testing to unvaccinated employees who were close contacts. Now, employers must also make COVID-19 testing available at no cost and during paid time to employees who were fully vaccinated before being exposed to someone with COVID-19 in the workplace, even if the fully vaccinated employee is asymptomatic.

Notably, employers still do not have to provide testing to close-contact employees who (a) returned to work after contracting COVID-19 and have remained asymptomatic after recovery for 90 days after the initial onset of symptoms, or (b) were asymptomatic COVID-19 cases and never developed symptoms for 90 days after first testing positive.

The Definition of 'Fully Vaccinated' Updated To Include Combination of Approved Vaccines and Certain Clinical Trials

When employers are required to facilitate outbreak testing for an "exposed group" of employees, testing must be made available to all employees present at the workplace during the "high-risk exposure period" regardless of vaccination status, including those who are fully vaccinated and asymptomatic, on a weekly basis during an outbreak and twice weekly during a major outbreak in the workplace.

Employees who returned to work after contracting COVID-19 and did not develop symptoms after such return do not have to be tested for 90 days after the initial onset of symptoms. Employees who were asymptomatic COVID-19 cases and never developed symptoms do not have to be tested for 90 days after first testing positive.

Permissible Types of Face Coverings Have Been Modified

Employees who reside in "employer-provided housing" (as that term is defined in the readopted ETS) must be tested when there are three or more COVID-19 cases in such housing in a 14-day period, regardless of their vaccination status. Moreover, employers have to quarantine all close-

contact residents from other residents; asymptomatic, fully vaccinated residents are no longer exempt from such requirement.

Symptomatic Close Contacts (Regardless of Vaccination Status) Must Meet Certain Requirements Before Returning to Work; However, a Negative PCR Test Is No Longer Required

Subject to specified exceptions, employers must ensure that all employees in employer-provided transportation (as that term is defined in the readopted ETS), regardless of vaccination status, receive a permissible face covering.

Workplace Close Contacts, Both Fully Vaccinated and Not, Must Be Provided Testing

The new ETS clarifies that “fully vaccinated” means either one or two of the below have been documented by the employer:

- An individual’s status two weeks since the completion of a primary vaccine with, if applicable, at least the minimum recommended interval between doses. The primary vaccine must be approved or authorized for emergency use by the U.S. Food and Drug Administration (FDA), listed for emergency use by the World Health Organization (WHO) or administered (non-placebo) as part of a clinical trial at a U.S. site under specific circumstances.
- An individual’s status two weeks after receiving the second dose of any combination of two doses of a COVID-19 vaccine that is approved or authorized by the FDA or listed as a two-dose series by the WHO (i.e., receiving doses of different COVID-19 vaccines as part of a primary series), as long as the second dose is received no earlier than 17 days (or 21 days with a four-day grace period) after the first dose.

Outbreak and Major Outbreak Testing Must Be Provided Regardless of Vaccination Status

The new ETS also modifies the definition of “permissible face coverings.” Under the definition, permissible face coverings include surgical masks, medical procedure masks, a voluntarily worn respirator, or a tightly woven fabric or nonwoven material of at least two layers (meaning fabrics that do not let light pass through when

held up to a light source) that completely covers the nose and mouth and is secured to the head with ties, ear loops or behind-the-head elastic bands. The new standards also clarify that a face covering is a solid piece of material without slits, visible holes or punctures, and must fit snugly over the nose, mouth and chin with no large gaps on the sides of the face.

Gaiters are permitted only if they have two layers of fabric or are folded to make two layers. Likewise, clear face coverings or cloth face coverings with a clear plastic panel that, despite the non-cloth material allowing light to pass through, are permissible face coverings that may be used to facilitate communication with people who are deaf or hard of hearing or others who need to see a speaker’s mouth or facial expressions to understand speech or sign language. However, scarves, ski masks, balaclavas, bandanas, turtlenecks, collars and single layers of fabric do not qualify as permitted face coverings.

The revised ETS also provides further information related to employees who are exempted from wearing face coverings (under the ETS) due to a medical condition, mental health condition or disability. These individuals are permitted to wear an effective, nonrestrictive alternative such as a face shield with a drape on the bottom. However, the new ETS specifies that if their condition or disability does not permit a nonrestrictive alternative, the employee has to (1) social distance at least 6 feet from others in the workplace and (2) either be fully vaccinated or test weekly during paid time at no cost to the employee.

The Definition of ‘Worksite’ Has Been Modified As It Relates to Notifying Employees of COVID-19 Cases

Under the new ETS, “worksite” does not include, and notification of a positive COVID-19 case in the workplace is not required for, workers who worked at the following places at the time of the workplace exposure:

- Locations where the individual worked by himself or herself without exposure to other employees.
- An individual’s personal residence.
- An alternative work location chosen by the worker when working remotely.

Further, the ETS specifies that notice has to be provided only to those employees, independent contractors and other employers who were on the premises at the same worksite as the COVID-19 case during the high-risk exposure period.

Temperature Screenings Require Permissible Face Coverings Regardless of Employee Vaccination Status

The new ETS provides that if an employer conducts employee screenings indoors at the workplace, the employer has to ensure that permissible face coverings are used during the screenings by both screeners and employees, regardless of the employee’s vaccination status. Previously, only non-fully vaccinated employees had to wear face coverings during screenings.

The Definition of ‘COVID-19 Test’ Updated, Including Specifying That Employees Can Self-Administer But Cannot Self-Report

The readopted ETS also presents an updated definition of “COVID-19 test”: Tests (1) must be cleared, approved or authorized, including in an Emergency Use Authorization, by the FDA to detect current infection with the SARS-CoV-2 virus; (2) must be administered in accordance with authorized instructions; and (3) cannot be both self-administered and self-read unless observed by the employer or an authorized telehealth proctor. Hence, the new rules clarify that employees cannot self-report results of a home-administered test. The new rules also provide examples of tests that satisfy the requirement: laboratory-processed tests; proctored over-the-counter tests; point-of-care tests; and tests where collection and processing are either done or observed by an employer.

Employer Next Steps

While we have captured many of the key changes here, there are additional modifications in the revised ETS. Employers should review the updated ETS and confer with employment counsel should they have questions regarding any of its contents. Further, employers should implement any necessary changes to their COVID-19 policies, protocols and practices so that they are compliant with the readopted ETS.

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