

Top 5 Things Employers Need to Know About the Cal/OSHA COVID-19 Emergency Temporary Standard (ETS)

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- 20+ years advising California employers
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DISCLAIMER TIME

While I am an attorney, I am not *your* attorney unless and until we enter into a formal retention agreement. Today's presentation is for informational and educational purposes only. Nothing I say today is legal advice for you.



The Top 5 Things to Know

1. What the Cal/OSHA Emergency Standard is.
2. What the Cal/OSHA Emergency Standard isn't.
3. How to comply with each requirement.
4. What employers can do now to stay ahead of the curve.
5. If Cal/OSHA comes calling.



What is the Cal/OSHA Emergency COVID Standard (“ECS”)?

- Legally-enforceable regulation from Cal/OSHA = California Code of Regulations, Title 8, Sections 3205—3205.4
- Took effect November 30, 2020
- Originally set to expire on May 30, 2021. **Extended on June 9, 2021, pending further Cal/OSHA Standards Board action.**



What the ECS is not

- It's not a joke. Cal/OSHA is making unannounced site visits or sending letters requesting proof of compliance. Must have real plans that employees have been notified of and trained on, and supervisors need a clear understanding of compliance requirements.
- It does not apply to everyone:
 - Employers with 1 employee who does not have contact with other persons at the worksite.
 - Employees working from home.
 - Employees already covered by Cal/OSHA's aerosol transmission standard.

ECS Requirements Overview

- Prevention Requirements
- Exclusion Requirements
- Paid Leave Requirements
- Notice Requirements
- Testing Requirements
- Return to Work Requirements
- Special Circumstances

PREVENTION REQUIREMENTS



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ECS Prevention Requirements

- Written COVID Prevention Plan (Site Specific COVID Prevention Plan +)
- Face covering requirement
- Exemption requests
- Employee training
- Physical distancing
- PPE
- Engineering and administrative controls
(TO DO: Document everything!!)

Prevention: Written COVID Prevention Program

- Employers must prepare, implement, and maintain a Written COVID Prevention Program (“WCPP”) that includes:
 - Identifying and evaluating employee exposures
 - Implementing policies/procedures to correct unsafe/unhealthy conditions
 - Providing and ensuring workers wear face coverings to prevent exposure
- WCPP may be integrated into existing Injury and Illness Prevention Programs.
- Site Specific COVID Plan will need to be amended.
- Cal/OSHA has developed a COVID-19 Model Prevention Program.



Prevention: Identifying, Evaluating and Correcting COVID-19 Hazards

- Processes:
 - Screening employees for symptoms
 - Responding to employees with symptoms & confirmed cases
- Practices:
 - Controlling COVID-19
 - Identifying where transmission could occur
- Procedures to correct identified issues

Prevention: Face Covering Requirement

- Provide employees face coverings or reimburse the cost
- Ensure coverings are worn over the nose & mouth
 - When indoors
 - When outdoors and closer than 6 feet to each other
- Enforce the policy unless exemption
- Cannot substitute COVID testing for face mask requirement

Prevention: Face Covering Exceptions

- Alone in a room
- Eating or drinking
- Using a respirator or other respiratory protection
- Exceptions:
 - Medical or mental condition
 - Hearing impaired
 - Work tasks cannot be performed with a face covering

Prevention: Exemption Requests

- Documented procedure for requesting exemption
- Communicated to all employees
- If employee requests exemption for health reasons, then must engage in interactive process to find a reasonable accommodation
- If exemption granted, employee must be 6 feet apart from other people or they must be tested 2 times per week at the employer's expense.

Prevention: Employee Training

- Communicated to all employees
 - How COVID-19 is spread
 - Infection-prevention techniques
 - How to report COVID-related information
 - How to obtain testing for COVID-19
 - Information regarding COVID-19-related benefits
- (TO DO: written training materials and proof of completion)



Prevention: Physical Distancing Requirements

- At least 6 feet between persons
- Unless it is impossible = as far from others as possible
- Less than 6 feet while in movement is not a violation
- If claiming impossibility, must be prepared to show Cal/OSHA why physical distancing is not possible



Prevention: Methods of Physical Distancing

- Telework/Remote work arrangements
- Reduce # of people in area at one time
- Visual cues (signs, floor markings)
- Staggered arrival, departure, work, and break times
- Adjusted work processes or procedures to allow greater distance between employees

Prevention: PPE

- Evaluate employees' need for PPE
- Provide PPE at no cost to the employees or reimburse the cost
- Prohibit the sharing of PPE
- Ensure ample supply and regular restocking of PPE

Prevention: Engineering & Administrative Controls

Engineering Controls

- Cleanable solid partitions
- Maximize amount of outside air when conditions permit

Administrative Controls

- Cleaning procedures of commonly touched surfaces
- Minimize sharing of tools, equipment and vehicles/disinfect between uses
- Deep clean affected areas
- Facilitate frequent hand washing and provide hand sanitizer



EXCLUSION REQUIREMENTS

What are employers required to do upon learning of a COVID-19 exposure in the workplace?



What is a “COVID-19 Case”?

- Who: employee who tested positive for COVID-19 or who was ordered to isolate by a public health official.
- How: COVID-19 case employee must be excluded until employee satisfies ECS Return-to-Work Requirements.



What is a “COVID-19 Exposure”?

- Who: employee within 6 feet of a COVID-19 case for a cumulative total of 15 minutes within any 24-hour period during the “high risk exposure period”
- “High risk exposure period” depends on symptomatic vs. asymptomatic:
 - Symptomatic window is 2 days before until 10 days after onset of symptoms AND fever free for 24 hours without use of fever-reducers.
 - Asymptomatic window is 2 days before until 10 days after specimen for positive test was collected.
- How: employee must be excluded for 10 days from last known exposure



ECS: Exclusion Requirements

- COVID-19 Case: employee must be excluded from the workplace until meets Return-to-Work Requirements.
- COVID-19 Exposure: employee must be excluded from the workplace for 14 days after the last-known exposure (10 days thanks to Gov. Newsom). OR can be temporarily reassigned to work where they do not have contact with another person.
- **Not limited to one occurrence and not capped.**



ECS: Exclusion Requirements

- Employers must maintain a record and track all COVID-19 cases in their workplace,
- While ensuring medical information remains confidential.
- Records must be made available to employees and their authorized representatives, with all personal identifying information removed.
- If Outbreak or Major Outbreak, records must be given to local health department, with all personal identifying information included.

Degrees of Magnitude

ONE CASE

- Regardless of source

MULTIPLE CASES

- 3+ COVID-19 cases in an exposed workplace in 14 days
- Or identified by local health authorities
- “Outbreak”
- Triggers additional notice and testing requirements

MAJOR OUTBREAK

- 20+ COVID-19 cases in 30 days
- “Major Outbreak”
- Even more notice and testing requirements
- Ventilation changes/filtration

PAID LEAVE REQUIREMENTS



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ECS Paid Leave Requirements

- Any employee excluded from work because of work-related exposure must continue to be PAID their earnings during the exclusion period. Not defined but good rule of thumb is 90-day average earnings.
- Must also keep their seniority and benefits.
- Must be provided information about these benefit entitlements (TO DO: template).
- If employee caught COVID in the workplace, then paid COVID leave under the ECS is in addition to FCRA or CCA paid leave.

ECS Paid Leave Requirements

- If employee is hospitalized, they still get paid, unless the employer can show the employee wouldn't be working anyway.
- OR if employer can show that the exposure was not work-related (very difficult to show after 2nd case)



NOTICE REQUIREMENTS



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ECS Written Notice Requirements

ONE CASE, then give notice the same business day to:

- All employees
- Their exclusive reps
- Independent contractors
- Employers of subs who were on the same premises
- Do not divulge confidential personal identifying info

(TO DO: Notice templates for each type of recipient. Explain reason for the test and possible consequences of a positive test)

3+ CASES = OUTBREAK

- In addition to column one, must give written notice to local health department, within 48 hours.
- Notice to health officials must include confidential personal identifying information.

Cases involving employee death or hospitalization for serious illness must immediately be reported to Cal/OSHA

(TO DO: Gather and post contact information for local health department and Cal/OSHA)

Local Health Department Notice

- Name
- Occupation
- Worksite
- Business address
- NAICS Code (find your NAICS Codes at <https://www.naics.com/search>)
- Total # of Cases
- Hospitalization and/or fatality status (must also notify Cal/OSHA immediately)
- PLUS: ongoing notice duties if any additional cases within 30-day period



TESTING REQUIREMENTS



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ECS Testing Requirements

ONE CASE
(regardless of source)

Employer must offer:

- ✓ Free COVID-19 testing
- ✓ During work hours
- ✓ For all employees potentially exposed

Must inform all employees on how they can obtain testing.

MULTIPLE CASES (3+
in 14-days)

In addition to previous column, employer must offer potentially exposed employees:

- ✓ Testing immediately
- ✓ Follow-up test one week later
- ✓ Must offer continuing testing on a weekly basis to employees who remain in the workplace until the worksite is out of a multiple case scenario

MAJOR OUTBREAK
(20+ in 30-days)

- ✓ Free testing immediately
- ✓ During work hours
- ✓ For all employees
- ✓ Testing 2x/week or more frequently for employees who stay in the workplace over a 30-day period.



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RETURN TO WORK REQUIREMENTS



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ECS Return to Work Requirements

- ❑ #1 FEVER-FREE for at least 24 hours, without using any fever-reducing medication.
“Fever” = 100.4° +

AND

- ❑ #2 SYMPTOMS have improved. If asymptomatic with positive test, then must wait at least 10 days from specimen collection date/7 days from negative test.

AND

- ❑ #3 10-DAY WINDOW. At least 10 days have passed since symptoms first appeared.

(TO DO: Develop a written protocol for gathering this information and keeping it confidential. If subject to CCPA, get waivers from employees if saving this information.)

ECS Return to Work Requirements

- A NEGATIVE TEST IS NOT REQUIRED.
- Employers cannot require a negative test and cannot require a test as a condition to return to work.
- Mantra: Communicate, Document and Protect Personal Information

ECS Outbreaks and Major Outbreaks

- This is the worst-case scenario.
- Additional reporting requirements.
- Additional testing requirements.
- Must also conduct an investigation, perform a hazard assessment and take corrective action – all documented.
- Outbreak requirements apply until there are no new COVID-19 cases detected in the workplace for a 14-day period.



ECS Employer-Provided Housing

- Even more requirements. If you provide housing or transportation to your employees, contact a specialist. You need more than this overview.

ECS Employer-Provided Transportation

- Must screen employees before boarding.
- Must sit at least 3 feet apart.
- Must wear face mask for duration of trip.
- Must disinfect interior and shared exteriors every day.



Look Out for Executive Orders

- Exec. Order N-84-20 is actually helpful to employers. California Department of Public Health published updated quarantine guidelines on 12/14/2020 that are based on Centers for Disease Control guidelines for when employees exposed to COVID-19 who are asymptomatic may discontinue quarantine.
- Exec. Order N-84-20 suspended the exclusion periods of the ECS to the extent that they are longer than CDPH recommendations or longer than local health officer who has jurisdiction over the workplace.
- Effect: 10-day exclusion period rather than 14-day.

ECS To Do Today

- Written COVID Prevention Plan/IIPP & Notice Templates
- Lock in your test providers
- Employee training materials
- Face covering and physical distancing requirements with consequences
- Procedure for employees requesting exemption
- PPE evaluation
- Stock of PPE on hand
- Cleaning and disinfecting protocols in place
- Procedure to investigate and respond to COVID-19 cases in the workplace

If Cal/OSHA comes calling

- Unannounced onsite visit or a letter requesting required documentation.
- They will ask about all of the things on the previous slide so be prepared to show/provide them.
- Make sure your front-line managers are thoroughly familiar with all of the COVID-related policies, procedures, and materials.
- Make sure your employees have been trained well enough so they can show how it works.

Thank you for joining us!
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