

Revised Cal/OSHA COVID-19 Workplace Rules: What Employers Need to Know

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In November 2020, when the pandemic was near its most severe point, the California Department of Occupational Safety and Health (Cal/OSHA) set forth a package of rules designed to create a uniform standard for COVID-19 prevention and outbreak mitigation in the workplace.

These standards, also referred to as Emergency Temporary Standards (ETS), create such rules as requiring employers to draft a written COVID-19 prevention plan, as well as dictating when face coverings must be worn in the workplace, when testing must occur, and when employers must exclude employees from the workplace due to infection or close contact with an infected employee.

The revised Emergency Temporary Standards went into effect immediately on June 17, 2021.

The original ETS went into effect on November 30, 2020, and remained unchanged until revisions to them — spurred by changing guidance for the general public from the Centers for Disease Control (CDC) and the California Department of Public Health (CDPH) — were adopted on June 17, 2021.

These revisions dramatically changed some rules, while leaving others in place — and they went into effect immediately per an [executive order](#) issued by Governor Gavin Newsom.

Because the [revised ETS](#) creates subsets of rules depending upon vaccination status, confusion about what to do in the workplace understandably follows. To assist employers in navigating COVID-19-related workplace rules, here are key takeaways on what has and hasn't changed.

Written COVID-19 Prevention Plan

The original ETS required employers to maintain a written COVID-19 Prevention Plan that covered the following 11 subject areas:

1. A system for employers and employees to communicate about COVID-19 issues.
2. Identifying and evaluating COVID-19 hazards.
3. Investigating and responding to COVID-19 cases in the workplace.
4. Correcting COVID-19 hazards.
5. Training and instruction on COVID-19-related issues.
6. Physical distancing requirements.
7. Face coverings.
8. Other infection control measures and personal protective equipment (PPE).
9. Reporting, recordkeeping and access.
10. Exclusion of COVID-19 cases.
11. Return to work criteria.

Several of the rules contained in the mandatory written COVID-19 Prevention Plan have been modified.

The ETS revisions still require employers to maintain a written COVID-19 Prevention Plan; however, as explained in this white paper, several of the rules have been modified. Employers will need to review their plans to make appropriate revisions. For employers who haven't yet created a written COVID-19 Prevention Plan, Cal/OSHA released a [model plan](#) employers may use; employers should note, however, that this model was released before the June 17, 2021, ETS revisions.

Face Coverings

In the ETS revisions, one of the primary thrusts was facilitating the change in CDC and CDPH guidance related to face coverings in public. Generally under the ETS revisions, fully vaccinated employees no longer need to wear face coverings unless the CDPH order requires them to do so. At the time of publication, the [CDPH requires face coverings](#) on public transit, in K-12 educational facilities, in health care and long-term care settings, in correctional and detention facilities, and in shelters.

Employees who aren't fully vaccinated must continue to wear face coverings indoors and in vehicles with others. There are a few exceptions, the most common of which are when the employee is alone in a room or vehicle; when eating or drinking; when a medical accommodation is required; or when the job duties make a face covering infeasible or hazardous.

Employees who aren't fully vaccinated don't need to wear face coverings outside; however, the revised ETS requires employers to recommend face coverings to those employees when physical distancing of six feet or more cannot be maintained.

Documentation of Fully Vaccinated Status

For fully vaccinated employees to take advantage of relaxed rules based on their vaccinated status, the revised ETS requires employers to document this status. “Fully vaccinated” means the employee has received the final dose of the vaccine at least 14 days prior to certifying that they’re fully vaccinated.

Cal/OSHA suggests three ways employers may document an employee’s fully vaccinated status:

- Employers obtain a copy of the record showing proof of full vaccination;
- Employers view the record showing proof of full vaccination but don’t keep a copy and instead maintain a record of employees who showed their proof; or
- Employees self-attest to full vaccination and the employer maintains a record of those who self-attested.

For purposes of the ETS, if an employee refuses to disclose their vaccination status, the employer must treat them as unvaccinated. Any record demonstrating vaccination status is a medical record and must be kept confidential.

There are two ways employers may comply with the N95 respirator provision requirement.

N95 Respirators

Employers must provide N95 respirators to any unvaccinated employees who works indoors or in a vehicle and requests one. Employers must also provide N95s to any exposed employees during a “major outbreak.” N95 respirator use in either situation is voluntary. The employer must provide an N95 that is the correct size, and the employee must receive basic instruction on how to create an appropriate seal around the nose and mouth.

Cal/OSHA suggests two methods for employers to comply with the N95 provision requirement:

- Employers can either stock N95s and offer them upon request; or
- Employers may take an initial poll of employees to determine who wishes to be provided an N95, and then stock an appropriate amount of N95 respirators of the correct size and type based upon this demand.

An employer should provide a requested N95 respirator as soon as possible and, in the case of a “major outbreak,” must do so immediately and without request from an employee.

Cal/OSHA also reminds employers that filtering facepiece respirators can’t be cleaned or disinfected, so they must be replaced if they get damaged, deformed or dirty, or become difficult to breathe through. Cal/OSHA recommends providing a new N95 respirator at the beginning of each shift to employees who request one and having employers follow the manufacturer’s instructions.

To assist employers with getting up to speed on this new requirement, California has set up a [website](#) to provide a one-month supply to businesses.

Physical Distancing Requirements

One of the more jarring changes in the revised ETS is that Cal/OSHA has eliminated the physical distancing requirement in all settings — unless the workplace is experiencing a “major outbreak.”¹ This means that employers are no longer required to maintain six feet of distance between employees or otherwise put up physical barriers if physical distancing cannot be maintained.

The ETS does, however, still require employers to assess and evaluate transmission hazards in the workplace and after an “outbreak.”² Physical distancing may be necessary after that assessment. Employers may also continue to voluntarily impose physical distancing and physical barrier measures in the workplace.

Testing

The revised ETS kept a mix of the old rules with some new tweaks based on full vaccination status. For employees who were in a workplace where an infected employee entered, employer must still offer testing — but only if the employee is unvaccinated or if a vaccinated employee displays symptoms after exposure.

Employers must continue to follow the outbreak testing rules — where the employer immediately provides testing and continues to provide testing once per week until there have been zero cases in the preceding 14-day period — but only to unvaccinated employees. Employers also must continue to follow the major outbreak testing rules under which the employer immediately provides testing and continues to provide testing twice per week until there have been zero cases in a 14-day period. Under

Whenever an employer must offer COVID-19 testing under the ETS, the test must be at no cost to the employee.

the major outbreak rules, testing must be provided to all employees regardless of vaccination status.

A new testing requirement was added to the revised ETS: When an unvaccinated employee is symptomatic, employers must offer testing to that employee regardless of whether there was a known exposure in the workplace.

Whenever an employer must offer testing under the ETS, the test must be at no cost to the employee and the employee must be paid for the time taking the test. Employers may meet this requirement in a number of ways, such as directing an employee to a community testing center, the local public health department or the employee's health plan — or the employer may provide testing services on site.

Excluding Employees from the Worksite

For the most part, employers must continue to exclude from the worksite employees who are a COVID-19 case or who have experienced close contact exposure to a known COVID-19 case. The close contact definition has not changed: The employee has been within six feet of a known COVID-19 case during their high-risk infectious period for a cumulative 15 minutes over a 24-hour period. The high-risk infectious period begins two days before the onset of symptoms or, for asymptomatic cases, two days before the sample for the positive COVID-19 test was taken and for 10 days after the onset of symptoms or after the sample was taken.

1. A “major outbreak” is defined as 20 or more COVID-19 cases in the workplace in a 30-day period.

2. An “outbreak” is defined as three or more COVID-19 cases in the workplace in a 14-day period.

The revised ETS provides a little more flexibility for excluding employees who had a close contact exposure. Employers no longer have to exclude employees that were fully vaccinated before a close contact with a known COVID-19 case as long as the employee remains asymptomatic. Employers also don't have to exclude unvaccinated employees who previously had COVID-19 who had a close contact exposure in the workplace as long as:

- They've been properly returned to work under the ETS return-to-work requirements and have remained symptom-free for 90 days after the initial onset of COVID-19 symptoms; or
- If they never developed COVID-19 symptoms, for 90 days after the first positive test.

Any employee excluded from the worksite for this reason who was able and available to work must continue to receive the salary and benefits for the time they are excluded. For employers with more than 25 employees, the employer may first require the exhaustion of any available California Supplemental Paid Sick Leave (SPSL)³ before continuing with exclusion pay. Employers may review the Division of Labor Standards Enforcement's [guidance](#) or consult with legal counsel with any questions about the SPSL leave entitlements.

Employers must continue to provide a timely, written notice of potential exposure within one business day of a COVID-19 case in the workplace.

The ETS return-to-work requirements remain largely unchanged. Asymptomatic COVID-19 cases may return to work 10 days after the date their test sample was taken. Symptomatic COVID-19 cases may return to work 10 days after the first onset of symptoms.

Generally, employees excluded because they had a close contact exposure with a COVID-19 case may return to work 10 days after the last date of exposure to the COVID-19 case — unless that employee develops symptoms. If the employee experiences symptoms during this time, the employee can return if following the return-to-work criteria described above for a COVID-19 case, or the person:

1. Tested negative using a polymerase chain reaction (PCR) test after the onset of symptoms;
2. Waited 10 days following the last known close contact; and
3. Has been symptom-free for at least 24 hours without fever-reducing medications.

Notice Requirements

Employers must continue to provide to all employees a timely, written notice of potential exposure within one business of a COVID-19 case in the workplace. A new wrinkle in the revised ETS is that if the employer knows the employees didn't receive the written notice, or that the employee has limited literacy in the language used in the notice, the employer must also provide verbal notice as soon as practicable in the language understood by the employee.

³ The SPSL went into effect on March 29, 2021, requiring employers with more than 25 employees to provide up to 80 hours of sick leave for certain COVID-19 related reasons retroactive to January 1, 2021.

The revised ETS also links the notice to the [requirements of AB 685](#), passed in 2020, that require employers to notify all employees of the potential exposure, as well as any COVID-19-related benefits the employee may be entitled to, and the disinfection and safety measures that will be taken at the exposed workplace in response to the potential exposure.

Enforcement


The revised ETS is enforceable immediately, which means employers must work quickly and diligently to create, revise or update their COVID-19 Prevention Plan and take steps to address what their new procedures will be regarding face coverings, physical distancing and stockpiling of N95 respirators.

To assist with enforcement, Cal/OSHA has released two different sets of FAQs — one that includes information on the [current revised ETS](#) in its entirety and one that just [highlights the changes](#) between the original ETS and the current revisions. This guidance provides an excellent resource for employers, but if any questions arise specific to an employer's workplace, the employer should consult with legal counsel.

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 COVID-19 Prevention Program Checklist

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