



CAL/OSHA PROPOSES A PERMANENT COVID-19 STANDARD TO REPLACE EMERGENCY TEMPORARY STANDARD (ETS)

June 29, 2022

BACKGROUND

Although the Cal/OSHA Emergency Temporary Standard (California Code of Regulations Title 8, Sections 3205 – 3205.4) is not scheduled to expire until December 2022, the agency released a proposed “permanent” rule that proposes to impose COVID-19 requirements on workplaces through 2024.

Most of the proposed new rules align with the existing requirements. There are several key changes of which employers should be aware – including the possible elimination of the controversial exclusion pay requirement.

KEY CHANGES

1. **Definition change.** The definition of “close contacts” in the proposed rule is defined as *employees sharing the same indoor space as a COVID-19 case for a cumulative total of 15 minutes or more over a 24-hour time period.* This definition reflects the most recent order from the California Department of Public Health (CDPH). This definition provides less specificity than the previous definition of “*within six feet.*” If adopted, it could require additional employees to be labeled as close contacts if they sit around the same table or are in the same room regardless of the distance between them and the COVID-19 case.
2. **Notice Requirements.** The proposed permanent rule affords employers a little more time to notify employees of a potential close contact. Employers will be required to provide notice to an employee or independent contractor *as soon as possible, rather than within one business day as currently required in the ETS.*

There is a glitch, however. California Labor Code Section 6409.6 contains a statutory requirement to provide such notice within one business day. Although that requirement is scheduled to expire by the end of 2022, pending legislation would extend that requirement until January 1, 2025. *So, while the proposed rule may provide more flexibility, the statute will likely continue to require notice to be provided within one business day.*

3. **Adds Aerosolizing Procedures for Employees in Certain Healthcare Settings.** This requirement does not affect construction rather it applies to certain healthcare activities such as certain dental procedures and outpatient medical specialties.
4. **Reporting and Recordkeeping.** In addition to the requirement to report outbreaks to the local health department, the proposed permanent rule requires that employers keep confidential records of all COVID-19 cases as well as all close contacts. The records *must be retained for two years and must be provided to the local health department, CDPH, Cal/OSHA, or the National Institute for Occupational Safety and Health immediately upon request.*
5. **Elimination of Exclusion Pay?** In a potentially significant departure from the ETS, the proposed permanent rule *does not* require employers to provide exclusion pay to employees who are excluded from the

workplace due to COVID-19. Exclusion pay was one of the most controversial and costly provisions of the ETS.

This provision will be monitored closely as labor stakeholders are likely to push for the permanent rule to include exclusion pay. Employers are reminded that there may be state or local obligations to provide COVID-19 supplemental paid sick leave.

6. Provisions deleted from the ETS aside from the possible deletion of the exclusion pay provision, the following elements in the ETS have been deleted in the proposed permanent standard:
 - a. A specific written COVID-19 Prevention Plan will no longer be required. Instead, employers should address disease through their Injury and Illness Prevention Plan (IIPP) or as a standalone document
 - b. Identification and evaluation of COVID hazards
 - c. Investigation and responding to COVID-19 cases in the workplace
 - d. Making COVID-19 testing available to all employees with close contact
 - e. Correction of COVID-19 hazards
 - f. Training provisions

WHEN WILL THE PROPOSED PERMANENT RULE TAKE EFFECT?

The proposal is expected to be formally published for public comment this fall and adopted by the Standards Board late in the year, with an effective date in January 2023. The regulation would sunset in 2025.

WHAT SHOULD EMPLOYERS DO NOW?

Employers should continue to comply with the current ETS until there is further information about the proposed permanent standard.

NEXT STEPS

Although many of the proposed requirements are the same, employers should review their IIPP or COVID-19 Prevention Plan to ensure it can be readily updated. Additionally, employers should review their record-keeping practices to be able to implement the record requirements under the new rule.