

Updated California Face Covering Rules

New EEOC And OSHA Reopening Guidance

Local Government Rules For Reopening

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CDPH Updates Guidance On Use Of Face Coverings

The California Department of Public Health (CDPH) released updated guidance on the use of face coverings as the state sees an uptick in COVID-19 cases. The guidance requires mandatory use of face coverings in a variety of high-risk situations, including at the workplace. Specifically, the guidance requires those engaged in work (at the worksite or performing work off-site) to wear a face covering when:

- Interacting in-person with any member of the public
- Working in any space visited by members of the public, regardless of whether anyone from the public is present at the time
- Working in any space where food is prepared or packaged for sale or distribution to others
- Working in or walking through common areas, such as hallways, stairways, elevators, and parking facilities
- In any room or enclosed area where other people (except for members of the person's own household or residence) are present when unable to physically distance

The guidance also provides several exceptions. These exceptions include people living with disabilities that could have difficulty breathing with a mask, or the hearing impaired (and those talking to the hearing impaired) when the ability to see the mouth is

essential for communication. Individuals engaged in outdoor work can also be exempt so long as they are able to remain at least six feet from others.

Employers need to comply with these new rules as it applies to their employees **and** members of the public visiting the workplace. Employers should consider posting signs requiring face masks for visitors or customers at the worksite if such postings are not already required by other applicable guidance. If employers do not take measures to ensure that visitors and employees are taking necessary safety precautions, they may be exposed to claims that they failed to provide a safe work environment for their employees.

The guidance also requires wearing face coverings in other settings, such as when one is inside of, or in line to enter any indoor public space.

The CPHD guidance can be found at: https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Guidance-for-Face-Coverings_06-18-2020.pdf

EEOC Updates Technical Assistance Questions And Answers

The EEOC recently updated its Q&A on issues related to COVID-19 and various equal employment opportunity laws, including the Americans with Disabilities Act (ADA). As jurisdictions around the country have begun allowing the reopening of businesses, the EEOC has provided further guidance

on several issues relevant to employees returning to the workplace:

- The EEOC clarified that employees in high risk categories (e.g., older workers, pregnant workers, or workers with a medical condition making them particularly vulnerable to COVID-19) cannot be excluded from returning to the workplace or treated differently from other workers based on their high risk category. However, employers can provide a general notice to all employees reminding them of the company's reasonable accommodation policy and that requests for accommodation or flexible working conditions will be considered on an individualized basis.
- Employers can consider the voluntary request of employees in high risk categories for accommodations such as working remotely, and provide such accommodations even though the requesting employee does not have a covered disability, so long as providing the accommodations is not done in a discriminatory or retaliatory manner.
- Employees are not entitled to accommodations under the ADA because their family members are at a higher risk of severe illness from COVID-19. The employer's accommodation obligations only extend to an employee's disability or medical condition.
- Older workers (aged 65 and higher) are at elevated risk for COVID-19, but the Age Discrimination in Employment Act does not provide for accommodations based solely on age. However, older workers may have underlying medical conditions that could trigger ADA obligations.
- Many employers are requiring some manner of symptom or temperature screening at the beginning of an employee's shift. The EEOC notes that employees may also be entitled to accommodations for alternative screening procedures, and that employers should engage their standard ADA accommodation process for these requests.
- The EEOC also reminded employers to be vigilant

for harassment during the pandemic, particularly against employees who are or are perceived to be of Chinese or other Asian national origin, and to remind employees of their anti-discrimination policies.

- Employers may not require antibody testing before employees return to the workplace. Antibody tests are considered medical examinations under the ADA and at this time do not meet the ADA's requirement that medical examinations be "job related and consistent with business necessity."

This new EEOC guidance can be found at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

OSHA Guidance On Returning To Work

The Occupational Safety and Health Administration (OSHA) released new Guidance on Returning to Work during the COVID-19 pandemic. This guidance clearly states that it "is not a standard or regulation, and it creates no new legal obligations." Instead it restates some mandatory safety and health standards and otherwise provides advisory recommendations. The guidance reiterates that under Section 5(a)(1) of the Occupational Safety and Health Act's General Duty Clause, employers are required "to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm."

This new OSHA guidance goes on to provide general principles for the three phase reopening plan identified in the White House's Guidelines for Opening up America Again, along with examples of how to implement these principles in the workplace. The guidance calls for (among other things) implementing social distancing measures, creating protocols for addressing sick employees, and training employees on COVID-19 risks and safety precautions. Below are several highlights from the OSHA guidance:

- OSHA confirmed that cloth face coverings are not considered Personal Protective Equipment (PPE). However, OSHA reiterated that employers

need to train their employees on the use of cloth face coverings, “including any employer policies related to their use and considerations for when cloth face coverings could cause or contribute to a workplace safety and health hazard.”

- If the records of employee temperature readings are created or maintained by a physician, nurse, or other health care personnel, or technician, employers may be required to maintain those documents as medical records for the duration of employment plus 30 years under the Access to Employee Exposure and Medical Records Standard (29 C.F.R. 1910.1020). However, creating a record of employee temperature readings is not required.
- Employers must conduct a hazard assessment in accordance with OSHA’s PPE standard (29 C.F.R. 1910.132) to determine whether PPE is required in their workplace. OSHA emphasized that given the potential shortage of PPE, employers should look for alternative solutions that avoid or reduce the need for PPE. OSHA suggests employers modify workers’ interactions with the public and with each other (social and physical distancing measures) to reduce the need for PPE.

OSHA’s recommendations will seem familiar to California employers. This is because California’s reopening guidelines have generally recommended or required similar safety measures. While the OSHA guidance provides useful insight into the agency’s approach to COVID-19 workplace safety, all employers should remember to play close attention to their state and county requirements for reopening and workplace safety throughout the pandemic.

California Reopening And County Variance

Last month California first moved into Stage 2 of its Resilience Roadmap plan to gradually reopen businesses. Since then, the state and counties have continued to gradually expand the list of industries permitted to operate during the COVID-19 pandemic. Most counties in the state have been approved to accelerate their Stage 2 opening and broaden the categories of businesses approved for reopening.

The state reopening order permits counties and

municipalities to include more restrictive and additional requirements for reopening. Many counties have created their own requirements for businesses, including model worksite specific COVID-19 protection plans and mandatory postings at the workplace.

As the state reopens, it is critical for all employers to review state and county guidance to determine which applies to their business, and at a minimum take action on the following:

- Worksite Protection Plan – State guidance requires businesses to conduct a comprehensive risk assessment and develop a worksite specific COVID-19 protection plan. Businesses that have not fulfilled these requirements should do so immediately to maintain compliance and avoid various liabilities, including state or county enforcement. Some counties have model plans with additional requirements that must also be followed. In those cases, employers must comply with the most protective (or restrictive) requirements. Note that these plans have both required and recommended protocols, but compliance with both will often be the best choice.
- Posters And Checklists – Some counties require businesses to post certain documents or signs at their worksite. These can vary from informational posters about hygiene practices, to industry reopening checklists, to copies of the worksite specific COVID-19 protection plan.
- Compliance Attestations - County authorities may also require employers to attest that they have complied with all state and county requirements for reopening. Depending on the county, businesses may simply need to post these attestations at the workplace, or they may be required to submit their attestation directly to the county. These attestation requirements make it all the more important to ensure your business is compliant with all state and county reopening requirements.

Each county and county public health authority may have different requirements for reopening or operating. Companies should confirm whether

separate requirements apply to separate worksites.

Workers Compensation Reimbursement Programs

Some workers' compensation insurance carriers have implemented programs providing employers financial incentives or reimbursements for implementing safety measures to prevent the spread of COVID-19. Employers who are reopening and struggling with the costs of implementing the various necessary safety measures should reach out to their workers' compensation carriers to see if they have similar programs available. At the same time, employers may request that the carrier audit their workplace and recommend other proactive measures that could be taken, seek assistance in doing the required risk assessment, or seek assistance in putting together their worksite specific protection plan. Not all carriers offer the same services, but it cannot hurt to inquire.

Stradling Has Resources To Help You Stay Compliant

To assist California employers in complying with state, county and municipal regulations, Stradling has materials available to help businesses conduct their comprehensive risk assessments and create their worksite specific protection plans to stay in compliance with state and county requirements. We encourage you to reach out if you are in the process of reopening or you have been conducting business and want to make sure you are in compliance with the applicable industry guidelines.

We are available to assist

Please do not hesitate to reach out to us for assistance in dealing with the effects of the COVID-19 pandemic on your company.

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