

Key Takeaways from Cal/OSHA's COVID Related Emergency Temporary Standards

1. The ETS create new standards for excluding employees from the workplace due to COVID-19.

There are two instances in which employees are excluded from the workplace, when they are a "COVID-19 case" and when they have a "COVID-19 exposure."

"COVID-19 cases" are excluded from the workplace until the return to work criteria specified in the ETS regulations are met. The ETS regulations define a "COVID-19 case" as a person who:

1. Has a positive COVID-19 test
2. Is subject to a COVID-19-related order to isolate issued by a local or state health official
3. Has died due to COVID-19, in the determination of a local health department or per inclusion in the COVID-19 statistics of a county

The regulations then specify when COVID-19 cases can return to work. Employees who fall within the scope of a COVID-19 case and have COVID-19 symptoms must be excluded from the workplace until:

1. At least 24 hours have passed since a fever of 100.4 or higher has resolved without the use of fever-reducing medications;
2. COVID-19 symptoms have improved; and
3. At least 10 days have passed since COVID-19 symptoms first appeared

An employee who falls within the scope of a COVID-19 case who does not have any symptoms must be excluded from the workplace for at least 10 days since the date of their first positive COVID-19 test.

In addition, employees with "COVID-19 exposure"

must be excluded from the workplace for 14 days. "COVID-19 exposure" is defined as being within six feet of a COVID-19 case for a cumulative total of 15 minutes in a 24 hour period. While the CDC recently published guidance that individuals without symptoms could end a quarantine on day 10 without testing (or on day seven after receiving a negative test result), absent further guidance from Cal/OSHA, California employers will need to exclude all employees with "COVID-19 exposure" for 14 days even if they receive a negative test result or show no symptoms.

2. The ETS also create a new pay requirement for employees excluded from the workplace under the ETS.

Significantly, the ETS mandates that employees continue to be paid while they are excluded from work because they fall within the scope of a COVID-19 case or COVID-19 exposure and are "otherwise able and available to work." While "otherwise able and available to work" is not yet defined, it appears to mean that the continued payment requirement only applies if the employee would otherwise be able to work absent the COVID-19 related work exclusion. It also appears the continuing payment requirement would not apply if the excluded employee was authorized and able to telework. For those employees subject to this continuing pay requirement, the ETS states that employers must "continue and maintain an employee's earnings, seniority, and all other employee rights and benefits, including the employee's right to their former job status, as if the employee had not been removed from the job." It appears that an employer may use employer-provided sick leave benefits as well as California and Federal supplemental paid sick leave to compensate employees, and can offset the earnings payable to employees by certain benefit payments from public sources such as unemployment benefits. The ETS also

calls out employees receiving workers' compensation benefits related to COVID-19 under SB 1159, but how that affects the pay requirements under the ETS is not yet clear. The current ETS does not indicate whether employers may apply accrued vacation or PTO time to comply with their obligation to maintain the employee's earnings when excluded from the workplace.

In addition, the ETS appears to provide that employees earnings must be maintained each time they are excluded from the workplace as a COVID-19 case or COVID-19 exposure, subject to the same standards discussed above. For example, if an employee is excluded from the workplace as a "COVID-19 exposure" multiple times, the obligation to continue to pay the employee while they are excluded would exist each time the employee is excluded.

There is some question as to whether Cal/OSHA has the authority to create this significant pay requirement. Cal/OSHA intends to hold a stakeholder meeting in December to explain the ETS, answer questions and give interested parties an opportunity to provide feedback on the ETS, with an advisory committee meeting to be scheduled soon after. Cal/OSHA has also provided FAQs to help explain the rule and noted that these FAQs will be expanded on an "ongoing basis" to assist in understanding the regulations. For the time being, employers should comply with the current ETS requirements until further guidance is provided. The current FAQs can be accessed here.

<https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html>

3. The ETS Creates New Testing And Notification Obligations.

Employers must offer testing to employees at no cost during working hours in the event of a "COVID-19 exposure." Additionally, employees must be tested, during working hours at the employer's expense, in the following cases:

- Employees must be tested once per week if there are 3 positive tests within a 14 day period at an "exposed workplace," or when there is an

"outbreak." An "exposed workplace" is any work location, working area, or common area accessed or used by a COVID-19 case.

- An outbreak occurs when either (1) four employees test positive if the employer has 100 employees or fewer at the specific place of employment; (2) four percent of the number of employees who reported to the specific place of employment test positive if the employer has more than 100 employees; or (3) a specific place of employment is ordered to close by a local public health department. A specific place of employment is defined as a building, store, or facility where the employee works.
- Employees must be tested twice per week if there is a "major outbreak"
- A major outbreak is defined as 20 positive tests within a 30 day period at an "exposed workplace."
- The weekly testing requirements in cases of an outbreak and major outbreak end when there are no additional COVID-19 cases for a 14 day period.

The ETS also required the reporting of specified information to the local health department in cases of an outbreak or major outbreak.

4. Employers must develop a written COVID-19 prevention program to ensure that all the requirements of the ETS are met.

Employers have already been required to adopt a workplace specific plan for operating under COVID-19 restrictions. See Stradling's [Client Alert dated July 27, 2020](#). The ETS requires that the following provisions also be included in the workplaces specific plan:

- Use of engineering controls (primarily ventilation, administrative controls and personal protective equipment as required to reduce transmission risk;
- Expanded employer-provided training for employees covering how COVID-19 is spread;
- Required testing for employees at employer's expense in cases of an "outbreak" or major outbreak

- Employers must offer testing, at employer's expense, to employees who experience a COVID-19 exposure at the workplace;
- Expanded requirements for excluding employees who constitute a COVID-19 case or COVID-19 exposure until they are no longer an infection risk; and
- Reporting of COVID-19 hospitalizations, outbreaks, and major outbreaks to Cal/OSHA and the local health department and related recordkeeping requirements.

The ETS also repeats the existing requirement to include the following points in the employer's written prevention program:

- Communication to employees about the employer's COVID-19 prevention procedures;
- Identification, evaluation and correction of COVID-19 hazards;
- Physical distancing of at least six feet unless it is not possible;
- Use of face coverings;

- Procedures to investigate and respond to COVID-19 cases in the workplace;

Cal/OSHA has released a model plan that requires customization to apply to employers' specific business. Stradling can provide our clients a compliant COVID-19 workplace specific plan and related protocols and answer any related questions. Contact information is provided below.

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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