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**Sent:** Monday, December 7, 2020 2:16 PM  
**To:** Agency Directors & Managers, HR Representatives and Safety Coordinators  
**Subject:** New Emergency OSHA Regulations for COVID-19

Dear Agency/Department Directors:

Please carefully review the attached CALPELRA Alert 20-35 for a summary of new Cal OSHA COVID-19-related emergency regulatory changes that went into effect November 30, 2020.

We are working to update the Agency Worksite Plan template provided to you in June to include the required aspects of the COVID-19 Prevention Plan referenced in the CALPELRA Alert. An employee notification template and updated employee training material will be circulated shortly. Please remain diligent with preventative measures such as screening, social distancing, and face covering usage, all important features of the County's preventative efforts.

The new OSHA requirements define when an employee must be excluded from the workplace following contracting the virus or with a possible exposure following having been within six feet of an infected individual for 15 minutes or more during a cumulative 24-hour period. The workplace exclusion is required to be with pay. If at all possible, an employee who must be excluded from the workplace under these requirements should be assigned duties that can be performed at home (i.e., telework). If the employee cannot work from home, pay options include County Attestation time, Family First Coronavirus Response Act (FFCRA), sick leave for employees who have time available in their leave banks, and finally regular pay if all of the above has been exhausted. Further information regarding pay coding will be provided to leave representatives for cost recovery tracking of COVID-19-related pay. Please contact Tracy Sewell in Benefits at (805) 648-9218 regarding leave and pay options.

Even though these new Cal OSHA requirements may be disruptive for productivity and continued operation, the regulations underscore the importance of maximizing telework opportunities to minimize the number of employees in the workplace and enforcing social distancing practices for those who must report to the workplace. This includes utilizing virtual meeting platforms such as Microsoft Teams to conduct what would otherwise be in-person meetings, even for those in the workplace.

We also soon send additional information regarding new and additional statutory requirements under AB 685 that will take effect on January 1. In the meantime, should you have any questions, please feel free to contact me at (805) 662-6784.

Chuck

## Cal/OSHA Adopts Expansive And Burdensome COVID-19 Regulations

by Nate Kowalski, Irma Rodríguez Moisa, Laura A. Izon, and Eric T. Riss,  
Atkinson, Andelson, Loya, Ruud & Romo

The California Occupational Safety and Health Standards Board (“Cal/OSHA”) approved vast emergency regulations on November 19, 2020, to address the recent spike in COVID-19 cases and prevent future outbreaks in the workplace. (See 8 Cal. Code of Regulations §§ 3205 – 3205.4.) These regulations impose numerous obligations on private and public employers, including cities, counties, school districts, public colleges and universities, housing authorities, transit agencies, water districts, and other special districts (“public employers”), relating to COVID-19 exposure and workplace safety. The new rules do not apply to (1) workers when they are working from home, (2) places of employment with one employee who does not have contact with other persons, or (3) employees when covered by Cal/OSHA’s Aerosol Transmissible Diseases regulations (8 Cal. Code Regs. § 5199) which apply, as specified, to hospitals, paramedic and emergency medical services, correctional facilities, homeless shelters, and others.

Cal/OSHA chose to pass several costly (and extensively debated) regulations, including: continuation of pay and benefits for employees excluded from work due to COVID-19; prohibiting employers from requiring negative COVID-19 tests for returning employees; and no-cost testing for employees in many circumstances. These regulations went into effect on November 30, 2020, and will remain in effect (unless extended by Cal/OSHA) until October 2, 2021.

Key aspects of these new emergency regulations are summarized below.

### **COVID-19 Prevention Rules — Communication, Notice, And Workplace Safety Measures**

Cal/OSHA passed several rules and procedures that public employers must follow *at all times*, regardless of the existence of reported COVID-19 cases or workplace outbreaks. Public employers are required to adopt a written “COVID-19 Prevention Plan.” These rules do not

apply to employees working remotely from home. Among other items, this Plan must include the following:

- Process for employees to advise public employers about (i) development of COVID-19-related symptoms, (ii) exposure to someone who tested positive or developed symptoms, or (iii) complaints with workplace hazards exposing them to higher risk of COVID-19.
- Screening procedures for employees entering the workplace. While Cal/OSHA does not require particular screening methods be used, the agency provides certain limitations.
- Process for conducting contact tracing of employees who report a positive test for COVID-19, or report “close contact”<sup>1</sup> with a person testing positive.
- Process for notifying employees who came into “close contact” and/or were exposed to COVID-19 cases.<sup>2</sup>
- Process for providing employees with testing for COVID-19 at no cost and during work hours.
- Process for periodic inspections of unhealthy conditions or hazards in the workplace. Cal/OSHA does not specify which hazards or conditions should be considered, but inspections surely may involve assessing whether congested worksites prevent effective social distancing, air filtration systems in indoor work facilities are ineffective, or employees inconsistently follow face covering policies.
- Process for training employees on the various rules in a public employer’s Prevention Plan.
- Requirement for all employees to socially distance, with limited exceptions.
- Requirement for all employees to (i) wear face coverings for any indoor work, with limited exceptions, and (ii) wear face coverings in outdoor workplaces where social distancing (i.e. standing at least 6 feet from another person) is not possible.
- Process for modifying the workplace to mitigate safety risks, including installing cleanable partitions at fixed work locations, implementing cleaning and disinfecting steps for the workplace, and evaluating the need for personal protective equipment.

Cal/OSHA emphasized that public employers must maintain the confidentiality of personally-identifiable information obtained in the process of enforcing a COVID-19 Prevention Plan.

Public employers are also required to follow strict procedures for removing and/or excluding employees from the workplace due to COVID-19, including:

- Exclude all employees from the worksite, who had “close contact” and/or exposure to a person who tested positive for COVID-19, for at least 14 days after the last known COVID-19 exposure.
- Continue pay and benefits for excluded employees during the period of their absence, unless the employee is unable to work for reasons unrelated to their COVID-19 exposure.

- Provide excluded employees with information about available COVID-19-related benefits, including COVID-related leaves of absence provided under federal law, state law, or public employer policies.
- Enforce particular return to work protocols, namely:
  - Employees who test positive for COVID-19 and display symptoms cannot return until (i) at least 24 hours pass since fever of 100.4 degrees Fahrenheit (or higher) has resolved without use of medication, (ii) other COVID-19 symptoms have improved, and (iii) at least 10 days have passed since COVID-19 symptoms first manifested.
  - Employees who test positive for COVID-19 but never showed symptoms cannot return until at least 10 days have passed since their positive test specimen was collected.
  - Employees who self-quarantined due to COVID-19 public health order cannot return until order lifts or at least 14 days have passed since order to quarantine was effective.

Cal/OSHA's regulations notably provide that public employers *may not require a negative COVID-19 test* before an employee may be permitted to return to work.<sup>3</sup>

## Heightened Standards For “Outbreaks” And “Major Outbreaks”

Cal/OSHA also passed rules and procedures that public employers must follow in the case of an “outbreak” or “major outbreak”, in addition to the general rules described above. An “outbreak” exists if a public employer has three or more COVID-19 cases in a worksite within a 14-day period. Public employers must follow these additional procedures during “outbreaks” until there are no new COVID-19 cases in the workplace for a 14-day period.<sup>4</sup> Among others, these procedures include:

- Access to no-cost testing for COVID-19 to employees at “exposed workplaces” on a *weekly basis* until the “outbreak” ends.
  - “Exposed workplaces” include any work location used or accessed by an individual who tests positive for COVID-19, including bathrooms; walkways; hallways; aisles; break or eating areas; and waiting areas.
- Investigation into whether workplace conditions have increased and/or affected the level of risk of exposure and infection in the workplace, including whether employees are discouraged from remaining at home, whether the COVID-19 Prevention Plan is consistently enforced, etc.
- Notification to local public health agency within 48 hours of an “outbreak” occurring, including providing the total number of COVID-19 cases and certain information about each case (name, occupation, contact information, workplace location(s), business address of worksite, hospitalization/fatality status, and NAICS code of workplace).

Stricter procedures apply in the case of a “major outbreak”, which arises if 20 or more COVID-19 cases occur in a worksite within a 30-day period. These additional procedures apply until there

are no new cases in the workplace for a 14-day period. In addition to the generally-applicable rules outlined above, public employers must:

- Provide access to no-cost testing for COVID-19 to employees at “exposed workplaces” on a bi-weekly basis until the “major outbreak” ends.
- Investigate and correct COVID-19 workplace hazards, including increasing building facility filtration and/or halting on-site operations until hazards have been addressed.
- Notify local public health agency within 48 hours of a “major outbreak” occurring of the same type of information described above for “outbreaks.”

## **Safety Standards For Public Employer-Provided Transportation**

Finally, Cal/OSHA issued additional safety requirements for transportation provided by public employers, including ride-share vans, shuttle vehicles, car-pools, and privately chartered vehicles. These rules would not apply if all occupants in the vehicle reside in the same household, such as family members.

These new regulations apply regardless of the duration of the ride, and include the following:

- All vehicle occupants must be separated by at least three feet, regardless of the vehicle’s seat capacity.
- All vehicle occupants must wear face coverings at all times while in the vehicle.
- The vehicle’s windows must be kept open, except in cases of extreme temperature or inclement weather conditions.
- Prioritization rules, in which employees residing in different households and working at different work sites may use employer-provided transportation only if no alternatives exist.

## **Consequences For Noncompliance**

Cal/OSHA’s emergency action did not include changes to its current enforcement scheme, or otherwise provide for additional or different penalties for noncompliance. As a general matter, Cal/OSHA’s Enforcement Branch has the authority to investigate workplace hazards or conditions, including those identified in a complaint filed by employees or union representatives. Following an investigation, Cal/OSHA can issue citations, monetary fines, and orders prohibiting use (“OPU(s)”). Monetary fines escalate in amount based on the severity of the hazard, or the recurring nature of the violation. Cal/OSHA has published a table of recent citations issued for COVID-19-related violations, including citations against public agencies.<sup>5</sup> As to OPUs, AB 685 expands Cal/OSHA’s authority by permitting the agency (starting on January 1, 2021) to shut down entire worksites that expose employees to an imminent hazard related to COVID-19 infection. Cal/OSHA has not clarified how these new emergency regulations impact this general enforcement regimen, including when workplace investigations are triggered or whether OPUs will be issued for non-compliance with these expansive new regulations.

## PRACTITIONER TIPS

In response to these emergency regulations, public employers should:

- Carefully review Cal/OSHA's [new regulations](#).
- Develop workplace-specific protocols to ensure compliance (see [Cal/OSHA's Model COVID-19 Prevention Plan \(November 2020\)](#) [downloads Word file]).
- Monitor Cal/OSHA's website for subsequent guidance on these expansive regulations, as public health guidance on the various aspects of the present pandemic is updated frequently and subject to change. The following documents address the new emergency regulations:
  - [December 1, 2020, DIR News Release](#)
  - [Cal/OSHA One-Page Fact Sheet \(November 30, 2020\)](#)
  - [DIR COVID-19 Emergency Temporary Standards Frequently Asked Questions \(December 2020\)](#)

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<sup>1</sup> Cal/OSHA follows the same definition of “close contact” recently adopted by the CDC and CDPH.

<sup>2</sup> These notice requirements overlap in several respects with those outlined in recent Assembly Bill 685, which becomes effective on January 1, 2021.

<sup>3</sup> This portion of Cal/OSHA's regulations does not directly address surveillance testing programs (periodic tests of all personnel). Please note that surveillance testing programs are currently recommended by state and local public health officials in various employment contexts (e.g. schools, skilled nursing, etc.), thus suggesting a narrow reading of the Cal/OSHA regulations in this regard. Employers should consult counsel to ascertain if a particular testing regimen, including surveillance testing, remains viable.

<sup>4</sup> The reporting requirements issued by Cal/OSHA overlap in several respects with those outlined in recent Assembly Bill 685, which becomes effective on January 1, 2021.

<sup>5</sup> For example, one public agency received citations for violations involving (i) failure to immediately report a COVID-19-related fatality to Cal/OSHA, (ii) failure to implement screening and referral procedures for persons exhibiting COVID symptoms, and failure to implement procedures for excluding persons exposed to COVID-19.