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OSHA Alert

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Cal/OSHA Standards Board readopts COVID-19 ETS, extending standards through December 31st

By Rachel L. Conn

This third readoption arrives as the Cal/OSHA Standards Board and the California legislature consider additional COVID-19 mitigation measures.



What's the Impact?

- / The readopted ETS revises and clarifies some of the outdated provisions from earlier versions
- / Only minor changes to existing employee notification and "exposed group" provisions
- / The future of the permanent standard is unclear—employers should be on the lookout for further information and feedback opportunities

The California Division of Occupational Safety and Health Standards Board (Standards Board) voted late last week to readopt (for the third time) the COVID-19 Emergency Temporary Standards (COVID-19 ETS) 8 CCR §§ 3205, 3205.1, 3205.2, 3205.3, and 3205.4. Although the readopted COVID-19 ETS does revise and clarify some outdated provisions, it comes as many other states (as well as many other public health agencies) are significantly rolling back restrictions.

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Although California Government Code section 11346.1 (h) allows for no more than two readoptions of an emergency temporary standard, Governor Newsom's Executive Order N-23-21 waived this subsection "to permit a third readoption of the Emergency Temporary Standards . . . so long as the effective period of the third readoption does not extend beyond December 31, 2022." This readoption also allows additional time for the Standards Board to adopt a permanent standard.

The Governor's use of his executive power to affect the ETS is nothing new. Since its original adoption, the COVID-19 ETS has been criticized for its lack of flexibility, which prevents it from adapting to an evolving virus and corresponding public health guidance. This was previously remedied by executive orders such as N-84-20, which supersede certain exclusion periods.

Highlights of the revised ETS include:

- / Revisions to the "close contact" and "COVID-19 test" definitions
- / Removal of all vaccination distinctions (the "fully vaccinated" definition removed in its entirety)
- / Removal of cleaning and disinfecting procedures
- / Addition of a provision requiring employers to review California Department of Public Health (CDPH) guidance on "close contacts" and "develop, implement, and maintain effective policies to prevent transmission of COVID-19 by persons who had close contacts."
- / Revisions to return to work criteria for COVID-19 cases to align more with CDPH guidance.

Areas that did not see major revisions include the employee notification section and the definition of "exposed group" as used in 8 CCR §§ 3205.1 and 3205.2, despite many employers continuing to question their effectiveness.

The current ETS expires on May 6, 2022. The revised ETS will be submitted to the Office of Administrative Law, which will have ten days to review and approve. Once approved, the ETS will become effective after filing with the Secretary of State. Note that the California Legislature is also busy potentially passing additional COVID-19-related statutes, including extending the employee notice requirements under AB 685 (currently set to expire in 2023).

Although the ETS will now be in place until December 31, 2022, the future of the permanent standard is still unclear. Specifically, several Standards Board members stated that they do not want to see the ETS in its current form adopted as a permanent standard. Employers should be on the lookout for notice regarding how to provide feedback for the permanent standard once available.

Nixon Peabody will continue to provide updates on issues facing employers and up-to-date and creative solutions to assist them in navigating through these turbulent times.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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