

MAY 12, 2021



Cal/OSHA releases overhauled COVID-19 prevention emergency standard draft for proposed readoption

By Rachel Conn and Maritza Martin

On May 7, 2021, the California Occupational Safety and Health Standards Board (Standards Board) released the heavily revised COVID-19 Prevention (8 CCR §§ 3205, 3205.1, 3205.2, 3205.3, and 3205.4) Emergency Temporary Standard (ETS) [proposed text](#) for readoption. Employers, who have been critical of the 31-page ETS since it went into effect on November 30, 2020, have been highly anticipating the revisions (our analysis of the current ETS can be found in our [previous alert](#)). Employers have always been concerned that the ETS is too rigid and does not allow employers to adapt to changing public health guidance, including the increase in vaccinated workers. The proposed text does appear to address some of these concerns. Notable, proposed changes to the ETS include:

- Revising the ETS' exemptions to include “[e]mployees teleworking from a location of the employee’s choice, which is not under the control of the employer”;
- Dropping the term “COVID-19 exposure” and replacing it with “close contact,” which aligns with public health guidance nomenclature. An exception also clarifies that “[e]mployees have not had a close contact if they wore a respirator required by employer and used it in compliance with section 5144, whenever they were within six feet of the COVID-19 case during the high-risk exposure period.”
- Dropping the term “exposed workplace” and replacing it with the term “exposed group,” which revises the definition and includes several exceptions.
- Revising the definition of “face covering” to mean a surgical mask, a medical procedure mask, a respirator worn voluntarily, or a tightly woven fabric or non-woven material of at least two layers. A face covering has no visible holes or openings and must cover the nose and mouth. Notably, the definition **does not include** a scarf, ski mask, balaclava, bandana, turtleneck, collar, or single layer of fabric.
- Including a definition for “fully vaccinated,” which means the employer has **documentation** showing that the person received, at least 14 days prior, either the second dose in a two-dose COVID-19 vaccine series or a single-dose COVID-19 vaccine. Vaccines must be FDA approved or have an emergency use authorization from the FDA.

- The draft includes several exemptions for “fully vaccinated” workers including to the following requirements:
 - Make available a COVID-19 test at no cost for employees who were fully vaccinated before the close contact and do not have COVID-19 symptoms;
 - Physical distancing requirements for locations in which all employees are fully vaccinated;
 - Face coverings when all persons in a room are fully vaccinated and do not have COVID-19 symptoms or are outdoors and do not have COVID-19 symptoms;
 - Exclude from the workplace COVID-19 cases if they were fully vaccinated before they became COVID-19 cases and do not have COVID-19 symptoms, when allowed to remain at the workplace by the local public health department; and
 - Exclude from the workplace after close contact with a COVID-19 case when they are fully vaccinated before the close contact and do not have COVID-19 symptoms.
- Revising the notice of exposure requirement to further align with AB 685.
- Revising several requirements to only “apply before July 31, 2021,” including:
 - The subsection on physical distancing;
 - The requirement to provide solid partitions at “work stations” when physical distancing cannot be maintained; and
 - The requirement to evaluate the need for respiratory protection when physical distancing is not feasible.
- Including additional requirements that will go into effect starting July 31, 2021:
 - Employers shall provide respirators for voluntary use to all employees working indoors who are not fully vaccinated; and
 - Employers shall make COVID-19 testing available at no cost to employees with COVID-19 symptoms who are not fully vaccinated, during employees’ paid time.
- Revising to include additional training requirements:
 - When respirators are provided for voluntary use, how to properly wear the respirator, how to perform a seal check according to the manufacturer’s instructions each time a respirator is worn, and how facial hair can interfere with a seal;
 - “COVID-19 ... [as] an airborne disease” and how “N95s and more protective respirators protect the users from airborne disease while face coverings primarily protect people around the user; and
 - The importance of vaccination against COVID-19 and how to access a vaccination.
- The text also includes several revisions to the sections on Multiple COVID-19 Infections and COVID-19 Outbreaks, Major COVID-19 Outbreaks, COVID-19 Prevention in Employer Provided Housing, and COVID-19 Prevention in Employer-Provided Transportation.

The Standards Board is expected to vote on re-adoption of the proposed ETS language at its May 20, 2021, meeting. While the Standards Board will take public comments at the meeting, based on the previous Standards Board meeting on the ETS, the Standards Board is unlikely to make any substantive changes before voting. If the Standards Board adopts the proposed text, the Office of Administrative Law (OAL) will have ten calendar days to review the submission. If approved (which it most likely will be), it will become effective after being filed with the secretary of state.

Accordingly, employers should now review the proposed text, submit public comments for the Standards Board's consideration, and be prepared to make and implement substantial changes to their COVID-19 Prevention Program and their daily occupational safety and health practices if the Standards Board and OAL approve the proposed changes.

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

- Rachel Conn, 415-984-8216, rconn@nixonpeabody.com
 - Maritza Martin, 415-984-8350, mmartin@nixonpeabody.com
 - Benjamin Kim, 213-629-6090, bkim@nixonpeabody.com
-