

# Labor & Employment Alert

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## Cal/OSHA Issues Emergency COVID-19 Regulations

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### Key Points

- Cal/OSHA issued new emergency regulations regarding COVID-19 prevention and outbreaks in the workplace that are applicable to nearly all California employers, which were approved and became effective November 30, 2020.
- The regulations require employers to implement a written “COVID-19 Prevention Program,” provide paid sick leave to certain employees affected by COVID-19, notify employees and third parties of potential COVID-19 exposure, provide testing to employees under certain circumstances, and record and track COVID-19 cases.
- Although California employers may already be subject to similar requirements through state or local government orders, the Cal/OSHA regulations are more extensive and more likely to be enforced through civil penalties. Accordingly, California employers should review and revise their current COVID-19 policies in compliance with these new standards.
- Employers should be mindful that other states—including Oregon, Michigan and Virginia—have implemented similar COVID-19 emergency occupational safety and health regulations during the pandemic and that the incoming Biden administration could well look to one or more of these state standards as a model for a federal rule.

On November 30, 2020, California approved temporary emergency regulations proposed by the Division of Occupational Safety and Health (“Cal/OSHA”) regarding COVID-19 prevention and outbreaks in the workplace (available [here](#)). Effective immediately, these regulations apply to nearly all California employers and impose a number of stringent new requirements related to COVID-19 prevention, reporting, testing, paid sick leave and record-keeping. The regulations do not apply to employees working from home, employees covered under the Cal/OSHA Aerosol Transmissible Diseases standard and places of employment with only one employee who does not interact with others. Although the new standards are extensive and should be reviewed by employers in detail, the most significant requirements are summarized below.

### COVID-19 Prevention Program

### Contact Information

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The new regulations require employers to implement a written “COVID-19 Prevention Program,” which includes identifying risks of exposure, implementing effective policies and procedures to correct unsafe conditions, and ensuring that workers wear face coverings. The elements required under this program mirror California’s existing Injury and Illness Prevention Plan requirements. Cal/OSHA has provided a [Model COVID-19 Prevention Program](#) to assist employers with developing their own written program.

### **Exclusion from Work and Paid Sick Leave**

Under the new regulations, employers must exclude from the worksite employees who (1) have tested positive for COVID-19; (2) have been ordered by public health authorities to isolate; or (3) have been exposed to COVID-19. Exposure under the third category is defined as “being within six feet of a COVID-19 case for a cumulative total of 15 minutes or greater in any 24-hour period within or overlapping with the ‘high-risk exposure period.’” The “high-risk exposure period” differs depending on whether the individual develops symptoms or tests positive but remains asymptomatic.

Excluded workers may not resume work until they satisfy certain return-to-work criteria. Notably, the new standards provide that if an employee falls into any above category and is otherwise able and available to work, the employer must continue the employee’s pay, benefits and seniority, and provide job protection. This provision does not apply to any period of time during which the employee is unable to work for reasons other than protecting persons at the workplace from possible COVID-19 transmission, and does not apply where the employer demonstrates that the COVID-19 exposure is not work related. Additionally, although employers may use existing sick leave benefits for this purpose, the new Cal/OSHA requirement does not cap the amount of paid sick leave available, so employers could potentially be required to provide more paid leave than currently required under other paid sick leave laws or offered under their policies.

### **Reporting and Testing**

The regulations additionally provide that employers must follow new requirements for testing and notifying public health departments of workplace outbreaks. In the event of potential COVID-19 exposure in the workplace, employers must offer COVID-19 testing to all potentially exposed employees at no cost to the employees during their work hours. Employers must report information about COVID-19 cases at the workplace to the local health department wherever required by law. More onerous requirements apply in the event of a workplace outbreak. An outbreak is defined as three or more cases in a workplace in a 14-day period, or when any workplace is otherwise identified as the location of an outbreak by a local health department, and a major outbreak occurs when there are 20 or more cases in a 30-day period. In either event, employers are required to provide free COVID-19 testing to all employees who may have been exposed during the period of the outbreak. In the event of an outbreak, employees exposed in the workplace must be tested immediately and then again one week later. The employer must continue to test employees at least once a week (or more frequently if recommended by the local health department) until the workplace no longer qualifies as an outbreak. If a major outbreak occurs, employers must provide testing twice a week (or more frequently if recommended by the local health department) to all exposed employees until no new cases are detected for a 14-day period.

Although the regulations do not require that the testing be provided on the employer's physical premises, it does require that it be offered during the employee's working hours and employees must be compensated for their time spent obtaining the test. If the testing occurs off-site, employees should likewise be reimbursed for their mileage to and from the testing location. Employers must further contact the local health department immediately and not later than 48 hours after learning of an outbreak, and immediately report any COVID-19-related death to the nearest Cal/OSHA enforcement district office.

### Exposure Notice to Employees

The Cal/OSHA regulations further supplement AB 685, a recently passed California law (effective January 1, 2021) that imposes requirements regarding written notice to employees of potential COVID-19 exposure in the workplace. The Cal/OSHA regulations apply to independent contractors as well as employees, and like AB 685 require notice within one business day. In contrast to AB 685, the new regulations require employers to report the total number of cases as well as the hospitalization or fatality status. Employers must also inform employees and their authorized representatives of COVID-19 cleaning and disinfection protocols.

### Record Keeping

Although Cal/OSHA already requires employers to record certain events such as work-related illness resulting in death and significant injury or illness diagnosed by a health care professional, the new regulations impose more rigorous record keeping requirements. Employers must maintain a record of and track all COVID-19 cases in the workplace and make that information available to employees, authorized employee representatives or as otherwise required by law.

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California employers should carefully review and revise their COVID-19 policies in compliance with these new regulations. Cal/OSHA can enforce noncompliance with the regulations through civil penalties, depending on the severity of the violation. Cal/OSHA has indicated that it will consider an employer's good faith efforts in working towards compliance, but may be more strict about certain requirements, including eliminating health hazards and implementing testing during an outbreak. The emergency rule will be in effect for 180 days and can be renewed thereafter for 90 days at a time.

Employers should also be aware that a number of other states, including Oregon, Michigan and Virginia, have implemented similar COVID-19 emergency regulations to protect the safety and health of employees during the pandemic. Further, the incoming Biden administration could well look to one or more of these state standards as a model for a federal rule.

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