

CAL-OSHA ISSUES MANDATORY EMERGENCY COVID-19 REGULATIONS

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Employment Law Reporter, Ervin Cohen & Jessup LLP

On November 30, 2020, Cal-OSHA's proposed temporary COVID-19-related emergency regulations became effective. The new regulations, which are found here, will remain in effect for 180 days, unless they are adopted for a longer period.

The new regulations apply to most California employees, only excluding employees working from home, an employee at a site where the employee does not have contact with others and employees covered by Cal-OSHA's Aerosol Transmissible Diseases standard (applies to certain healthcare facilities and labs).

Under the new regulations, employers must adopt and implement a written COVID-19 Prevention Program (CPP), which can be a part of or separate from the employer's regular Injury and Illness Prevention Program. In this regard, employers should be aware that the new CPP requirements will likely require supplementation of existing COVID-19 prevention programs.

The required CPP components include: a communication system to inform employees of COVID-19 preventions procedures (testing, symptoms, illnesses and an employee reporting system to report exposures without retaliation); employee training and instruction; identification and evaluation of hazards (including consideration of air quality and filtration systems, and analysis of times, places, surfaces and occurrences of potential exposure); a system to investigate and respond to COVID-19 cases, including providing notice to employees and independent contractors within one business day of potential exposure without disclosing personal identifying information of the COVID-19 case; a system to correct COVID-19 hazards, including period inspections; requirements regarding physical distancing, face coverings and other personal protective equipment, as necessary; site-specific methods to reduce exposure; positive COVID-19 case and illness recording; removal of workers exposed to or positive for COVID-19; return to work criteria; testing and health department notice requirements; and infection prevention in employer-provided housing and transportation to and from work.

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Employers should note that the emergency Cal-OSHA notice requirements are not as expansive as the employer requirement to provide notice to employees of potential COVID-19 exposure under AB 685, which will become effective on January 1, 2021. As we reported here, employers learning of a worksite potential COVID-19 exposure under AB 685 must provide written notice to all employees, and the employers of subcontracted employees, who were on the premises at the same worksite as the qualifying individual within the infectious period that they may have been exposed to COVID-19.

An important new requirement is that an employer must continue an employee's earnings, seniority, and all other rights and benefits for any employee who is able to and available for work, but who is excluded from the workplace due to a positive COVID-19 test, a local or state isolation order, or during a 14-day period after COVID-19 exposure or positivity, if the employee was within 6 feet of the positive individual for a cumulative total of 15 minutes or more during a 24-hour period. However, if an employer can prove that an employee's exposure was not work-related, no continuation of pay or benefits is required during the period of any exclusion from the workplace.

To provide continued earnings, employers may use employer-provided sick leave and benefits from other public sources. Public sources may include government-provided wage replacement when Workers' Compensation does not apply. As we previously reported here, SB 1159, Workers' Compensation will apply if an employee tests positive for or is diagnosed with COVID-19 under certain circumstances. Emergency paid leave may also be available under the federal Families First Coronavirus Response Act (FFCRA), as we previously reported here. However, FFCRA paid leave requirements will expire on December 31, 2020 unless the Emergency Paid Sick Leave Act established by the FFCRA is extended beyond that date.

Certain protocols must be implemented if there is a COVID-19 workplace outbreak of three or more cases in a 14-day period. These include providing testing at no cost to employees during their working hours both immediately after an outbreak and one week later, excluding all employees exposed to or having COVID-19; investigating the exposure; reviewing the employer's policies and controls in place and taking corrective action as necessary; documenting the investigation, review and corrective action taken; and notifying the local health department within 48 hours after knowledge of the outbreak. Employers cannot require a negative test in order for an employee to return to work. Additional measures must be taken in the event of a major workplace outbreak, defined as 20 or more cases within a 30-day period.

The failure to comply with the various requirements may expose an employer to a potentially serious and willful claim, and citations from Cal-OSHA. Guidance issued by Cal-OSHA regarding the regulations is expected soon.

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