



California adopts emergency COVID-19 standards

Employment Alert

1 December 2020

By: Ben Gipson

On November 19, 2020, California's Division of Occupational Safety and Health Standards Board adopted emergency temporary standards to protect the workplace from hazards related to coronavirus disease 2019 (COVID-19). Effective Monday, November 30, 2020, pursuant to anticipated approval by the Office of Administrative Law, these standards impose significant requirements on employers. Notably, most companies with California-based employees will be required to implement written COVID-19 Prevention Plans subject to specific criteria, provide training and instruction related to COVID-19 safety, and offer paid leave to individuals with COVID-19 exposure.

If approved, the emergency standards will remain in effect for at least 180 days and may be extended.

Covered employers

All California employers are subject to the new California Division of Occupational Safety and Health (Cal/OSHA) standards except for (a) employers with one employee who does not have contact with other individuals; (b) employees working from home; and (c) employees covered by Cal/OSHA's Aerosol Transmissible Diseases standard, which is

generally applicable to work at certain health care facilities, laboratories, and others.

Paid time off requirement

The new emergency standards provide that any employee excluded from the workplace due to a positive COVID-19 test must be provided paid sick leave, unless the employee is unable to work for reasons other than protecting persons at the workplace from possible COVID-19 transmission, or the employer can demonstrate that the COVID-19 exposure is not work related – which is unlikely given the California presumption under its workers compensation law that an employee who was working at a facility and contracted COVID-19 contracted that at work.

Employers must also provide employees with information regarding COVID-19-related benefits, including those available as workers' compensation, under the federal Families First Coronavirus Response Act (FFCRA), the California Labor Code, and any leave guaranteed by contract.

Notably, however, the standards do not indicate that an employee will be limited to only being allowed such leave once. This may mean that an employee may be excluded from the workplace on more than one occasion. Employers can satisfy these paid time off obligations through employer-provided employee sick leave benefits and/or supplemental paid sick leave offered in response to COVID-19, but it is unclear from the new regulations what paid leave must be provided when an employee has exhausted his or her paid leave entitlements, which is occurring more regularly now as employees have used their paid sick leave and FFCRA earlier in the year.

COVID-19 prevention plan

The new emergency standards primarily set forth that covered employers must provide a written COVID-19 Prevention Plan that incorporates various requirements, including: a system for communicating with employees about COVID-19 prevention procedures, testing, and systems for reporting potential exposure without fear of retaliation; procedures for investigating and responding to positive COVID-19 cases in the workplace; identifying and correcting any COVID-19 hazards; physical distancing and face coverings; and recording positive COVID-19 cases and informing public health departments of any outbreaks.

Further, the COVID-19 Prevention Plan may be developed as a standalone document or be incorporated into an employer's existing Injury and Illness Program. Due to the specific language that must be included in a prevention plan under these emergency standards, employers are strongly encouraged to carefully examine language if incorporating these Cal/OSHA requirements into existing plans.

Outbreaks in the workplace

Following any "outbreak" of COVID-19 in the workplace, which is defined as three or more COVID-19 cases within a 14-day period at a single location or when a local health department identifies a place of employment as the location of a COVID-19 outbreak, the standards impose numerous requirements:

- Immediately provide testing (as discussed below)
- Exclude from the workplace all employees who test positive for or were exposed to COVID-19
- Investigate the outbreak and implement any necessary corrective action
- Document the investigation pursuant to the standards and any corrective action implemented as a result and
- Notify the local health department within 48 hours of notice of the outbreak.

If there is a "major outbreak" of COVID-19, defined as 20 or more COVID-19 cases in an exposed workplace within a 30-day period, in addition to the requirements set forth above, employers must also:

- Increase COVID-19 testing at least twice a week to all exposed employees within the 30-day period and who remain at the workplace and
- Investigate the outbreak and implement any necessary corrective action, including potential stoppage of operations until corrections are made.

Testing requirements

Importantly, the standards require employers to now offer COVID-19 testing at no cost, during working hours (so employees are compensated for going to get these tests), to all employees who were exposed to COVID-19 in the

workplace. All such employees must be provided a follow-up test one week later, as well as continued testing at least once a week during the quarantine period of 14 days from the date of the COVID-19 outbreak.

Exclusion from and return to work

If an order to isolate or quarantine is issued to an employee by a local or state health official, the employee shall not return to work until that specified period is completed or the order is lifted. If no period was specified, the period shall be 10 days from the time the order to isolate was effective, or 14 days from the time the order to quarantine was effective.

Any employees with COVID-19 cases or those exposed to COVID-19 within the past 14 days must additionally be excluded from the workplace until they have satisfied specific return-to-work criteria. An exception is if the employee is reassigned to work in an area where they do not have contact with other individuals until the return-to-work criteria has been met.

Asymptomatic employees. Any employee who tests positive for COVID-19 but does not display any symptoms shall not return to work for a minimum of 10 days since the date of specimen collection of the first positive COVID-19 test.

Symptomatic employees. Employees who test positive for COVID-19 and develop symptoms shall not return to work until:

- At least 24 hours have passed since a fever of 100.4 or higher has resolved without the use of fever-reducing medications
- COVID-19 symptoms have improved and
- At least 10 days have passed since COVID-19 symptoms first appeared

During the exclusionary period, however, employers are obligated to continue providing and maintaining the employee's earnings, seniority, and benefits.

Importantly, the new standards prohibit an employer from requiring a negative COVID-19 test for an employee to return to work. What is required is time, rather than tests, before employees can return.

Interaction with county protocols

In addition to these new statewide requirements, California counties have begun announcing their own revised COVID-19 protocols. For example, Los Angeles County recently announced a new stay-at-home order to remain in effect for three weeks through December 20, 2020. The order requires that certain businesses abide by restricted occupancy limits – specifically, essential retail stores may only operate at 35% maximum occupancy, while non-essential retail is restricted to 20 percent maximum occupancy. Santa Clara County has issued a more restrictive protocol which, for example, prohibits contact sports at all levels, including pro football franchises. Employers are urged to keep apprised of any updates to this order and consider allowing employees to work remotely whenever possible.

Next steps

California employers are strongly encouraged to evaluate their current COVID-19 protocol as soon as possible to ensure compliance with the new standards, including adoption of a written COVID-19 Prevention Plan. While many employers likely already have some protocols in place, the specific requirements provided by Cal/OSHA's emergency standards may require that employers update their existing procedures and/or documentation of such plan to remain compliant with the rapidly changing landscape.

If you have any questions regarding this development, please contact the author or your DLA Piper relationship attorney.

Please visit our Coronavirus Resource Center and subscribe to our mailing list to receive alerts, webinar invitations and other publications to help you navigate this challenging time.

This information does not, and is not intended to, constitute legal advice. All information, content, and materials are for general informational purposes only. No reader should act, or refrain from acting, with respect to any particular legal

matter on the basis of this information without first seeking legal advice from counsel in the relevant jurisdiction.

AUTHORS



Ben Gipson

Partner

Los Angeles (Century City) | T: +1 310 595 3000

ben.gipson@dlapiper.com
