Cal-OSHA's Emergency COVID-19 Regulation §3205

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California's employers continue to be hit with more and more regulatory obligations.

Cal-OSHA has added to this list of obligations by enacting an "emergency regulation" that creates substantial and extensive COVID-19 protection requirements for employers.

This move comes despite broad opposition from the employer community urging rejection of the 21-page regulation on quite a few grounds. The regulation was proposed by labor.

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California's Office of Administrative Law approved the standard known as General Industry Safety Orders §3205.

One silver lining written into the regulation is that it will expire in six months unless readopted for up to two consecutive 90-day periods. The text of the regulation can be found here: Emergency COVID Regulation §3205

Employer Requirement Summary:

Effective immediately

- Employers are required to develop, implement, and maintain a written COVID-19 Prevention Program, either as part of their Injury and Illness Prevention Program (IIPP) or as a standalone document.
- Employers must identify, evaluate, and correct COVID-19 hazards in their workplace.
- Employees and their representatives must also be allowed to participate in the identification and evaluation procedures.
- Employers must investigate and "respond effectively" to COVID-19 cases.
- Employers must notify employees who might be exposed within one day, offering them testing at no cost.
- Employers must report COVID-19 cases in the workplace to local health authorities.
- The regulation has specific return-to-work criteria for employees who are infected with COVID-19.
- The emergency standard also requires employers to implement physical distancing (unless impossible), mask-wearing, and sanitation facilities.
- The rule includes additional and more stringent requirements for multiple COVID-19 infections and outbreaks in the workplace.
- It also includes controversial prevention procedures for employer-provided housing and transportation.

According to the Cal-OSHA Reporter:

> "Employers insist that the standard does not meet the Administrative Procedures Act's necessity, clarity, and consistency requirements. They also contend it conflicts with the recently passed COVID-19 reporting requirements and signed AB 685 and SB 1159."

Cal-OSHA Reporter also states that:

> "Now that the controversial regulation is approved and in effect, employers are scrambling to figure out how to comply. DOSH Chief Doug Parker told the Standards Board as it prepared to vote on the proposal, "Some employers are going to need more time. We intend to fully take that into account in determining how they're implementing the rule."

He also noted that the Division would consider "good-faith" efforts on the part of employers and will offer compliance assistance.



Applicability of COVID-19 Emergency Standards

These emergency standards are applicable to most employers in California. The new standards do not apply to employees when covered by Cal-OSHA's Aerosol Transmissible Diseases standard, which applies to work at certain healthcare facilities, laboratories, and a limited number of other employers. Additionally, the new standards do not cover employees who work from home or employers with only one employee if the employee has no contact with others.

COVID-19 Prevention Program

The main requirement of the emergency standards is that employers must develop, implement, and maintain a written COVID-19 Prevention Program (CPP). The standard states that the CPP may be integrated as part of an employer's IIPP or maintained in a separate, standalone document.

According to Cal-OSHA, the CPP must provide for the following:

- System for communicating information to employees about COVID-19 prevention procedures, testing, symptoms, and illnesses, including a system for employees to report exposures without fear of retaliation.
- Identification and evaluation of hazards screening employees for symptoms, identifying workplace conditions and practices that could result in potential exposure.
- Investigating and responding to cases in the workplace.
- Responding immediately to potential exposures by following steps to determine who may have been exposed, providing notice within one business day about potential exposures (similar to the requirements under AB 685), and offering testing to workers who may have been exposed.
- Correcting COVID-19 hazards, including correcting unsafe conditions and work practices.
- Providing effective training and instruction with respect to COVID-19 hazards.
- Implementing physical distancing procedures to ensure workers stay at least six feet apart from other people if possible.
- Providing face coverings and ensuring they are worn through enforcement procedures.
- Adopting site-specific strategies such as changing work schedules and providing personal protective equipment to reduce exposure.
- Positive COVID-19 case and illness recording requirements.
- Ensuring the CPP is accessible to employees and employee representatives.
- Removal of COVID-19 exposed workers and COVID-19 positive workers from the workplace with measures to protect pay and benefits.
- Criteria for employees to return to work after recovering from COVID-19.
- Requirements for testing and notifying public health departments of workplace outbreaks (three or more cases in a workplace in a 14-day period) and major outbreaks (20 or more cases within a 30-day period).
- Specific requirements for infection prevention in employer-provided housing and transportation to and from work.

The bullet points above provide a summary.



The standard is very detailed, with numerous burdensome requirements.

Thus, while countless employers have already implemented a COVID-19 response plan, quite a few of those requirements will likely change or the policies or procedures be significantly expanded.

The following requirements are likely to be new to most employers:

- Employers must offer COVID-19 testing at no cost to all employees during work hours who have had a potential COVID-19 exposure in the workplace.
- Employers must exclude from the workplace any employees with positive COVID-19 cases, and those who were exposed to COVID-19, until they satisfy certain return-to-work criteria.
  - » Employers must continue and maintain the excluded employee's earnings, seniority, and benefits while they are off work.
  - » As such, this requirement essentially constitutes a new form of paid leave that is available unless:
  1. The employee is unable to work for reasons other than protecting persons at the workplace from COVID-19 transmission, or
  2. The employer can demonstrate the exposure was not work-related.
  - » Additionally, there is no limit on the "leave" in the requirement, meaning an employee could receive it multiple times.
- Employers cannot require a negative COVID-19 test for an employee to return to work.
- Employers must implement specific protocols if there is an outbreak in the workplace, including the following:
  - » Providing testing (immediately and 1 week later) to all employees in the exposed workplace during the outbreak period;
  - » Excluding all COVID-19 cases and employees with a COVID-19 exposure;
  - » 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 must implement additional protocols if there is an outbreak of 20 or more COVID-19 cases within a 30-day period, until there are no new cases for a 14-day period. These include conducting twice-weekly testing and evaluating whether respiratory protection should be required, and whether the employer's operations should cease.

Takeaway

Recognizing the ambiguity in some of the requirements and complications with immediate compliance, Cal-OSHA has stated that it will publish guidance and FAQs soon. However, with the short timeline for implementation and multiple required actions that will be new to the employer and its employees, employers should begin immediately creating and implementing a compliant CPP. Employers with any questions or concerns should consult with experienced employment counsel to ensure they are compliant.

As you are aware, things are changing quickly and there is a lack of clear-cut authority or bright line rules on implementation. This article is not intended to be a one-size fits all guidance, but instead represents our interpretation of where things are currently.