



LAW UPDATE LABOR AND EMPLOYMENT

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THEY ARE HERE AND NOW IN EFFECT! CAL/OSHA COVID-19 PREVENTION NON-EMERGENCY REGULATIONS

The Cal/OSHA COVID-19 Prevention Non-Emergency Regulations (Non-Emergency Regulations) went into effect on February 3, 2023. Cal/OSHA has provided a useful courtesy copy that illustrates the differences between the Non-Emergency Regulations and the Emergency Temporary Standards (ETS).¹ The Non-Emergency Regulations will remain in effect for two years after the effective date. The recordkeeping requirements of the Non-Emergency Regulations will be in effect for three years.

Cal/OSHA has posted a Frequently Asked Questions (FAQ) page (available in English and Spanish) with detailed questions and answers regarding the Non-Emergency Regulations.² In addition, Cal/OSHA has made available a revised COVID-19 Model Prevention Program.³ There is also a summary fact sheet released by Cal/OSHA after the Non-Emergency Regulations were first approved on December 15, 2022 that is accessible in English and Spanish.⁴ Cal/OSHA has also announced it will be providing training on the Non-Emergency Regulations in a webinar format.

While the Non-Emergency Regulations have many similarities with the earlier ETS, there are some key differences. One of the key differences is the focus on consistently allowing for automatic flexibility in the Non-Emergency Regulations if changes are made to guidance in the future from the California Department of Public Health (CDPH). This update outlines the key changes to be aware of in working through the Non-Emergency Regulations and the implementation impacts for schools.

Close Contact Masking

The Isolation and Quarantine Guidance issued by the CDPH (CDPH Isolation and Quarantine Guidance) establishes the return-to-work criteria for close contacts.⁵ The current isolation

¹ <https://www.dir.ca.gov/oshsb/documents/COVID-19-Prevention-Non-Emergency-txtcourtesyfinal.pdf>

² English: <https://www.dir.ca.gov/DOSH/Coronavirus/Covid-19-NE-Reg-FAQs.html>;

Spanish: <https://www.dir.ca.gov/DOSH/Coronavirus/Spanish/Covid-19-NE-Reg-FAQs.html>

³ https://www.dir.PPca.gov/dosh/dosh_publications/PPP.doc

⁴ English: <https://www.dir.ca.gov/dosh/coronavirus/Non-Emergency-regs-summary.pdf>;

Spanish: <https://www.dir.ca.gov/dosh/coronavirus/Non-Emergency-regs-summary-ES.pdf>

⁵ <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-on-Isolation-and-Quarantine-for-COVID-19-Contact-Tracing.aspx>

and quarantine periods from the CDPH are contained in guidance issued on November 9, 2022. If that guidance from the CDPH changes, it will automatically become the new return-to-work criteria under the Non-Emergency Regulations.

Note that there had previously been a conflict in the language in the CDPH Isolation and Quarantine Guidance and the ETS in Table 1 and Table 2 regarding masking requirements. This conflict has been partially remedied in the Non-Emergency Regulations. In Table 1, the CDPH Isolation and Quarantine Guidance advises that a COVID-19 positive individual “should wear a well-fitting mask around others for a total of 10 days, especially in indoor settings.” However, in Table 1 of the Non-Emergency Regulations, this is a **mandatory** requirement: “Employees must wear face coverings around others for a total of 10 days.”

Conversely, the language in Table 2 is now consistent between the CDPH Isolation and Quarantine Guidance and the Non-Emergency Regulations. Both now use the word “should” regarding masking. An asymptomatic individual who is exposed to someone with COVID-19 “should wear a well-fitting mask around others for a total of 10 days, especially in indoor settings and when near those at higher risk for severe COVID-19 disease.”

Notice to All Employees at Worksite

An employer is still required under the Non-Emergency Regulations to provide written notification to all employees (and, if applicable) their union representatives and independent contractors who were at the worksite at the same time as the COVID-19 case during the infectious period of any potential exposures within one business day (and notifying any other employer who has potentially exposed employees in the workplace). California Labor Code section 6409.6 has been amended to give employers some flexibility in this regard.⁶

An employer could elect to prominently display a notice in all places where notices to employees regarding workplace rules and regulations are customarily posted containing specific information listed in section 6409.6(a)(1)-(4) regarding the exposure. The notice must be posted within one business day from when the employer receives notice of the potential exposure and must remain posted for not less than 15 calendar days. If the employer posts other workplace notices on an existing employee portal, this notice shall be posted on the employee portal. The notice must be in English and also in the language understood by the majority of employees. A log of the posted notices must be kept for three years and the Labor Commissioner must have access to these records.

Alternatively, the employer could provide written notice to all employees, and the employers of subcontracted employees, who were on the premises at the same worksite as the confirmed case of COVID-19 that they may have been exposed. This written notice could be delivered by personal service, email or text message.

If a district elects to use the “posting” option for the notification to all employees of the presence of a COVID-19 positive employee at the “worksite,” we advise caution in how you define the “worksite.” The Non-Emergency Regulations define “worksite” and, under that definition, a “worksite” could be one building on your campus. If that definition is used and the worksite is

⁶ https://leginfo.ca.gov/faces/codes_displaySection.xhtml?sectionNum=6409.6&lawCode=LAB

identified as the “School Resource Building” for example and only six employees work in that building, when one of those employees is not at work the day the notice is posted, the posting will have essentially “outed” that employee as the COVID-19 positive employee and disclosed their confidential information.

Notice to Close Contacts

The requirement to provide notice to “close contacts” of the confirmed COVID-19 positive employee remains. The template “Employer Notice to Close Contact of Exposure to COVID-19 at Worksite” has been revised consistent with the Non-Emergency Regulations and is included with this update for your use and reference.

For close contacts in a non-outbreak scenario, it is sufficient for an employer to make the COVID-19 testing available to the employees at no cost. In the words of Cal/OSHA from the FAQ on this topic: “An employer that offers a test at no cost to the employee does not violate the regulation because an employee declines or refuses to take it. The employer is not required to obtain a signed declination from employees who refuse to take a COVID-19 test offered by the employer.”⁷

Close Contact Exclusion

The Non-Emergency Regulations eliminate the requirement for an employer to provide “exclusion pay” to employees who are exposed to COVID-19 in the workplace and test positive or are unable to work due to COVID-19 related symptoms. The Cal/OSHA FAQ includes two questions and answers regarding “Benefits Available to Excluded Workers.”⁸ The first question results in the answer that: “Employees who test positive for COVID-19 or are unable to work due to COVID-19 and believe they contracted COVID-19 at work should file a workers’ compensation claim with their employer.”

The answer to the second question regarding what other COVID-19 pay or benefits an employee may be entitled to is problematic in the school environment. Part of the answer given by Cal/OSHA is: “If you are unable to work because you are infected or suspect you are infected with COVID-19, you can file a Disability Insurance (DI) claim.” However, school employees are not entitled to Disability Insurance. School employees would be entitled to receive their leave benefits if they are excluded from work due to an exposure to COVID-19 in the workplace, including extended sick leave. Some employees have purchased a private disability insurance plan which may provide coverage in this situation, but this is not the “Disability Insurance” being referred to by Cal/OSHA in this answer.

Outbreak

In the FAQs, Cal/OSHA has posted a question that was often asked and has now been answered related to counting the number of cases.⁹

⁷ <https://www.dir.ca.gov/DOSH/Coronavirus/Covid-19-NE-Reg-FAQs.html#testing:~:text=Q%3A%20What%20should%20employers,for%20further%20information.>

⁸ <https://www.dir.ca.gov/DOSH/Coronavirus/Covid-19-NE-Reg-FAQs.html#exclusions>

⁹ <https://www.dir.ca.gov/DOSH/Coronavirus/Covid-19-NE-Reg-FAQs.html#iso:~:text=Q%3A%20Is%20the%20%22three,other%20businesses%20or%20agencies.>

Q: Is the "three or more cases" outbreak requirement limited to employee cases, or do cases involving anyone that has been in the workplace count towards the requirement?

A: The cases are only among employees. However, this may include independent contractors and employees of contractors, subcontractors, or other businesses or agencies.

This is great clarifying information. A word of caution for the school environment. If you have several cases of students with COVID-19 and one employee who tested positive for COVID-19, it may not formally trigger the Cal/OSHA requirements for an "outbreak" at that time. However, it may just be a matter of time because of the proximity between your students and employees and could lead to an outbreak amongst employees. You may want to consider notifying your employees of the higher rates of COVID-19 positive students and reinforce the importance of testing and availability at the school of COVID-19 at-home testing to reduce the likelihood of a "workplace" Cal/OSHA "outbreak" in such a scenario. You may also want to engage the county public health department for awareness of the potentially developing situation on your campus and possible additional resources they can provide.

Testing in "Outbreak" versus "Major Outbreak"

Outbreak

An outbreak is defined as three or more cases in an "exposed group" within a 14-day day period.¹⁰ In an outbreak setting, the employer must immediately make COVID-19 testing available to its employees within the exposed group and then again one week later and continue to make the testing available at least weekly until the workplace no longer qualifies as an outbreak (i.e., there are one or fewer new COVID-19 cases in the exposed group for a 14-day period). The employer only has to make the testing available. However, the employer is obligated to "ensure" that the employees who were in close contact and remain at work take a COVID-19 test within three to five days of the close contact. Employees who do not take a COVID-19 test within three to five days after the close contact must be excluded until the return-to-work requirements for COVID-19 cases are met (see CDPH Isolation and Quarantine Guidance). This is based on the following language in the new portion of the "Outbreaks" section of the Non-Emergency Regulations:

Employees who had close contacts shall have a negative COVID-19 test taken within three to five days after the close contact or shall be excluded and follow the return to work requirements of subsection 3205(c)(5) starting from the date of the last known close contact.¹¹

¹⁰ Exposed group explained: <https://www.dir.ca.gov/DOSH/Coronavirus/Covid-19-NE-Reg-FAQs.html#iso:~:text=Q%3A%20What%20is%20an%20%22exposed%20group,not%20part%20of%20the%20expo sed%20group>

¹¹ Title 8 section 3205.1(b)(3); <https://www.dir.ca.gov/oshsb/documents/COVID-19-Prevention-Non-Emergency-apprvdtxt-oal.pdf>

Major Outbreak

A major outbreak is defined as 20 or more cases in an “exposed group” within a 30-day period. The employer must ensure that all employees in the exposed group who remain at work are tested for COVID-19 at least twice weekly until there are fewer than three COVID-19 cases in the exposed group for a 14-day period. After that, the employer must make tests available to employees within the exposed group at least weekly until there are one or fewer new COVID-19 cases detected in the exposed group for a 14-day period. The employer must exclude all employees in the exposed group who do not take a COVID-19 test until the return-to-work requirements for COVID-19 cases are met (see CDPH Isolation and Quarantine Guidance).

also included this very helpful Q&A about an employee refusing testing in a major outbreak scenario:¹²

Q: In a major outbreak, if an employee does not test as required and is excluded, what happens when they return? Because they isolate for at least 10 days, when they return, the outbreak status may not have ended. If the outbreak has not yet ended, must they be excluded again when they again refuse the next scheduled test?

A: Not necessarily. After the initial exclusion period, they may generally stay at work without additional testing as long as they take all other precautions indicated for major outbreaks. However, if the employee who didn't test and was excluded for 10 days has a close contact after they return to work, they must test negative or be excluded for another 10 days.

COVID-19 Prevention Program

Under the Non-Emergency Regulations, an employer need not maintain a separate, stand-alone COVID-19 Prevention Program (CPP). The required elements under the Non-Emergency Regulations can be included in an existing Injury and Illness Prevention Program (IIPP), which employers are already required to maintain. The model revised CPP that Cal/OSHA has rolled out contains language suitable for inclusion into existing IIPPs.

Kern County Specific Requirement for Reporting Cases to Public Health

Schools that are performing point of care testing are required to report results in accordance with Title 17 California Code of Regulations section 2500 and the State Public Health Officer Order of October 4, 2022. Schools and designated officials not reporting point of care tests performed by the facility will only be required to report outbreaks in any specific location or site that fall into one or both of the following circumstances:

1) Three or more confirmed cases in a specified location (classroom, office, etc.).

and/or

2) The total number of confirmed cases in a specific site is 10% of the total population.

¹² <https://www.dir.ca.gov/DOSH/Coronavirus/Covid-19-NE-Reg-FAQs.html#iso:~:text=Q%3A%20In%20a%20major,for%20another%2010%20days.>

When reporting cases to Kern County Public Health Department, the reports must be emailed to Education Liaison Hashim Zaka (zakah@kerncounty.com) with a cc to Kern County Superintendent of Schools Associate Superintendent John Mendiburu (jomendiburu@kern.org). If you are receiving this update and are located in a different county, please check with your county public health department for their specific COVID-19 reporting requirements.

Our office is available to assist with any questions related to the Non-Emergency Regulations or other COVID-19 matters. Please reach out as needed for assistance.

-Abby Auffant

Education Law Updates are intended to alert Schools Legal Service clients to developments in legislation, opinions of courts and administrative bodies and related matters. They are not intended as legal advice in any specific situation. Consult legal counsel as to how the issue presented may affect your particular circumstances.