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New Emergency COVID-19 Prevention Cal/OSHA Regulations for California Employees

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On November 19, 2020, The California Occupational Safety and Health Standards Board unanimously approved a far reaching 21 page ***emergency COVID-19 prevention standard under California's Occupational Safety & Health Act (Cal/OSHA) to protect California employees from the recent resurgence of the pandemic. The new emergency standard imposes wide ranging and significant new requirements on most employees to minimize or eliminate COVID-19 hazards, including new hazard identification and mitigation rules, testing and record keeping requirements, paid leave from work, notification and recordkeeping rules, requirements for the use of face coverings, trainings, cleaning and disinfecting protocols, the use of personal protective equipment (PPE), ventilation, and additional requirements on employers that provide housing or transportation for employees. The new standard applies to all employees in California except for those employees who work from home or to employers covered under Cal/OSHA's Aerosol Transmissible Disease standard, including hospitals and skilled nursing facilities. Moreover, the new standard requires immediate action by employers. The Standards Board has submitted the new standard to the Office of Administrative Law (OAL), which will have 10 days to review the proposal. The draft will remain open for five days thereafter during which stakeholders will be permitted to submit comments to the OAL. Once the OAL adopts a final regulation, it will be codified and enforceable by Cal/OSHA. Therefore, this complex and vast new standard may be in effect by as soon as the first week of December 2020. The emergency standard will be in effect for 6 months and can be extended.***

The new standard requires California employers to prepare, implement, and maintain a Written COVID-19 Prevention Program (WCPP) similar to Injury and Illness Prevention Programs (IIPP) long required under California law and which many employers have recently amended to include COVID-19 related requirements. Indeed, the standard provides that the newly required WCPP may be integrated into an employer's existing IIPP or maintained in a separate document. However, the new WCPP requirements will take considerable time and effort to amend even those existing IIPP plans to ensure compliance. Although several WCPP elements mirror those in the IIPP, many requirements are new or have been significantly expanded. In summary, the new WCPP must include establishing the following procedures:

1. Communication of COVID-19 Policies and Procedures:

Once a non-work-related COVID-19 case enters the worksite, it is deemed to be a worksite hazard. Therefore, employers must effectively communicate with employees to reduce the risks associated with any COVID-19 case even if it did not originate in the workplace. Such communications should include:

- Asking employees to report COVID-19 symptoms and exposure without fear of reprisal;
- An explanation of how employees at higher risk of the virus can request an accommodation; and
- Providing information about access to testing, including the reasons for and possible consequences of such testing.

2. Identifying COVID-19 Hazards:

A process to identify and evaluate COVID-19 hazards, including:

- **Allowing employees to participate in identifying and evaluating hazards;**
- **Developing a process to conduct health screenings. Employees may evaluate their own symptoms before reporting to work. If the employer conducts the screening, both the screeners and the employers must wear masks and a non-contact thermometer must be used if temperatures are measured;**
- **Establishing Procedures to respond to COVID-19 cases to reduce risk of transmission in the workplace;**
- **Identifying all points of contact in the workplace that could expose employees to COVID-19, including: (i) locations where employees work in close contact to perform job tasks; (ii) locations where employees congregate (including meetings, time clocks, bathrooms, hallways, aisles, elevators, break rooms, cool-down rest areas, or waiting areas); (iii) locations where employees cannot wear masks or respirators due to other job hazards; and (iv) locations where employees must share equipment or tools. The employer must treat all employees, regardless of symptoms or negative test results, as potentially infectious individuals;**
- **Evaluating how to maximize quantity of outdoor air and increase filtration efficiency to the highest possible level;**
- **Implementing local health orders of the county and the California Department of Public Health;**
- **Evaluating the need for improvements to existing COVID-19 prevention controls; and**
- **Conducting periodic inspections to identify COVID-19 related hazards and to ensure compliance with policies and procedures.**

3. **Investigating COVID-19 Cases:**

Procedures for investigating and responding to COVID-19 cases in the workplace, as follows:

- **Determine key dates, as follows: (a) when the COVID-19 case was last present in the workplace; (b) date of the positive test; and (c) date the COVID-19 case had any symptoms;**
- **Determine who may have exposure by tracking the activities of the COVID-19 case;**
- **Give notice (within one business day, while maintaining privacy of the COVID-19 case) to all employees who may have had exposure and all independent contractors and other employees present during the high-risk exposure period;**
- **Offer free testing to all employees who had potential exposure and provide information on available benefits; and**
- **Investigate whether any workplace conditions contributed to the risk of exposure and any implement remedial measures, as needed.**

4. **Correcting Hazards:**

A procedure for correcting COVID-19-related hazards identified in the course of an inspection into a COVID-19 positive case or concerns raised by employees.

5. **Training and enforcing safety procedures:**

Policies for training and enforcement on several topics relating to COVID-19, including the following:

- **The employer's COVID-19 Prevention Plan;**
- **Information on available COVID-19 related benefits under Federal, State and local laws;**

- **Education on the transmission of the virus and preventing its spread, including that it can easily spread through the air, travel more than 6 feet, and spread through commonly used items and equipment, and the importance of using face masks in combination with social distancing requirements and frequent hand washing or sanitizing;**
- **Methods of enforcing physical distancing;**
- **Procedures for enforcing use of face masks, and methods safeguarding employees from COVID-19 where face masks are not possible. Where respirators are required, the employer must provide procedures outlining how the employer will comply with Cal/OSHA's respiratory protection program requirements; and**
- **Exceptions to the mask requirement, including due to medical conditions and disabilities.**

6. **Engineering, Administrative and Personal Protective Equipment (PPE) Controls:**

Additional engineering, administrative, and PPE controls for minimizing the risk of COVID-19 infections, including the following:

- **Use of solid barriers at fixed work locations, where physical distancing is not possible;**
- **Maximize quantity of outdoor air except when air quality index is greater than100;**
- **Implement cleaning and disinfecting procedures, including (a) identifying and cleaning or disinfecting frequently touched surfaces; (b) prohibiting sharing of PPE and items that employees come into regular contact with; (c) cleaning or disinfecting of areas used by the COVID-19 case during the high risk exposure period; (d) encouraging and allowing time for handwashing ; and (e) increasing handwashing facilities as needed; and**
- **Evaluate need for PPE and respiratory protection and provide such equipment as needed.**

7. **Recordkeeping and Reporting Obligations:**

- **Report COVID-19 cases to Cal/OSHA and the local health department when required by law;**
- **Maintain records of steps taken to implement the written COVID-19 Prevention Program;**
- **The written COVID-19 Preparation Program should be made available to employees; and**
- **Employers should keep a record of all COVID-19 cases, with medical information kept confidential. The information should be made available to employees, with personal identifying information removed.**

8. **Exclusion of COVID-19 Cases and Return-to-Work Criteria:**

- **Employers must ensure that COVID-19 cases are excluded from the workplace until return-to-work requirements are met;**
- **A COVID-19 case with symptoms shall not return to work until 24 hours have passed since a fever of 100.4 (measured without the use of any medication), symptoms have improved, and at least 10 days have passed since symptoms first appeared;**
- **An employee who tested positive but has no symptoms shall not return to work until 10 days have passed since the date the test specimen was collected;**
- **An employee with COVID-19 exposure shall not return to work for 14 days after the last known exposure;**
- **A negative COVID-19 test shall *not be required for an employee to return to work; and***
- ***Employers excluded from work as set forth above shall maintain their earnings, seniority and all other employee rights and benefits, including their right to former job status.***

Multiple COVID-19 Infections and COVID-19 Outbreaks.

In addition to the new requirements of maintaining a policy, the new standard also requires an employer to address potential outbreaks as follows:

- When there are three or more cases in an exposed workplace within a 14-day period, the exposed employees shall be tested for free and then tested again one week later;
- Employees who remain at the workplace at least once per week shall receive continuous testing until no new cases are detected for a 14-day period;
- When there are 20 or more cases in a 30-day period, employers shall provide at least twice a week testing until no new cases are detected of 14 days;
- The employer shall investigate possible workplace factors that contributed to the outbreak and implement remedial measures as needed; and
- The employer shall report the outbreak to the local health department within 48 hours.

COVID-19 Prevention in Employer-Provided Housing and Transportation to and from Work

The emergency standard requires that those employers that provide housing or transportation for their workers to and from work must comply with additional measures to reduce the risk of COVID-19 infections.

What Is the Impact on Employers?

The new standard will place significant additional regulatory burdens on California businesses that are already in economic stress and that have already complied with the state's COVID-19 requirements and guidelines. As discussed above, the regulations require that California employers maintain employees' earnings, seniority, and benefits when they are off work because of COVID-19. This unprecedented provision may be outside the typical scope of workplace safety regulations, and the cost of this measure will clearly place a significant burden on employers. The extended scope of the standard will also likely lead to an increase in enforcement actions by Cal/OSHA and increased litigation in the areas of wage and hour, leave laws, and Private Attorney General (PAGA) safety related claims.

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