

# Third Time's A Charm: Cal/OSHA Standards Board Passes Revisions To Its COVID-19 Emergency Temporary Standard After Two Aborted Attempts

## Key Points

- Fully vaccinated employees no longer need to wear face coverings indoors or outdoors.
- The revised ETS removes all social distancing requirements.
- Employers must provide respirators to employees who are not fully vaccinated "upon request."
- Governor has issued an executive order which makes the revised ETS enforceable immediately upon submission to the Office of Administrative Law.
- Employers should amend their COVID-19 Prevention Plans as soon as practicable.

On June 17, 2021, the Cal/OSHA Standards Board (Board) passed the [latest version](#)—the third proposed since May—of its COVID-19 Emergency Temporary Standards ("ETS"). We previously discussed the version of the ETS [passed on June 3](#). However, Cal/OSHA later [withdrew](#) that version on June 9 with the goal of bringing the ETS into closer alignment with current CDC and CDPH guidance and California's re-opening.

Many elements of the previously withdrawn ETS continue to exist in the version passed on June 17 with some significant revisions concerning face covering and social distancing requirements as discussed in greater detail below.

## Governor Newsom Signs Same-Day Executive Order

Ordinarily, the current version of the ETS would remain in effect until the Office of Administrative Law (OAL) votes on the latest version, which is expected to take place by June 28th. However, Governor Newsom, almost simultaneously with the Board's vote, issued an [executive order](#) which makes the revised ETS effective upon submission to the OAL, which is expected to happen on June 17. The purpose behind the order is to ensure that the revised ETS "should be consistent to protect public health, and an extended period of misalignment would likely impose unnecessary burdens on employers, and cause confusion among employers and employees alike."

## Revised Definition of "Fully Vaccinated"

by Sandra L. Rappaport & Diane Marie O'Malley



The revised ETS includes a slightly different definition of "fully vaccinated," which now includes international vaccines. "Fully Vaccinated" now means "the employer has documented that the person received, at least 14 days prior, either the second dose in a two-dose COVID-19 vaccine series or a single-dose COVID-19 vaccine. Vaccines must be FDA (U.S. Food and Drug Administration) approved; have an FDA emergency use authorization; or, for persons fully vaccinated outside the United States, be listed for emergency use by the World Health Organization (WHO)."

The ETS does not explain what type of documentation is suitable regarding an employee's vaccination status but [guidance issued on June 16](#) states that employers can collect proof in different ways, including self-attestation by the employees. Employers should treat all vaccination documentation as confidential employee medical information.

## **Social Distancing**

The latest ETS version removes mostly all social distancing requirements and the term "outdoor mega events." However, under the latest version of the ETS, in the event of a major outbreak, unvaccinated individuals who are not wearing respirators will need to socially distance and employers will need to evaluate whether to implement social distancing for all employees.

## **Face Coverings**

The revised ETS exempts employees who are "fully vaccinated" from wearing face coverings indoors, although employers must continue to provide employee training on face coverings. Under the revised ETS, employees who are not fully vaccinated will still be required to wear face coverings while indoors or in vehicles with others, subject to certain limited exceptions including while alone in a room, while eating or drinking while maintaining physical distancing, and while wearing a respirator.

Where the ETS does not require face coverings, employers will be required to provide them to employees "upon request," regardless of vaccination status.

## **Respirators**

Under the latest version of the ETS, "upon request," employers must provide respirators to all employees who are not fully vaccinated and who are working indoors or in vehicles with others. The ETS does not require employers to actively monitor employees to ensure they are wearing the respirators provided to them.

Employers must also provide training to employees regarding the right of employees who are not fully vaccinated to request a respirator for voluntary use without fear of retaliation and at no cost to employees, how to properly wear the respirator provided, how to perform a seal check according to the manufacturer's instructions each time a respirator is worn, and the fact that facial hair interferes with a seal.

## **Exclusions From the Work Place**

The revised ETS provides that fully vaccinated employees without symptoms do not need to quarantine after close contacts with COVID-19 cases. Most unvaccinated employees, however, still must be excluded from the workplace in that situation.

For employees excluded from work—whether or not they are "otherwise able and available for work"—

employers must continue and maintain the employee's earnings. The employee is not entitled to this exclusion pay "where the employee received disability payments or was covered by workers' compensation and received temporary disability" or where "the employer can demonstrate that the close contact is not work related." If the employer intends to rely on one of those exceptions, "it shall inform the employee of the denial and the applicable exception."

## Employee Testing

As before, the revised ETS continues to require that employers provide testing to employees with close contact exposure unless those employees were fully vaccinated before the exposure, or unless the employees have recovered from COVID-19 and have remained free of symptoms for 90 days after the initial onset of COVID-19 symptoms or, for COVID-19 cases who never developed symptoms, for 90 days after the first positive test. Employers must also provide testing to any symptomatic unvaccinated employees at no cost and during paid time, regardless of whether the exposure was work related.

Additionally, the revised ETS clarifies employers' testing obligations in the event of major outbreaks. In the event of a major outbreak, employers must provide at least twice-weekly COVID-19 testing to all employees in the exposed group regardless of vaccination status.

## Conclusion

The revised ETS lifts a number of burdensome requirements for employers such as mandatory face coverings, social distancing, and exclusion of fully-vaccinated employees from the workplace after close contact exposure. Still, there are still a myriad of compliance requirements and employers should expect Cal/OSHA to continue to rigorously enforce the ETS. Accordingly, California employers should consult with counsel to review and update their COVID-19 Prevention Plans and employee training programs to comply with the revised ETS. Employers should also continue to monitor the [DIR's website](#) for additional anticipated FAQ guidance on the revised ETS.

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