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CalOSHA COVID-19 Emergency Regulation

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On November 19, the CalOSHA Standards Board unanimously adopted an emergency regulation on workplace safety regarding COVID-19. The regulation was released only 5 days before the hearing.

The emergency regulation is a mix of the requirements found in existing CalOSHA guidelines; incorporation of definitions and requirements from AB 685 (Reyes) passed by the Legislature this year; and brand new employer mandates.

Definitions

The regulation includes several important definitions:

- “COVID-19 exposure” is defined as being within six feet of a COVID-19 case for a cumulative total of 15 minutes or greater in any 24-hour period within or overlapping with the “high-risk exposure period” regardless of the use of face coverings.
- “Exposed workplace” is defined as any work location, working area, or common area at work used or accessed by a COVID-19 case during the high-risk period, including bathrooms, walkways, hallways, aisles, break or eating areas, and waiting areas. After January 1, 2021, the regulation incorporates the definition of “worksite” from AB 685.
- “High-risk exposure period” is defined as the following time period:
 - For a person that develops COVID-19 symptoms: from two days before they first

- develop symptoms until 10 days after symptoms first appeared, and 24 hours have passed with no fever and symptoms have improved; or
- For a person who tests positive, but is asymptomatic: from two days before until ten days after the specimen for their first positive test for COVID-19 was collected.
- A “COVID-19 outbreak” applies to a place of employment if it has been identified by a local health department as the location of a COVID-19 outbreak or when there are three or more COVID-19 cases in an exposed workplace within a 14-day period. The outbreak definition applies until there are no new COVID-19 cases detected in a workplace for a 14 day period.
- A “major COVID-19 outbreak” applies to any place of employment where there are 20 or more COVID-19 cases in an exposed workplace within a 30-day period. This major outbreak definition applies until there are no new COVID-19 cases detected in the workplace for a 14-day period.

Injury and Illness Prevention Program (IIPP)

The regulation requires employers to include extensive COVID-19 information in their IIPP's. Requirements include, but are not limited to:

1. A system allowing employees to report to the employer, without fear of retaliation, COVID-19 symptoms, possible COVID-19 hazards at the workplace, and possible COVID-19 exposure.
2. Identification of COVID-19 hazards at the workplace through screening of employees, responding to employees that test positive or are exposed, and work-place identification of potential COVID-19 hazards, including activities and equipment that could cause exposure. The employer must allow employees and authorized employee representatives to participate in the identification and evaluation of COVID-19 hazards.
3. Procedures to investigate and respond to COVID-19 cases at the workplace. If a COVID-19 case occurs at the workplace, the employer must determine who may have been exposed and give notice of the potential COVID-19 exposure, within one business day, in a way that does not reveal any personal identifying information of the individual diagnosed with COVID-19.
4. Procedures to correct unsafe or unhealthy conditions, work practices, policies, and procedures.
5. Training and instruction of employees that includes: (1) the employer's COVID-19 policies and procedures to protect employees from COVID-19 hazards; (2) information regarding COVID-19-related benefits to which the employee may be entitled under applicable federal, state, or local laws; (3) methods of physical distancing and importance of physical distancing and wearing face coverings; (4) that COVID-19 is an infectious disease and the ways it is transmitted; (5) the importance of frequent handwashing and proper use of face coverings; and (6) COVID-19 symptoms and importance of not coming to work if the employee has symptoms.

Physical Distancing and Face Coverings

The regulation requires all employees at the worksite be separated from other individuals by at least six feet, except where an employer can demonstrate that six feet of separation is not possible, and except for momentary exposure while individuals are in movement. Employers must also provide face coverings and ensure they are worn by employees over the nose and mouth when indoors, when outdoors and less than six feet away from another person, and where required by orders from the CDPH or local health department.

Employees are not required to wear face coverings when: (1) the employee is alone in a room; (2) while eating and drinking, provided employees are six feet apart, and if indoors, outside air is maximized; (3) employees are wearing respiratory protection; (4) employees cannot wear a face covering due to medical or mental health conditions or disabilities; and (5) employees are performing specific tasks which cannot feasibly be performed with face coverings.

Employee Testing

If there is an outbreak at the workplace, or employees have been exposed at the workplace, the employer must provide COVID-19 testing at no cost, during their working hours, to all employees who had potential COVID-19 exposure at the workplace. COVID-19 testing must be conducted as follows:

1. All employees exposed must be immediately tested for COVID-19, and then tested again one week later.
2. If there is an outbreak at the workplace, after the two COVID-19 tests, employers must provide continuous COVID-19 testing of employees who remain at the workplace at least once per week, or more frequently if recommended by the local health department, until the outbreak has ceased.

Engineering Controls

At fixed work locations where it is not possible to maintain the physical distancing requirement at all times, the employer shall install cleanable solid partitions that effectively reduce aerosol transmission between the employee and other persons. For buildings with mechanical or natural ventilation, or both, employers shall maximize the quantity of outside air provided to the extent feasible, except when the United States Environmental Protection Agency Air Quality Index is greater than 100 for any pollutant or if opening windows or letting in outdoor air by other means would cause a hazard to employees.

Employers must implement regular cleaning and disinfecting procedures and prohibit the sharing of personal protective equipment and, to the extent feasible, items employees regularly come in contact with.

Reporting and Recordkeeping

The employer must report information about COVID-19 cases at the workplace to the local health department whenever required by law, and provide any related information requested by the local health department. The employer must also immediately report to CalOSHA any COVID-19 related serious injuries or death of an employee occurring at the worksite or in connection with employment.

The employer must keep a record of and track all COVID-19 cases with the employee's name, contact information, occupation, location where the employee worked, the date of the last day at the workplace, and the date of a positive COVID-19 test.

Exclusion of Employees from the Workplace

When an employee tests positive for COVID-19, the employer must ensure the employee, and all employees exposed to COVID-19 are excluded from the workplace for 14 days after the last known COVID-19 exposure to an individual that tested positive or died due to COVID-19. The employer cannot allow exposed employees to return to the workplace early, even if they test negative for COVID-19.

While these employees are excluded from the workplace, and are otherwise able and available for work, the employer must continue and maintain an employee's earnings, seniority, and all other employee rights and benefits, including the employee's right to their former job status, as if the employee had not been removed from their job. Employers may use employer-provided employee sick leave benefits and consider benefit payments from public sources in determining how to maintain earnings, rights and benefits, where permitted by law and when not covered by workers' compensation. The employer is not required to maintain these benefits if the employer demonstrates the COVID-19 exposure is not work related.

COVID Outbreak and Major COVID Outbreak at the Workplace

If there is an outbreak at the workplace, in addition to the testing and exclusion requirements outlined above, the employer must conduct an investigation of the workplace to identify and abate any COVID-19 hazards. This investigative review must be updated every thirty days that the outbreak continues.

The employer must also contact the local health department immediately, but not longer than 48 hours after the employer knows, or with diligent inquiry would have known of the outbreak, for guidance on preventing the further spread of COVID-19 within the workplace. The employer must provide to the local health department the total number of COVID-19 cases and for each COVID-19 case, the name, contact information, occupation, workplace location, business address, hospitalization and/or fatality status, and North American Industry Classification

System code of the workplace of the COVID-19 case, and any other information requested by the local health department. The employer must continue to give notice to the local health department of any subsequent COVID-19 cases at the workplace.

If there is a major COVID-19 outbreak at a workplace, the employer must implement all testing, employee exclusion, and reporting requirements required during a COVID-19 outbreak. In addition to these requirements, the employer must:

1. In buildings or structures with mechanical ventilation, filter recirculated air with Minimum Efficiency Reporting Value (MERV) 13 or higher efficiency filters if compatible with the ventilation system. If MERV-13 or higher filters are not compatible with the ventilation system, employers shall use filters with the highest compatible filtering efficiency. Employers must also evaluate whether portable or mounted High Efficiency Particulate Air filtration units, or other air cleaning systems would reduce the risk of transmission.
2. The employer must determine the need for a respiratory protection program or changes to an existing respiratory protection program.
3. The employer must evaluate whether to halt some or all operations at the workplace until COVID-19 hazards have been corrected.

Employer-Providing Housing

The regulation defines employee-provided housing as any place or area of land, any portion of any housing accommodation, or property upon which a housing accommodation is located, consisting of: living quarters, dwelling, boardinghouse, tent, bunkhouse, maintenance-of-way car, mobile home, manufactured home, recreational vehicle, travel trailer, or other housing accommodations. The definition includes hotels and motels, and includes any housing that is arranged for or provided by an employer, other person, or entity to workers, and in some cases to workers and persons in their households, in connection with the worker's employment, whether or not rent or fees are paid or collected.

When assigning housing, the regulation requires:

1. Residents who usually maintain a household together outside of work, such as family members, must be housed in the same housing unit without others.
2. Residents who work in the same crew or work together at the same worksite must be housed in the same housing unit without others.
3. Employees who do not usually maintain a common household, work crew, or worksite must be housed in the same housing unit only when no other housing alternatives are possible.

The employer must ensure physical distancing is maintained, including ensuring the premises allows at least six feet of physical distance between residents in the housing units, common areas, and other areas on the premises. The regulation requires employers to ensure beds are spaced at least six feet apart and prohibits the use of bunk beds. The regulation does not allow for engineering controls in employer-provided housing, even if engineering controls have been approved by local governments.

The regulations also requires housing units, kitchens, bathrooms, and common areas are effectively cleaned and disinfected at least once a day to prevent the spread of COVID-19.

If residents are exposed to COVID-19 or test positive for COVID-19, they must be isolated from all other occupants by providing the employee with a private bathroom, sleeping area, and cooking and eating facility.

Employee-Provided Transportation to and from Work

The regulation defines employee-provided transportation to and from work as any transportation of an employee, during the course and scope of employment, provided, arranged for, or secured by an employer including ride-share vans or shuttle vehicles, car-pools, and private charter buses, regardless of the travel distance or duration involved. The regulation does not apply if the driver and all passengers are from the same household outside of work.

When assigning transportation, the employer must prioritize shared transportation assignments as follows:

1. Employees residing in the same housing unit shall be transported in the same vehicle.
2. Employees working in the same crew or worksite shall be transported in the same vehicle.
3. Employees who do not share the same household, work crew or worksite shall be transported in the same vehicle only when no other transportation alternatives are possible.

The employer must implement physical distancing measures and require the use of face coverings by employees while they are waiting for transportation. The driver of the vehicle and all passengers must be separated by at least three feet in all directions and face coverings must be worn. The regulation does not allow for engineering controls, such as partitions.

The employer must ensure all high-contact surfaces are cleaned and disinfected before each trip and that high-contact surfaces used by the driver are cleaned and disinfected between different drivers. Employers must provide hand sanitizer in each vehicle and ensure all drivers and passengers sanitize their hands before entering and exiting the vehicle. Hand sanitizers with methyl alcohol are prohibited.

The regulation also requires that vehicle windows be kept open and the ventilation system set to maximize outdoor air and not set to recirculate air. Windows do not have to be kept open if: (1) the vehicle has functioning air conditioning in use and the outside temperature is greater than 90 degrees Fahrenheit; (2) the vehicle has functioning heating in use and the outside temperature is less than 60 degrees Fahrenheit; (3) protection is needed from rain or snow; or (4) the vehicle has a cabin air filter in use and the U.S. EPA Air Quality Index for any pollutant is greater than 100.

Next Steps

The emergency regulation now heads to the Office of Administrative Law (OAL) for approval. Stakeholders have a chance to comment in a 5-day window, and the OAL has 10 days to approve the regulation. The regulation becomes effective once the OAL approves it, so if OAL takes the full 10 days, it will go into effect on November 29. The emergency regulation stays in effect for 180 days, which at that point CalOSHA either needs to readopt it or go through the full regulatory process.

The Standards Board committed staff to convening an advisory committee made of stakeholders to refine the regulation and clear up confusion. The Standards Board did not state when this committee would be convened, or how many times it would meet, but indicated the desire to have it convened before the end of the year.

If you have any questions regarding the CalOSHA COVID-19 emergency regulation, please reach out to Lauren Noland-Hajik at lhajik@ksacsacramento.com.

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