



Newly-Issued OSHA Emergency Temporary Standards: What California Employers Need to Know Now

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Presenters



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About Michael Sullivan & Associates

- The firm provides high-quality litigation in defense of workers' compensation claims, employment issues, immigration law and insurance litigation
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- Author of *Sullivan On Comp*, which covers the complete body of California workers' compensation law

Navigating COVID-19

A Legal Guide for California Employers

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Agenda

- President Biden Issues 'Path Out of the Pandemic' and Executive Order
- OSHA Vaccine and Testing Mandate
- California Cal/OSHA Requirements
- Sick Leave and Other Leaves of Absence
- COVID Related Litigation



Path Out Of The Pandemic

President Biden's 6-part COVID-19 plan of action

- Vaccinating the unvaccinated*
- Further protecting the vaccinated
- Keeping schools safely open
- Increasing testing and requiring masking
- Protecting our economic recovery
- Improving care for those with COVID-19



Vaccinating the Unvaccinated

- Requires all employers with 100+ employees ensure their workers are vaccinated. OSHA had issued emergency temporary standards (ETS)
- Require all federal workers and contractors who do business with the federal government to be vaccinated fully by 11/22/2021
- Require health care workers at Medicare and Medicaid participating hospitals to be vaccinated, as well as other health care workers not covered by the OSHA ETS which was issued in June 2021
- Require large entertainment venues to demand patrons show proof of vaccination or a negative COVID-19 test for entry
- Require covered employers to provide paid time off for employees to get vaccinated and recover, if necessary, from adverse side effects of the vaccine



OSHA ETS Requirements

Purpose and Rationale for OSHA ETS

- The ETS is intended to comprehensively address safety and health issues of COVID-19
- Unvaccinated employees face grave danger of COVID-19 exposure in the workplace and hospitalization and death
- Vaccinations can prevent serious illness and death
- Mandatory face coverings for unvaccinated employees and removal of COVID-19 positive employees from the workplace will protect employees

OSHA ETS Requirements

OSHA ETS Preempts State & Local Laws

- OSHA ETS is the minimum standard that must be applied by all states
- States may not adopt any policy or law that differs from the OSHA ETS unless it provides greater benefits or protections to employees

OSHA ETS Requirements

Employers Covered and Employers Excluded by OSHA ETS

- **Covered employers**
 - Those who have at least 100 employees firm or corporate wide
 - Employees counted as of November 5, 2021
- **Excluded employees**
 - Employees who don't report to a workplace where other individuals are present
 - Employees while working from home
 - Employees who work exclusively outdoors
- **Excluded employers**
 - Federal contractors covered by Safer Federal Workforce Task Force COVID-19 Workplace Safety
 - Healthcare services covered by the requirements of the Healthcare ETS

OSHA ETS Requirements

Employers Covered and Employers Excluded by OSHA ETS

- **Counting employees at multi-employer sites (like a construction site):** Each employer counts their own employees and the total number of combined employees on site is irrelevant.
- **Counting employees from staffing agencies:** The staffing agency would count the employee for purposes of the 100-employee threshold. The host employer counts its own employees.
- **Counting seasonal or temporary workers:** When employed directly by the employer these employees are counted in determining the 100-employee threshold provided they're employed at any point while the ETS is in effect.

OSHA ETS Requirements

Employers Covered and Employers Excluded by OSHA ETS

- Determining employees who work exclusively outdoors
 - They are counted towards the 100 threshold but not covered by the ETS requirements
 - The employee must work outdoors on all days
 - The employee can't routinely occupy vehicles with other employees as part of the work duties (i.e., don't travel to worksites in a company vehicle)
 - The employee works outdoors for the duration of the workday except for de minimis use of indoor spaces, like an indoor bathroom with multi-stall toilets
 - Construction sites with portions of buildings constructed is not considered "outside"

OSHA ETS Requirements

Effective Dates

- The ETS is effective immediately (November 5)
- **30 days after publication (December 5):** all requirements other than testing for employees who have not completed their entire primary vaccination dose(s)
- **60 days after publication (January 4):** testing for employees who have not received all doses required for a primary vaccination
- The ETS will be in effect for six months (until May 5, 2022) but will be extended if it is necessary
- NOTE: On November 6, the law was stayed by the Fifth Circuit Court of Appeal pending outcome of a judicial challenge

OSHA ETS Requirements

Employer ETS Requirements

- Employer must have a vaccination policy
- Determine employee vaccination status
- Employer support of vaccination
- COVID-19 testing for employees not fully vaccinated
- Employees must notify employer of a positive COVID-19 test and be removed
- Face Coverings must be worn indoors by employees not fully vaccinated or who have exemptions (medical or religious)
- Must provide OSHA ETS information to employees
- Report COVID-19 fatalities and hospitalizations to OSHA
- Make records available

OSHA ETS Requirements

Employer Policy on Vaccination

- Develop, implement and enforce a mandatory COVID-19 vaccination policy; or
- Develop, implement, and enforce a policy allowing employees who are not fully vaccinated to elect to undergo weekly COVID-19 testing and wear a face covering at the workplace
- NOTE: both types of policies may be required in a fully vaccinated workplace to address requirements for employees with medical or religious exemptions to vaccination
- OSHA has prepared sample policies

OSHA ETS Requirements

Employer Policy on Vaccine

- Employers may implement different vaccination policies for different groups of employees. For example, employees who serve the public must be vaccinated; those who work in the corporate offices may elect to be tested weekly
- Employers may terminate employees who refuse to get vaccinated in a workplace with a mandatory vaccination requirement
 - Employees are entitled to legal exemptions (medical and religious) and, if they qualify, cannot be terminated

OSHA ETS Requirements

Determine Employee Vaccination Status

- Must document each employee's vaccination status
- Obtain acceptable proof of vaccination—must retain a copy of the proof of vaccine
- Maintain a roster of each employee's vaccination status
 - Roster must include whether each employee is fully vaccinated, partially vaccinated, not fully vaccinated because of a medical or religious exemption, or aren't fully vaccinated because they haven't provided proof of vaccination
 - Rosters and records are considered medical records

OSHA ETS Requirements

Determine Employee Vaccination Status

- Employees who have had COVID-19 are not considered fully vaccinated even if they have antibodies and must be vaccinated or treated as unvaccinated employees
- Employees who have lost their COVID-19 Vaccination Record can self attest if unable to get a duplicate copy
- Employers must keep copies of the vaccination card. A photocopy, a photograph, or pdf, is acceptable if it is clear
 - It's not sufficient for an employee to merely show a vaccination card

OSHA ETS Requirements

Determine Employee Vaccination Status

- Booster shots and additional doses are not included in the definition of *fully vaccinated*
- Employers aren't required to obtain vaccine related information beyond determining full vaccination

OSHA ETS Requirements

Determine Employee Vaccination Status

- **List of acceptable proof of vaccination status**
 - Record of immunization from a health care provider or pharmacy
 - Copy of U.S. COVID-19 Vaccination Record Card
 - Copy of medical records documenting vaccination
 - Immunization records from a public health, state, or triable immunization information system
- **Information that should be included**
 - Employee name
 - Type of vaccination
 - Dates of administering
 - Name of health care provider or clinic site

OSHA ETS Requirements

Employer Support for Vaccinations

- Provide employees reasonable time, up to 4 hours of paid time, to receive each dose
 - Cannot require use of personal time or sick leave
- Provide employees reasonable time to recover from side effects experienced from each dose. Reasonable pay may be required
 - Employers can reasonably cap paid time off for employees recovering from side effects of the vaccine. Up to 2 days per dose has been deemed reasonable
 - Employers can require employees use accrued sick leave, but if employee has no accrued sick time, employers must pay up to 2 days of time off
- Employers don't have to pay for vaccination time if an employee gets vaccinated outside of work hours

OSHA ETS Requirements

COVID-19 Testing for Employees Who Aren't Fully Vaccinated

- Employers must ensure employees who aren't fully vaccinated are tested at least weekly
 - Employer must exclude unvaccinated employees who fail to provide weekly tests
 - No requirement to pay them for time spent testing
 - NOTE: OSHA intends to issue further guidance, and CA likely requires payment for time spent testing
- Employees must be tested within 7 days before returning to work if away from the workplace for a week or longer
- There's no requirement that employers pay for any costs associated with testing
 - NOTE: CA may require employers pay for the cost of testing

OSHA ETS Requirements

COVID-19 Testing for Employees Who Aren't Fully Vaccinated

- Employees who have tested positive for COVID-19 should not be tested for 90 days following the positive test
 - They can return to work after the isolation period but must wear a face covering
- Employees who have vaccination accommodation (medical or religious) still must test weekly
- Testing remains in effect for the duration of the ETS
- Employers must maintain copies of the results of COVID-19 tests

OSHA ETS Requirements

COVID-19 Testing for Employees Who Aren't Fully Vaccinated

- Tests must be a test for SARS-CoV-2 that is
 - Approved or authorized, including Emergency Use Authorization, by the FDA to detect current infection with the SARS-CoV-2 virus (virus test)
 - Administered in accordance with authorized instructions
 - Not both self-administered and self-read unless observed by the employer or authorized telehealth proctor
- Home tests and antigen tests would be acceptable if taken at work and read by the employer
 - Antibody tests not sufficient

OSHA ETS Requirements

Employee Notification to Employer of a Positive COVID-19 Test and Removal

- Employers must:
 - Require employees promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19
 - Immediately remove any employee from the workplace, regardless of vaccination status, who received a positive COVID-19 test or is diagnosed with COVID-19
 - Keep employees out of the worksite until they meet the criteria for returning to work

OSHA ETS Requirements

Employee Notification to Employer of a Positive COVID-19 Test and Removal

- Criteria for vaccinated employee to return to work following positive COVID-19 test:
 - Employee receives a negative result on COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test if the employee chooses to seek a NAAT test for confirmatory testing
 - Employee meets the return-to-work criteria in CDC’s “Isolation Guidance” or
 - Receives a recommendation to return to work from a licensed health care provider
- Employers do not need to pay employees removed from the workplace

OSHA ETS Requirements

Employee Notification to Employer of a Positive COVID-19 Test and Removal

- An unvaccinated employee need not be removed if they've been in close contact with a COVID-19 positive employee. Employee must continue to wear face coverings
- Removed employees can work remotely
- Employer need not conduct contact tracing
- Employer need not keep records of a positive diagnosis



OSHA ETS Requirements

Face Coverings

- Require employees who aren't fully vaccinated to wear a face covering when
 - Indoors; or
 - When occupying a vehicle with another person for work purposes
- Face coverings aren't required:
 - When an employee is alone in a room
 - For a limited time while an employee is eating or drinking or for identification purposes in compliance with safety and security requirements
 - When an employee is wearing a respirator or facemask
 - When the employer can show a face covering is infeasible or creates a greater hazard that would excuse compliance (need to see employee's mouth when the work requires the use of the employee's uncovered mouth, or when the use of a face covering presents a serious risk of injury or death)
- Allow any employee to wear a face covering regardless of vaccination status unless it creates a serious workplace hazard

OSHA ETS Requirements

Information Provided to Employees

- Employers must provide the following information to employees in a language and at a literacy level the employee understands:
 - Information about the requirements of the ETS and workplace policies and procedures established to implement the ETS
 - The CDC document titled *Key Things to Know About COVID-19 Vaccines*
 - Information about protections from retaliation or discrimination
 - Information about laws that provide for criminal penalties for knowingly supplying false statements or documentation
- It's assumed the information must only be provided once; not upon each new positive case



OSHA ETS Requirements

Reporting COVID-19 Fatalities and Hospitalizations to OSHA

- Employers must report work related COVID-19 fatalities to OSHA within 8 hours of learning about them
- Employers must report work related COVID-19 hospitalizations within 24 hours of learning about the hospitalization

Reporting COVID-19 Serious Illness, Fatalities and Hospitalizations to Cal/OSHA

- Employers must report any serious illness, serious injury or death that occurred at work or in connection with work within 8 hours of when the employer knew or should have known of it
- Serious illness includes any illness occurring in a place of employment or in connection with any employment that requires inpatient hospitalization for other than medical observation or diagnostic testing

OSHA ETS Requirements

Reporting COVID-19 Fatalities and Hospitalizations to OSHA and Cal/OSHA

- Determining whether a COVID-19 serious illness, fatality or hospitalization was work related
 - Consider the type, extent and duration of contact the employee had at the work environment with other people, particularly the general public
 - Was physical distancing and other controls in place
 - Extent and duration of the time spent in a shared indoor space with limited ventilation
 - Whether employee had work related contact with anyone who exhibited symptoms of COVID-19

OSHA ETS Requirements

Availability of Records

- Employers must make available for examination and copying an employee's COVID-19 vaccine documentation and any COVID-19 test results to that employee and to anyone having written authorized consent from the employee
- Employers must make available to an employee, or an employee representative, the aggregate number of fully vaccinated employees at a workplace and the total number of employees at the workplace



California City & County Vaccine Mandates

Los Angeles City Mandate

- All city employees must be vaccinated by December 18 and show proof of vaccination to keep their jobs
- Until December 18, unvaccinated employees must submit to twice weekly COVID-19 tests
 - Employees are responsible for the \$65 per test cost that will be paid through payroll deductions
 - Employees are required to get tested on their free time through a city vendor
- Medical and religious exemptions are allowed
- After December 18, unvaccinated employees without an approved exemption will either be allowed to resign, retire in good standing, or be terminated



California City & County Vaccine Mandates

Los Angeles County Mandate

- All county employees had until October 1, to show proof of vaccination to keep their jobs
- Noncomplying employees have received 45-day notices to comply or face a five-day suspension with 30 days upon return to work to comply
- As of October 12, weekly testing is required of all unvaccinated employees
- Medical and religious exemptions are allowed
- Termination may result for continued non-compliance

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EEOC/DFEH Vaccination Mandates

- The EEOC guidance suggests employers can require employees to obtain COVID-19 vaccinations
- No requirement that the vaccines be job-related and consistent with business necessity, because vaccines are not considered 'medical examinations' under the ADA
 - A vaccine is not a medical examination because it does not seek information about an individual's impairments or current health status

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EEOC/DFEH Vaccination Mandates

- **Disability accommodations:** treat all accommodation requests as you would treat any other accommodation request
- **Religious accommodations:** if the religious belief is sincerely held, a reasonable accommodation must be provided unless it would pose an undue hardship



CAL/OSHA Notice And Reporting Obligations

AB 685 imposes notice and reporting requirements on employers when an employee tests positive – expires January 1, 2023

- Employer notice requirements – within 24 hours
 - Employees and employee representatives
 - Provide list of benefits and employer’s safety protocols
- Employer reporting requirements – within 48 hours
 - Report an “outbreak” to local public health agency
 - Outbreak defined as 3 or more cases in a 2-week period



CAL / OSHA Notice and Reporting Obligations

AB 685 imposes notice and reporting requirements on employers when an employee tests positive

- CAL/OSHA may shutdown workplaces that are an imminent hazard
 - May shutdown a workplace, operation, or process
- Reduced notice period for serious violation citations
 - CAL/OSHA need not provide notice or allow employers the opportunity to rebut allegations prior to issuing a serious violation citation
 - Allows for immediate issuance of citation in conjunction with business shutdown



CAL/OSHA ETS – Post June 17, 2021

Revised CAL/OSHA ETS

1. Fully vaccinated employees without symptoms don't need to be tested or quarantined after close contacts with COVID-19 cases
2. Unvaccinated, asymptomatic employees who are close contacts may end quarantine 10 days after exposure or 7 days after exposure if they test negative, but test must occur on day 5 or later

NOTE: OSHA ETS doesn't address quarantine requirements of close contacts because it doesn't require contact tracing



CAL/OSHA ETS – Post June 17, 2021

Revised CAL/OSHA ETS

3. No face coverings requirements outside regardless of vaccination status, except during outbreaks and when 6-foot distancing can't be maintained
4. Vaccinated employees need not wear face coverings indoors, but employer must document their vaccination status. Exceptions for outbreaks and when 6-foot of physical distancing can't be maintained

NOTE: OSHA ETS doesn't address outbreaks, and doesn't address social distancing



CAL/OSHA ETS – Post June 17, 2021

Revised CAL/OSHA ETS

5. Upon request, employer must provide unvaccinated employees with approved respirators for voluntary use when working indoors or in a vehicle with others
6. No physical distancing or barrier requirements regardless of vaccination status except in an outbreak situation
7. No physical distancing requirements in employer provided housing or transportation
8. Must evaluate ventilation systems to maximize outdoor air and increase filtration efficiency, and evaluate the use of additional air cleaning systems



CAL/OSHA ETS – Post June 17, 2021

Revised CAL/OSHA ETS – requirements that remain in place

9. Requirements for responding to COVID-19 cases and outbreaks
10. Quarantine and exclusion pay requirements
11. Basic prevention requirements for employer provided housing and transportation



CAL/OSHA ETS – Proposed Readoption

Proposed CAL/OSHA readoption – if approved will be effective from January 14, 2022, to April 14, 2022.

COVID-19 prevention

- Face coverings must be worn during employee screening regardless of vaccination status
- When employers are notified of a COVID case, they must provide testing to all non-symptomatic close contacts, including vaccinated employees
- Testing must be provided and made available to both vaccinated and unvaccinated employees
 - Presumably, testing is in addition to weekly testing required by OSHA ETS



CAL/OSHA ETS – Proposed Readoption

COVID-19 prevention – changes to exclusion protocols after close contact

- Employees who were fully vaccinated before the close contact and don't have symptoms need not be excluded if (1) wear face covering at the workplace for 14 days after the last date of close contact; (2) maintain 6 feet of distance from others for 14 days; and (3) get tested 3-5 days after last date of close contact
- COVID-19 cases who have returned to work and remain free of symptoms for 90 days do not need to be excluded if (1) wear face covering at the workplace for 14 days following the last date of close contact; (2) maintain 6 feet of distance from others for 14 days
- Employer must provide the non-excluded “information about any applicable precautions recommended by the CDPH for persons with close contacts”



CAL/OSHA ETS – Proposed Readoption

Outbreaks

- Employees are required to test even vaccinated employees in an exposed group

Employer provided housing & transportation

- Ventilation must be maximized regardless of vaccination status. Previous guidance required vaccination maximization only when there were some unvaccinated employees
- All employees must be tested if there are 3 or more cases in their housing unit
- If there's a close contact, must exclude vaccinated, asymptomatic employees
- In transit all employees must be provided with, and wear, face coverings



Federal, State & Local Time Off Requirements

- Families First Coronavirus Response Act (FFCRA) – expired 12/31/20, but employers could voluntarily provide the leave until 3/31/21
- California Emergency Supplemental Paid Sick Leave – expired 9/30/21
- California Healthy Workplace Healthy Family Act – California sick leave
- Local sick leave statutes
 - Oakland – expires at the end of public health emergency
 - San Francisco – expires at the end of public health emergency
 - Los Angeles – supplemental paid sick leave expires at the end of public health emergency



FMLA/CFRA Time Off

Is COVID-19 a “serious health condition?”

A serious health condition involves one or more of the following:

1. Inpatient care in a hospital, hospice or residential health care facility; any subsequent treatment in connection with inpatient care or period of incapacity
2. Absence plus treatment: incapacity must be more than 3 consecutive days, including subsequent treatment and period of incapacity
3. Chronic conditions requiring treatment
4. Permanent or long-term conditions requiring supervision
5. Multiple treatments (non-chronic)
6. Treatment for substance abuse
7. Pregnancy (but not under CFRA)



FMLA/CFRA Time Off

If COVID-19 is a “serious health condition” under FMLA/CFRA and the employee is otherwise qualified for the leave, the employer must provide 12 weeks of unpaid time off. The time can also be taken intermittently

As of January 1, 2021, CFRA is applicable to employers with 5 or more employees



Is COVID-19 Subject To ADA/FEHA?

Is COVID-19 a disability under the ADA/FEHA?

1. Has a physical or mental disability that limits a major life activity
 - *Limits* means to make more difficult
 - *Major life activity* is broadly construed and includes working temporarily
 - Symptomless disabilities may be covered
2. Regarded as disabled
 - Includes an actual or perceived disability, whether the impairment actually limits, or is perceived to limit, a major life activity



Is COVID-19 Subject To ADA/FEHA?

Is COVID-19 a disability under the law?

3. Record of and perceived as disabled

- Includes previously having, or misclassified as having, a record or history of disability
- Includes those who don't currently have a disability but had a disability in the past
- Includes those who have a history of, or who have been misclassified as having, a disability

If it is a disability, accommodation may be necessary



COVID-19 Litigation

COVID litigation is on the rise: over 3,784 COVID-related cases have been filed between March 2020, and October 1, 2021, including 356 class actions

- **Tyson Foods:** wrongful death cases alleging Tyson knowingly risked the lives of meatpackers in its Iowa plant resulting in more than 1,000 infections and at least 5 deaths
- **EEOC v. ISS Facility Services:** failure to accommodate manager employee with a health condition by refusing her request to work from home 2 days a week during the pandemic
- **DOL v. Hi Tech Motorcars LLC:** after an OSHA investigation, the DOL sued for terminating an employee who warned managers and coworkers about potential Coronavirus hazards in the workplace following an employee's positive COVID test



COVID-19 Litigation

- **OSHA Citation and Penalties:** OSHA cited a Colorado insurance company and proposed penalties of \$23,406 after investigators found the company ignored pandemic related safety and needlessly exposed employees to coworkers with COVID-19 symptoms
- **BURBACH v. Arconic Corp:** alleged the employer made him work through days he requested off to recover from COVID-19 symptoms and failed to offer or grant him FMLA leave. The company terminated him after he requested to work remotely
- **United Airlines Class Action:** class action filed in Texas alleging the company failed to consider religious or medical exemptions to its COVID-19 vaccine mandate



Thank you | Questions

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