



Employment and Labor

OSHA Updates 2021: What Employers Need to Know

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Overview

- COVID Enforcement Trends
- Biden Administration Executive Order
- State Plan Updates
- Proactively Managing Risk/Protecting Employees

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COVID Enforcement Trends

- 12/4/20 OSHA National News Release
 - 255 inspections for violations relating to COVID
 - \$3.4 M proposed penalties
 - Violations
 - Written respiratory protection program
 - Med eval, respirator fit test, training
 - Report an injury, illness, or fatality
 - Record (on OSHA 300 Logs)
 - General Duty Clause

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COVID Enforcement Trends (cont.)

- Entities/Industries
 - Healthcare/Medical/Hospitals
 - Rehabilitation/Nursing/LTC
- Recordkeeping – “work-related”
 - Recording – 1904.4(a) (OSHA 300 Logs)
 - Reporting – 1904.39(a)(1) (contact OSHA)

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Biden Administration Executive Order

- Protecting Worker Health and Safety (1/21/21) – the Secretary of Labor shall:
 - Within two weeks issue revised guidance to employers on workplace safety during the COVID pandemic
 - Consider ETS (emergency temp standards), including regarding masks in workplace, and issue by 3/15/21
 - Review enforcement efforts of OSHA
 - Launch national program to focus OSHA enforcement efforts related to COVID on violations that put the largest number of workers at serious risk

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Recordkeeping Directives

- CSHO will consider reasonableness of employer's investigation
- Ask employee how employee believes he/she contracted COVID
- “While respecting employee privacy, discuss with the employee his work and out-of-work activities” that may have led to the illness
- Review employee's work environment for potential exposure

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Likely Work-Related

- Several cases develop among workers who work closely together, or
- Contracted shortly after lengthy, close exposure to particular customer or coworker who has a confirmed case, or
- Worker's job duties include having frequent, close exposure to the general public in locality with ongoing community transmission
- ... and, for all of the above, there is no alternative explanation

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Likely Not Work-Related

- Employee is the only worker to contract COVID-19 in employee's vicinity and job duties do not include frequent contact with the general public
- Employee closely and frequently associates with someone (family member, significant other, close friend) outside the workplace who has COVID-19
- Employer does not need to record if cannot determine whether it is more likely than not that exposure in the workplace played a causal role

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OSH Act General Duty Clause

- Section 5(a)(1) of the OSH Act: every employer must provide each of its employees “employment and a place of employment, which are **free from recognized hazards that are causing or are likely to cause death or serious physical harm**”
- OSHA must prove:
 - The employer failed to keep the workplace free of a **hazard to which employees of that employer were exposed**;
 - The hazard was recognized;
 - The hazard was causing or was likely to cause death or serious physical harm; and
 - There was **a feasible and useful method to correct the hazard**.

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Virginia – Emergency Temporary Standard

- July 15 – Virginia Safety & Health Codes Board adopts §16VAC25-220
- ETS applies to every employer and place of employment within VOSH’s jurisdiction
- ETS expired: w/in 6 months of July 27th (January 26th); or If repealed by the S&H Codes Board; or upon expiration of State of Emergency; or if superseded by a permanent infectious disease standard

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Virginia – Permanent Rule

- Virginia became the first state in the country to enact a permanent rule requiring employers to take steps to protect workers from Covid-19 infection on the job
- Enacted January 13, 2021, effective January 27th
- Training requirements effective March 26, 2021 (very high, high and medium)
- Remains in effect until repealed
- Within 14 days of expiration of the state of emergency, a meeting will be called to determine whether the standard is still needed
- Discrimination and retaliation prohibited

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Virginia – Permanent Rule (cont.)

Requirements based on Risk

LOWER RISK:

Do not require contact inside 6'

Minimal occupational contact or can achieve minimal occupational contact

MEDIUM RISK:

Require more than minimal occupational contact inside 6'

- waiters, grocery workers, agriculture workers, construction workers, domestic service, hairdressers, fitness instructors, workers in meat processing, manufacturing workers, and healthcare workers in settings w/out known or suspected sources of COVID-19

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Virginia – Permanent Rule (cont.)

Requirements based on Risk (cont.)

HIGH RISK:

High potential for employee exposure inside 6'

- hospital workers, first responders, medical transport, mortuary services workers, medical and dental staff, non-medical support staff, long term care staff, home healthcare, etc.

VERY HIGH RISK:

High potential for employee exposure inside 6'

- Aerosol generating, postmortem, or lab procedures from COVID-positive individual

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Virginia – Permanent Rule (cont.)

- What are the Virginia required COVID-19 Notifications?
- Notify VA Dept. of Health w/in 24 hours of learning of an “outbreak” two or more cases of their own employees in a 14 day period (regardless of work-relatedness)
- Notify VOSH w/in 24 hours of learning of three or more cases within a 14 day period (regardless of work-relatedness)
- Notify your employees who may have been exposed to a confirmed case w/in 24 hours of learning of the possible exposure

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Virginia – Permanent Rule (cont.)

- Notify other employer whose employee may have been exposed to your confirmed positive employee within 24 hours of learning of possible exposure
- Facility owners shall notify employer-tenants that a case has been discovered and the floor(s)/work area(s) where the case was located



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Virginia – Permanent Rule (cont.)

- Can an employer comply with CDC Guidance instead of VOSH's Permanent Standard?
- It depends – the standard rule provides a safe harbor:
To the extent an employer complies with a recommendation contained in CDC guidelines...and provided the CDC recommendation provides equal or greater protection than provided by a provision of this standard, the employer's actions shall be considered in compliance with this standard.
- VOSH will evaluate whether it agrees particular guidance provides equal or greater protection, and will verify the employer compliance with it

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California – Emergency Temporary Standards

In response to the rising number of reported COVID-19 cases in California, California's Division of Occupational Safety and Health Standards Board adopted emergency temporary standards (ETS), which went into effect immediately on November 30, 2020.

Covered Employers:

The ETS casts a wide net and applies to all California employers and employees except:

- Employers with one employee who does not have contact with others
- Employees who are working from home
- Employees who are already covered under Cal/OSHA's Aerosol Transmissible Diseases standard

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California – Emergency Temporary Standards (cont.)

The new ETS requires employers to develop a written COVID-19 Prevention Plan or incorporate a plan into its existing Injury and Illness Prevention Program (IIPP). As outlined in Cal/OSHA's recent FAQs, the employer must implement the following in accordance with their written program:

- Communication to employees about the employer's COVID-19 prevention procedures
- Identify, evaluate, and correct COVID-19 hazards
- Physical distancing of at least six feet unless it is not possible

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California – Emergency Temporary Standards (cont.)

- Use of face coverings
- Use engineering controls, administrative controls, and personal protective equipment as required to reduce transmission risk
- Procedures to investigate and respond to COVID-19 cases in the workplace
- Provide COVID-19 training to employees
- Provide testing to employees who are exposed to a COVID-19 case, and in the case of multiple infections or a major outbreak, implement regular workplace testing for employees in the exposed work areas
- Exclusion of COVID-19 cases and exposed employees from the workplace until they are no longer an infection risk
- Maintain records of COVID-19 cases and report serious illnesses and multiple cases to Cal/OSHA and the local health department, as required

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California – Emergency Temporary Standards (cont.)

The ETS puts into place specific requirements following an “outbreak” of COVID-19 in the workplace. An “outbreak” is defined as (1) three or more COVID-19 cases within a 14-day period at a single location, or (2) when a local health department identifies a place of employment as the location of a COVID-19 outbreak. In the event of an outbreak, employers must:

- Immediately provide testing and continue testing at least weekly until the workplace no longer qualifies as an outbreak
- Exclude from the workplace all employees who test positive for or who were exposed to COVID-19
- Investigate the outbreak and implement any necessary corrective action
- Document the investigation pursuant to the standards and any corrective action implemented as a result
- Notify the local health department within 48 hours of notice of the outbreak

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California – Emergency Temporary Standards (cont.)

However, in the event of a “major outbreak” (defined as 20 or more COVID-19 cases in an “exposed workplace” within a 30-day period), employers must also:

- Provide testing to all employees in the exposed workplace at least twice weekly, and exclude positive cases and exposures until there are no new cases detected for a 14-day period
- Implement ventilation changes to mechanical ventilation systems including increasing filtration efficiency to at least MERV-13, or the highest efficiency compatible with the ventilation system
- Evaluate whether HEPA air filtration units are needed in poorly ventilated areas
- Determine the need for a respiratory protection program or changes to an existing respiratory protection program under section 5144 to address COVID-19 hazards
- Consider halting all or part of operations to control the virus

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California – Emergency Temporary Standards (cont.)

One of the most notable aspects of the ETS is that it requires employers to provide testing to employees at no cost during work hours. Specifically, as touched on above, testing requirements vary depending on the scope of infections:

- Non-outbreak exposure of COVID-19—employers must offer testing at no cost to any employee potentially exposed to COVID-19 in the workplace, and provide applicable benefit information. The time an employee spends being tested is considered compensable hours worked.
- Outbreak of COVID-19—employer must, in addition to requirements for a non-outbreak, immediately provide testing to all employees in the exposed workplace, and exclude positive cases and exposures from work. They must also repeat the testing one week later, and continue testing employees at least weekly until the workplace no longer qualifies as an outbreak.
- Major outbreak of COVID-19—employer must, in addition to requirements for a non-outbreak, provide testing to all employees in the exposed workplace at least twice weekly, and exclude positive cases and exposures until there are no new cases detected for a 14-day period.

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California – Emergency Temporary Standards (cont.)

- Employers must exclude employees who test positive for COVID-19, or have had COVID-19 exposure from the workplace.
- Employees who test positive may return under the following conditions:
 - Employees with symptoms must meet all of these conditions:
 - At least 24 hours have passed since a fever of 100.4 or higher has resolved without the use of fever-reducing medications
 - COVID-19 symptoms have improved
 - At least 10 days have passed since COVID-19 symptoms first appeared
 - Employees without symptoms, at least 10 days have passed since the case's first positive test
 - If a licensed health care professional determines the person is no longer a COVID-19 case, in accordance with California Department of Public Health (CDPH) or local health department recommendations
 - Employees with COVID-19 exposure may return to the workplace 14 days after the last known COVID-19 exposure

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California – Emergency Temporary Standards (cont.)

One of the most notable requirements of California's Emergency Temporary Standards is the Paid Time Off requirement.

- For employees who are excluded from work for COVID-19 related reasons, but remain "otherwise able and available to work, employers shall 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"
- Must notify employees of all other possible leave benefits (i.e. Workers Compensation, FFCRA, CA labor code)

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California – Emergency Temporary Standards (cont.)

- There is no explicit cap on the amount of earnings that must be continued if employees are excluded from work multiple times.
- The requirement for paid time off under the ETS may be satisfied via employer-provided employee sick leave benefits and other supplemental paid sick leave offered in response to COVID-19.
- The requirement does not apply where the employer can demonstrate that the COVID-19 exposure is not work related.

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Tips for Avoiding Risk – Keeping COVID out of the Workplace

It is becoming more challenging as we are approaching the 1 year mark:

- Fatigue is setting in
- Vaccination is rolling out which presents additional issues
 - EEOC Guidance
 - Reasonable Accommodations
 - Policy on Vaccinations – PPE after vaccination

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Tips for Avoiding Risk – Keeping COVID out of the Workplace (cont.)

- Evaluate your current plan and double check any state response plan requirements to develop a checklist of any gaps – Most require written plans and requirements have changed and evolved over the past 9 months
- Time is of the essence
- Do your own contact tracing – try not to rely on DOH -Will make a good impression if you are a step ahead of them
- Don't rely on Temporary Agency if you have temporary workers as they may not share the same vested interest in your workplace and may have limited resources

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OSHA Areas of Focus

- Whether employer has written pandemic plan
- Social distancing protocols (entrance/exits, common areas, lunch, break times, shift changes, restrooms, etc.)
- Personal hygiene (including hand hygiene stations)
- Identification of high-touch surfaces
- Cleaning and disinfecting procedures (including methods/frequency)
- Use of EPA-registered disinfectants
- Employee access to SDS
- PPE (adequate supplies, proper care/maintenance, use, instruction, etc.)
- Signage (restrictions, warnings, paths of travel, reminders regarding social distancing and masks)

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Additional OSHA Areas of Focus

- Employee communications and training (preventing infection, symptoms, controls, etc.)
- Screening/testing (at home/facility entrances – visitors too)
- Respiratory protection program
- Isolation of visitors/employees experiencing symptoms
- Return to work procedures/protocols
- Engineering controls (e.g., barriers, dividers, etc.)
- Administrative controls (e.g., staggered work shifts, etc.)
- Whether employer follows CDC guidelines
- OSHA-required recordkeeping

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Questions?

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