



SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

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serving school and college
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5350 Skylane Boulevard
Santa Rosa, CA 95403

Tel: (707) 524-2690
Fax: (707) 578-0517
santarosa@sclscal.org
www.sclscal.org

General Counsel
Carl D. Corbin

Attorneys
Monica D. Batanero
Jennifer Henry
Nancy L. Klein
Damara L. Moore
Jennifer E. Nix
Steven P. Reiner
Kaitlyn A. Schwendeman
Loren W. Soukup
Erin E. Stagg

Of Counsel
Ellie R. Austin
Robert J. Henry
Frank Zotter, Jr.

LEGAL UPDATE

December 7, 2020

To: Superintendents, Member School Districts (K-12)
From: Jennifer Henry, Associate General Counsel *J.H.*
Subject: Cal/OSHA Issues Emergency COVID-19 Regulations for All
Employers
Memo No. 72-2020

On November 30, 2020, California approved 21 pages of emergency Cal/OSHA regulations on COVID-19 infection prevention for all employers. The regulations went into effect immediately and will remain in effect until October 2, 2021.

School District/COE Employers are Subject to the Regulations

All employers, including public agencies, are subject to the regulations, except for employers already covered under the Cal/OSHA Aerosol Transmissible Diseases standards (medical employers and corrections facilities; see Title 8 CCR 5199) and employers with a single employee who does not have contact with others.

Where state or local health department orders are more strict, the stricter provisions control.

The regulations do not apply to employees when they are working from home.

Written COVID-19 Prevention Program

Employers must establish and implement a written, site-specific COVID-19 Prevention Program (“CPP”) that includes the following elements:

- Communication to employees about the COVID-19 prevention procedures
- Identifying, evaluating, and correcting workplace COVID-19 hazards (screening and responding to employees for COVID-19 symptoms; staying current on state and local COVID-19 guidance; evaluating and correcting worksites for hazards)



- Implementing effective policies and procedures to correct unsafe and unhealthy conditions (such as physical distancing, workplace modifications, and staggering work schedules)
- Providing and ensuring workers wear face coverings
- Physical distancing of at least six feet
- Use of face coverings
- Use of controls and PPE to reduce transmission risk (plexiglass partitions; disinfecting workplaces; providing PPE as required)
- Procedures to investigate and respond to COVID-19 cases (including contact tracing and notifying potentially exposed employees)
- Provide COVID-19 training to employees
- Provide testing to exposed employees
- Excluding employees who test positive
- Maintaining records of COVID-19 cases and reporting cases to Cal/OSHA and the local health department

In lieu of establishing a separate CPP, employers can ensure that all of the above elements are included in their Injury and Illness Prevention Program (“IIPP”), which already requires many of the above elements.

The link to Cal/OSHA’s Model CPP can be found here:
https://www.dir.ca.gov/dosh/dosh_publications/ CPP.doc

Communication with Employees

Employers must communicate the following to their employees:

- How to report COVID-19 symptoms, exposures, and hazards without fear of retaliation
- The employer’s procedure to address any COVID-19 hazards
- Existing procedures regarding accommodating employees with elevated risk factors
- How employees can obtain COVID-19 testing
- Notice of potential exposures
- Cleaning and disinfection protocols

Employee Training

Employers must train employees on how COVID-19 is spread, infection prevention techniques, and information regarding COVID-19 benefits that employees may be entitled to under applicable federal, state, or local laws. Employees must also be trained in the importance of physical distancing, face coverings, and frequent hand washing. Many local educational agencies (LEAs) addressed this at the start of the 2020-2021 school year.

Physical Distancing

Employers must ensure that employees maintain at least six feet of distance from others except while in movement, such as in a hallway. If this is not possible, employers must consider physical barriers such as plexiglass barriers, telework, reducing the number of people in an area, and/or staggered work schedules. Other required “controls” include maximizing outdoor air,



cleaning frequently touched surfaces, and encouraging frequent hand washing and hand sanitizing.

Face Coverings

Employers must provide employees with face coverings and ensure they are worn when indoors, and when outdoors within six feet of another. Exceptions include: when an employee is alone in a room, when eating or drinking, and when an employee has a medical condition, is working with the hearing impaired, or is performing a task that cannot be performed with a face covering. If an exception applies, the employee must use an effective non-restrictive alternative, such as distancing, a clear face shield with a drape, or biweekly testing.

Addressing COVID-19 Cases – Exclusion from Workplace

Employers must develop and implement a process for screening and responding to employees with COVID-19 symptoms. All employees who have tested positive, been ordered to isolate by the state or local health officer, or had COVID-19 exposure, must be excluded. Employers must also investigate all exposures and correct those conditions, if any workplace conditions could have contributed to the risk of exposure.

An employee who tested positive *and has symptoms* may not return to work until all of the following “return to work” criteria have been met: 10 days have passed from the first symptoms; COVID-19 symptoms have improved; **and** at least 24 hours since a fever of 100.4 or higher resolved.

An employee who tested positive *and does not have symptoms* may not return to work until 10 days after the positive test.

Employees who were exposed must be excluded for 14 days after the last known exposure.

All excluded employees must receive information about their available COVID-19 related benefits and applicable leaves.

The new emergency regulations at 8 CCR § 3205(c)(11)(C) specifically provide that “a negative COVID-19 test shall not be required for an employee to return to work” if the employee has otherwise met the “return to work” criteria. Please note this is a change in our understanding of when an employee could be required by an employer to be tested for COVID-19.

Continuation of Compensation and Benefits While Excluded from Workplace

For employees *who are able and available to work*, but excluded after a positive COVID-19 test, ordered to isolate by a local or state health officer, or COVID-19 exposure, employers are required to continue and maintain the employee’s earnings, seniority, rights and benefits, and right to return to their former jobs. Employers may require employees to exhaust paid sick leave benefits first and may offset payments by the amount an employee receives from government benefits (where permitted by law and not covered by worker’s compensation); however, employees’ rights under the new regulations are not capped by other available paid benefits. On the other hand, the rights do not apply where the employer can demonstrate that the employee’s COVID-19 exposure is not work related.



The continuation of compensation is arguably beyond the scope of the Occupational Safety and Health Standards Board's authority and may be the subject of future litigation.

Outbreaks

Workplace Outbreaks (three or more cases in a workplace in a 14-day period)

- Follow the AB 685 notification requirements (See our Legal Update Memo No. 57-2020 ADDENDUM, dated November 5, 2020, for template notices of potential COVID-19 exposure for employees, unions, and county health departments).
- Offer employees free COVID-19 testing during working hours, and test employees potentially exposed once a week until there have been no new cases in 14 days.
- Exclude all positive cases.
- Immediately investigate and determine whether workplace factors could have contributed to the outbreak. Such factors include leave policies, whether employees are discouraged from remaining home when sick, testing policies, insufficient outdoor air, insufficient air filtration, and lack of physical distancing.

Major Outbreaks (20 or more cases in a 30-day period)

- Follow the AB 685 notification requirements (See our Legal Update Memo No. 57-2020 ADDENDUM, dated November 5, 2020, for template notices of potential COVID-19 exposure for employees, unions, and county health departments).
- Offer employees free COVID-19 testing during working hours, and test employees at least twice a week until there have been no new cases in 14 days.
- Exclude all positive cases.
- Investigate and correct workplace hazards, including improving air filtration to at least MERV-13 efficiency, or if MERV-13 or higher filters are not compatible with the ventilation system, implement the use of filters with the highest compatible filtering efficiency. In addition, evaluate whether portable HEPA filtration or other air cleaning systems would reduce the risk of COVID-19 transmission and implement their use to the degree feasible.
- Determine whether a respiratory protection program is needed.
- Considering halting all or part of operations.

Recordkeeping and Reporting COVID-19 Cases

Employers must maintain a record of and track all COVID-19 cases with the employee's name, contact information, occupation, location of work, most recent date worked at the workplace, and the date of the positive COVID-19 test. Employers must ensure such employee medical information remains confidential.

When a **serious** COVID-19 illness (requiring hospitalization) or death occurs, the employer must report this immediately to a Cal/OSHA office. Report COVID-19 exposures to DIR:

<https://www.dir.ca.gov/dosh/report-accident-or-injury.html>

Penalties for Not Following the Regulations

Non-compliance can result in an OSHA citation and penalty in accordance with Cal/OSHA's pre-existing penalty structure. Penalties can range from \$13,277 for a Regulatory or General



violation, \$25,000 for a Serious violation, and up to \$132,765 for a Repeat or Willful violation. Cal/OSHA's Chief stated that it will take into account the time employers will need to implement the new regulations, and any "good faith" efforts to comply. AB 685 recently expanded Cal/OSHA's authority to shut down entire worksites that expose employees to COVID-19 related hazards.

Links for More Information

Cal/OSHA COVID-19 Emergency Temporary Standards Frequently Asked Questions:

<https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html>

Cal/OSHA one-page fact sheet:

https://www.dir.ca.gov/dosh/dosh_publications/COVIDOnePageFS.pdf

Text of Regulations (8 CCR 3205-3205.4: <https://www.dir.ca.gov/oshsb/documents/COVID-19-Prevention-Emergency-apprvdtxt.pdf>)

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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