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LEGAL UPDATE

June 25, 2021

To: Superintendents/Presidents/Chancellors, Member Community
College Districts)

From: Damara Moore, Senior Associate General Counsel *DM*
Jennifer Henry, Associate General Counsel *JH*

Subject: Cal/OSHA Guidance Harmonized with Other State Laws,
Orders and Regulations
Memo No. 12-2021(CC)

While the Governor and the State of California’s Department of Public Health (“CDPH”) loosened restrictions related to protections from COVID-19 due to reduced cases and vaccinations, Cal/OSHA regulations, which were stricter than other guidance received from the State, remained out-of-sync. On June 17, 2021, Cal/OSHA revised its regulations related to emergency temporary standards for COVID-19 Prevention to conform with the new CDPH guidance.¹

*It is important to note that these newly revised Cal/OSHA regulations have replaced CDPH Guidance “COVID-19 Industry Guidance: Institutions of Higher Education” dated September 30, 2020.²

This legal update addresses the new regulations and other frequently asked questions we receive related to the loosening of restrictions and how these affect higher education local educational agencies (“LEAs”).

Frequently Asked Questions

1. Do vaccinated employees still need to wear a mask? What about unvaccinated employees? Must the employer provide the face coverings? Preliminarily, Cal/OHSA defines “Face covering” as a surgical mask, a medical procedure mask, a respirator worn voluntarily, or a tightly woven fabric or non-woven material of at least two layers. A face covering has no visible holes or

¹ <https://www.dir.ca.gov/dosh/coronavirus/ETS.html>.

² A disclaimer for CDPH Guidance “COVID-19 Industry Guidance: Institutions of Higher Education” dated September 30, 2020, now reads: “This guidance is no longer in effect. Most businesses now follow the COVID-19 Prevention Emergency Temporary Standards. Visit the California Department of Public Health’s COVID-19 website for the current COVID-19 public health guidance.” <https://files.covid19.ca.gov/pdf/guidance-higher-education--en.pdf> .



openings and must cover the nose and mouth. A face covering does not include a scarf, ski mask, balaclava, bandana, turtleneck, collar, or single layer of fabric.³

1. Vaccinated Employees

As of June 15, 2021, CDPH's position is: "Face coverings are not required for fully vaccinated individuals, except in the following settings where face coverings are required for everyone, regardless of vaccination status: on public transit, indoors at youth settings (such as childcare), healthcare settings, and in indoor public settings and businesses.⁴ Employers must also provide face coverings to vaccinated employees, upon request.⁵

2. Unvaccinated Employees

Employers must provide face coverings for all employees who are not fully vaccinated and ensure they are worn when indoors or in vehicles.⁶ Employers shall provide face coverings and ensure they are worn by employees when required by orders from the CDPH.⁷

Exemptions: The following are exceptions to the face coverings requirement:

1. When an employee is alone in a room or vehicle.
2. While eating and/or drinking at the workplace, provided employees are at least six feet apart and there is outside air supply to the area; if indoors, air has been maximized to the extent feasibly possible.
3. Employees wearing respirators required by the employer and used in compliance in accordance with Cal. Code of Regs., title 8, section 5144.
4. Employees who cannot wear face coverings due to a medical or mental health condition or disability, or who are hearing-impaired or communicating with a hearing-impaired person.
5. Specific tasks which cannot feasibly be performed with a face covering. This exception is limited to the time period in which such tasks are actually being performed.⁸ Employees exempt from wearing face coverings due to a medical condition, mental health condition, or disability shall wear an effective non-restrictive alternative, such as a face shield with a drape on the bottom, if their condition or disability permits it.⁹

Any employee not wearing a face covering pursuant to the above exceptions, shall be at least six feet apart from all other persons, unless the unmasked employee is either fully vaccinated or tested at least weekly for COVID-19 during paid time and at no cost to the employee.¹⁰

³ Cal. Code of Regs., tit. 8, section 3205(b)(8).

⁴ CDPH Face Coverings Guidance. <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/guidance-for-face-coverings.aspx>

⁵ Cal. Code of Regs., tit. 8, sections 3205(c)(5)(J), 3205(c)(6)(H).

⁶ Cal. Code of Regs., tit. 8, section 3205(c)(6)(A).

⁷ Cal. Code of Regs., tit. 8, section 3205(c)(6)(B).

⁸ Cal. Code of Regs., tit. 8, section 3205(c)(6)(D).

⁹ Cal. Code of Regs., tit. 8, section 3205(c)(6)(E).

¹⁰ Cal. Code of Regs., tit. 8, section 3205(c)(6)(F).

Employers may not use COVID-19 testing or physical distancing as an alternative to face coverings when face coverings are otherwise required. Employers may not use the mask alternatives related to disabilities, as described above, as an alternative to face coverings when face coverings are otherwise required by this section.¹¹ Nonetheless, face coverings must be provided upon request for voluntary use and non-vaccinated employees must be provided with a respirator upon request without retaliation.¹²

2. What about students – must they wear face coverings?

Although the CDPH Guidance for Higher Education has been replaced by the revised Cal/OSHA regulations, which only apply to employees, the general CDPH Face Covering Guidance still applies. As noted above, regardless of vaccination status, face coverings must still be worn in indoor public settings and businesses, on public transit, indoors at youth settings (such as childcare), and in healthcare settings.¹³

3. Are there exceptions for students with disabilities to wearing a mask indoors?

Under Section 504 and the Individuals with Disabilities Education Act (“IDEA”), LEAs are required to make modifications for students who are unable to wear a face covering. According to OCR:

Students with a disability who cannot wear or safely wear a mask because of their disability in accordance with CDC guidelines should not be required to wear one. For example, a student with a disability who, for reasons related to the disability, would be physically unable to remove a mask without assistance if breathing became obstructed should not be required to wear a mask. Students with other types of disabilities could also be exempt from wearing a face mask based on factors specific to the student, and colleges should rely on CDC guidance in making such determination.

For the narrow subset of students with disabilities who, because of their disability, cannot wear a mask or cannot safely wear a mask, the college must determine based on a student’s individual circumstances whether that student is able to attend school safely if other prevention strategies can be followed, in accordance with CDC guidance. . . . Prevention strategies might include correct and consistent masking and additional Personal Protective Equipment (PPE) for others who work or learn with the student, avoiding large gatherings in class areas, maintaining sufficient physical distance, and remote education.¹⁴

4. Can we ask staff about their vaccination status? Can we ask for evidence of vaccination?

¹¹ *Id.*

¹² Cal. Code of Regs, tit. 8, sections 3205(c)(5)(E). Cal. Code of Regs, tit. 8, section 3205(c)(7)(D)(2).

¹³ CDPH Face Coverings Guidance.

¹⁴ U.S. Dep’t of Educ, Office for Civil Rights, *Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment* at 8-9 (May 13, 2021), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-reopening-202105.pdf>.



In regards to employees, the EEOC has provided guidance¹⁵ that asking an employee if they have been vaccinated (and requesting proof of receipt of vaccination) by itself is legally permissible as asking for this information is *not* considered a medical inquiry. The employer *should be very careful* in asking any additional questions if the employee is not vaccinated (such as *why* is the employee not vaccinated) as many of these sorts of follow-up questions could result in a disability-related inquiry. For more information on disability-related or religious inquiries, see items K.1-K.12 in the EEOC guidance (See footnote 15). There are no limitations on the specific title of the employer agent asking an employee if they have been vaccinated and requesting proof of vaccination. A COVID-19 coordinator would be an appropriate first choice, but in the absence of the COVID-19 coordinator, other agents of the employer could gather this information.

An employee can self-certify that they have been vaccinated via a written attestation.¹⁶ Contact our office if you would like such a form. In addition, the State has set up a website that digitally verifies an employee's vaccination status: <https://myvaccinerecord.cdph.ca.gov/>.

5. Can we ask students about their vaccination status?

Using the EEOC's reasoning, we see no prohibition of asking students if they have received the COVID-19 vaccine and requesting proof of the vaccination. While the UC and CSU systems are moving to require vaccines this Fall, for the time being it appears that the California Community Colleges Chancellor is leaving it up to each community college district to decide whether to mandate student vaccines. We advise that any district wanting to develop such a requirement contact their legal counsel to discuss this issue.

6. Should employee and student vaccination status be maintained as confidential, and, if so, how?

We advise designating someone as a COVID-19 coordinator to be responsible for seeking this information and maintaining it.

1. Employees

For employees, we advise that any information be kept confidential, and for an employer not to widely distribute lists detailing which employees are, and are not vaccinated, so as to avoid issues associated with confronting and/or asking questions.

2. Students

For students, information maintained by an LEA personally identifiable to a student (such as a record that a student has received a COVID-19 vaccination) is a student record under federal (Family Educational Rights & Privacy Act ("FERPA")) and state (see Education Code sections 76240 *et seq.*) law, so such records should be kept confidential.

¹⁵ U.S. Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (updated May 28, 2021), FAQs K-1, K-3, available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> .

¹⁶ <https://www.dir.ca.gov/dosh/coronavirus/Revisions-FAQ.html#background> FAQ under "Vaccines".



Additionally, in accordance with FERPA and California law on student record access issues, any agent of the LEA who has a “legitimate educational interest” may obtain this information and share this information with other agents of the LEA that have a legitimate educational interest.¹⁷ For example, a sports team coach could ask student athletes if they have been vaccinated to help determine the appropriate response following a COVID-19 exposure.

7. What are the testing requirements under the new Cal/OHSA regulation?

Preliminarily, here are notable definitions from Cal/OSHA:

“COVID-19 test” means a viral test for SARS-CoV-2 that is: (A) Approved by the United States Food and Drug Administration (“FDA”) or has an Emergency Use Authorization from the FDA to diagnose current infection with the SARS-CoV-2 virus; and (B) Administered in accordance with the FDA approval or the FDA Emergency Use Authorization as applicable.¹⁸

“Fully vaccinated” 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 approved; have an emergency use authorization from the FDA; or, for persons fully vaccinated outside the United States, be listed for emergency use by the World Health Organization (“WHO”).¹⁹

“High-risk exposure period” means the following time period:

(A) For COVID-19 cases who develop COVID-19 symptoms, from two days before they first develop symptoms until all of the following are true: it has been 10 days since symptoms first appeared; 24 hours have passed with no fever, without the use of fever-reducing medications; and symptoms have improved.

(B) For COVID-19 cases who never develop COVID-19 symptoms, from two days before until 10 days after the specimen for their first positive test for COVID-19 was collected.²⁰

“Respirator” means a respiratory protection device approved by the National Institute for Occupational Safety and Health (“NIOSH”) to protect the wearer from particulate matter, such as an N95 filtering facepiece respirator.²¹

Testing

There are no testing requirements absent a positive case (i.e. no requirement that LEA’s conduct “surveillance” testing).

If there are one or two positive cases: Employers must “[m]ake COVID-19 testing available at no cost, to all employees of the employer who had a close contact²² in the workplace with the

¹⁷ See Education Code section 76243.

¹⁸ Cal. Code of Regs., tit. 8, section 3205(b)(6).

¹⁹ Cal. Code of Regs., tit. 8, section 3205(b)(9).

²⁰ Cal. Code of Regs., tit. 8, section 3205(b)(10).

²¹ Cal. Code of Regs., tit. 8, section 3205(b)(11).

exception of (a) Employees who were fully vaccinated before the close contact and do not have COVID-19 symptoms; and (b) COVID-19 cases who returned to work pursuant to [the return to work criteria].”²³ See Attachment A for these criteria.

Three or more cases: Employers are required to test when there is a COVID-19 outbreak of three or more employees within an exposed group²⁴ who visited the workplace during their high-risk exposure period at any time within a 14-day period, except for employees who were not present during the relevant 14 day period; employees who were fully vaccinated before June 17, 2021 and are asymptomatic, and those who met the return-to-work criteria in Attachment A.²⁵ The employer must make testing available to all employees in the exposed group and then again one week later.²⁶ Negative COVID-19 test results of employees with COVID-19 exposure shall not impact the duration of any quarantine, isolation, or exclusion period required by, or orders issued by, the local health department.²⁷ Two tests shall be made available – one immediately and another one week later.²⁸ After the first two COVID-19 tests, employers must make available testing once a week, at no cost, during paid time, to all employees in the exposed group who remain at the workplace, or more frequently if recommended by the health department, until there are no new cases detected in the exposed group for a 14-day period.²⁹ The Department of Industrial Relations may order yet additional testing under these circumstances, which the employer would then have to provide at no cost during the employee’s paid time.³⁰

Twenty or more cases: Essentially, until there are fewer than three cases detected in the exposed group, the employer must follow the rules for exposures of three employees, *supra*, but regardless of vaccination status.³¹

²² “Close contact” means 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” defined by this section. This definition applies regardless of the use of face coverings. Cal. Code of Regs, tit. 8, 3205(b)(1).

²³ Cal. Code of Regs., tit. 8, section 3205(c)(3)(B)(5).

²⁴ “Exposed group” means all employees at a work location, working area, or a common area at work, where an employee COVID-19 case was present at any time during the high-risk exposure period. A common area at work includes bathrooms, walkways, hallways, aisles, break or eating areas, and waiting areas. The following exceptions apply:

(A) For the purpose of determining the exposed group, a place where persons momentarily pass through while everyone is wearing face coverings, without congregating, is not a work location, working area, or a common area at work.

(B) If the COVID-19 case was part of a distinct group of employees who are not present at the workplace at the same time as other employees, for instance a work crew or shift that does not overlap with another work crew or shift, only employees within that distinct group are part of the exposed group.

(C) If the COVID-19 case visited a work location, working area, or a common area at work for less than 15 minutes during the high-risk exposure period, and the COVID-19 case was wearing a face covering during the entire visit, other people at the work location, working area, or common area are not part of the exposed group.

NOTE: An exposed group may include the employees of more than one employer. See Labor Code sections 6303 and 6304.1. Cal. Code of Regs, tit. 8, section 3205(b)(7)

²⁵ Cal. Code of Regs., tit. 8., sections 3205.1(a), (b).

²⁶ Cal. Code of Regs., tit. 8., section 3205.1(b)(2)(A).

²⁷ *Id.*

²⁸ Cal. Code of Regs., tit. 8., section 3205.1(b)(2)(A).

²⁹ Cal. Code of Regs., tit. 8, sections 3205.1(a)(2), (b)(2)(B).

³⁰ Cal. Code of Regs., tit. 8, section 3205.1(c).

³¹ Cal. Code of Regs., tit. 8, section 3205.2.



8. Is a COVID-19 Prevention Program still required?

Yes. A link to Cal/OSHA's form can be found on its FAQ page about the regulations, page 2.³² Employers must establish, implement, and maintain an effective written COVID-19 Prevention Program that includes:

- Identifying and evaluating employee exposures to COVID-19 health hazards.
- Implementing effective policies and procedures to correct unsafe and unhealthy conditions.
- Allowing adequate time for handwashing and cleaning frequently touched surfaces and objects.
- Employers must provide effective training and instruction to employees on how COVID-19 is spread, infection prevention techniques, and information regarding COVID-19-related benefits that affected employees may be entitled to under applicable federal, state, or local laws.
- Employers must exclude employees who have COVID-19 symptoms and/or are not fully vaccinated and have had a close contact from the workplace and, if that close contact is work related, ensure continued wages.³³

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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³² Cal/OSHA, *COVID-19 Emergency Temporary Standards: What Employers Need to Know About the Recommended Revisions* (updated June 16, 2021), available at https://www.dir.ca.gov/dosh/dosh_publications/06-16-21-ETS-Revisions.pdf.

³³ *Id.*



ATTACHMENT A - RETURN TO WORK CRITERIA

“COVID-19 cases with COVID-19 symptoms shall not return to work until:

1. At least 24 hours have passed since a fever of 100.4 degrees Fahrenheit or higher has resolved without the use of fever-reducing medications; and
2. COVID-19 symptoms have improved; and
3. At least 10 days have passed since COVID-19 symptoms first appeared.

(B) COVID-19 cases who tested positive but never developed COVID-19 symptoms shall not return to work until a minimum of 10 days have passed since the date of specimen collection of their first positive COVID-19 test.

(C) Once a COVID-19 case has met the requirements of subsection (c)(10)(A) or (B), as applicable, a negative COVID-19 test shall not be required for an employee to return to work.

(D) Persons who had a close contact may return to work as follows:

1. Persons who had a close contact but never developed any COVID-19 symptoms may return to work when 10 days have passed since the last known close contact.
2. Persons who had a close contact and developed any COVID-19 symptom cannot return to work until these requirements have been met, unless all of the following are true:
 - a. The person tested negative for COVID-19 using a polymerase chain reaction (PCR) COVID-19 test with specimen taken after the onset of symptoms; and
 - b. At least 10 days have passed since the last known close contact; and
 - c. The person has been symptom-free for at least 24 hours, without using fever-reducing medications.

...

(E) If an order to isolate, or quarantine, or exclude an employee is issued by a local or state health official, the employee shall not return to work until the period of isolation or quarantine is completed or the order is lifted. If no period was specified, then the period shall be in accordance with the return to work periods [stated herein.]

Cal. Code Regs, tit. 8, section 3205(c)(10)