

# Alert

November 15, 2021



## California Employers Can Let Cal/OSHA Know Federal OSHA COVID-19 ETS Potential Workplace Impacts

The California Division of Occupational Safety and Health (Cal/OSHA) maintains an occupational safety and health plan that is approved and monitored by the federal Occupational Safety and Health Administration (federal OSHA). As a “state plan state,” California is required to adopt occupational safety and health standards “at least as effective” as federal OSHA’s, in accordance with Section 18 of the federal Occupational Safety and Health Act of 1970 (29 USC § 667(c)(2)).

On November 5, 2021, federal OSHA published in the Federal Register an emergency temporary standard (OSHA ETS) to protect workers’ safety by reducing the spread of COVID-19 in workplaces. The OSHA ETS establishes vaccination or weekly testing mandates for companies with 100 or more employees in all locations in the United States.

Now that the federal OSHA has adopted a standard obligating covered employers to require either vaccines or weekly testing, the Cal/OSHA will have 30 days after the date of promulgation of the OSHA ETS to adopt a “comparable standard.”

The Cal/OSHA Occupational Safety and Health Standards Board provided notice of a public meeting to be held on November 18, 2021 and placed on its agenda new “Proposed Emergency Safety Orders for Adoption,” signaling its intent to implement new General Industry Safety Orders comparable to the federal OSHA ETS for Vaccination, Testing and Face Coverings. If implemented, it is anticipated it will go into effect immediately as a new Emergency Temporary Standard (Cal/OSHA ETS.)

Unfortunately, at this point Cal/OSHA has not issued proposed regulations, promising only that: “The draft regulations will be posted on our [Cal/OSHA’s] website as soon as feasible at: <https://www.dir.ca.gov/oshsb/mtgsch.html>.”

### What Can California Employers Do at This Point?

Employers have a short window of opportunity to weigh in on the potential impact of these proposed regulations and actions on their work places by providing public comments on the proposed new standards to the Cal/OSHA board. Employers can “virtually” attend the meeting via: video-conference or teleconference, and the meeting will launch live video stream and audio stream as the meeting starts at 10:00 a.m. PST on November 18, 2021. Stakeholders who wish to comment on agenda items may submit a request to be added to the public comment queue either in advance of or during the meeting through one of the following methods: ONLINE: Provide your information through the online comment queue portal; or PHONE: Call a designated phone number to access the automated comment queue voicemail.

<https://www.dir.ca.gov/oshsb/documents/agendaNov2021.pdf>

### What is the current status of the Cal/OSHA ETS?

A little history and timeline:

On November 30, 2020, almost a year earlier than federal OSHA, the California Division of Occupational Safety and Health (Cal/OSHA) issued its initial Emergency Temporary Standard



C. Edward Langhammer, Jr.

**Member**

clanghammer@cozen.com  
Phone: (310) 943-4818  
Fax: (310) 394-4700



John S. Ho

**Co-Chair,  
OSHA-  
Workplace  
Safety Practice**

jho@cozen.com  
Phone: (212) 883-4927  
Fax: (212) 509-9492



James J. Sullivan, Jr.

**Co-Chair,  
OSHA-  
Workplace  
Safety Practice**

jjsullivan@cozen.com  
Phone: (202) 912-4841  
Fax: (267) 507-1571

### Related Practice Areas

- Labor & Employment

(Cal/OSHA ETS.) including workplace safety standards for masking and physical distancing.

On June 17, 2021, Cal/OSHA issued an **updated** Cal/OSHA ETS that included updates for then newly available vaccinations, masking and physical distancing requirements. The Cal/OSHA ETS is set to expire (unless further extended) on January 14, 2022.

On October 20, 2021, Cal/OSHA released a **proposed** second re-adoption with revisions to the Cal/OSHA ETS that includes revised language that, if adopted, would become effective from January 14, 2022 to April 14, 2022. The proposed ETS would among other things: no longer differentiate between fully vaccinated and unvaccinated employees for purposes of indoor COVID-19 screenings; require employers to make testing — at no cost — available to employees who had a “close contact” in the work place or in case of an “outbreak” without differentiating between vaccinated and unvaccinated workers; and change return to work requirements.

The federal OSHA ETS and the current version of the Cal/OSHA ETS have some differences that will have to be reconciled, including that the existing Cal/OSHA ETS:

- Does not have a vaccination mandate (a core requirements of the new federal OSHA ETS.) Cal/OSHA ETS has not provided any guidance as to whether employers **should** mandate vaccinations in their workplaces.
- Does not have an option to test in lieu of vaccination (another core requirements of the new federal OSHA ETS.) The new ETS will certainly have a vaccination requirement and if it provides the weekly testing option, the costs relating to weekly testing would almost, without doubt, have to be paid by employers. Employers must reimburse employees for “all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties.” *California Labor Code* Section 2802
- Is different from the federal OSHA ETS with respect to the 100 employee threshold for covered employees. The Cal/OSHA ETS has limited exemptions for: employers with only one employee who does not have contact with other people; employees who are working from home; employees covered by the Aerosol Diseases regulation; and employees working from a location chosen by the employee, which is not under the control of the employer (for instance, employee teleworking from a café or friend’s home.)

Given the Cal/OSHA board’s November 18 consideration of adopting a “comparable standard” with the federal OSHA ETS, the fate of the proposed regulations is now uncertain. Employers and other stakeholders may wish to have their voices heard by participating individually or collectively in the November 18 public hearing. Employers should continue to monitor COVID-19 related developments for their work places. COVID-19 is not going away any time soon, and the laws and regulations on a federal, state, and local levels continue to evolve and change as the pandemic continues.

UPDATE: As we go to press on this Alert, the Fifth District Court of Appeal has issued a stay blocking implementation of the Occupational Safety and Health Administration’s emergency regulation. This is likely to impact or possibly delay any action by the Cal/OSHA board at its November 18 meeting. Be on the look-out for further Alerts on these continuing developments.

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