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# NAVIGATING THE NEXT.

## New Cal-OSHA COVID-19 Regulations

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February 18, 2021

# Presenters



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# To Whom Does The ETS Apply?

All employees at places of employment



# California Labor Code 3205 Exceptions

- a. one employee who does not have contact with other persons,
- b. employees working from home, and
- c. employees who are covered by the Cal-OSHA Aerosol Transmissible Disease (ATD) Standard (8 CCR § 5199).



# Who Is Covered By The Aerosol Transmissible Disease Standard?

- A long list of “health care facilities, services, or operations”
- It addresses, among other things:
  - ATD exposure control plan,
  - respiratory protection, and
  - exposure incidents (e.g., responding, reporting).



# Key Definition: “COVID-19 Case”

- COVID-19 case
  - Positive COVID-19 test,
  - Subject to COVID-19-related order to isolate by local or state health official, or
  - Died due to COVID-19 as determined by local health department

# Key Definition: “COVID-19 Exposure”

- “COVID-19 exposure”
  - Within six feet
  - Cumulative 15 minutes or greater in any 24-hour period
  - Within or overlapping with the “high-risk exposure period” defined by this section
  - Face covering or not



# Key Definition: “High-Risk Exposure Period”

- “High-Risk Exposure Period”
  - Person who develops COVID-19 symptoms:
    - Two days before symptoms first start,
    - UNTIL 10 days after symptoms started, and
    - 24 hours after no fever (without meds).



# Key Definition: “High-Risk Exposure Period”

- Positive test but no symptoms?
  - Two days before specimen collected UNTIL 10 days after specimen collected



# Key Definition: “Exposed Workplace”

- “Exposed workplace”
  - Work location, working area, or common area used or accessed by a COVID-19 case during the high-risk period, including bathrooms, walkways, hallways, aisles, break or eating areas, and waiting areas.
  - **Does not include** buildings or facilities not entered by a COVID-19 case;
  - **Does not include** areas where masked workers momentarily pass through the same space without interacting or congregating;
  - **Does include** “worksites” as defined by California Labor Code § 6409.6(d)(5) (AB 685)

# Exposed Workplaces

- Per FAQs, consider creating “cohorts” (Exposed Workplace FAQ #8)
- Per FAQs, consider shift changes to be “separate workplaces” (Exposed Workplace FAQ #9)



# How Does AB 685 Define “Worksite”?

- Worksite
  - The building, store, facility, agricultural field, or other location where a worker worked during the infectious period. It does not apply to buildings, floors, or other locations of the employer that a qualified individual did not enter. In a multiworksite environment, the employer need only notify employees who were at the same worksite as the qualified individual. California Labor Code § 6409.6.

# Should You Be Worried About This?

**No.** The FAQs say nothing changes.

**Q:** Does the “exposed workplace” mean the entire workplace? Did this change after January 1, 2021 when AB 685 went into effect?

**A:** No, the “exposed workplace” includes only the areas of the building where the COVID-19 cases were present during the “high-risk exposure period.” This did not change after January 1, 2021.

# Written COVID-19 Exposure Plan

## Model COVID-19 Prevention Program (CPP)

With some exceptions, all employers and places of employment are required to establish and implement an effective written COVID-19 Prevention Program (CPP) pursuant to an Emergency Temporary Standard in place for COVID-19 (California Code of Regulations (CCR), Title 8, section 3205(c)). Cal/OSHA has developed this model program to assist employers with creating their own unique CPP tailored to their workplace.

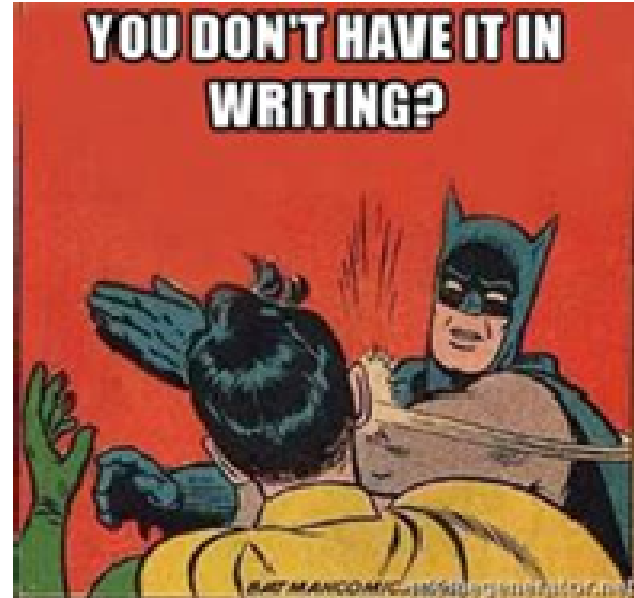
Employers are not required to use this program. Employers may create their own program or use another CCP template. Employers can also create a written CCP by incorporating elements of this program into their existing Injury and Illness Prevention Program (IIPP), if desired. Cal/OHA encourages employers to engage with employees in the design, implementation and evolution of their COVID-19 Prevention Program.

Using this model alone does not ensure compliance with the emergency temporary standard. To use this model program effectively, the person(s) responsible for implementing the CPP should carefully review:

- All of the elements that may be required in the following CCR, Title 8 sections:
  - 3205, COVID-19 Prevention
  - 3205.1, Multiple COVID-19 Infection and COVID-19 Outbreaks
  - 3205.2, Major COVID-19 Outbreaks
  - 3205.3, Prevention in Employer-Provided Housing
  - 3205.4, COVID-19 Prevention in Employer-Provided Transportation to and from Work
  - The four **Additional Considerations** provided at the end of this program to see if they are applicable to your workplace.
- The additional guidance materials available at [www.dir.ca.gov/dosh/coronavirus/](http://www.dir.ca.gov/dosh/coronavirus/)

# Key Points

- How to make Cal-OSHA happy
  - Have a written plan
  - Document, document, document!
  - Provide training



# Face Coverings

- Employers must provide face coverings to all employees and ensure that employees wear them over their noses and mouths when indoors, outdoors, and less than six feet away from another person, and where required by orders from the CDPH or local health department.





# Face Coverings - Exceptions

An employee is exempt from wearing a face covering:

1. When alone in a room.
2. While eating and drinking six feet away from others with outside air supply or maximized indoor to the extent possible.
3. When employee has other respiratory protection in accordance with 8 CCR § 5144.
4. When employee has medical issues.
5. If hearing impaired or communicating with a hearing-impaired person.
6. When the task does not allow a face covering.

**Q: What is a “room”?**



# Investigating And Responding To COVID-19 Cases In The Workplace



- Give notice of the potential COVID-19 exposure within “one business day”
  - To “[a]ll employees who may have had COVID-19 exposure and their authorized representatives.”
  - To “[i]ndependent contractors and other employers present at the workplace during the high-risk exposure period.”
- Do not include personal identifying information!

# Responding To COVID-19 Cases, continued...

- “Offer” COVID-19 testing
  - at no cost,
  - to “all employees who had potential COVID-19 Exposure in the workplace,” and
  - provide them with information on benefits.



# So, ummm...

- Is “potential COVID-19 exposure” different from “COVID-19 exposure”?
- Is a “workplace” different from an “exposed workplace”?



# Testing

- At no cost?
  - FAQs say tests can be “through the employer, local health department, a health plan, or at a community testing center.”
- So, mileage, too?
- What constitutes “working hours”?
- How about home tests?
- Other pay issues

# But What If...

- The employee leaves for the entire day?



# Exclusion Of COVID-19 Cases

- “The purpose of this subsection is to limit transmission of COVID-19 in the workplace.”



# Must Exclude “COVID-19 Cases” *With Symptoms*

- Until at least 24 hours have passed since a fever of 100.4+ (no Advil)
- Until COVID-19 symptoms have improved
- When at least 10 days have passed since COVID-19 symptoms first appeared

**Q:** Could this last for months?

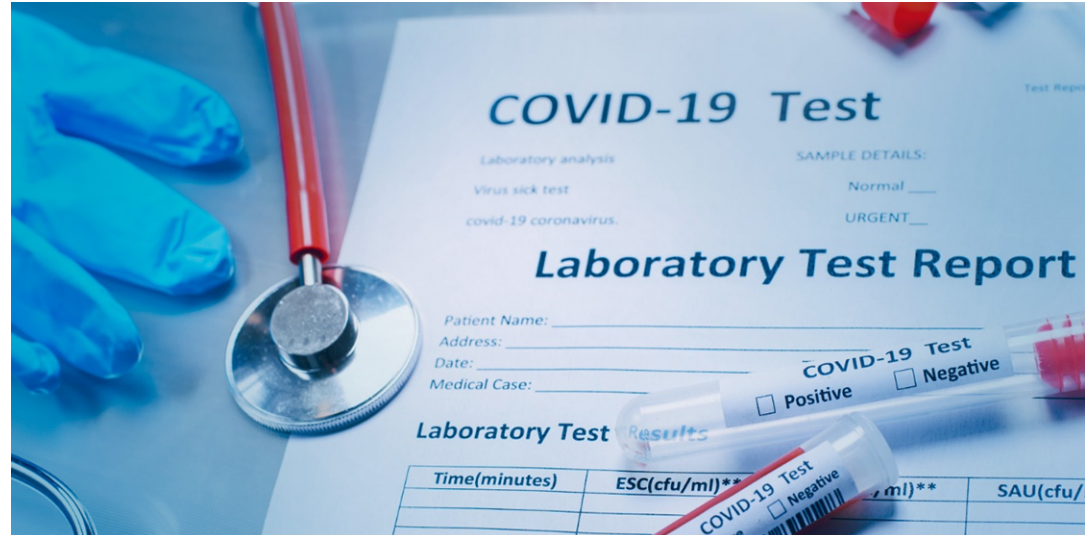
**A:** Yes, if the fever and/or symptoms do.





# Must Exclude "COVID-19 Cases" Without Symptoms

- Until 10 days from when test was administered



# COVID-19 Exposures

- Exceptions:
  - (1) Employee is not otherwise able and willing to work;
  - (2) If employer can demonstrate it is not work-related.



# And What Is This About?

“A negative COVID-19 test shall not be required for an employee to return to work”



FAQ:

**Q:** Is a negative test required for an employee to return to work?

**A:** No, the ETS does not require an employee to have a negative test to return to work. The criteria for returning to work are listed above.

So, can I require a test?

# But We Need Our Employees To Work!

- As long as it's not in violation of an order, "the Division may, upon request, allow employees to return to work on the basis that the removal of an employee would create undue risk to a community's health and safety."
- But you'll need a good plan in place.
- Requires "undue risk" to community
- Submit request to [rs.dir.ca.gov](https://rs.dir.ca.gov)



# Reports And Recordkeeping – Single Case

- Report to:
  - Local health department “whenever required by law” and provide related/requested information.
  - Cal-OSHA “COVID-19 related serious illnesses or death.” (nothing new here)
- Maintain records showing efforts to implement COVID-19 plan.
- Record ALL COVID-19 cases.
  - Names, contact information, occupation, location where worked, last day at workplace, date of test **CONFIDENTIAL**
  - Upon request, provide report to employees and representatives with personal information redacted.
- BUT you need to complete, maintain, and produce 300 logs per the usual course.

# Key Definition: “Outbreak”

- “Outbreak”
  - “[T]hree or more COVID-19 cases in an exposed workplace within a 14-day period”
  - UNTIL no COVID-19 cases are detected for 14 days



# Entire Building Or Just Part Of It?

**Q:** Is the testing requirement for outbreaks triggered by three or more cases in an entire building?

**A:** No, the testing requirement is triggered by three or more cases in a 14-day period present in the same “exposed workplace” during the “high-risk exposure period.”





# Just Our Own Employees?

**No.**

**Q:** Is the “three or more cases” outbreak requirement limited to employee cases, or do cases involving anyone who has been in the workplace count toward the requirement?

**A:** Any confirmed COVID-19 case who has been in the workplace during the high-risk exposure period counts toward the three-case threshold.

# Outbreak Testing



- “The employer shall provide COVID-19 testing to all employees at the exposed workplace”

# Testing FAQ #2

- Offer testing = Provide testing

# Testing FAQ #6

- During their working hours = during paid time

# Testing FAQ #5

- If employee refuses?



You tried

# Does “Shall Provide” Mean It’s Required?

- “Immediately upon being covered by this section, all employees in the exposed workplace shall be tested and then tested again one week later.”



# But...

- What if an employee refuses to be tested?
- What if random, unrelated COVID-19 cases pop up in 14 days? Could this go on forever?
- Where do I get all of these tests?
- What if I can't find the tests?
- Where can I find testing?
  - CDHP website or National Association of County & City Health Officials website
- Large numbers to test?
  - “Partner” with Valencia

# Look, We Did Our Best

**Q:** What if an employer is unable to comply with the ETS by its effective date?

**A:** As employers implement the new regulations, Cal-OSHA enforcement personnel will consider an employer's good-faith efforts in working toward compliance, but some aspects, such as eliminating hazards and implementing testing requirements during an outbreak, are essential.



# Notify Local Health Department

- No longer than 48 hours after employer knows or should know of 3 or more cases in the “workplace”
- So is that an “exposed workplace” or just a “workplace”?



## But...

- At least one FAQ on testing suggests that a “workplace” and an “exposed workplace” are treated the same

**Q:** Is the testing requirement triggered by three or more cases in an entire building?

**A:** No, just the same “*exposed workplace*.”

**Q:** Is the “three or more cases” outbreak requirement limited to *employee* cases?

**A:** Any confirmed COVID-19 case in the workplace during the high-risk exposure period counts toward the three-case threshold.

# Key Definition: “Major Outbreak”

- “Major outbreak”
  - “20 or more COVID-19 cases in an exposed workplace within a 30-day period”
  - UNTIL no COVID-19 cases have been detected for 14 days

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30			

# Testing Requirement

- “Employers shall provide twice a week COVID-19 testing, or more frequently if recommended by the local health department, to all employees present at the exposed workplace during the relevant 30-day period(s) and who remain at the workplace.”

# COVID-19 Hazard Correction

- In addition to testing and investigating, employers must:
  - Upgrade to a MERV 13 or higher air filter, or highest efficiency filter compatible with existing mechanical ventilation system.
  - Determine the need for a respiratory protection program.
  - Evaluate whether to halt some or all operations.

# Employer-Provided Housing

- “[E]nsure beds are spaced at least six feet apart in all directions and positioned to maximize the distance between sleepers’ heads.”
- “[E]nsure that housing units, kitchens, bathrooms, and common areas are effectively cleaned and disinfected at least once a day.”
- Isolate COVID-19-exposed residents from all other occupants.
  - “Effective isolation shall include providing COVID-19 exposed residents with a private bathroom, sleeping area, and cooking and eating facility.”



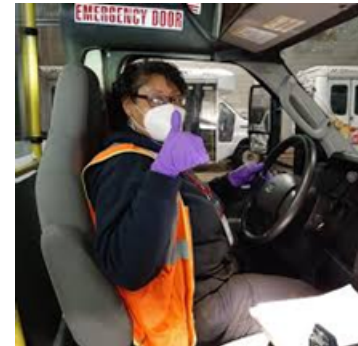
# Employer-Provided Transportation

- “[A]ny transportation of an employee, during the course and scope of employment, provided, arranged for, or secured by an employer.”
- Does not apply if driver and passengers are from same household.



# COVID-19 Prevention In Vehicles

- “[V]ehicle operator and any passengers are separated by at least three feet in all directions.”
- “The vehicle operator and any passengers are provided with and wear a face covering in the vehicle.”
- Must develop screening procedures for drivers and passengers prior to boarding.
- “[P]rovide hand sanitizer in each vehicle and ensure that all drivers and riders sanitize their hands before entering and exiting the vehicle.”





# Cleaning And Disinfecting Vehicles

- High-contact surfaces used by passengers must be cleaned and disinfected “before each trip.”
- High-contact surfaces used by drivers must be cleaned and disinfected “between different drivers.”



# Vehicle Ventilation

- “Employers shall ensure that vehicle windows are kept open, and the ventilation system set to maximize outdoor air and not set to recirculate air.”
- Exceptions to open-window requirement:
  - The vehicle has functioning air conditioning in use and the outside temperature is greater than 90 degrees Fahrenheit.
  - The vehicle has functioning heating in use and the outside temperature is less than 60 degrees Fahrenheit.
  - Protection is needed from weather conditions such as rain or snow.
  - The vehicle has a cabin air filter in use and the US EPA Air Quality Index for any pollutant is greater than 100.

# AB 685

- Amends California Labor Code § 6325 and § 6409.6
- Expands Cal-OSHA's authority to issue stop-work order for COVID-19 exposure
- Must report an "outbreak" to the local public health agency within 48 hours.
- Effective January 1, 2021 through January 1, 2023.
- Notice of intent to issue serious citation.
- The notice provisions are effective immediately since they are included in the Cal-OSHA ETS.



# SB 1159

- Adds California Labor Code § 3212.86, § 3212.87, and § 3212.18.
- Defines “injury” under workers’ compensation to include illness or death from COVID-19.
- Creates a rebuttable presumption that the injury arose out of and in the course of the employment and is compensable.
- Requires employees to exhaust their paid sick-leave benefits and meet specified certification requirements before receiving any temporary disability benefits.

# Can Cal-OSHA Even Do This?

- Emergency regulation requires “specific facts.”

*“The facts, Ma’am.  
Just the facts.”*



# Beware Of PAGA

- Plaintiffs' lawyers may attempt PAGA claims.



# Beware Of Bad Publicity!

<http://publichealth.lacounty.gov/media/Coronavirus/locations.htm>



# Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

**Morgan Lewis**

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at

[www.morganlewis.com/topics/coronavirus-covid-19](http://www.morganlewis.com/topics/coronavirus-covid-19)

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple “Stay Up to Date” button.



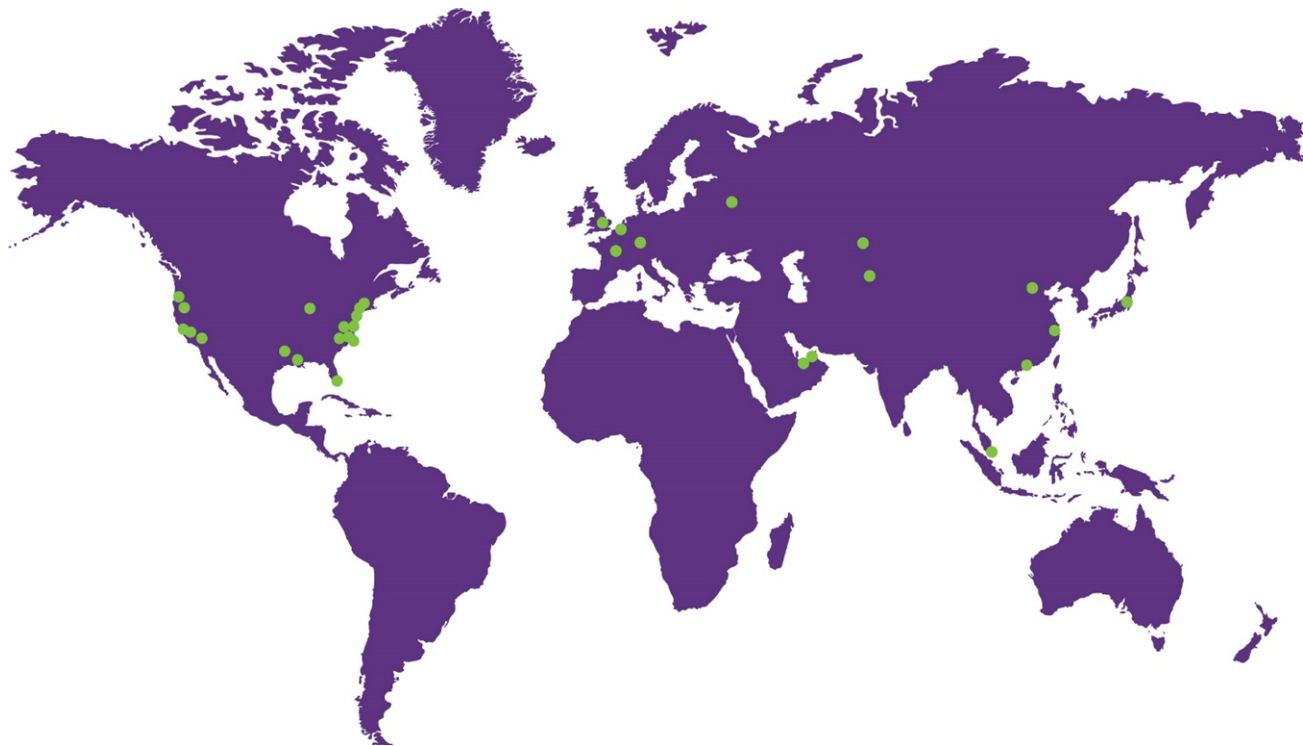


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