

COVID-19 FAQs (as of 1/4/2022)

As we enter Year 3 of the COVID-19 pandemic, the regulatory situation in California has never been so confusing, inconsistent, and ever changing. As the Omicron variant has come to dominate the U.S. landscape, the U.S. Supreme Court is preparing to hear arguments on the federal Occupational Safety & Health Administration's ("OSHA") Emergency Temporary Standard ("ETS") which seeks to implement a "vaccine or test" program for all employers with 100 or more employees in the United States. At the same time, Cal/OSHA has revised its own ETS yet again and, if the federal OSHA ETS is upheld, will have to do so another time to comply with those regulations. In addition, the Centers for Disease Control & Prevention ("CDC") issued surprise revised quarantine and isolation protocols for those with COVID-19 or who have had close contact with someone who has COVID-19, calling into question compliance with the California Department of Public Health ("CDPH") guidance, local health department guidance, and the Cal/OSHA ETS. These FAQ's endeavor to provide a quick picture of where things stand from a regulatory perspective, and provide some practical tips for how to comply with these requirements. As always in this ever changing landscape, these FAQ's are subject to change.

1. What is the status of the federal OSHA ETS?

The federal OSHA ETS is currently in effect. On December 17, 2021, the U.S. Court of Appeals for the Sixth Circuit dissolved a stay that had blocked federal OSHA from implementing or enforcing the ETS. That decision was immediately appealed to the U.S. Supreme Court which is set to hear oral arguments on January 7, 2022. It is unknown how long it will take for the Supreme Court to issue a decision.

2. What does this mean in California?

As you probably know, California operates its own OSHA program. Cal/OSHA's regulations must be at least as stringent as federal regulations. So long as the federal OSHA ETS remains in effect, Cal/OSHA has 30 days to implement regulations at least as stringent as the federal ETS. We anticipate Cal/OSHA will adopt portions of the federal ETS, such as the vaccine or test requirements, that are more stringent than Cal/OSHA's own ETS. However, Cal/OSHA has not yet set a meeting date and may be waiting to see how the Supreme Court decides this issue.

3. Should my Company prepare to comply with the federal ETS in California?

Yes, the vaccine or test regulations are complex and cannot be implemented with short notice. California employers should review the federal ETS and begin determining what kind of program they will implement and how they will go about doing so. Assuming the Supreme Court upholds the federal OSHA ETS, California employers will have some additional time to get into compliance. However, it is not yet known what compliance deadlines Cal/OSHA may set.

4. What does the federal OSHA ETS require?

The federal OSHA ETS contains a number of requirements related to a vaccine or test program, face coverings, training, and reporting and recording requirements. The newest and most onerous



requirements are the vaccination program. Employers must implement either a mandatory vaccination policy or a vaccine or test program. The difference is that under a mandatory vaccination policy, employees must be vaccinated unless they have been granted a reasonable accommodation for disability/medical contraindication or a sincerely held religious belief. Under a vaccine or test program, employees can choose to remain unvaccinated but must then test for COVID-19 at least once per week.

5. Who pays for the cost of testing and time spent testing under the federal OSHA ETS?

Federal OSHA does not require employers to pay for the cost of testing and non-exempt employee time spent testing under the ETS. However, it notes that employers may be required to do so by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements. It is not known whether Cal/OSHA will explicitly require employers to pay for the cost of testing and time spent getting tested. However, existing wage and hour laws in California make it high risk for employers to shift the cost of testing or time spent getting tested to employees. Employers can place restrictions on when and where employees can get tested to help control costs. If an employer wishes to impose a vaccine mandate as opposed to a vaccine or test program, that will need to be discussed with the Unions that represent your field employees. The compensation issues may also need to be discussed with the Unions.

6. Where, when, and how do employees get tested under the federal OSHA ETS?

This is entirely up to the employer. Employees working in-person must be tested at least once every 7 days under the federal OSHA ETS. It is unknown if Cal/OSHA may require testing more frequently. Employers can require that employees only get tested using PCR or rapid antigen tests, or it can accept either. Employees can be permitted to get tested at any location that provides testing or employers can require that employees only get tested at certain locations, such as pharmacies or community testing sites. An employer can pursue a contract with a particular testing location and require employees to get tested there. An employer can see if a testing provider will come on-site to do testing. Employers can also purchase self-testing kits for employees to use. However, under the federal OSHA ETS, tests cannot be both “self-administered” and “self-read.” This means that an employee cannot administer the test on themselves without supervision from the employer or a telehealth proctor and also read the test results on their own.

7. What happens if an employee does not test on time?

An employee performing in-person work who fails to test at least once every 7 days must be removed from the workplace/prohibited from returning to the workplace until s/he produces a negative test. Such employees should be treated as in violation of a Company policy.

8. Do I have to pay my employees for time spent getting vaccinated and for vaccine side effects?

The federal OSHA ETS requires that employers provide employees with up to 4 hours of paid leave to receive their primary vaccine doses – the first or second shots. This does not apply to boosters. In addition, the ETS requires employers to provide employees with “reasonable” time to recover from vaccine side



effects. OSHA has indicated it will consider “reasonable” time to be two working days. Again, this is for primary vaccine doses only, not boosters.

9. Has California adopted the new CDC quarantine and isolation guidance?

As you may have heard, on December 29, the CDC revised its guidance for isolation and quarantine for those with COVID-19 or those who had close contact with a COVID-19 case. Specifically, the CDC shortened its recommended time that those positive for COVID-19 should isolate from 10 days to 5 days if asymptomatic or their symptoms are resolving, and to continue wearing a mask around others for an additional 5 days. Similarly, the CDC now recommends that close contacts can end quarantine after 5 days, so long as they wear a mask for 5 additional days. However, this guidance has not been adopted by CDPH or Cal/OSHA as of the date of these FAQ’s. Further, the federal OSHA ETS explicitly incorporated by reference the CDC’s prior guidance. California employers should follow the prior CDC guidance – the 10 day quarantine/isolation period until more information is available from California authorities.

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