

December 18, 2020

Douglas Parker
Director, Division of Occupational Safety and Health
1515 Clay Street
Suite 1901
Oakland, CA 94612
DParker@dir.ca.gov

Eric Berg
Deputy Chief, Research and Standards,
Division of Occupational Safety and Health
1515 Clay Street
Suite 1901
Oakland, CA 94612
EBerg@dir.ca.gov

RE: Stakeholder Concerns Regarding COVID-19 Emergency Temporary Standard (Section 3052)

Dear Cal/OSHA Division Staff:

The California Chamber of Commerce submits this letter to provide feedback and seek necessary improvements to the COVID-19 Emergency Temporary Standard (Section 3205, or “ETS”) which went into effect on November 30, 2020.

The following comments are not a complete inventory of concerns with the ETS’s text but are instead a sampling of the most significant concerns that we believe merit immediate attention. Where possible, we have included suggested redlines to the text of the Section 3502, or to the “COVID-19 Emergency Temporary Standards Frequently Asked Questions” page¹ that was made available on December 1st, 2020 (“ETS FAQ”).

We thank you for the opportunity to provide comments.

Request No. 1: **Delay of Enforcement Until January 15th, 2021.**

- **Policy Problem:** The ETS applies sweeping new requirements to virtually every business in California – but employers were given virtually no opportunity to familiarize themselves with the text and get into compliance before it went into effect.² Given the breadth of its requirements, even well-resourced employers are struggling to determine what would constitute compliance, purchase the necessary materials, retool their training, and re-organize their workplaces. This is particularly difficult when, as here, the ETS’s requirements remain unclear on certain key areas and Cal/OSHA is expected to be releasing FAQ’s on a number of topics in the coming weeks. This leads to employers scrambling to determine how they can comply, only to find their interpretation may need to be re-examined due to the pending FAQ’s, wasting resources and time.

¹ Available here: <https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html>

² The relatively brief time from publication to passage to the present is further complicated because it took place during the “holiday” season, from Thanksgiving through to the New Year, when many employees may be taking personal time off.

- **Relevant Provisions:** ETS FAQ – Question “What if an employer is unable to comply with the ETS by its effective date.”
- **Suggested Solution:** With this background in mind, we would ask that the employer community be given a clear date before which enforcement of the ETS will not be conducted, so that employers are able to rework their policies may prepare to meet the ETS’s requirements quickly and efficiently, but without panicking. Importantly – this will not result in a gap in COVID-19 safety, as the pre-existing guidance documents remain enforceable, and local public health agencies will continue in their role dealing with workplace outbreaks. We propose the ETS FAQ recognize an enforcement date of January 15, 2021.
- **Suggested Revision:** Amend ETS FAQ as follows:
 - Q:** What if an employer is unable to comply with the ETS by its effective date?
 - A:** Many of the provisions of these regulations have already been required under employers’ Injury and Illness Prevention Programs (IIPP), including the requirement to identify and address hazards, use of face coverings, and physical distancing. **However, others may require new policies and practices for employers.** As employers implement the new regulations, **Cal/OSHA will not issue citations related to compliance with the ETS prior to January 15, 2020. During that period, however, employers should be aware that the previously existing guidance documents will continue to be enforced. After January 15th, enforcement personnel will consider an employer’s good faith efforts in working towards compliance and impossibility of compliance, such as due to a lack of availability of tests , undue financial burden, or other required materials, will be considered,** but some aspects, such as eliminating hazards and implementing testing requirements during an outbreak, are essential.

Request No. 2: Address Feasibility Concerns Regarding Testing Obligations

- **Policy Problem:** Employers are concerned that the volume of testing necessitated by the ETS is not feasible to acquire, particularly as COVID-19 cases are spiking beyond what was occurring during the drafting of the ETS. This has led to lengthening delays in scheduling testing, as well as receiving results for PCR test labs. Employers are also reporting shortages of testing and spiking prices for what tests can be acquired. Putting aside availability, delays in shipping appear increasingly frequent, partially due to increased testing, and also partially due to the holidays. These factors combine to create feasibility and cost concerns for employers related to testing that the ETS and the ETS FAQ does not acknowledge or provide for.

Related to these availability concerns, the outbreak provisions (which generate the broadest testing obligations) rely on triggers that are not adjusted for large workplaces. Specifically, the outbreak trigger of three cases in fourteen days in an exposed workplace, and the requirement of no new cases for a two-week period to end an outbreak, are both not reasonable for large employers. When a single exposed workplace area could include hundreds of employees, such one-size-fits-all triggers inherently punish large employers by failing to take into account the significance of social spread, which can be expected to introduce new, un-related cases into the workplace periodically. As a consequence, many large employers may fall into a perpetual “outbreak”, even if their positivity rate for COVID-19 mirrors the external community. This perpetual outbreak will burden larger employers with massive and ongoing testing obligations, despite not differing in any meaningful way from the social prevalence of COVID-19. In addition, it will effectively drain tests away from the market where they could be better used for other workplaces or communities.

- **Relevant Provisions:**
 - o § 3205(c)(3)(B)(4) – testing for “exposed” employees
 - o § 3205.1(b) – weekly testing in outbreak for “exposed workplace”
 - o § 3205.2(b) – bi-weekly testing in major outbreak for “exposed workplace”
- **Suggested Solution(s):** Because the most vaguely-defined and potentially far-reaching testing provisions relate to the “exposed workplace” area in the outbreak/major outbreak provisions, we

propose changes to those provisions and to the related questions in the General ETS FAQ. Specifically, we propose the following options:

- 2. A – Amend the ETS to include a percent-based threshold system applicable to large workplaces for outbreaks.³
 - 2. B – Amend the ETS FAQ regarding testing to acknowledge the feasibility concerns related to providing testing, as well as to recognize the need to prioritize testing among industries and among different workers in a workplace.
- **Suggested Revision(s):**
- Revision 2. A – Amend Sections 3205.1 & 3205.2⁴ as follows:
 - (1) This section applies to a place of employment covered by section 3205 if it has been identified by a local health department as the location of a COVID-19 outbreak or when there are three or more COVID-19 cases in an exposed workplace within a 14-day period, **or, for exposed workplaces with more than 100 employees during the relevant 14-day period, when COVID-19 cases meet or exceed 4% of the exposed workplace.**
 - (2) This section shall apply until there are no new COVID-19 cases detected in a workplace for a 14-day period, **or, for exposed workplaces with more than 100 employees, until no more than 1% of employees are identified as new COVID-19 cases during a 14-day period.**
 - Revision 2. B – Insert the following question and answer into the ETS FAQ:
 - Q: What if the testing obligations of the ETS are not feasible to provide due to a lack of availability or relative cost to the employer?**
 - A: In the event that an employer cannot feasibly acquire sufficient testing, or cannot locate sufficient testing to meet the specific time-windows identified in the ETS (such as bi-weekly testing for major outbreaks), then enforcement personnel will consider an employer’s good faith efforts in working towards compliance and impossibility of compliance for purposes of issuing a citation. Such feasibility consideration may include market availability, pricing, and resources of the individual employer, among other factors. Employers should prioritize testing for the most likely exposed employees first, and document attempts to locate suitable testing resources.**

Request No. 3: Vaccinated Employees Must Be Considered by the ETS.

- **Policy Problem:** Though initial doses of COVID-19 vaccines are being distributed in California as of the date of this letter, the ETS does not consider how its requirements are to be modified for vaccinated employees. Admittedly, data on the vaccines and their effectiveness will certainly develop further during 2021 – and federal guidance may similarly change. However, at present, California’s employers have no clarity as to how or if they may treat vaccinated employees differently under the ETS.
- **Relevant Provisions:**
 - § 3205(c)(10)(B) – exclusion of asymptomatic exposed employees.
 - § 3205(c)(11) – return to work.
 - § 3205.1(b) – weekly testing in outbreak for “exposed workplace”
 - § 3205.2(b) – bi-weekly testing in major outbreak for “exposed workplace”

³ We have utilized a 4% trigger for an “outbreak” for consistency with SB 1159, with a requirement that an employer fall below 1% to end an outbreak – but these suggestions are just suggestions. What is important is that the ETS must recognize the quantitative difference between workplaces with five hundred employees and those with just five and recognize that community spread will create statistically small numbers of cases in large workplaces.

⁴ These edits are specifically applicable to Section 3205.1, but parallel changes should be made to Section 3205.2. For purposes of brevity, we are not including a similar redline of Section 3205.2.

- **Suggested Solution(s):** The ETS, or a subsequent FAQ, should clarify how, if it all, vaccination changes the application of the ETS, or whether a vaccine can be required to return to work.
- **Suggested Revision(s)⁵:**
 - o 3. A – Amend exclusion provision (§ 3205(c)(10)(B)):
 - (B) Employers shall exclude employees with COVID-19 exposure from the workplace for 14 days after the last known COVID-19 exposure to a COVID-19 case, **unless the exposed employee has been vaccinated against COVID-19 with a CDPH-approved vaccine, in which case the vaccinated employee must only be excluded for 5 days. In the event a vaccinated employee begins to show symptoms of a COVID-19 infection, the employer must treat that vaccinated employee as if they had not been vaccinated and exclude them from the exposed workplace for the otherwise applicable duration.**
 - o 3. B – Amend outbreak/major outbreak provisions (§§ 3205.1 & 3205.2) to add the following language:
 - “Employers shall not be required to provide testing under this section to employees who have been vaccinated against COVID-19 using a CDPH-approved vaccine during the duration of that vaccine’s protection, so long as the employee has not shown any symptoms of a COVID-19 infection.”**

Request No. 4: Address Employees Who Refuse Testing

- **Policy Problem:** The ETS requires employers to provide testing and utilizes test positivity as the trigger for beginning and ending an outbreak but does not explicitly deal with employees who refuse to get a COVID-19 test in these situations. Employers need guidance to specify how an employee in an exposed workplace during an outbreak who refuses testing should be excluded (or not) from the workplace.
- **Relevant Provisions:**
 - o § 3205.1(b) – weekly testing in outbreak for “exposed workplace”
 - o § 3205.2(b) – bi-weekly testing in major outbreak for “exposed workplace”
- **Suggested Solution(s):** The ETS FAQ should clarify that employers may consider an outbreak ended despite the refusal of some employees in the exposed area to test.
- **Suggested Revision(s):** Amend the ETS FAQ as follows:
 - Q:** In an outbreak (three or more employee COVID-19 cases in an “exposed workplace” within a 14-day period or identified as an outbreak by a local health department), what are an employer’s requirements?
 - A:** In addition to the requirements for non-outbreak settings, an employer must:
 - ...
 - **In the event that an asymptomatic employee in the exposed workplace refuses testing, such that the employer cannot determine whether there are, in fact, no new COVID-19 cases in the exposed workplace, then the employer may exclude the asymptomatic refusing employee from the workplace for 10 days. During the exclusion, the refusing employee is not entitled to the maintained earnings provided by section 3205(c)(10)(C).⁶**

⁵ Given the present lack of data on vaccines’ effectiveness, the suggestions included herein are tentative. More important is that the issue needs to be considered, and we hope these provide some potential alterations.

⁶ It is important that employees who refuse testing are not rewarded for this behavior, as it would incentivize practices that would undercut the effectiveness of the testing regime and the ETS generally.

Request No. 5: Clarify Employees & Employers Rights Regarding Investigating COVID-19 Status

- **Policy Problem:** Though employers are required to “provide” testing, an employee may seek testing at a community site and may choose not to share results with an employer. Similarly, if an employer asks questions of COVID-19 cases in order to identify other potential exposures in the workplace, the questioned employee may (incorrectly) feel as if they are being pressured related to their COVID-19 status. Without an approachable explanation regarding these needs, employees may feel uncomfortable when employers are compelled into certain health and behavior-related inquiries in order to comply with ETS.
- **Relevant Provisions:**
 - o § 3205(c)(2)(D) – requiring a workplace-specific identification of employee interactions that could potentially have exposed employees to COVID-19.
 - o § 3205(c)(3)(B) – requiring employers to investigate COVID-19 cases in the workplace.
- **Suggested Solution(s):** The ETS FAQ should be amended to clarify that employers may ask employees for basic information about the time and results of their testing, as well as their contact with other employees related to potential exposure. This will help the ETS FAQ address employee concerns about the appropriateness of such inquiries and improve the overall effectiveness of the ETS.
- **Suggested Revision(s):** Amend the ETS FAQ as follows:
 - Q:** What must an employer do to investigate and respond to a COVID-19 case?
 - A:** Investigating and responding to a COVID-19 case in the workplace includes the following:
 - Determining when the COVID-19 case was last in the workplace, and if possible, the date of testing and onset of symptoms. **This includes asking employees who inform the employer that they have tested positive for COVID-19 when they were tested and when their symptoms began or ended. Employees are not required to respond, but employers are entitled to ask.**
 - Determining which employees may have been exposed to COVID-19. **This includes asking employees about their contacts which other employees in order to investigate when, where, and from whom the employee may have contracted COVID-19, and what other employees were exposer.**

Request No. 6: Reduce Disruption of Essential Workplaces by Shortening Exclusion

- **Policy Problem:** The ETS acknowledges the importance of shortening exclusions from the workplace for healthcare, but does not acknowledge the potential use of testing to shorten the exclusion of other essential workers from their workplaces, which will lead to unnecessary and increased disruption of other critical industries, such as logistics, agriculture, energy, communications, manufacturing, defense, and others. We cannot forget that these essential workplaces create and transport the very food, supplies, COVID-19 tests, and vaccines that we will need. To that end, disruption in these critical infrastructure areas must be kept minimized, but the ETS does not acknowledge their importance by allowing for a reduced exclusion based on testing.⁷

⁷ We do acknowledge the potential exception contained in Section 3205(c)(11)(E), but find it vague and unworkable, as it appears to require *every essential business in California* to potentially file an undefined application. Given the relative workload of the Division, the potential volume of these applications, and the potential urgency of such exceptions, we believe a broad solution is more efficient.

- **Relevant Provisions:**
 - o § 3205(c)(10)(B) – exclusion of asymptomatic exposed employees.
- **Suggested Solution(s):** The ETS or CDPH guidelines should recognize the optional use of testing by employers to allow shortened exclusion periods based on a negative test for all essential workforces,⁸ as identified by public health officials.
- **Suggested Revision(s):** Amend the ETS FAQ as follows:
 - (B) Employers shall exclude employees with COVID-19 exposure from the workplace for 14 days after the last known COVID-19 exposure to a COVID-19 case, **except for workers in essential infrastructure as identified by the California Department of Public Health. For essential critical infrastructure workers, they shall be excluded for 7 days after the last known COVID-19 exposure, provided that they are tested on or after the fifth day after exposure and the tests results are negative.**

Request No. 7: Clarify Obligation to “Maintain Earnings”

- **Policy Problem:** Presently, the ETS includes a vague requirement that employers “continue and maintain an employee’s earnings⁹ . . .” It is unclear what is required by this provision. Does it provide a new form of paid time off if an employee is exposed to COVID-19? If so, it appears to be lacking in the vast majority of the details that are normally included and critical to applying paid leave provisions. Alternatively, is it intended only to reflect that an employee’s position must be maintained (i.e., they may not be fired)? Notably, the legislature passed COVID-19-specific supplemental sick leave for employees of large employers during the 2020 legislative cycle, providing 80 additional hours of sick leave for full-time employees. As another concern: the ETS FAQ presently notes that employers can “require the employee to exhaust paid sick leave benefits before providing exclusion pay . . .” – which we do believe an employer can do by law. We believe the employee, not the employer, must be the one to choose to utilize paid sick leave.¹⁰ Broadly speaking, this language leaves employers unclear as to the interaction of this provision with existing paid time off and their obligations.
- **Relevant Provisions:**
 - o § 3205(c)(10) – exclusion of employees.
- **Suggested Solution(s):** Clarify that the employee must utilize their accrued sick leave during the exclusion pursuant to section 3205(c)(10) in order to be paid, but that their position will be held for them during exclusion regardless of whether they utilize paid time off, refuse to do so, or have exhausted their paid time off.
- **Suggested Revision(s):** Amend the ETS FAQ as follows:
 - Q:** Must an employer pay an employee while the employee is excluded from work?
 - A:** If the employee is able and available to work, the employer must **maintain the employee’s position and healthcare benefits, and an employee can choose to use any accrued paid sick leave, vacation, or paid time off. ~~continue to provide the employee’s pay and benefits.~~** An employer may **~~require the employee to exhaust paid sick leave benefits before providing exclusion pay, and~~** also **may** offset payments by the amount an employee receives in other benefit payments. (Please refer to the Labor Commissioner’s COVID-19 Guidance and Resources for information on paid sick leave requirements.). These

⁸ The list of critical sectors we would propose to use is those identified by the state already, available here: <https://covid19.ca.gov/essential-workforce/>.

⁹ Notably, we have no issue with maintaining an employee’s seniority or rights and benefits while they are excluded.

¹⁰ See *Labor Code* Section 246(k) – “An employee may determine how much paid sick leave they need to use, provided that an employer may set a reasonable minimum increment, not to exceed two hours, for the use of paid sick leave.” (emphasis added).

obligations do not apply if an employer establishes the employee's exposure was not work-related. **An exposure is not considered work-related if the employee cannot identify any individual at the workplace that is a COVID-19 case to whom the employee was exposed.**

Request No. 8: Outbreaks Must Only Be Triggered by Worker Cases

- **Policy Problem:** The present ETS FAQ defines an outbreak as including both workers and non-workers in the workplace – in contrast with existing guidance on **AB 685** that defines an outbreak as only based on workers.¹¹ Without clarification, this means that retail and grocery businesses could fall under outbreak provisions if three customers (or even one family of three) visit the store within a two-week period and subsequently test positive. In other words, essential retail and grocers could fall into an outbreak even if they have followed all protocols perfectly and *no workers are exposed to a COVID-19 case or become COVID-19 cases*. This absurd outcome will burden businesses unnecessarily and consume tests where such tests could be better used in other settings and creates inconsistency with parallel guidance for **AB 685**.
- **Relevant Provisions:** ETS FAQ – Question: Is the “three or more cases” outbreak requirement limited to employee cases, or do cases involving anyone that has been in the workplace count towards the requirement?
- **Suggested Solution(s):** Amend the ETS FAQ to be consistent with the **AB 685**¹² guidance and require three cases among workers (employees or independent contractors) in the workplace.
- **Suggested Revision(s):**
A: ~~Any confirmed COVID-19 case who has been in the workplace during the high-risk exposure period counts towards the three-case threshold.~~ The California Department of Public Health defines an outbreak in non-healthcare or non-residential congregate setting workplaces as three or more laboratory-confirmed cases of COVID-19 among employees who live in different households within a two-week period.¹³

Request No. 9: Address CCPA Application to the ETS

- **Policy Problem:** The ETS (and prior COVID-19 guidance documents) require employers to provide notices to employees (which may entail digital communications) and collect employee health information in new and relatively unprecedented ways. However, existing privacy laws complicate the legal regime around this data. One notable example is the California Consumer Privacy Act (CCPA) and the related California Privacy Rights Act (CPRA), which contain voluminous provisions regarding the collection and disbursement of individuals' information.
- **Relevant Provisions:**
 - o § 3205(c)(10) – exclusion of employees.

¹¹ **AB 685** guidance provides that “The California Department of Public Health defines an outbreak in non-healthcare or non-residential congregate setting workplaces as three or more laboratory-confirmed cases of COVID-19 *among employees who live in different households* within a two-week period.” (emphasis added). Available here:

<https://www.dir.ca.gov/dosh/coronavirus/AB6852020FAQs.html#:~:text=Assembly%20Bill%20685%20made%20permanent,response%20to%20the%20potential%20exposure>.

¹² Another concern for the ETS is consistency with AB 685's notice requirements – however, we understand that an FAQ will soon be released on this topic, so we are withholding comments on this point at this time.

¹³ This text is taken directly from the **AB 685** FAQ. We are open to modifications, but believe consistency is key, and so have copied the text directly.


- **Suggested Solution(s):** Revise the ETS and ETS FAQ to address ambiguities in the collection and protection of employee’s data, including excluding such data from the operation of the CCPA/CPRA.
- **Suggested Revision(s):** Amend the ETS FAQ to add the following, or alter ETS the ETS to similar effect:
 - Q:** Does the California Consumer Privacy Act apply to any information collected under Section 3205 of the COVID-19 Emergency Temporary Standards?
 - A:** No. Personal information that is collected under Section 3205 of the COVID-19 Emergency Temporary Standards, regardless of how such information is collected, shall be considered personal information that is collected by a business about a natural person in the course of the natural person acting as a job applicant to, an employee of, owner of, director of, officer of, medical staff member of, or contractor of that business; or personal information that is collected by a business that is emergency contact information of the natural person acting as a job applicant to, an employee of, owner of, director of, officer of, medical staff member of, or contractor of that business; or personal information that is necessary for the business to retain to administer benefits for another natural person relating to the natural person acting as a job applicant to, an employee of, owner of, director of, officer of, medical staff member of, or contractor of that business and is therefore exempt under the California Consumer Privacy Act. (CCPA Section 1798.145(h)).

Request No. 10: Clarify Requirement to Provide Testing During “Working Hours”

- **Policy Problem:** The ETS requires testing to be provided to employees during “working hours” – but this restriction, if read narrowly, would be infeasible. At present, it is unclear if testing needs to specifically be scheduled during an employee’s shift, or if the employee needs merely be paid for the time necessary to be tested. This may not be problematic for excluded employees (who are already excluded and potentially paid) but leaves much ambiguity as to outbreak testing. For example, if an employee works from 9am-5pm, can an employer pay for overtime for that employee to get tested from 5-6pm? Or, if an employee works night shifts, must the employee be tested between 10pm and 7am? As another example: certain workplaces only have workers in on three days per week (for example, long shifts in the medical field, or in certain manufacturing). If interpreted narrowly, under major outbreak circumstances, these workplaces would need to test employees twice within one week during their shifts – leading to tests that were, at most, seventy-two hours apart.
- **Relevant Provisions:**
 - o § 3205(c)(10) – exclusion of employees.
- **Suggested Solution(s):** Revise the ETS FAQ to clarify that “working hours” for testing purposes means that the employee must be compensated for the time necessary to take the test, including reasonable travel time to a remote location if necessary.
- **Suggested Revision(s):** Amend the ETS FAQ as follows:
 - Q:** When the ETS requires testing during an employees’ “working hours”, does that require testing literally during an employee’s regular shift and at their workplace?
 - A:** No. Testing must be provided at no cost to the employee – meaning the employee must be paid for the time that it takes to complete the COVID-19 test. As examples: employers may pay for the employee to travel offsite and complete the test during their normal hours. Alternatively, employers may pay the employee appropriate additional hours for an employee to be tested after their regular shift is complete. But testing is not required be completely literally during an employee’s pre-existing “working hours”.

This list of concerns is not all-encompassing. California's employer community has many more questions and will certainly do our best to raise them as we attempt further implementation of the ETS. But we hope that these comments provide the framework for concrete and near-term corrections and clarifications to improve the effectiveness and feasibility of the ETS as we move into 2021.

Sincerely,

A handwritten signature in blue ink, appearing to read 'RM', with a long horizontal flourish extending to the right.

Robert Moutrie
Policy Advocate

RM:ldl

Copy: Amalia Neidhardt aneidhardt@dir.ca.gov
David Kernazitskas dkernazitskas@dir.ca.gov
Christina Shupe, cshupe@dir.ca.gov