

February 1, 2021

The Honorable Toni Atkins  
President Pro Tem, California State Senate  
State Capitol, Room 205  
Sacramento, CA 95814

The Honorable Anthony Rendon  
Speaker, California State Assembly  
State Capitol, Room 219  
Sacramento, CA 95814

Members  
California State Legislature  
State Capitol  
Sacramento, CA 95814

**SUBJECT: California Occupational Safety and Health Emergency COVID Regulations**

Madam President Pro Tem, Mr. Speaker, Members of the State Legislature:

As a follow-up to our earlier letter regarding California's pathway to economic recovery, we wanted to provide you with a more detailed analysis on the undue burden employers throughout the State are facing due to rushed and infeasible standards Cal/OSHA adopted at the end of last year to address COVID-19 ("ETS" or "Regulation"). While we acknowledge that safety practices in the workplace have had to change as a result of COVID, such new safety restrictions *must be feasible* for employers of all sizes – large and small, rural and urban – to implement. In the rush to put the ETS into effect via emergency rulemaking last year, Cal/OSHA failed to adequately consider the feasibility of some of its provisions for California's employers, most importantly unlimited paid time off from work and testing obligations. These infeasible requirements will remain in effect until the Regulation expires later this year or, if extended, into early next year. They must be addressed.

**1) California Employers Cannot Afford the Unlimited Paid Time Off Provision of the Regulation.**

**The Financial Burden of Unlimited Time Off for Struggling Employers is Significant** - The Regulation requires employers to exclude anyone who was a "close contact"<sup>1</sup> of a COVID-19 case from the workplace for 10-14 days, during which time the employer must "maintain" their earnings.<sup>2</sup> This means that a working group or unit may *all* need to be excluded for a 10-14 day period with paid time off if they work in a relatively proximate workspace. And such exposures may occur more than once. By way of example: if social spread creates one COVID case in a workplace per month – even with *no actual spread in the workplace* – the employer will be forced to remove all workers who were close contacts of the positive case from the workplace for 10-14 days.<sup>3</sup> In that time period, the employer must:<sup>4</sup>

- Provide paid time off to the excluded employees; and
- Hire (and potentially train) temporary help to fill those roles and pay their wages, pay current employees overtime wages to make up that labor shortage, or shut down their business.

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<sup>1</sup> Defined as being within six feet of the COVID-19 case for 15 minutes, regardless of mask or dividers. See Section 3205(b)(3).

<sup>2</sup> Section 3205(c)(10)(C).

<sup>3</sup> Though the initial ETS provided for a 14-day exclusion, the Governor's EO N-84-20 adjusted this period to 10 days, subject to certain requirements, to be consistent with national standards.

<sup>4</sup> Notably, the obligations listed here all apply to one case in the workplace and ignore the sick leave obligation related to positive tests. There are considerable additional obligations when three cases occur in an exposed workplace, discussed in the ETS's "outbreak" provisions – see Sections 3205.1 & 3205.2. However, for purposes of illustrating the cost of unlimited sick leave, this simple example is instructive.

Under the Regulations, a COVID case in the workplace is not limited to employees. Accordingly, an employer could literally be paying multiple groups of employees to stay off work for being “exposed” simply because an asymptomatic customer came to their location. Unlike other leaves of absence, there is absolutely no limit in the Regulation on how many hours an employer must pay an employee due to exposure. Because the ETS may be in effect until early 2022, this means California employers – including the smallest rural family businesses – may end up paying for *months* of paid time off to employees who never catch COVID-19 – all while simultaneously paying their replacements.<sup>5</sup> And this paid leave will exist entirely outside of California’s existing framework of paid and unpaid sick leave.<sup>6</sup>

Or more likely, if an employer cannot quickly locate, hire, and train sufficient replacements for their workplace to fill the critical duties of these excluded workers, then the employer will have no option but to shut down that production line for the duration of the exclusion. In critical industries, these exclusions and shutdowns will slow down the production and distribution of essential goods, such as food and medical supplies.

We urge the Legislature to take action to place at least some limitations on this uncapped obligation, such that employers are not forced to provide potentially months of pay to excluded employees who are not sick, while simultaneously paying a second workforce to take their places. There are a number of forms such a solution could take – but unlimited paid leave is simply not feasible for California’s struggling employers.

**Employers Cannot Compel Use of Sick Leave** – In response to comments regarding the feasibility of this provision, Cal/OSHA has repeatedly suggested that employers may *compel* employees to utilize existing paid sick leave *before* the employer is required to provide the uncapped sick leave discussed above. These suggestions have come in the text of the Regulation, as well as the supporting Frequently Asked Questions (FAQ) document.<sup>7</sup>

While this may help alleviate some of the burden, we are concerned that it is, in fact, not permissible under present law. As set forth in Labor Code Sections 233 and 246 and the Division of Labor Standards Enforcement Manual and FAQ’s, it is the employee’s decision of whether to utilize paid sick leave.<sup>8</sup> Accordingly, employers cannot compel employees to utilize existing paid sick leave and therefore, this response by Cal/OSHA provides no relief to employers.

**Under the ETS, Vaccination Does Not Offer Any Relief from Exclusion Pay Requirements** – Furthermore, it should be noted that many employers have begun to (or are eager to) vaccinate their workers – but the Regulation *does not recognize vaccination as an alternative measure* to the unlimited paid time off for exclusion. In other words – even if an employer has randomized testing in place (which is beyond the Regulation’s requirements) and has vaccinated every employee who was potentially exposed,

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<sup>5</sup> Because of AB 5 (Gonzalez), it is a challenge for employers to contract for temporary staff while employees are on paid leave for exposure to a COVID case.

<sup>6</sup> See below for discussion of Cal/OSHA’s intention to allow paid sick leave to be used before this unlimited paid leave takes action.

<sup>7</sup> See Section 3205(c)(10)(C) – “Employers may use employer-provided employee sick leave benefits for this purpose ...”; See also FAQ’s to the ETS – “An employer may require the employee to exhaust paid sick leave benefits before providing exclusion pay, to the extent permitted by law ...” (available at: <https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html>).

<sup>8</sup> See Labor Code § 233 “... Employees have the sole discretion to designate days taken as paid sick leave under Section 233.”; DLSE Enforcement Manual – “30.2 Entitlement: An employee who ... works in California for 30 or more days within a year for the same employer is entitled to paid sick days ...An employee may determine how much paid sick leave he or she uses at any given time.” (available at: [https://www.dir.ca.gov/dlse/dlsemanual/dlse\\_enfmanual.pdf](https://www.dir.ca.gov/dlse/dlsemanual/dlse_enfmanual.pdf)); DLSE FAQ on paid sick leave – “For what purposes can an employee take paid sick leave – What can I use sick leave for? ...The employee may decide how much paid sick leave he or she wants to use (for example, whether you want to take an entire day, or only part of a day). Your employer can require you to take a minimum of at least two hours of paid sick leave at time, but otherwise the determination of how much time is needed is left to the employee.”

and has already paid for 60 days of paid time off for each of these vaccinated employees – the employer still must exclude all of them from the workplace for 10-14 days and provide them full pay.

This burden is simply not sustainable for many of California’s employers – particularly the smaller employers – who just barely managed to keep their doors open through 2020. Given that the Regulation may remain in effect into early 2022, language must be introduced as soon as possible to recognize vaccination as alleviating the requirement to exclude employees, which will allow critical industries to continue to function.

## **2) The ETS’s Testing Requirements Are Overbroad and Disconnected From Logistical Reality**

The Regulation requires employers to provide (or ensure employees have access to) testing to employees at no cost and on paid time in a variety of circumstances. If an employee is a close contact of a COVID-19 case, then they must be excluded (as discussed above) and receive testing at no cost.<sup>9</sup> Alternatively, if three cases occur in an exposed workplace area over a 14-day period then it is considered an “outbreak,”<sup>10</sup> and all employees in that area must be tested on a weekly basis.<sup>11</sup> The outbreak provisions are triggered regardless of whether the cases are among employees or customers,<sup>12</sup> and are triggered regardless of whether the cases were a result of social spread (such as three employees living together and all catching it socially) or workplace spread. The Regulation contains a similar “Major Outbreak” provision which requires twice weekly testing for all employees in the “exposed workplace” area.<sup>13</sup>

These requirements ignore the realities of testing availability. First, tests may not be publicly available in certain rural areas and may be a serious expense for smaller employers. Second, even if they are available, employers cannot compel medical facilities to prioritize testing of cases showing no symptoms. For example: if an employee is instructed to get tested because they were potentially exposed, and calls their doctor/local medical provider, the provider will commonly tell them: (a) that no testing is available in the timeline required by the Regulation, and (b) that the medical provider does not recommend testing given no symptoms and the need to prioritize tests to higher risk individuals.

These complications mean that even well-intentioned employers are at the mercy of medical logistics which they have no control over – unless they can hire their own testing company, which many will not be able to do. As a result, good employers will fail to meet the requirements of the Regulation *despite doing what they can*, which in this case is paying their employees for the time necessary to get tested and providing them information about local testing resources.

## **Conclusion**

California’s solution to COVID-19 cannot simply be to shift the costs of its social safety net to California’s employers. Only governments – and particularly the federal government – have that scale of resources to provide in these moments of crisis. That model can be seen in other recent legislation, including the recent

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<sup>9</sup> Section 3205(c)(10)(C).

<sup>10</sup> “Exposed workplace” is a defined term in the Regulation (Section 3205(b)(7)) and is further discussed in the associated FAQs.

<sup>11</sup> Section 3205.1.

<sup>12</sup> See FAQs Section “Outbreaks and the ‘Exposed Workplace,’” Question 11: “Q: 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? A: Any confirmed COVID-19 case who has been in the exposed workplace during the high-risk exposure period counts towards the three-case threshold.”

<sup>13</sup> Section 3205.2

federal rental assistance program<sup>14</sup> and federal tax credits for paid sick leave,<sup>15</sup> both of which included federal resources instead of simply placing the burden on California's struggling employers.

We appreciate the importance of the continued effort to fight COVID-19 and maintain safety in the workplace for our employees. However, we believe these two specific areas of the Regulation deserve your immediate attention given the undue financial burden these provisions are placing on California employers who simply cannot afford it.

Sincerely,



Robert Moutrie  
Policy Advocate

cc: Angie Wei, Special Advisor to the Governor  
Stuart Thompson, Chief Deputy Legislative Secretary  
Dee Dee Myers, Governor's Office of Business and Economic Development

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<sup>14</sup> SB 91 was signed by Governor Newsom on January 29, 2021, and incorporated.

<sup>15</sup> As of the date of this letter, the Families First Coronavirus Relief Act provides businesses with tax credits to cover some of the costs of providing additional paid sick leave and expanded family leave and medical leave to employees. Notably, the Regulation does NOT provide any form of tax credits for its unlimited paid leave.