

Cal/OSHA Regulatory Roundup

What's Coming for Businesses in 2021

The California Division of Occupational Safety and Health (Cal/OSHA) has been busy in the last few years. With the COVID-19 pandemic, Cal/OSHA has actually increased its activity and shows no signs of slowing down in 2021. Every business in California needs to monitor Cal/OSHA's activity to ensure compliance. Here is a brief primer on some of the recent high-profile regulations coming out of Cal/OSHA that employers should be aware of heading into 2021—but this is by no means a full summary of the items that may be voted upon or commented upon in 2021.

COVID-19 REGULATIONS IN 2021

Guidance Documents

Looking back at 2020, we saw the rise of new “guidance documents” issued by Cal/OSHA with both general and industry-specific requirements for employers, under the authority of the existing Injury and Illness Protection Plan Regulation (California Code of Regulations, Title 8, Section 3203). Although Cal/OSHA had no specific COVID-19 regulation, these guidance documents provided a framework of guidance and best practices to employers facing uncertainty surrounding their COVID-19 obligations. As knowledge of COVID-19 has evolved, Cal/OSHA has updated the documents with new or different requirements.

One central strength (and also concern) for these guidance documents was their adaptability. They were often updated with little or no notice or discussion with stakeholders. To be clear—this was not unique to Cal/OSHA. Similar instructions were updated by the California Department of Public Health (CDPH) and local public health agencies with little or no notice throughout 2020, leading to frenzied attempts by employers across California to keep up to date.

Thankfully, over the course of 2020, there was increasing coordination between Cal/OSHA and CDPH, and both agencies

appear to be developing certain helpful norms when updating their guidance, such as explicitly identifying the new provisions and including the most recent date the document was revised. Being able to monitor and keep up with an evolving patchwork of guidance documents across local, state and federal agencies will certainly continue to challenge businesses throughout 2021.

COVID-19 EMERGENCY REGULATION

Cal/OSHA approved an emergency regulation on COVID-19 in November 2020 (California Code of Regulations, Title 8, Section 3205 *et seq.*). In an unprecedented regulatory process, stakeholders were given no public opportunity to comment before the Standards Board's hearing and vote on November 19, 2020, and the text was made public only five business days prior to the vote. This stands in stark contrast with the emergency standard related to wildfire smoke (adopted in 2019) where there was an advisory committee process months before the final vote.

The resulting COVID-19 standard duplicated many provisions of the guidance documents, but also added considerable new requirements. Notable among them are the following:

- New sweeping testing obligations for employers to provide testing when “outbreaks” and “major outbreaks” (defined as three cases in a two-week period at a worksite, or 20 cases in a 30-day period) occur in a workplace.
- New sweeping obligations to exclude from the workplace and provide ongoing pay for COVID-19 cases and potentially exposed employees.
- New prescriptive requirements for employer-provided housing, including specifying six-foot distancing among beds and forbidding bunk beds and requiring that any isolation housing used to separate COVID-19 cases must include specific amenities, including “cooking facilities.”
- New prescriptive requirements for employer-provided transportation, including specifying three feet of distance among all occupants.
- Numerous terminology issues, including vague or inconsistent usage.

Heading into 2021, the Standards Board has already instructed the Division to hold an advisory committee and bring feedback

Agenda for California Recovery

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to the Board on the emergency regulation by March 2021, and again four months later. This means that public and private employers need to be gathering feedback from their personnel and be prepared to raise the concerns to the Division with specific examples throughout 2021 as they work to comply.

Also, if COVID-19 is more under control by the end of 2021 and the emergency regulation expires or is no longer needed, the Standards Board also instructed the Division to examine the issue of a permanent regulation covering all “infectious diseases, including novel pathogens.” The contours of that broad regulation will be another critical question where employers will need to make their voices heard in late 2021 or early 2022.

In short: California employers head into 2021 quickly adapting to a sweeping and very new COVID-19 regulation and will need to make their voices heard repeatedly throughout the year to render this new regulation into something that is workable, effective at maintaining employee safety, and feasible.

WILDFIRE SMOKE PROTECTION

Among many supply shocks created by COVID-19 was an extreme shortage of N95 respirators. Cal/OSHA’s high-profile wildfire smoke protection emergency regulation (Emergency Wildfire Smoke Regulation, California Code of Regulations, Title 8, Section 5141.1), adopted on July 29, 2019, relied heavily on the use of N95s for compliance, creating statewide shortages and concerns as 2020’s unprecedented fire season quickly exhausted industry stockpiles.

Broadly speaking, the Emergency Wildfire Smoke Regulation requires employers to do the following when the Air Quality Index (AQI) for particulate matter with a diameter of 2.5 micrometers or smaller (PM2.5) rises due to smoke:

- Monitor the AQI at any worksite that their employees will visit and be outside for more than 1 hour.
- AQI of 150: Provide information to outdoor employees regarding wildfire smoke hazards and provide the option of protection (N95 respirators) to outdoor employees at 150.
- AQI of 500: Compel all outdoor employees to be medically evaluated, fit-tested, and wear respiratory protection—or shut down.

Despite some attention from the Division to this mask shortage, N95 shortages remain a key concern for nonmedical businesses across California trying to comply with the Emergency Wildfire Smoke Regulation as they look to 2021.

In addition, employers should watch for this emergency regulation to be transitioned into a permanent regulation in fall 2021, which will provide another opportunity for textual improvements and input to the Division and Standards Board.

OTHER REGULATIONS THAT MAY ARISE IN 2021

Despite the recent focus on COVID-19 and wildfires, multiple other regulations with potentially huge effect on the business community are nearing their final vote with the Standards Board and may move forward in 2021. Two candidates stand out:

- **Indoor Heat.** California’s draft Indoor Heat Regulation has been in final draft form since April 2019 and apparently has been undergoing the required economic analysis—Standardized Regulatory Impact Analysis (SRIA). Given the broad effect this regulation could have for indoor working environments in restaurants and industrial settings, this regulation deserves a close eye and will certainly be an important vote should it arise in 2021.

- **Lead Standards.** California’s lead exposure standards in construction and in general industry have been creeping through the Cal/OSHA regulatory process since 2011 (California Code of Regulations, Title 8, Sections 1532.1, 5198). Generally speaking, the draft regulation will greatly lower thresholds for testing and medical removal related to blood lead levels, and consequently greatly expand the number of workplaces and employees that will fall under blood lead monitoring.

In 2019, the SRIA was finally completed, allowing the standard to move to formal rulemaking. However, that SRIA has prompted multiple rounds of comments from the Department of Finance and is being revised. Once it is complete, the regulation will be nearing its vote at the Standards Board. Businesses working with even small amounts of lead—potentially even lead contained in other metals, such as brass—should keep an eye on this process as it heads to the Standards Board in 2021.

CALCHAMBER POSITION

The California Chamber of Commerce takes the safety and health of California’s workers very seriously. The CalChamber supports effective workplace safety policies and believes that such policies must be based on sound science, must be clearly drafted, and must be feasible to implement.

The CalChamber also believes stakeholder input, even in times of crisis, is critical to drafting effective, successful regulations. The CalChamber will continue to advocate for sound, effective and feasible policy at Cal/OSHA in all rulemaking processes.



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