

# Cal/OSHA Regulatory Roundup

## What's Coming for Businesses in 2023

The California Division of Occupational Safety and Health (Cal/OSHA) was busy before the pandemic – and COVID-19 pushed the understaffed agency into overdrive. From 2020–2022, Cal/OSHA's COVID-19 workplace emergency temporary standard — California Code of Regulations, Title 8, Section 3205 et seq. (the Workplace ETS) — and the related guidance was arguably the most important regulatory issue for employers in California. The ETS was constantly evolving and has potentially found its final form heading into 2023. In addition, Cal/OSHA has a number of long-term rulemakings that may become regulations in 2023, including the update to California's lead regulation, and new indoor heat and workplace violence regulations.

Following is a brief primer on the state's COVID-19 regulations, as well as some of the other high-profile regulations and concerns that employers should be aware of heading into 2023.

*Note:* Workers at healthcare facilities and other workplaces covered by California's Aerosol Transmissible Disease (ATD) Standard (California Code of Regulations, Title 8, Section 5199) face a different set of COVID-19 regulations and are exempted from the Workplace ETS for that reason. In that vein, Cal/OSHA convened an advisory committee on a proposal to require vaccination for COVID-19 in ATD settings in October 2021. Details regarding this rulemaking, which was completed in early 2022, are available at <https://www.dir.ca.gov/dosh/doshbreg/AirborneInfectious-Meetings.html>.



### COVID-19 REGULATION HEADING INTO 2023

Thankfully, California has been among the most successful states in the nation in combatting COVID-19 and reducing transmissibility, despite predictable holiday surges. Despite a labor shortage and considerable vaccine hesitancy among workers, California employers largely embraced vaccination during 2021 and reaped the benefits of reduced workplace cases and workplace disruption.

In 2022, workplaces reopened more fully and life largely returned to normal. Although that return brought an increase in case rates, the cases were significantly more manageable due to increased vaccination, improved scientific understanding, less severe forms of the virus, and newly developed treatments (such as Paxlovid). It remains to be seen, however, how the virus will evolve and whether Californians will continue to update their COVID-19 vaccines as those evolutions occur.

### TIMELINE FOR THE COVID-19 REGULATION

Cal/OSHA initially approved an emergency regulation on COVID-19 in November 2020. 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 before the vote. As the Workplace ETS and its guidance evolved through 2021 and 2022, this pattern of minimal notice and communication continued, with some improvement. Through 2022, unexpected changes by

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California Department of Public Health (CDPH) guidance prompted corresponding changes in the COVID-19 regulation, leading to confusion and operational difficulties as California employers attempted to keep pace.

Looking toward 2023, the Workplace ETS has reached its likely final form, as it was approved for a two-year, nonemergency extension on December 15, 2022. This extension will carry forward until December 31, 2024, when it will expire.

### SUBSTANTIVE ISSUES IN TWO-YEAR, NONEMERGENCY COVID-19 REGULATION

With its December 15, 2022 vote, the Cal/OSHA Standards Board approved what is likely to be the final form of the COVID-19 regulation in California — which means employers will be adjusting their compliance regimes and settling in for the next two years. Thankfully, this final iteration has some noticeable improvements for California employers over prior versions, but also a few added complexities. Below are a few of the key changes from prior versions of the regulation:

- **Exclusion Pay Removed:** Exclusion pay was *not* extended in the two-year, nonemergency regulation, which means employers' sick leave calculations and costs will be reduced. This is a significant improvement, particularly for smaller businesses, who have been forced to shoulder the cost of employees' COVID-19 cases that often were caught outside the workplace.

- **Change to More Easily End Outbreaks:** Prior versions of the regulation required that outbreak precautions continue until a workplace had *zero* cases in a two-week period. This difficult standard meant that larger workplaces might remain in an outbreak for weeks (or months) after any workplace outbreak occurred due to unrelated social spread creating one new case and extending outbreak protocols. Under the new version, employers need to continue their outbreak protocols only if *two or more* cases occur in a two-week period. This also is a considerable improvement for employers.

- **“Close Contacts” Definition Changed Based on Size of Room:** Many of the COVID-19 regulation's provisions hinge on whether a worker is a close contact for a COVID-19 case. However, the regulation's definition of the term “close contact” has been changed significantly during the latter half of 2022. Because of a change made by the CDPH, the definition of a “close contact” was changed from the longstanding “6 feet / 15 minutes” standard to a new hybrid definition, based on the size of the indoor space. For indoor airspaces exceeding 400,000 cubic feet, a close contact will be anyone within 6

feet of a positive COVID-19 case for 15 minutes in a 24-hour period. For indoor airspaces smaller than 400,000 cubic feet, close contacts will be anyone “sharing the same indoor airspace” for 15 minutes in a 24-hour period. Notably, this definition was in effect *before* the nonemergency regulation was adopted in December, but still is a significant change that employers should focus on adapting to as they head into 2023.

As employers adapt to these changes, another silver lining is that the California Chamber of Commerce does not anticipate additional frequent changes to the text between January 2023 and December 2024 as there were over the last few years. This should ease compliance, as employers should be able to “set it and forget it” for their policies because the regulatory text will be locked in for the next two years — although employers will continue to need to watch for frequently asked questions (FAQ) changes from Cal/OSHA.

### OTHER REGULATIONS THAT MAY ARISE IN 2023

Although COVID-19 has dominated the lion's share of Cal/OSHA's focus for the last few years, other regulations are likely to show some movement in 2023. Keep an eye out for the following changes:

- **Indoor Heat:** California's draft Indoor Heat Regulation has been in final draft form since April 2019 and completed the required economic analysis — Standardized Regulatory Impact Analysis (SRIA) — in 2021. If your workplace temperature exceeds 82 degrees Fahrenheit, then this regulation is one to watch as it may apply to your workplace. Substantively, it will require temperature monitoring, cool down areas, and other heat-related precautions to protect employees. We expect this regulation to be especially problematic for smaller employers in tight quarters, such as restaurants. The text of the regulation is finalized and available online, and we are waiting for the Cal/OSHA Standards Board to begin formal rulemaking. Estimated potential passage would be late 2023 at the earliest.

- **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 need to undergo blood lead monitoring. In 2019, the SRIA was finally completed, allowing the standard to move to formal rulemaking. After

comments from the Department of Finance, the SRIA was subsequently revised in late 2020. With that hurdle cleared, we are now waiting for the Cal/OSHA Standards Board to begin formal rulemaking, which involves public notice at a Board meeting, and a 45-day comment opportunity, then analysis of comments. Estimated potential passage would be late 2023 at the earliest.

- **Workplace Violence:** Cal/OSHA has been preparing a workplace violence standard to cover all industries since 2017 and circulated its last draft text in May 2022. Substantively, this draft requires employers to log and categorize any workplace violence occurrences, as well as adopt a “workplace violence prevention plan” with specific requirements. This draft has not yet been finalized, and we anticipate another

advisory committee meeting, as well as an SRIA analysis, before the text is finalized. We estimate potential adoption no sooner than mid-2024.

#### CALCHAMBER POSITION

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. Regarding COVID-19, the CalChamber supports a managed transition away from emergency-footing workplace precautions. The CalChamber will continue to advocate sound, effective, and feasible policy at Cal/OSHA in all rulemaking processes.



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