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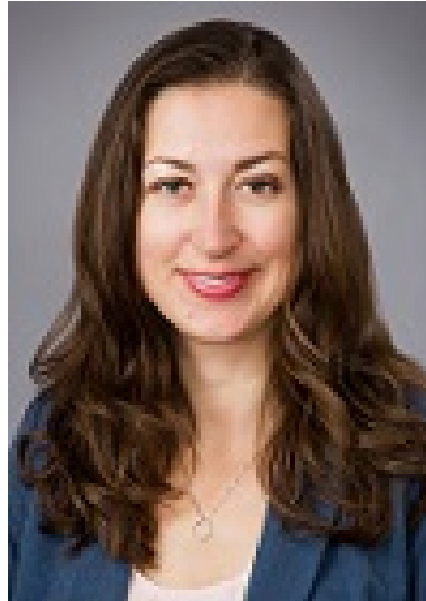
Cal OSHA

Emergency Temporary Standards

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Presenter

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Primary Practice Area: Employment Litigation and Employment Advice and Counsel

Emergency Temporary Standards (ETS) re COVID-19

KEY DATES

- Effective November 30, 2020
- No end date indicated in the text of the ETS
- If an employer shows good faith effort to comply, Cal OSHA will cite violations but not assess a monetary penalty through February 1, 2021
- 14-day exclusion period changed to 10 days PER Executive Order N-84-20

EXCLUSION

The ETS does **not** apply to employees covered by the requirements of Aerosol Transmissible Diseases (ATD) regulations. Employees not identified in the ATD plan and not provided protections under that plan (for example, clerical employees working away from a medical facility) **are** covered under the ETS.

Main Requirements of the ETS

- Create a written COVID-19 Prevention Plan (CPP) using Cal OSHA's model that has been tailored to your business and make it available to employees
- Implement and enforce COVID-19 safety measures that are most likely already in place
- Routinely evaluate the workplace for hazards that contribute to COVID-19 spread
- Document efforts to remediate hazards
- Provide training to employees regarding COVID-19
- Encourage employees to participate in the process

Main Requirements of the ETS

- Rigorously enforce PPE and sanitation requirements and discipline employees who fail to comply
- Offer or require testing depending on number of positive cases
- Exclude infected and exposed employees from the workplace
- Provide written notice regarding workplace exposure
- Maintain employee pay in certain specific circumstances
- Adhere to strict return to work protocol
- Manage outbreaks and maintain documentation of CPP compliance

Responding to a Positive Case

- Everything starts with a person with a **positive COVID-19 test** (the COVID-19 case). If you are only aware of a symptomatic person at the workplace, the ETS requirements are not yet triggered.

STEP ONE: TRACK DATES

- a) Date the COVID-19 case was last at the workplace
- b) Date of symptom onset, or if asymptomatic, date of specimen collection for positive test

STEP TWO: IDENTIFY EXPOSED EMPLOYEES (aka close contacts)

- a) Employee worked with COVID-19 case two days before date in (b) above; **and**
- b) Employee and COVID-19 case were within 6 feet of each other for a cumulative total of 15 minutes over 24 hours **regardless** of whether masks were worn

STEP THREE: EXCLUDE EMPLOYEES and OFFER TESTING

- a) Send COVID-19 case and exposed employees home
- b) Instruct exposed employees to advise if they develop symptoms
- c) Offer testing at no cost and pay for time to test and mileage to get to test site – can be free community test center, medical providers or pay-to-test businesses.

What to do following positive case (Con't.)

STEP FOUR: PROVIDE WRITTEN NOTICE and TRACK CASES

- a) Within one business day of learning of COVID-19 case provide written notice to:
 - ❖ All employees who had “COVID-19 exposure” and any authorized representatives (see Step Two)
 - ❖ Independent contractors, other employers (such as staffing agencies) present during the 2-day exposure period.
- b) What to include in written notice?
 - ❖ The ETS doesn't specify!
 - ❖ The ETS only says to give “notice” of the potential exposure without revealing the name of the positive case.
 - ❖ AB 685 contains detailed requirements regarding notification following a positive case.
- c) Track all positive cases:
 - ❖ Employee's name, contact information, occupation, location where the employee worked, the date of the last day at the workplace, and the date of a positive COVID-19 test.
 - ❖ Employees may request a copy of this chart, with personal information redacted.

What to do following positive case (Con't.)

STEP FIVE: DETERMINE WHO IS ENTITLED TO EXCLUSION PAY

- a) If the employee is too sick to work:
 - ❖ Exclusion pay is not due.
 - ❖ Paid sick leave, disability benefits or worker's compensation may be available.
- b) If the employee is able and available to work:
 - ❖ Exclusion pay is due.
 - ❖ Employer may require exhaustion of sick leave benefits and may off set payments from "public sources" before providing exclusion pay.
- c) If the employee is unable to work for reasons unrelated to COVID-19:
 - ❖ Exclusion pay is not due.
 - ❖ Examples include business closure, caring for a family member, disability, or vacation.

Exclusion Pay is not due if COVID-19 exposure was not work related.

What to do following positive case (Con't.)

STEP SIX: RETURN EMPLOYEES TO WORK

- a) The Symptomatic COVID-19 Case and Symptomatic Exposed Employees may return after:
 - ❖ At least 24 hours have passed since a fever of 100.4 or higher has resolved without the use of fever-reducing medications;
 - ❖ Symptoms have improved; and
 - ❖ At least 10 days have passed since symptoms first appeared.
- b) The Asymptomatic COVID-19 Case may return after:
 - ❖ 10 days following the date the specimen was collected for their first positive result
- c) The Asymptomatic Exposed Employees may return after:
 - ❖ 10 days following the date of their exposure to the COVID-19 case

Important: If an excluded employee develops symptoms or tests positive while out, their RTW period starts from that date.

A negative COVID-19 test shall not be required to return to work and does not change the mandatory exclusion time period as outlined above.

More on Exclusion Pay

- Numerous lawsuits have been filed challenging the ETS
- These lawsuits assert that Division of Occupational Safety and Health does not have the authority to regulate wages and paid leave, which are the domain of the Department of Labor Standards.
- The provisions are confusing: exclusion pay is **not due** when employees are too sick to work, yet the standards and FAQ specifically state employers may “**exhaust sick leave benefits** before providing exclusion pay”!
 - ❖ Employers under 500 employees: Emergency Paid Sick Leave under the FFCRA expired 12/31/20 though employers can voluntarily provide and tax the tax credit through 3/31/21.
 - ❖ Employers over 500 employees: California’s Supplemental Paid Sick Leave expired 12/31/20. Some major cities have paid sick leave ordinances which were extended into 2021.

More on Exclusion Pay

- **Interplay with SB 1159:**
 - Rebuttable presumption of COVID-19 as an industrial injury if employee worked within 14 days and was positive during an outbreak.
 - Employers can rebut the presumption with evidence exposure was not work related.
 - Cal OSHA FAQ suggests that employers can conduct “comparable investigations” and produce “comparable evidence” used to rebut the Worker’s Compensation presumption to show it is **more likely than not that an employee’s COVID-19 exposure did not occur in the workplace.**
- **Interplay with Unemployment:**
 - Text of the ETS says employers can consider “benefit payments from public sources” but does not define “public sources.”
 - The FAQ reference unemployment as available when employee is unable to work for reasons other than protecting the workforce from exposure.
- **Need to Top Off Public Sources?**
 - Likely not. Since exclusion pay is not due when worker is getting disability or Worker’s Comp, then no need to supplement these wages to bring employee to 100%.

Showing Exposure was Not Work Related

- ❖ Take detailed notes regarding information your employee provides about contact he has had with exposed or positive individuals, taking care not to ask about specific family members.
- ❖ It is more common for someone to become infected at home or at a family gathering, so ask if anyone the employee lives with or has had recent contact with has been infected or exposed.
- ❖ Have robust written safety measures in place and get employee acknowledgments of those measures. If you have signs up in your workplace, or stations set up with sanitizer or for symptoms check-in, take pictures! This will help you demonstrate what you are doing to mitigate risk.

Outbreaks and Major Outbreaks

Outbreak: Three or more positive cases in an “exposed workplace” within 14 days.

Major Outbreak: 20 or more positive cases in an “exposed workplace” within 30 days.

“Exposed workplace”

- ❖ Work location, working area, or common area used or accessed by a COVID-19 case during the high-risk period, including bathrooms, walkways, hallways, aisles, break or eating areas, and waiting areas.
- ❖ Does not include areas where masked employees pass by one another momentarily.

How is the 14-day Period Measured?

- ❖ The date of the test of the first positive case forward for 14 days
- ❖ Include any confirmed positive person who has been in the exposed workplace during the 2-day infection period

Outbreaks and Major Outbreaks

How to Limit Outbreaks and Narrow the “Exposed workplace”

- ❖ Group employees into non-overlapping shifts
 - Keep facilities well ventilated
 - Clean and disinfect between shifts
- ❖ If possible, reduce common areas shared by employees in different departments or floors.
 - Consider using portable bathrooms to ensure employees from one floor don't go to another floor to use the restroom.
 - This way, both floors are separate workplaces
 - Create separate break areas or require employees to break in their car/away from the facility

AB 685 vs ETS Reporting Requirements

- ❖ ETS = notice to exposed employees only
- ❖ AB 685 = notice to *all* employees who were on the premises at the *same worksite* as the positive employee (even if they were not in close contact and thus not “exposed”).

WHAT IS A WORKSITE?

A building, store, facility, agricultural field, or other location where a worker worked during the positive employees’ high risk exposure period.

A worksite does **not include** buildings, floors, or other locations where the positive worker did not enter. In a multi-worksite environment, you need only notify employees who were at the same worksite as the person who tested positive.

Testing

- **No Outbreak:** Offer testing to at no cost to employees. If they are interested, help them find a site.
 - ❖ The employer doesn't *have* to pay, but the employee must not pay.
 - ❖ Testing during working hours doesn't actually mean working hours.
 - Just means employees must be paid while testing.
 - ❖ What is the difference between an employer being required to “offer testing” vs “provide testing”.
 - Absolutely nothing. Apparently, they mean the same thing.

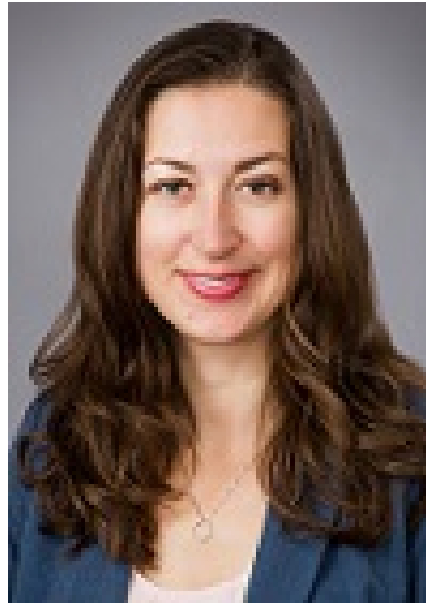
- **During an Outbreak**
 - ❖ Remember, outbreaks only judged by the “exposed workplace”.
 - ❖ Test once weekly (or 2x week for major outbreaks) for those only in the “exposed workplace”) until no cases for 14 days.
 - ❖ Testing does not need to be done at employer's site. Can be anywhere the employee can get tested.

Common Cal OSHA Client Questions

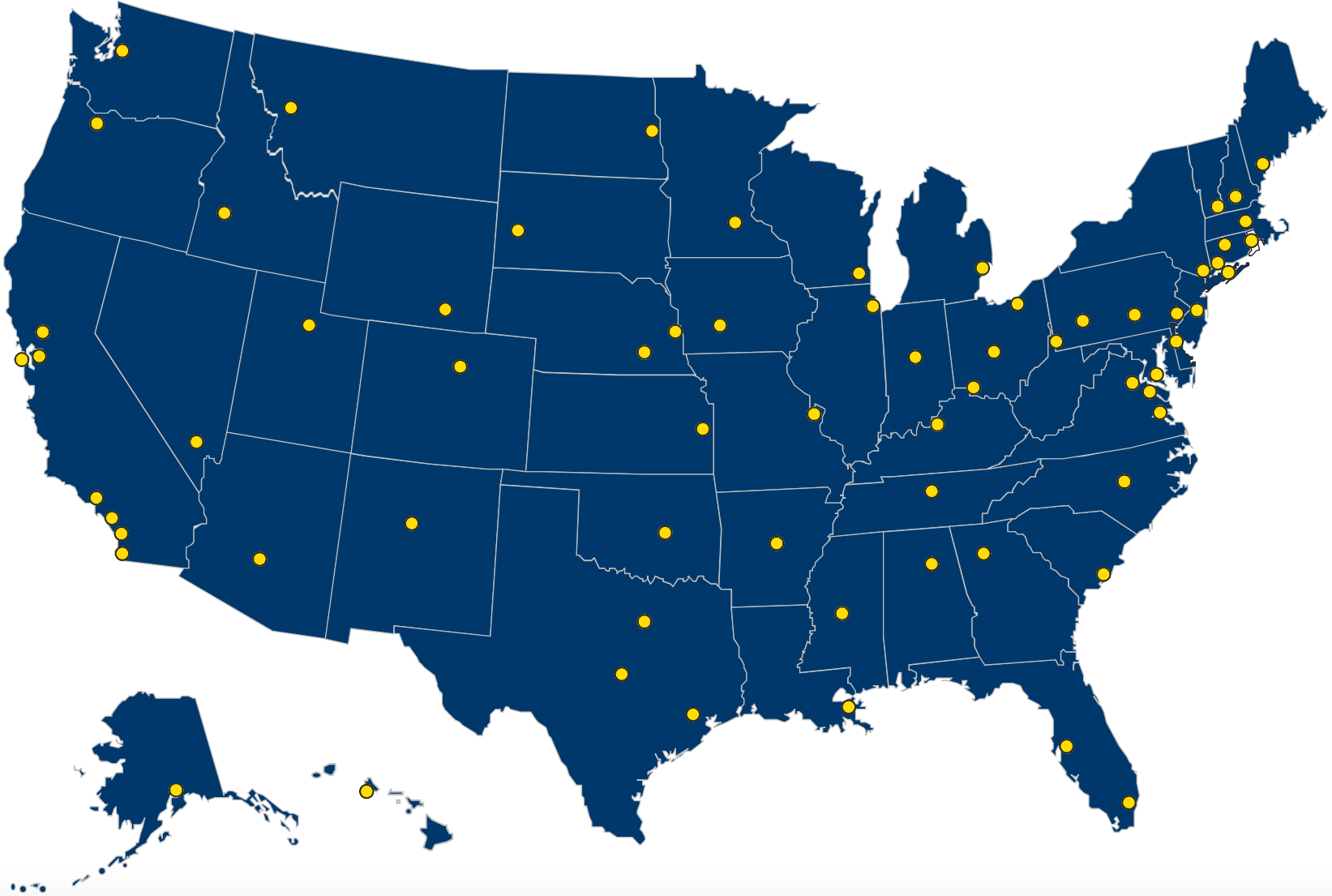
- **Can I require my employees to use PTO/Vacation before paying Exclusion Pay?**
 - Unfortunately this is not clear. The regulations and the FAQ say nothing about PTO and specifically state employers may use sick time and public benefits. If you choose to require vacation pay, depending on how the courts rule on the legality of the ETS, you may have to restore these benefits to your employees.
- **How do I maintain confidentiality of test results while also determining who is an “exposed employee”?**
 - If there is any way to determine who had close contact without revealing the name of the positive employee, such as describing only work areas or shifts, do so. Again, the ETS and FAQs ignore this concern. Ultimately, the obligation is to exclude employees with close contact and to do this you have to know if Person A was within 6 feet of Person B for cumulative 15 minutes.
- **Can I post a notice regarding exposure to satisfy the ETS notice requirement?**
 - I do not recommend doing so. While the guidance does not prohibit posting notice, it requires delivery within one business day (as does AB 685). Since an employer cannot ensure that a posted notice will be viewed by its intended recipients, it is the least secure means of complying with the notice requirement. Remember to keep copies of the notices for three years.
- **What do I do if an employee refuses to be tested?**
 - You may exclude this person from the workplace. There would be no qualifying reason for exclusion pay for this. And with SPSL expired, paid sick leave would not be due for the employer excluding the employee due to concerns over transmission of COVID-19. Cal OSHA's new FAQ indicate that no signed declination is required.

QUESTIONS?

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