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Cal/OSHA Enforcement and Regulatory Update

March 15, 2022

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- More than 35 years experience with employers, general counsel, safety directors, risk managers, human resources administrators and safety professionals defending OSHA and Cal/OSHA citations
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MEGAN S. SHAKED is an Associate in the Workplace Safety and Employment Practices at **Conn Maciel Carey LLP** in California, where she focuses her practice on a wide range of employment litigation and counsel for clients on myriad legal issues employers face in the workplace, including all aspects of the employment relationship:

- Represents employers in inspections, investigations and enforcement actions involving Cal/OSHA
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- Counsels employers on compliance with employment laws

Agenda



Revised Cal/OSHA's COVID-19 Emergency Temporary Standard



2022 COVID-19 Supplemental Paid Sick Leave



Warehouse/Pharmacy Quotas (AB 701 and SB 362)



Expanded Cal/OSHA Authority (SB 606)

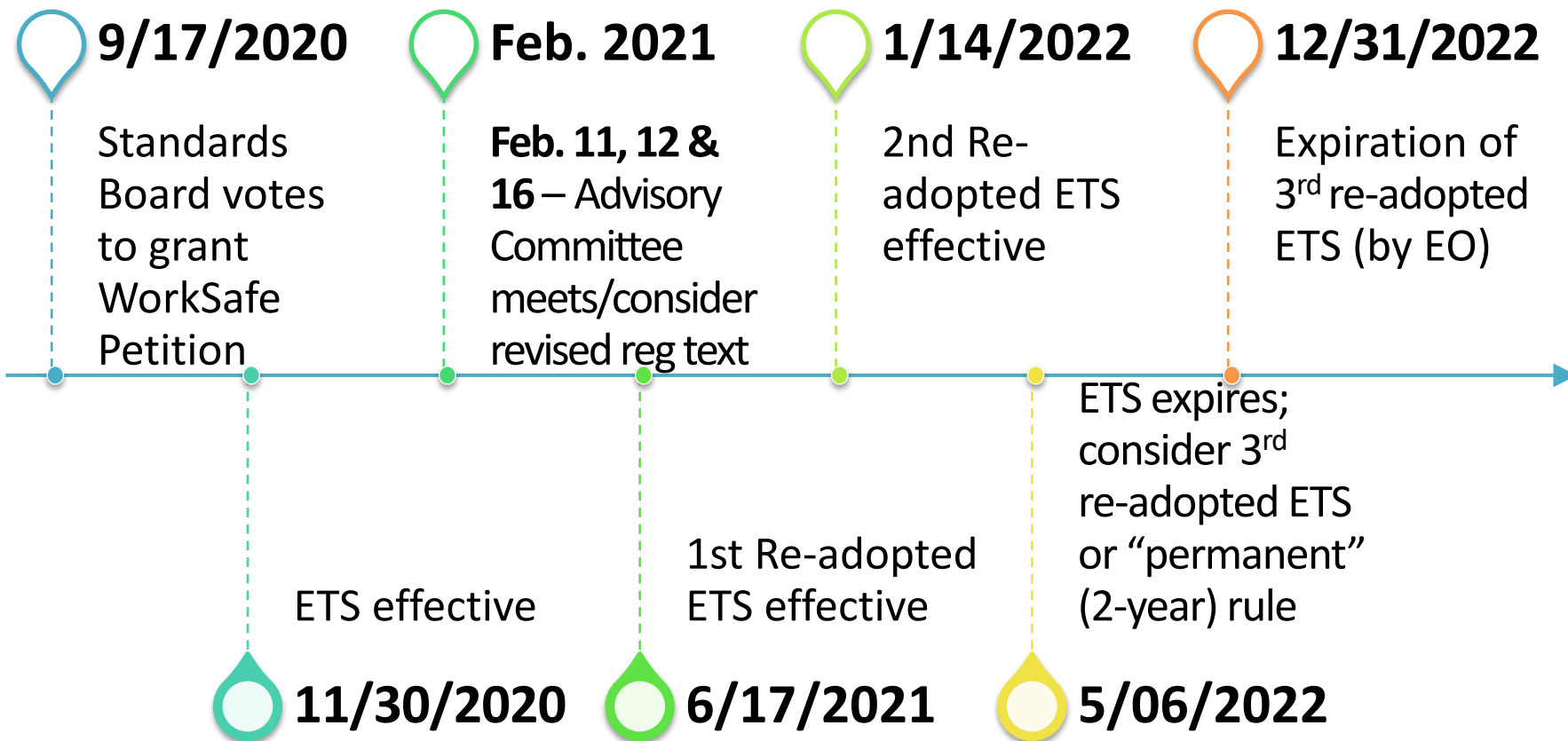


Status of Enforcement and Case Updates

Cal/OSHA COVID-19 Emergency Temporary Standard

Cal/OSHA COVID-19 ETS

Timeline



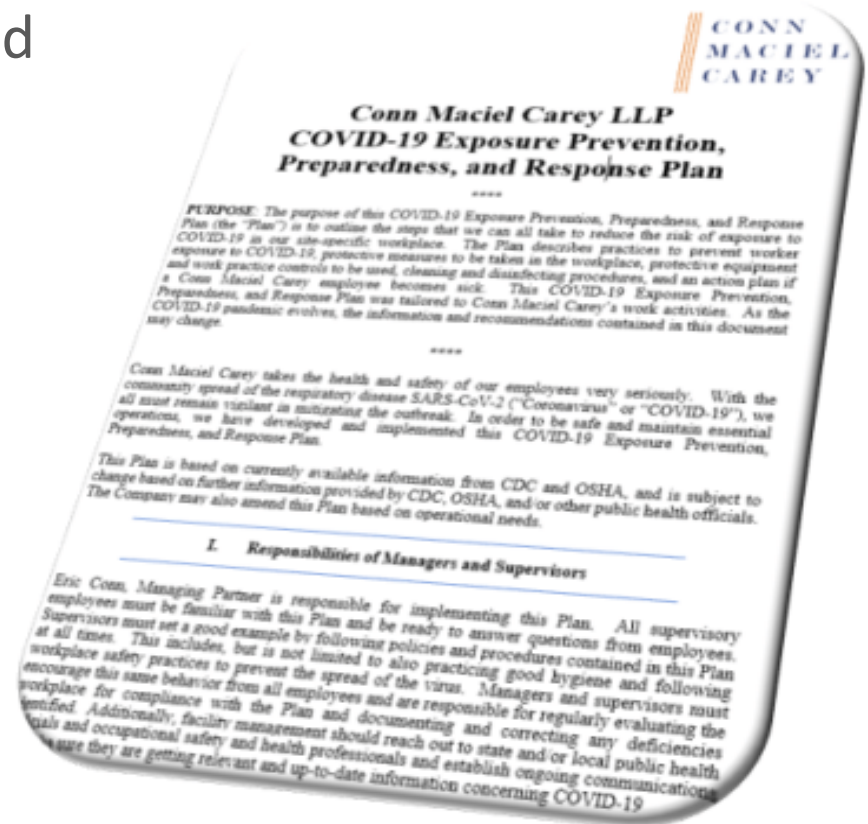
Application of the ETS

- ETS applies to *all “places of employment,”* except where:
 - Employees work from home or other location of their choice, or otherwise do not have contact w/ others
 - Employees are subject to the Aerosol Transmittable Diseases Std. (5199) (healthcare workplaces, generally)
- **NOTE:** “Nothing in this [ETS] is intended to limit more protective or stringent state or local health department mandates or guidance”



Written COVID-19 Prevention Program

- Employers must “*establish, implement and maintain*” an effective, written COVID-19 Prevention Program
- Similar to Cal/OSHA’s Injury and Illness Prevention Plan Rule:
 - Communication
 - Investigating incidents
 - Inspecting sources of infection
 - Correcting hazards
 - Training



Responding to COVID-19 Cases

- W/in 1 business day, give notice of a COVID-19 case (e.g., positive individual), w/out revealing personal identifying info:
 - Employees who were on the premises at same worksite as COVID-19 case, during the high-risk exposure period
 - Independent contractors/other employers on “premises at the same worksite” during the high-risk exposure period
 - Employees’ union (if appl.) of the COVID-19 case and any employee who had a close contact
- Employer must immediately investigate and determine possible work-related factors that contributed to infection

A Note About Notice

Existing law (Labor Code 6409.6/AB 685) requires employers take certain action within one business day of receiving notice of potential exposure to COVID-19 (written notice to workers; outbreak notice to local health department)



AB 654 (effective October 2021) clarifies and narrows requirements:

Outbreak reporting timeline to local public health agency is now within **48 hours or one business day (whichever is later)**

Additional employers exempt from COVID-19 outbreak reporting requirements (certain additional licensed entities, for example, childcare facilities)

Covered worksites do not include locations where employee identified as source of COVID-19 exposure worked alone or worked remotely, or did not enter location

COVID-19 Testing

- Employer must offer COVID-19 testing at no cost, during paid time, to all ***employees having a close contact in the workplace*** (regardless of vaccination status)
- ***Per 1/14/22 revised ETS:*** COVID-19 testing cannot be both self-administered and self-read unless ***“observed”*** by the employer or an authorized telehealth proctor
- Examples of approved tests:
 - Tests processed by a laboratory (including home or on site collected specimens)
 - Proctored over-the-counter tests
 - Tests where “specimen collection and processing is either done or observed by an employer”

Physical Distancing

- ETS *no longer* requires physical distancing
- But employers must consider whether it is necessary to implement physical distancing during an outbreak, and must implement physical distancing during a major outbreak

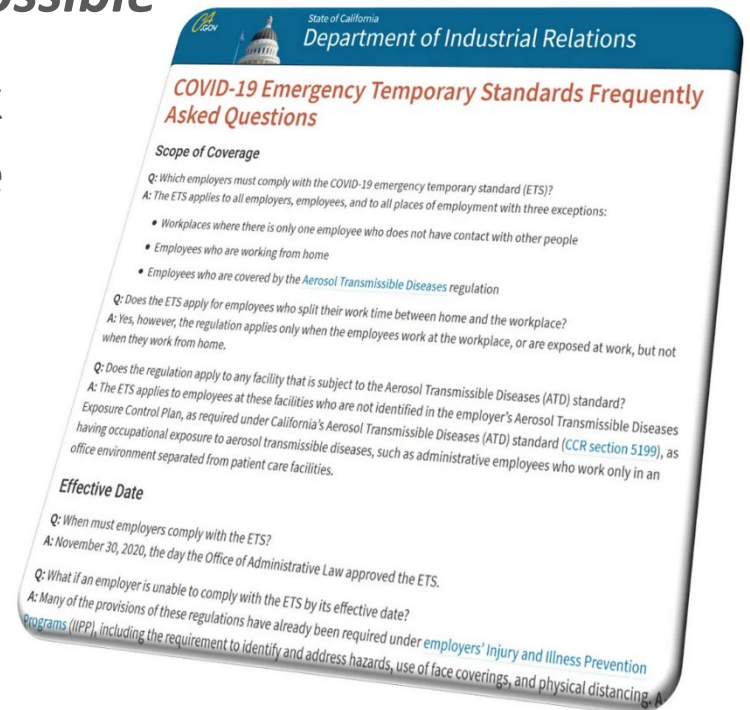


Update re Face Coverings

- ***Fully vaccinated workers*** were not required to wear face masks
 - **1/14/22 ETS update:** person screening employees for COVID symptoms must wear a face covering, regardless of vaccination status
- Employees who are ***not fully vaccinated***: masks are required indoors or when in vehicles, with limited exceptions
- CDPH guidance (2/28/22) has generally lifted masking public health requirements except in certain high-risk settings
- Executive Order (2/28/22) has “suspended” 3205(c)(6)(A) requiring masking for unvaccinated indoors or in vehicles

Respirators

- **“Upon request,”** employers must provide respirators for **voluntary-use** to unvaccinated employees working indoors or in vehicles w/ others **“as soon as possible”**
- Former FAQ: employer may either stock respirators or poll workers to determine how many will want them
- Former FAQ: once employer establishes employees wish to wear respirators, it must stock enough of the **correct size and type** to meet foreseeable requests on demand
- Former FAQ: employee may purchase their own respirator, as long as employer reimburses in timely manner



Exclusion

- Exclusion for COVID-19 cases and employees who had a close contact in the workplace (10 days/14 days)
- **1/14/22 update – close contact *exceptions*:**
 1. Employees who were fully vaccinated before the close contact and do not develop COVID-19 symptoms
 2. COVID-19 cases who return to work under return-to-work criteria and no longer have symptoms do not need to be excluded for 90 days after initial onset of symptoms;
 3. COVID-19 cases who return to work under return-to-work criteria and never developed symptoms do not need to be excluded for 90 days after first positive test

Note: Exceptions apply only if employees wear face covering + distancing for 14 days following last close contact. If employer does not exclude employee with close contact, must provide employee information about applicable precautions recommended by CDPH.

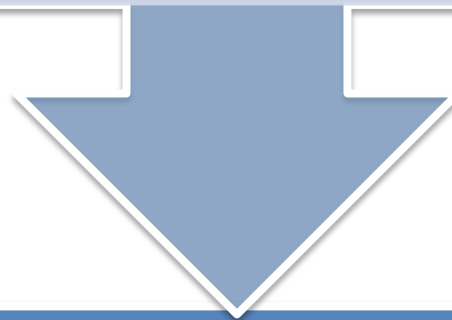
Exclusion Pay

Exclusion pay for COVID-19 cases and employees who had a close contact in the workplace

Includes wages, seniority and “other employee rights and benefits” while employee is excluded

Exclusion pay not required for close contact where employer can show the employee's exposure was not work-related

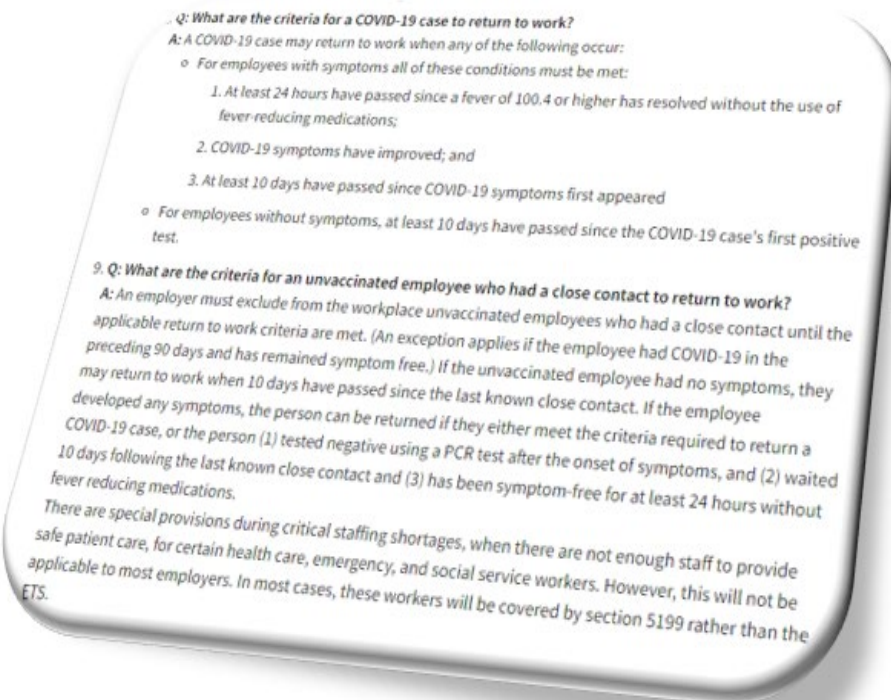
Exclusion pay is not required where employee receives disability payments or is covered by Workers Comp



Wages are “subject to enforcement through procedures available under existing law” - beware of class action/PAGA litigation

New Return-to-Work Criteria

- 12/20 Executive Order N-84-20 states that ETS exclusion and return-to-work periods are **“suspended”** to the extent they **exceed** “any applicable quarantine or isolation period recommended by the CDPH”
- Thus, per Cal/OSHA’s FAQs, 1/6/2022 CDPH guidance **“replaces”** the exclusion periods and return-to-work criteria in the ETS (but does not apply to healthcare personnel)



Exclusion/Return to Work (Per CDPH Guidance)

Exclusion requirements for *employees who test positive for COVID-19 (Isolation)*:

Vaccination Status	Period of time to be excluded from work
<p>Employees who test positive for COVID-19, regardless of vaccination status</p>	<p>Must be excluded from the workplace for at least 5 days</p>
	<p>Employees can return to work after day 5 if they do not have symptoms and diagnostic specimen collected on day 5 or later tests negative</p>
	<p>If employees cannot test or decline to test, they can return to work after 10 days (provided they have no COVID-19 symptoms)</p>
	<p>Must wear a face covering around others at work for a total of 10 days after the positive test</p>

Exclusion/Return-to-Work

Exclusion requirements for **unvaccinated employees who have a close contact (Quarantine)**:

Vaccination Status	Period of time to be excluded from work
<p>Employees who are unvaccinated</p>	<ul style="list-style-type: none"> • Must be excluded from the workplace for at least 5 days after the last close contact • Employees can return to work after day 5 if they test negative based on diagnostic specimen collected on day 5 or later and have no COVID-19 symptoms
	<ul style="list-style-type: none"> • If employees cannot test or decline to test, they can return to work after 10 days provided they have no COVID-19 symptoms
	<ul style="list-style-type: none"> • Must wear a face covering around others at work for a total of 10 days after exposure
	<ul style="list-style-type: none"> • If the exposed employees develop symptoms, they must be excluded pending the test results
	<ul style="list-style-type: none"> • If the exposed employees test positive, they must follow isolation requirements in first chart.

Exclusion/Return to Work

Exclusion requirements for **vaccinated employees who are booster eligible *but not boosted and have a close contact (Quarantine)***:

Vaccination Status	Period of time to be excluded from work
<p>Employees who are vaccinated and booster eligible but not boosted</p>	<ul style="list-style-type: none"> • Employees do not need to be excluded from work if asymptomatic but must have a negative test 3-5 days after last close contact
	<ul style="list-style-type: none"> • If employees cannot test or decline to test, they can return to work after 10 days provided they have no COVID-19 symptoms
	<ul style="list-style-type: none"> • Must wear a face covering around others at work for a total of 10 days after exposure
	<ul style="list-style-type: none"> • If the exposed employees develop symptoms, they must be excluded pending the test results
	<ul style="list-style-type: none"> • If the exposed employees test positive, they must follow isolation requirements

Exclusion/Return to Work

Exclusion requirements for **employees who received boosters or are fully vaccinated but not booster-eligible, and who *have a close contact exposure (Quarantine)***:

Vaccination Status	Period of time to be excluded from work
<p>Employees who received booster or are not booster eligible</p>	<ul style="list-style-type: none"> • Employees do not need to be excluded from work if asymptomatic but must take a test on day 5 after exposure.
	<ul style="list-style-type: none"> • Must wear a face covering around others at work for a total of 10 days after exposure
	<ul style="list-style-type: none"> • If the exposed employees develop symptoms, they must be excluded pending the test results
	<ul style="list-style-type: none"> • If the exposed employees test positive, they must follow isolation requirements

But Wait! There's More...

Keep an eye on these other sources of guidance impacting Cal/OSHA's COVID-19 ETS:

1. Guidance documents from DOSH including "Frequently Asked Questions"
2. Guidance from California's Dept. of Public Health and CDC/NIOSH
3. Guidance and directives from local health departments
4. Gov. Newsom's Executive Orders



ETS v. IIPP: the Western Steel Council Petition

Problems with the ETS (among many):

- Rulemaking, even on an emergency basis, cannot keep up with changes in information and new methods to manage transmission of COVID
- Often calls for a different approach in workplaces than what DPH is recommending/requiring for the general public
- DOSH has no real expertise in infectious disease control. The shots are called by generalists in occupational health who are well-meaning, but not tapped into CDC and worldwide experts as is DPH


ETS v. IIPP: the Western Steel Council Petition

Petition 594

- Available at <https://www.dir.ca.gov/oshsb/petition-594.html>
- Calls for amending 8 CCR section 3203(a)— minimum requirements for IIPP--to add a 9th subsection.
- Subsection (a)(9) would apply and require employers not covered by the ATD standard, section 5199, to implement guidance issued by DPH--**only:**

2022 COVID-19 Supplemental Paid Sick Leave

2022 COVID-19 Paid Sick Leave

- Employers with more than 25 must provide up to 80 hours of COVID-19 Supplemental Paid Sick Leave
 - Up to 40 hours for *reasons related to COVID-19*
 - Up to 40 additional hours for *testing positive for COVID-19*
- 
- Above and beyond California paid sick leave or previous California COVID-19 Supplemental Paid Sick Leave
 - Retroactive to January 1, 2022, continuing through September 30, 2022

2022 COVID-19 Paid Sick Leave

- Qualifying reasons related to COVID-19:
 - Employee experiencing COVID-19 symptoms and seeking a medical diagnosis
 - Employee is caring for a child whose school or place of care is closed or otherwise unavailable related to “COVID-19 on the premises”
 - Employee attending COVID-19 vaccine appointment (for employee or taking “family member”)
 - Employee experiencing symptoms related to vaccination or caring for family member experiencing such symptoms
 - Employee subject to isolate/quarantine order, or advised by health care provider to isolate/quarantine
 - Employee caring for family member subject to an order to isolate or quarantine

2022 COVID-19 Paid Sick Leave

- Qualifying reasons where there is a positive test:
 - Where employee or family member for whom the employee is providing care, tests positive for COVID-19
- If positive, employer may require employee submit to another test on or after 5th day after first positive test and provide documentation
- Testing must be made available at no cost to employee
- Employer need not provide additional supplemental paid sick leave if employee refuses to provide documentation of test result



2022 COVID-19 Paid Sick Leave

- Full 40 hours is available to a covered employee who works full time, or scheduled to work average of at least 40 hours/week in the prior two weeks prior to the leave
 - The calculation differs for those who work a different schedule or for firefighters.
- COVID-19 supplemental paid sick leave must be ***identified separately*** from regular paid sick days and employers must provide an employee with written notice of the amount (on itemized wage statement or in a separate writing on the designated pay date)

2022 COVID-19 Paid Sick Leave

- Payments capped (\$511/day; \$5110 total)
- If a covered employee makes an oral or written request for retroactive payment, payments are due on or before the payday for the next full pay period after such request
- DIR has issued model notices and FAQs, and more guidance expected to follow



Warehouse/Pharmacy Quotas

Warehouse Distribution Centers

AB 701



- Effective Jan. 1, 2022, adds requirements for non-exempt warehouse employees
- Employer must disclose written description of all quotas a warehouse employee is subject to (upon hire or w/in 30 days of law going into effect)
- Quotas may not prevent: an employee from taking meal or rest periods; using bathroom facilities (including reasonable travel time to and from bathroom facilities); or complying with other occupational health and safety laws
- Employer may not subject employee to adverse employment action based on a quota that prevents the above

Warehouse Distribution Centers

AB 701

- Rebuttable presumption of retaliation against employees who are subject to adverse employment action w/in 90 days of engaging in protected activity under AB 701
 - Protected activity includes complaining that their work quota violation AB 701 or making an initial request (in a calendar year) for information about a quota or personal work speed data
- Employee may request a written description of every quota that applied to the employee as well as the employee's own personal work speed data from the past 90 days (21 days to respond)
- Relief: Injunctive relief; attorney's fees; PAGA penalties

Chain Community Pharmacies Quotas

SB 362

- “Chain community pharmacies” may not establish a quota related to the duties for which a pharmacist or pharmacy technician license is required.
- Chain community pharmacy means a chain of 75 or more stores in California under the same ownership



SB 606: Enterprise-Wide Citations

Enterprise-Wide Citations
SB 606 – Effective Jan. 1, 2022

Part One

Provides that there is a ***rebuttable presumption that the violation is “enterprise-wide”*** for multiple worksites and calling for “enterprise wide” abatement where either:

A written policy or procedure violates any Cal/OSHA safety order,
OR

Evidence of a “pattern or practice” of the same violation involving more than one of the employer’s worksites

Part Two

Per Instance Citations

SB 606

- For “egregious” employers that *willfully* violate a regulation, ***separate citations and penalties for each violation AND each exposed employee*** may be available.
- Broad definition of “**egregious**” employer:
 - Violations result in “*persistently high*” rates of worker injuries or illnesses ...
 - “*Extensive history*” of past violations “...of this part.”

Part Two (cont'd)

Per Instance Citations

SB 606

- *Intentionally disregarded* safety responsibilities
- Conduct *taken as a whole, amounts to “clear bad faith,” or*
- Employer has committed “*a large number*” of *violations*
- Intentional known violation with no *reasonable effort to eliminate the violation*

Expanded Jurisdiction and Retaliation

SB 606

Proposes to give Cal/OSHA new jurisdiction over violations of the Health and Safety Code and the Labor Code

Creates a rebuttable presumption of retaliation when “adverse action” is taken against an employee w/in 90 days of the employee:

Disclosing a positive test or diagnosis resulting from an exposure in the workplace, or of a communicable disease

Asking for testing as a result of an exposure in the workplace

Requesting PPE that is “reasonable under the circumstances”

Reporting a possible violation of a safety regulation

Status of Enforcement

Cal/OSHA Enforcement Data

	2017	2018	2019	2020
On-Site Inspections	7,912	7,818	7,560	6,034
# of Violations	20,473	19,893	18,235	13,105
Letter Responses	--	--	7,103	12,992

- Trend continuing into 2021 with on-site inspections, alleged violations, and alleged serious violations dropping in the first quarter (though not for agriculture)
- Many sectors saw a decrease in inspections, except agriculture, retail and public administration. Following saw increased accident-related inspections: manufacturing, transportation/public utilities, wholesale, retail, services, public admin.

Source: Cal-OSHA Reporter

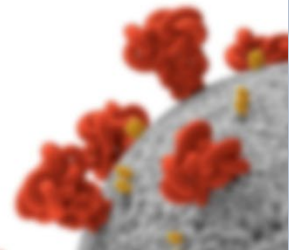
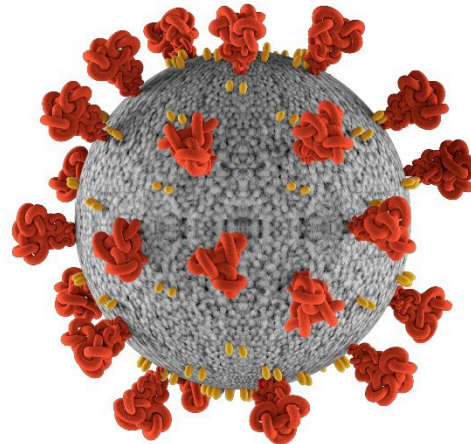
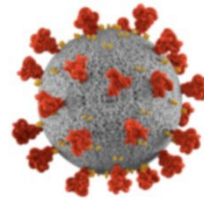
Current State of DOSH (Enforcement Agency)

- Agency continues to hire, but
 - Still a CSHO vacancy rate of 27.2%
 - Calif. CSHO: Worker rate 1:95,000
 - Compare: Washington - 1:24,000
Oregon - 1:28,000
 - CSHO hires often recent graduates w/out “real world” experience
 - 7 district offices without managers (up 2 from 2021)
 - Legal Unit – 58% vacancy rate



DOSH's Current Emphasis on COVID-19 Enforcement

- COVID-19 is an enforcement priority
- COVID-19 related inspections since the early pandemic
- Industries frequently cited for COVID-19 related violations
 - Healthcare (nursing care, hospitals, assisted living)
 - Agriculture
 - Manufacturing
 - Supermarkets
 - Meat/food processing



Enforcement Efforts before and after COVID-19 ETS

- Citations for COVID-19 Violations available to the public: <https://www.dir.ca.gov/dosh/COVID19citations.html>
- Pre-ETS: IIPP, Haz Comm, ATD, Respiratory Protection, Reporting
- Post-ETS: All of the above, plus ETS. We're regularly seeing citations including both IIPP and ETS citations, even where inspections were entirely during period when ETS was in effect

More Updates

Significant Recent Decisions

Western Growers Association v. Standards Board (App. Ct)

- Affirming denial of trade organization's request for preliminary injunction suspending enforcement of COVID-19 ETS

Papich Construction Co., Inc. and Granite Construction Co. (Board Precedent Decisions)

- Valley Fever virus
- Finding violations of Injury and Illness Prevention Program and other safety orders

Check out our blogs:

the **OSHA DEFENSE** report



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the **CAL/OSHA DEFENSE** report

CAL/OSHA Updates from Conn Maciel Carey's national OSHA Practice Group

the **EMPLOYER DEFENSE** Report



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Conn Maciel Carey COVID-19 Task Force Resources

COVID-19 TASK FORCE

As employers around the country grapple with the employment law and workplace safety implications of the 2019 Novel Coronavirus, "COVID-19" Conn Maciel Carey has formed a multi-disciplinary legal and regulatory task force comprised of our dedicated Workplace Safety, Labor and Employment Law, and Litigation attorneys to help our clients across all industries manage the multitude of pandemic-related issues employers are facing and prepare for potential litigation that is around the corner. We have produced a comprehensive database of resources to guide employers through this uncharted territory and the unique workplace challenges presented by the presence of a new health hazard in our nation's workplaces.

Members of CMC's COVID-19 Task Force

Eric J. Conn OSHA Chair	Kara M. Maciel Labor and Employment Chair	Bryan A. Carey Partner	Nicholas W. Scala MSHA Chair
Kate M. McMahon OSHA Partner	Jordan B. Schwartz Labor and Employment Partner	Andrew J. Sommer Cal/OSHA and Employment Partner	Aaron R. Gelb OSHA and Employment Partner
Amanda Strainis-Walker OSHA Partner	Mark M. Trapp Labor and Employment Partner	Lindsay A. DiSalvo Associate	Megan S. Shaked Associate

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COVID-19 FAQs for Employers

As the COVID-19 Pandemic continues to evolve, we have created an extensive index of frequently asked questions about HR, employment, and MSHA/OSHA related regulatory developments and guidance from federal agencies and the CDC. Conn Maciel Carey's COVID-19 Task Force will be updating our list of FAQs frequently, but please reach out to us for the most up to date information.

- Employee Layoffs & Reduced Working Schedules
- The CARES Act
- Vacation, Paid Time Off & Sick Leave
- OSHA Recordkeeping and Reporting of COVID-19 Cases
- Temperature Checks for Employees
- Personal Protective Equipment
- Preventing Exposure in the Workplace
- Annual Physical Requirements
- Space Restrictions in Retail
- On-Site Inspection Activities
- Employer-Employee Confidentiality
- Emergency Infectious Disease Rule / NEP
- Offer Letters & Flexible Start Dates
- Employer Liability

COVID-19 OSHA Recordkeeping and Reporting Resource Guide

CMC's COVID-19 Task Force has prepared a series of resources to assist employers in assessing whether a COVID-19 diagnosis for one of its employees is reportable to OSHA and/or recordable on the company's OSHA 300 Log, and if so, "how to" record it on the log. The toolkit includes a COVID-19 OSHA Reporting Flow Chart, a COVID-19 OSHA Recording Flow Chart, a one-pager on "How to record" COVID-19 cases on the log, and a detailed "Work-Relatedness Questionnaire." For more information about the OSHA reporting and reporting implications of COVID-19, [read this detailed article.](#)

the **OSHA DEFENSE** report



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2021 Year in Review and 2022 Forecast
Wednesday, January 12th

COVID-19 Standards and Enforcement
Thursday, February 10th

Annual Cal/OSHA Enforcement and Regulatory Update
Thursday, March 10th

Religious and Disability Accommodations
Thursday, April 7th

OSHA Training Issues: Proof of Training, Language, etc.
Tuesday, May 10th

Exit Routes and Exit Doors
Tuesday, June 7th

OSHA and Climate Change
Tuesday, July 12th

A Deep Dive into LOTO Periodic Inspections
Wednesday, August 10th

OSHA's Recordkeeping and Reporting Rules
Tuesday, September 13th

The State of the Law re: Drug Testing
Tuesday, October 11th

OSHA's PSM Standard and EPA's RMP Rule
Wednesday, November 9th

New Emergency Response Rule
Tuesday, December 13th

QUESTIONS?



Contact Information



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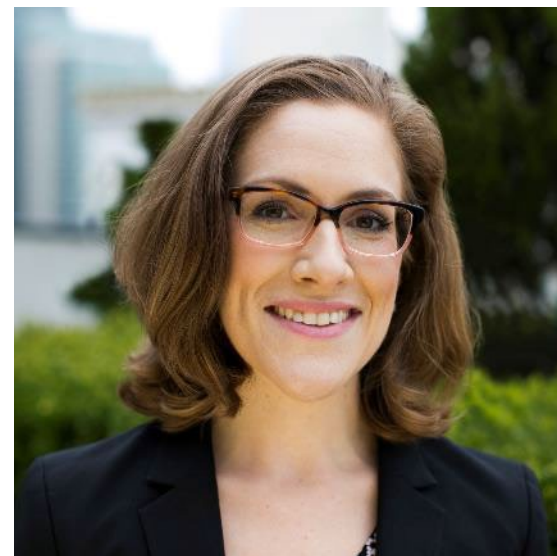


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