

EDC 2021 Quarterly Legal Update

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2021 Legislative Updates



2021 CA Minimum Wage Increase

- Effective January 1, 2021
 - <25 Employees: **\$13/hour**
 - 26+ Employees: **\$14/hour**
 - Consider inside sales exempt employees (1.5x minimum wage)
- Salary threshold for certain exempt employees
 - <25 Employees: **\$54,080**
 - 26+ Employees: **\$58,240**
- IRS Rate
 - **.56/mile** (down 1.5 cents)

Emergency Paid Sick Leave Ordinances

- FFCRA expired 12/31/2020 (employers with 1-499 employees)
 - Tax credit extended through 3/31/2021
- CA COVID-19 SPSL and many local emergency paid sick leave ordinances expired 12/31/2020 (revival/expansion pending for employers of all sizes)
- Other local emergency paid sick leaves still in effect

SB 1159 – Workers’ Compensation Presumption

- Creates a new rebuttable presumption for cases occurring on or after July 6 but only where the employer had an “outbreak”

An outbreak is:

- 4 positives in 14 days if 100 employees or less;
 - 4 percent of employees if over 100;
 - or closure by public health authorities
- Workers’ compensation carrier reporting requirement added as well when an employee tests positive – three business days (plus a “look back” reporting period to positive tests back to July 6...within 30 business days of effective date of bill).

SB 1383 (Jackson) – CFRA Expansion

- Extends CFRA to apply to employers with **five (5) or more** employees (from 50 or more).
- Expands **“family members”** to include adult children, siblings, grandparents, grandchildren.
- Potential stacking issue with FMLA.
- Eliminates “two employees at same employer” rule.
- Eliminates “highly compensated exemption” to reinstatement provisions.

AB 2992 (Weber) – Victims of Crime

- Amends existing law (LC 230 and 230.1) providing job-protected time off for employees who are victims of domestic violence, sexual assault or stalking to include:
 - Applies to Employers with **25+ Employees**
 - A victim of a crime that caused physical injury or that caused mental injury and a threat of physical injury.
 - The immediate family member (child, parent, spouse, sibling, or “equivalent”) of a person who is deceased as the direct result of a crime.

SB 973 (Jackson) – Pay Data Reporting

Who Has to File?

- Employees located inside ***and*** outside of California are counted when determining whether an employer has 100 or more employees (DFEH FAQs)
- Includes part-timers
- An employer has the requisite number of employees if the employer either employed 100 or more employees in the **Snapshot Period** chosen by the employer or regularly employed 100 or more employees during the **Reporting Year**

AB 2257 – AB 5 Follow-Up

- This year, **AB 2257** (which went into effect immediately on 9/4/2020) made a number of changes to the exemptions under AB 5:
 - There are now 109 exemptions from the ABC test.
 - Key changes to the **“business-to-business”** exemption:
 - Can provide services to the client as long as doing so under the name of the business service provider and the business regularly contracts with others.
 - Merely have to show that the business service provider “can” contract with others and “can” maintain a clientele of their own.
 - Key changes to the **“referral agency/service provider”** exemption:
 - Non-exclusive list of industries the exemption can apply to.
 - But now specifically excludes janitorial, delivery, courier, transportation, trucking, agriculture, retail, logging, in-home care, construction, or any high-hazard industry.

COVID-19, Cal-OSHA and Vaccines



New Cal/OSHA Emergency Temporary Standard (ETS)



- New Emergency Temporary standard became effective **November 30, 2020**.
- Very prescriptive and detailed, and now Cal/OSHA can cite employers for violations.
- Includes significant **testing** and **paid time off** mandates for employees excluded from the worksite.
- Updated FAQs

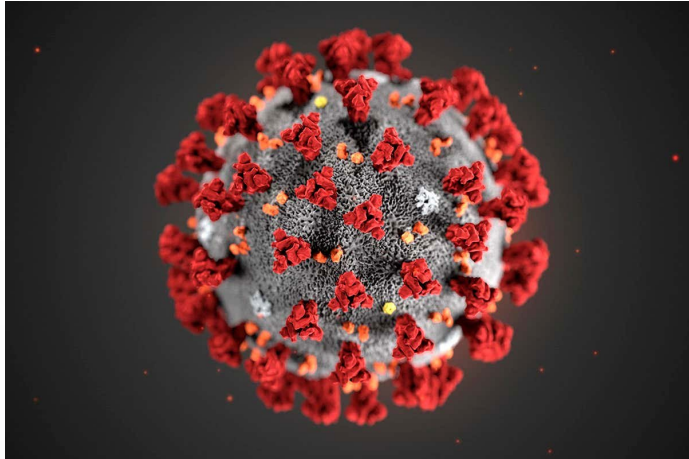
New Cal/OSHA ETS

Who must comply with the ETS?

The ETS applies to all employers, employees, and to all places of employment with three exceptions:

- Workplaces where there is only one employee who does not have contact with other people
- **Employees who are working from home**
- Employees who are covered by the Aerosol Transmissible Diseases regulation (e.g., hospitals, skilled nursing facilities, certain laboratories (ATD) etc.)

Cal-OSHA Emergency Standard



- Written COVID-19 Prevention Program
- Notice of COVID-19 Exposures
- Notice to Local Health Department
- Exclusion / Continued Pay & Benefits
- Testing
- Workplace Safety Requirements
- Training

New Cal/OSHA ETS

Written COVID-19 Prevention Program

- Must include specific elements
- May be a stand-alone document or incorporated into an employer's existing IIPP

Notice of COVID-19 Exposures and Cases

- Must notify within one business day
- Many of the notice requirements overlap with AB 685 (discussed later), but there are some differences
- Must notify local public health department of “outbreaks”

New Cal/OSHA ETS

Exclusion and Quarantine: A positive case requires the employer to:

- Identify anyone within **6 feet for 15 cumulative minutes** of a positive case during the “high risk exposure period.”
- The “high risk exposure period” is:
 - Two days before symptoms start until 10 days after symptoms, and 24 hours with no fever (no test)
 - Two days before the test until 10 days after the test.

New Cal/OSHA ETS

Exclusion and Quarantine: A positive case requires the employer to:

- Exclude with pay the COVID-19 case and anyone exposed to the positive case within the high risk exposure period for 14 days (10 days in some counties). *Note: there are exceptions to the exclusion pay requirement.
- Provide notice of potential exposure to employees and independent contractors
- Offer free, on-duty testing to any potentially exposed employees
- Follow the return-to-work criteria

New Cal/OSHA ETS

Continuation Pay

Excluded employees' pay must be continued during exclusion period except when:

- (1) The employer can prove that the employee's exposure was not work-related, or
- (2) The employee is unable to work for reasons other than protecting other people at the worksite, or
- (3) The employee is not otherwise "able and available" to work.

New Cal/OSHA ETS

Continuation Pay

The goal is to ensure employee ultimately receives the same pay, but this can come from other sources:

- Paid sick leave*
- Vacation*
- Disability benefits
- Disability insurance

*Must use caution around use of sick and vacation.

New Cal/OSHA ETS

Testing

- Must offer free testing during working hours when there has been one positive case in the workplace
- Additional weekly or twice weekly testing requirements for “outbreaks” (3 cases in 14 days) and “major outbreaks” (20 cases in 30 days)

New Cal/OSHA ETS

Other ETS Requirements

- Training
- Social distancing
- Face coverings
- Employer-provided housing/transportation

New Cal/OSHA ETS

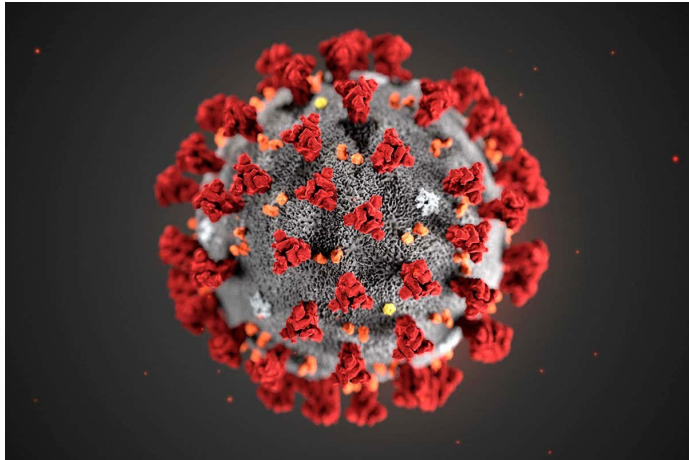
Recommendations:

- Make sure you have a compliant written COVID-19 plan in place.
- Strictly enforce the six-feet apart rule!
- Strictly enforce mask wearing.
- Permit working from home wherever possible.
- Have template notices ready.
- Locate testing resources that will be used for testing.
- Conduct training.

Check out our California COVID-19 Resource Center for Employers and legal alert for additional information and resources about this new emergency regulation

AB 685 Notice Requirements

AB 685



- Notice Requirements for Workplace Exposures
 - Written
 - Within 1 business day
 - Notice of potential exposure
 - Certain language (e.g., antiretaliation, etc.)
- Who Must Receive Notice
 - Employees (exclusive representatives)
 - Employers of Subcontracted Employees
- Notice to Local Public Health Department if “outbreak” within 48 hours

AB 685 – What Triggers Notice?

Employers are required to provide written notice *within one business day* when they receive “notice of a potential exposure.”

- Notification from a public health official or medical provider that an employee was exposed to a **qualifying individual** at work.
- Notification from the employee or their emergency contact that they are a **qualifying individual**.
- Notification through employer’s testing protocol that they are a **qualifying individual**.
- Notification from a subcontracted employer that a **qualifying individual** was on the worksite.

AB 685 – What is a Qualifying Individual?

- 1) Has a laboratory-confirmed case of COVID-19;
- 2) Has a positive COVID-19 diagnosis from a licensed health care provider;
- 3) Has a COVID-19 related order to isolate from a public health official; or
- 4) Has died from COVID-19.

* This definition is slightly different than ETS definition of “COVID-19 case”.

AB 685 – Who and What?

- 1) Written Notice
- 2) Notice to employees (and the exclusive representative) and any employers of subcontractors ***who were on the premises*** at the same worksite as the qualifying individual that they may have been exposed.
 - a. Per the ETS, must also provide notice to independent contractors
- 3) Notice to employees ***who may have been exposed*** with information about COVID-19 related benefits they might be entitled to under federal, state and local law as well as antiretaliation and antidiscrimination protections of the employee.
- 4) Notify all employees and the employers of subcontracted employees and any exclusive representative and independent contractors, of the disinfection and safety plan that the employer plans to implement per CDC guidelines.

AB 685 – “Outbreak” Notice

*If number of cases meets the definition of an “outbreak” (generally 3 cases within a 14-day period) must notify local public health agency **within 48 hours** of:*

- Names of employees
- Number of employees
- Occupation and worksite of employees
- Business address and NAICS code of the worksite

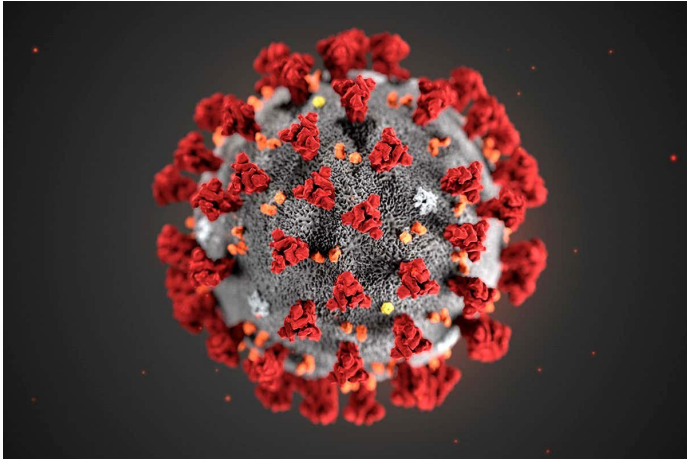
Must also notify local public health of any subsequent cases.

Additional notice requirements in the ETS (e.g., contact information, hospitalization status, etc.)

Vaccines and the Workplace

Vaccine Considerations

- Required vs. Optional
- EEOC Guidance
- Reasonable Accommodation Considerations
- Incentives
- Additional Issues



EEOC Guidance Regarding COVID Vaccines

- Issued on December 16, 2020.
- Employers *can require* workers to get COVID-19 vaccine.
 - Consider the employee's duties and work setting.

EEOC Guidance Regarding COVID Vaccines

- Can an employee be “*excluded from the workplace*” for not being vaccinated? **Maybe.**
 - **Is there a Direct Threat?** Would an unvaccinated worker pose significant risk of substantial harm, based on reasonable medical judgment, which cannot be eliminated by a workplace accommodation?
 - Considered a **Qualification Standard**, meaning must be an objective basis for the standard, historically tied to public safety. Standard must be job-related and consistent with business necessity.

ADA – The American with Disabilities Act

- Requires “reasonable accommodation”
- Limits an employer’s rights to inquire/conduct medical exams
 - Must be job related, consistent with business necessity
 - Medical condition must pose a significant risk of substantial harm
 - Reliable, objective information must support employers’ concern
- Protects privacy of each employee’s medical information

What Are the Employer's Responsibilities?

- EEOC (Equal Employment Opportunity Commission):
 - An employee ***may be entitled to an exemption*** from a vaccine requirement due to an ADA-covered disability or medical circumstance
 - An employee may be exempted from vaccination requirement based on sincerely-held religious beliefs, practices, or observances
- Either way: your goal is demonstrate consideration of possible reasonable accommodations

Direct Threat

- To evaluate a possible direct threat, the employer should individually assess these factors:
 - The duration of the risk;
 - The nature and severity of the potential harm;
 - The likelihood that the potential harm will occur; and
 - The imminence of the potential harm.

EEOC: Regarding Proof of Vaccination

- Seeking proof of vaccination is **not** a medical examination.
- Such a request, *by itself*, is unlikely to elicit disability info.
- This is not a disability-related inquiry.
- Inquiries should stop there, however.
- Any medical information received must be kept confidential.
- Employee should be instructed ***not*** to provide genetic information (such as family members' medical history).

Summary of EEOC's Position

- Employers can generally require vaccine
- An employee *may* be entitled to exemption from mandatory vaccine requirement:
 - due to an ADA-covered disability or other medical circumstances
 - based on sincerely-held religious beliefs, practices, or observances
- In either case, the “interactive process” is critical
- Must consider reasonable accommodations
- Document communications with employee
- Employer’s rights to make medical inquiries are limited
- Train managers
- “Process” may be as important as the final accommodation decision

Adopt a Policy Regarding Vaccines

- Consider required v. *strongly encouraged*
- Any **requirement** should be based on objective facts; tied to employee's job duties/job descriptions; and consistently administered.
 - Clearly describe expectations and rationale
 - Explain how to seek an exemption as an accommodation
 - Follow the *individualized* accommodation process diligently
 - Ensure no retaliation (or appearance of retaliation)
 - Safeguard all medical information - separate from general personnel files

Adopt a Policy Regarding Vaccines

- Vaccines may reduce strain on the healthcare system
- Develop your rationale - decide on your plan
- Develop policies and communications aligned with your decision
- Educate employees on vaccines
- **REMEMBER**: Just because an employee gets vaccinated, no automatic exemption from masking/distancing requirements/quarantine

Visit **FISHER PHILLIPS** **VACCINE RESOURCE CENTER** for **Employers**

Fisher Phillips has a number of resources to aid employers with the upcoming COVID-19 vaccine. We encourage you to check back often.

- COVID-19 Vaccine FAQs
- Sample policies and procedures
- Data Bank of templates and forms
- 50-state issues
- COVID-19 Vaccine and Flu insights
- ... and more

Visit **fisherphillips.com** for up-to-date information



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Questions?



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