

December 14, 2021

Chair David Thomas and Board Members
Occupational Safety & Health Standards Board
Department of Industrial Relations, State of California
2520 Venture Oaks Way
Suite 350
Sacramento, CA 95833

Submitted electronically: oshsb@dir.ca.gov

RE: Second Readoption of the COVID-19 ETS

Dear Chair Thomas and Members of the Board:

The California Chamber of Commerce and the undersigned organizations submit this letter¹ to provide comment upon the proposed second re-adoption of the COVID-19 Emergency Temporary Standard (Section 3205, “ETS”, or “the Regulation”), and its differences from the existing provisions of the ETS (the “2nd Readoption ETS”).²

Overall, we are glad to see that consistency is largely maintained from the ETS to the 2nd Readoption ETS. We believe consistency is necessary and wise given the present relative success of California compared to other states, and also the relatively short duration which the 2nd Readoption ETS will be in effect. However, we are concerned with multiple provisions of the 2nd Readoption ETS which, broadly speaking, eliminate distinctions between vaccinated and unvaccinated individuals in the regulation, as well as complicating return to work provisions.

Simply put – vaccination is the most effective preventative measure against COVID-19.³ Both Governor Newsom and President Biden have acknowledged repeatedly that being vaccinated changes the likelihood of catching COVID-19 and severity of symptoms significantly. As has been reported widely and repeatedly – the vast majority of COVID-19 cases, hospitalizations, and deaths continue to be among the *unvaccinated*.⁴ Moreover, there is new evidence noting that, where breakthrough cases occur, they appear to be most common in those with underlying health conditions, including seniors or immuno-compromised individuals.⁵ In fact, there are also some early signs that, contrary to initial concerns, when a breakthrough case does occur, it appears to not spread COVID-19 the same way that unvaccinated cases do.⁶

¹ A similar letter was submitted on November 8, 2021, based on the draft version of the second readoption text that was available at that time. This letter supersedes that letter and provides a more complete list of concerns based on the final agendized text for the December Standards Board meeting.

² 2nd Readoption ETS text with strikeouts/redlines for changes available here:

<https://www.dir.ca.gov/dosh/doshreg/covid-19-emergency-standards/Proposed-second-readoption.pdf>.

³ Notably, the recent emergence of the Omicron variant does not lessen the importance of vaccines. Initial findings from Pfizer suggest vaccination is still helpful, but boosters may be more important than against prior variants. Initial press release available at: <https://www.pfizer.com/news/press-release/press-release-detail/pfizer-and-biontech-provide-update-omicron-variant>.

⁴ California’s own data supports this reality. Updated data available at: <https://covid19.ca.gov/state-dashboard/#postvax-status>.

⁵ See *Massachusetts’s Institute of Technology, Medical* - “Breakthrough Infections: What you need to know,” Aug 5, 2021. Available at: <https://medical.mit.edu/covid-19-updates/2021/08/breakthrough-infections> (“In addition, the vast majority of those who do become seriously ill from breakthrough infections are older or have underlying medical conditions.”). See also John Hopkins Medicine, Health “Breakthrough Infections: Coronavirus after Vaccination,” available at: <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/breakthrough-infections-coronavirus-after-vaccination>. (“Although any fully vaccinated person can experience a breakthrough infection, people with weakened immune systems caused by certain medical conditions or treatments (including organ transplants, HIV and some cancers and chemotherapy) are more likely to have breakthrough infections.”)

⁶ See “Virological characteristics of SARS-CoV-2 vaccine breakthrough infections in healthcare workers,” Preprint available at: <https://www.medrxiv.org/content/10.1101/2021.08.20.21262158v1>. See also National Public Radio, “Breakthrough infections might not be a big transmission risk. Here’s the evidence. Oct 12, 2021, available at: <https://www.npr.org/sections/health-shots/2021/10/12/1044553048/covid-data-vaccines-breakthrough-infections-transmission>.

Obviously, the Omicron variant poses new questions – but we believe this background and the significant medical improvements on the horizon⁷ render some of the additional requirements of the 2nd Readoption ETS text more onerous than necessary. We have identified specific concerning changes between the present ETS and the 2nd Readoption ETS below.

Specific Provision Concerns

1. Section 3205(c)(3)(B)(5)/3205(c)(9) – Expanding post-case testing to vaccinated individuals with no symptoms.

There has been nationwide press on the coming shortage of COVID-19 tests, (particularly rapid tests), including specific acknowledgements from the White House.⁸ We also anticipate an increase in testing demand due to the recently released vaccine mandate for employers with 100+ employees, which will drive up demand nation-wide and affect California employers' ability to purchase such tests.⁹

Given this supply issue and the cost of testing, we are concerned that expanding testing to vaccinated individuals with no symptoms after a close contact is an inefficient use of our testing supply, and also a considerable new cost for employers. Notably, this will hit employers who committed to vaccination particularly hard, as they will now need to purchase tests at rates similar to other, less-vaccinated workplaces. In addition, we believe this removes yet another motivation for employees to seek vaccination, as both vaccinated and unvaccinated employees are compelled to seek testing after a close contact.

In light of these concerns, we believe the present ETS strikes a proper balance on this issue by not requiring testing of vaccinated individuals who are close contacts unless they develop symptoms.

2. Section 3205(c)(9)/3205(c)(10)(D) – Re-institution of social distancing for vaccinated individuals after exposure.

We are particularly concerned that the 2nd Readoption ETS appears to require that vaccinated individuals re-institute six-foot social distancing or be excluded from the workplace after a close contact. In other words, the exposed vaccinated employee must stay out of the workplace for 14 days pursuant to Section 3205(c)(10)(D), or, if they return within 14 days, then they must wear a mask and maintain six feet of social distancing for the remainder of that 14-day period pursuant to Section 3205(c)(9)(B). Significantly, this requirement applies regardless of whether the employee has tested negative.

This requirement is problematic because social distancing is not something that can be flipped on/off in a workplace or on a per-employee basis. As a result, the early return provision of Section 3205(c)(9)(B) – which appears intended to minimize workplace disruptions and facilitate safe return to work - is illusory.

For context, many workplaces across the state were re-organized to accommodate 6-foot spacing during the COVID-19 lockdown. Then, when California re-opened in June, workplaces across the state were able to return to normal spacing of workstations – which, for many involved physically relocating workstations or similar relocations of workplace equipment. These reorganizations are not trivial.

⁷ Among these improvements, we expect children's vaccines and new antiviral pills from Merck and Pfizer to significantly improve vaccination rates in the total population, as well as COVID-19 hospitalization and death rates.

⁸ White House acknowledgement noted at <https://abcnews.go.com/Politics/white-house-promises-rapid-covid-19-tests-amid/story?id=80351004>.

⁹ Despite the federal regulation presently awaiting the attention of the Sixth Circuit Court of Appeals, we believe the regulation (or other pushes from state legislatures concerned with the Omicron variant) will likely increase test consumption for at least the first half of 2022.

By way of example:

- Many restaurants cannot create 6-feet of additional space in their kitchens and walkways, particularly on some-shifts-on-some-shifts-off basis. In particular, this would potentially push chefs in small kitchens to stand closer to hot surfaces or friers.
- In large manufacturing or light industrial facilities, manufacturing machinery cannot easily be moved six feet.
- In television or movie studios, actors and their supporting teams (hairstylists, makeup, and related staff) cannot work while maintaining six-foot distancing.

Because these precautions are not feasible in many workplaces, employers will be forced to adopt the onerous alternative: excluding all close contacts for 14 days. This 14-day exclusion does not make sense for multiple reasons. First, almost all of these close contacts will have been provided a COVID test¹⁰ and will have tested negative (or else they would have been removed as a COVID-19 case), so they are free of COVID-19 and their relative risk to the workplace is nominal. Second, California is experiencing a labor shortage across multiple sectors and sending home many fully vaccinated employees who are *far less likely* to catch COVID-19, or, if caught, *even less likely to have serious symptoms* will create significant disruption in already under-staffed workplaces.

Moreover, such a policy removes a significant portion of the benefit of vaccination for the employer community – ensuring that their workplaces are consistently able to function – by forcing exclusion of even vaccinated employees. Protecting their workplace and, consequentially, minimizing disruption to operations was the incentive which pushed employers across California to embrace vaccination and to push their employees to do so as well. By removing these incentives, the 2nd Readoption ETS will lessen the incentives for employees and employers to be vaccinated in the future.

Logistically, we also view this drastic change in policy as particularly surprising in that it would be in effect for 90 days (the duration of the 2nd Readoption ETS) and then would disappear under the draft text of the permanent regulation. Such a drastic change doesn't make sense when California has been successful in reducing COVID-19 cases and hospitalization rates (despite the recent re-opening of schools and June re-opening of the economy) largely because of the *effectiveness of vaccines*.

We would urge that the 2nd Readoption remove the re-institution of social distancing for vaccinated individuals showing no symptoms of COVID-19 from the draft amends to Section 3205(c)(9)&(c)(10).

3. Section 3205(c)(9) - Exclusion Pay Ambiguity.

The 2nd Readoption ETS text creates an ambiguity around exclusion pay related to the new “mask/vaccination or 14-day exclusion” provisions.

As proposed in the 2nd Readoption ETS, Section 3205(c)(9)/(10) generally requires that employees either: (1) be excluded for 14 days; or (2) comply with additional requirements in the workplace (in the form of social distancing and masking). A question that is not considered is whether, if an employee *refuses* to comply with these additional requirements, does the employer then become compelled to provide exclusion pay under Section 3205(c)(9)(D)?

We believe that, in this situation, the employee should not be entitled to exclusion pay, as they are refusing to work because they do not want to comply with health precautions but are otherwise available to work. However, the 2nd Readoption ETS does not provide clarity on this situation. If the text is not clarified, we would ask for an FAQ to clarify this situation as soon as possible.

¹⁰ The sole exception here is recovered COVID cases, who the 2nd Readoption ETS recognizes as potentially testing positive despite being non-contagious. See 3205(c)(10).

4. Section 3205(c)(10)(D) - Deletion of critical infrastructure exception.

The 2nd Readoption ETS removes the prior exception to exclusion periods for critical staffing shortages in critical industries (applicable to healthcare, emergency response, and social services). Though the 2nd Readoption ETS adds a similar exception under the new Section 3205(c)(10)(D)(1)(b), the new exception is more limited and does not quite serve the same purpose.

As noted above, requiring institution of social distancing if a vaccinated employee returns prior to 14 days after an exposure is problematic for many workplaces – and particularly so for critical industries. These settings were recognized in the present ETS for special treatment particularly because they *must* be able to provide their services and cannot do so without their personnel. For that reason, we believe that requiring these industries to re-institute social distancing for 7 days¹¹ after a vaccinated person has a close contact (*and a negative test*) will potentially interfere with their ability to provide critical services.

For that reason, we would urge that the present critical staffing shortages exception be maintained.

5. Section 3205.1(b) – Requiring testing of vaccinated individuals during outbreaks.

Similar to our concerns above, we believe that expanding testing during outbreaks to vaccinated individuals is a less ideal use of limited and expensive testing resources (which will only become more in-demand in the coming months).

We see the same issue incorporated into the housing provisions of the 2nd Readoption ETS in Section 3205.3(g), which requires testing for all residents if an outbreak occurs in housing, regardless of the vaccination status of the residents or if an actual close contact occurred.

6. Section 3205.3(c) – Increased requirements for HEPA filters, even among vaccinated residents in employer-provided housing.

For employer-provided housing, the ETS presently requires HEPA filters only where two unvaccinated individuals are sleeping in the same room – which reflects both the relative cost of HEPA filtration units, and the relatively short supply of them. The 2nd Readoption ETS requires HEPA filtration units wherever even *one* unvaccinated individual is sleeping in a room.

We are concerned that the 2nd Readoption ETS text's change would require every employer who provides housing to purchase or rent multiple HEPA filtration units – creating a surge in demand that will create serious costs, potential supply shortages, and minimal benefits compared to the present ETS text. Also, we do not believe such purchases are justified given that the 2nd Readoption will be in effect for *only three months* - meaning by the time the market supply adjusts, this text will be irrelevant.

For these reasons, we believe the present ETS provision – which requires HEPA filtration in employer-provided housing *if* there are two unvaccinated individuals in the housing is a better precaution.

Appreciated Clarifications to the ETS

We also want to draw attention to numerous improvements contained in the 2nd Readoption ETS which will bring it up-to-date or clarify its application. These improvements include, but are not limited to:

¹¹ Seven days is used here because, under the exception, an employee could return after day 7 following the close contact but would need to maintain social distancing until day 14.

- Incorporating clinical trials of vaccines into the “fully vaccinated” category, so that participants are not required to participate and then seek a second two-dose regime of vaccination. (Section 3205(b)(9).)
- Clarifications to “worksite” definition regarding employees who are working alone/from home. (Section 3205(b)(12).)
- Method of notice post exposure (Section 3205(c)(3).)

We appreciate the opportunity to comment on the 2nd Readoption ETS.

Sincerely,



Robert Moutrie
Policy Advocate
California Chamber of Commerce
on behalf of

Acclamation Insurance Management Services
Agricultural Council of California
African American Farmers of California
Allied Managed Care
American Council of Engineering Companies
Associated Builders and Contractors of California
California Association of Joint Powers Authorities
California Association of Sheet Metal and Air
Conditioning Contractors National Association
California Association of Winegrape Growers
California Attractions and Parks Association
California Bankers Association
California Beer and Beverage Distributors
California Building Industry Association
California Business Properties Association
California Chamber of Commerce
California Chapters of the National Electrical
Contractors Association
California Citrus Mutual
California Cotton Ginners and Growers
Association
California Craft Brewers Association
California Farm Bureau
California Framing Contractors Association
California Fresh Fruit Association
California Gaming Association
California Grocers Association
California Hospital Association
California Hotel & Lodging Association
California League of Food Producers
California Legislative Conference of the
Plumbing, Heating and Piping Industry
California Manufacturers & Technology
Association
California New Car Dealers Association

California Restaurant Association
California Retailers Association
California Rice Commission
California Special Districts Association
California State Association of Counties
California Trucking Association
California Walnut Commission
Can Manufacturers Institute
Coalition of Small and Disabled Veteran
Businesses
Construction Employers' Association
Family Business Association of California
Far West Equipment Dealers Association
Flasher Barricade Association
Housing Contractors of California
Los Angeles County Business Federation
Mason Contractors Association of California
National Federation of Independent Business
Nisei Farmers League
Northern California Glass Management
Association
Northern California Painting and Finishing
Contractors
Pacific Association of Building Service
Contractors
Public Risk Innovation, Solutions and
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