

DEPARTMENT OF INDUSTRIAL RELATIONS
Occupational Safety and Health Standards Board
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**FINDING OF EMERGENCY GOVERNMENT CODE SECTION 11346.1
OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD
PROPOSED EMERGENCY REGULATION
TITLE 8, CALIFORNIA CODE OF REGULATIONS
GENERAL INDUSTRY SAFETY ORDERS CHAPTER 4,
SUBCHAPTER 7, NEW SECTIONS
3205; 3205.1; 3205.2; 3205.3; and 3205.4**

REFERENCE OAL FILE NOS: 2020-1120-01E and 2021-0617-03EFP

COVID-19 Prevention

In accordance with emergency regulation readoption requirements, the Occupational Safety and Health Standards Board (Board) has made substantial progress and is proceeding with diligence to comply with Government Code section 11346.1(e). An advisory meeting was held remotely on September 23, 2021 to review draft text. Previous advisory meetings regarding COVID-19 were held on February 11, 12, and 16, 2021. The advisory committee included representatives from business, labor, community groups, public agencies, and the health sciences. The meeting were open to the public through online videoconference and call-in, and both committee members and others submitted additional comments in writing.

Additionally, the Division of Occupational Safety and Health (Division) has discussed the regulatory response to COVID-19 with the California Department of Public Health (CDPH) on multiple occasions.

An updated finding of emergency has been included below in accordance with title 1, California Code of Regulations section 52(b) and Government Code section 11346.1(b), to address changed emergency circumstances.

Government Code section 11346.1(a)(2), requires that, at least five working days prior to submission of the proposed emergency rulemaking to the Office of Administrative Law (OAL), the Board provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the Board. To this end, the Board will post the proposed emergency regulation amendments on its public website and simultaneously disseminate notice of the proposed emergency action to all persons who have filed a request for notice.

After submission of the proposed emergency rulemaking to the OAL, OAL shall allow interested persons five calendar days to submit comments on the proposed emergency

regulation amendments as set forth in Government Code section 11349.6. Comments must be in writing, submitted via U.S. mail or email, contain a reference to the topic of the emergency rulemaking, and must be received by both the Board and OAL within five days of the Board's filing with OAL. To determine OAL's five-day comment period, please visit <http://www.oal.ca.gov> under the heading "Emergency Regulations Under Review."

The entire proposed text is open for comment. The public is welcome to submit comments on any aspect of the proposed emergency regulations.

FINDING OF EMERGENCY

The objective of the proposed emergency standard is to reduce employee exposure to the virus that causes COVID-19 and therefore reduce COVID-19 illness and transmission.

The Board finds that the adoption of this proposed emergency standard is necessary to address an emergency pursuant to Government Code section 11346.1(b)(1). The Board finds that immediate action must be taken to avoid serious harm to the public peace, health, safety, or general welfare, for the reasons stated below.

Basis for the Finding of Emergency

1. On March 4, 2020, Governor Gavin Newsom proclaimed a State of Emergency to exist in California in response to the outbreak of respiratory illness due to the novel coronavirus, known as COVID-19.¹
2. COVID-19 is a pandemic disease, found in every county in California, every state in the United States and nearly every country in the world. While a high percentage of individuals affected by COVID-19 will experience mild to moderate flu-like symptoms, some will have more serious symptoms and will require hospitalization, particularly individuals who are elderly or have underlying medical conditions.² Serious symptoms of COVID-19 include shortness of breath, difficulty breathing, pneumonia, and organ failure, and can result in death.³ The virus can damage the lungs, heart and brain and can cause long-term health problems.⁴

¹ Gavin Newsom, Governor of California; Proclamation of a State of Emergency; March 4, 2020. <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>

² CDC. Evidence used to update the list of underlying medical conditions that increase a person's risk of severe illness from COVID-19. Accessed on October 15, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/evidence-table.html>

³ Wiersinga WJ, Rhodes A, Cheng AC, Peacock SJ, Prescott HC. Pathophysiology, Transmission, Diagnosis, and Treatment of Coronavirus Disease 2019 (COVID-19): A Review. *JAMA*. 2020; 324(8):782–793. doi:10.1001/jama.2020.12839. <https://jamanetwork.com/journals/jama/fullarticle/2768391>

⁴ World Health Organization. What we know about Long-term effects of COVID-19. September 9, 2020. Last accessed November 13,

3. On March 19, 2020, Governor Newsom issued Executive Order N-33-20, a stay-at-home order to protect Californians and slow the spread of COVID-19. The order prohibited operations at all but essential businesses and workplaces.⁵
4. As of May 4, 2020, Governor Newsom allowed a number of lower-risk business sectors to reopen.⁶
5. On May 6, 2020, Governor Newsom issued Executive Order N-62-20⁷, which provides that under certain circumstances it is presumed that workers who contract a COVID-19-related illness between March 19, 2020, and July 5, 2020, have done so at work and are thus eligible for workers' compensation benefits. The Executive Order declares that "employees who report to their places of employment are often exposed to an increased risk of contracting COVID-19, which may require medical treatment, including hospitalization" and that "employees who report to work while sick increase health and safety risks for themselves, their fellow employees, and others with whom they come into contact."
6. There has been an overrepresentation of migrant temporary farmworkers testing positive for COVID-19 in California compared to workers in any other industry.⁸ Many of these workers live in compact, dorm-like housing facilities provided by employers.⁹ One California health officer noted that "farmworkers face the greatest infection risk not at work, but at home."¹⁰ Indeed, in Ventura County, almost 190 workers living in employer-provided housing tested positive for COVID-19 out of 216 people tested.¹¹ In recognition of the need to control against the spread of COVID-19 among farmworkers, on July 24, 2020,

2020. https://www.who.int/docs/default-source/coronaviruse/risk-comms-updates/update-36-long-term-symptoms.pdf?sfvrsn=5d3789a6_2

⁵ Gavin Newsom, Governor of California; Executive Order N-33-20; March 19, 2020. <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>

⁶ Gavin Newsom, Governor of California; Update on California's Reopening; May 4, 2020. <https://www.gov.ca.gov/2020/05/04/governor-newsom-provides-update-on-californias-progress-toward-stage-2-reopening/>

⁷ Gavin Newsom, Governor of California; Executive Order N-62-20; May 6, 2020. Last accessed November 13, 2020. <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.6.20-EO-N-62-20-text.pdf>

⁸ The Californian. COVID-19 rips through California motel rooms of guest workers who pick nation's produce, dated August 26, 2020. Accessed on November 6, 2020. <https://www.thecalifornian.com/story/news/2020/08/17/california-motel-guest-farm-workers-coronavirus-case-outbreak/5475182002/>

⁹ VC Star. Farmworker housing coronavirus outbreak: 188 test positive for COVID-19, dated July 4, 2020. Accessed on November 6, 2020. <https://www.vcstar.com/story/news/local/2020/07/03/oxnard-california-farmworker-housing-covid-19-coronavirus-outbreak/5368774002/>

¹⁰ The Californian. COVID-19 rips through California motel rooms of guest workers who pick nation's produce, dated August 26, 2020. Accessed on November 6, 2020. <https://www.thecalifornian.com/story/news/2020/08/17/california-motel-guest-farm-workers-coronavirus-case-outbreak/5475182002/>

¹¹ VC Star. Farmworker housing coronavirus outbreak: 188 test positive for COVID-19, dated July 4, 2020. Accessed on November 6, 2020.

<https://www.vcstar.com/story/news/local/2020/07/03/oxnard-california-farmworker-housing-covid-19-coronavirus-outbreak/5368774002/>

Governor Newsom unveiled the Housing for the Harvest program, which provides 14 paid days of temporary hotel rooms for California farmworkers who have been exposed to, or tested positive for, COVID-19 but are unable to adequately quarantine at home.¹² In addition, the federal Occupational Safety and Health Administration (OSHA) and the Centers for Disease Control (CDC) have published COVID-19 prevention guidance documents encouraging employers to adopt various workplace control measures for workers residing in communal living arrangements, including employer-furnished housing, and workers traveling to and from work in shared motor vehicles.¹³

7. As of April 2021, the majority of California workplaces were allowed to engage in on-site work operations despite the continuing spread of COVID-19. Vaccinations are reducing the transmission of COVID-19, but many California workers are not fully vaccinated and face potential exposure to COVID-19 on the job. Although vaccines dramatically reduce the risk of severe illness, hospitalization, and death, not all COVID-19 infections are prevented by vaccines, especially since the Delta variant has become the dominant strain of COVID-19 in California and the world.¹⁴
8. Clusters and outbreaks of COVID-19 have occurred in workplaces throughout California, including in food manufacturing, agricultural operations, and warehouses, among other industries.
9. As of October 14, 2020, there were 858,401 cases of COVID-19 infection and 16,757 deaths reported in California. As of April 27, 2021, there were 3,633,185 cases of COVID-19 and 60,208 deaths attributable to COVID-19.¹⁵ As of November 5, 2021, there have been 4,688,285 cases of COVID-19 infection and 71,852 COVID-19 deaths in California.¹⁶ A 2021 study by researchers at the University of California, San Francisco, used death certificate data to compare observed versus expected deaths among

¹² California Department of Food and Agriculture, et al. Housing for the Harvest – Program Overview, dated July 29, 2020. Accessed on November 6, 2020. https://files.covid19.ca.gov/pdf/Housing_for_the_Harvest-Program_Overview.pdf (As of September 23, 2021, Housing for the Harvest continues to operate); CDPH. Help for agricultural workers, Housing for the Harvest, updated September 23, 2021; accessed November 5, 2021. <https://covid19.ca.gov/housing-for-agricultural-workers/>

¹³ Federal OSHA. Additional Considerations for Workers Who Reside in Communal Living Arrangements. Accessed on November 6, 2020. <https://www.osha.gov/SLTC/covid-19/workers-in-shared-housing.html>; CDC. Agriculture Workers & Employers, Updated November 6, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.html>; CDC. COVID-19 Guidance for Shared or Congregate Housing, Updated Aug. 22, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/shared-congregate-house/guidance-shared-congregate-housing.html>

¹⁴ CDPH. Tracking COVID-19 in California. “Overview of vaccine administration,” updated November 5, 2021; accessed November 5, 2021. <https://covid19.ca.gov/vaccination-progress-data/#overview>

¹⁵ CDPH. Tracking COVID-19 in California, updated April 27, 2021; accessed April 27, 2021. <https://covid19.ca.gov/state-dashboard/>

¹⁶ CDPH. Tracking COVID-19 in California. “Today’s Update,” updated November 5, 2021; accessed November 5, 2021. <https://covid19.ca.gov/state-dashboard/>

California adults ages 18-65 years by occupational sector and occupation, as well as race and ethnicity, during the period March to October 2020.¹⁷ The study determined that about 11,628 more Californians in this age range died during this nine-month period than would be expected based on death rates during the same time period over four pre-pandemic years. The authors concluded that these deaths were attributable to COVID-19. Sectors with the highest relative and per-capita excess mortality were food/agriculture (39 percent relative excess; 75 excess deaths per 100,000), transportation/logistics (31 percent; 91 per 100,000), manufacturing (24 percent; 61 per 100,000), and facilities (23 percent; 83 per 100,000).

10. Data for the number of cases of COVID-19 infection and number of deaths attributable to workplace exposure to COVID-19 is not currently available; however, the numbers are likely substantial, particularly among essential workers, due to workers' exposure to persons outside of those in one's household, along with the close proximity between persons required in some industries.
11. Employees infected with COVID-19 at work can transmit the infection to persons in their homes and communities, resulting in an increase in infection rates.
12. Emergency rulemaking is required to address the immediate threat to employees from COVID-19. The nature of the threat has been characterized by the occupational health and medical community as both acute and chronic adverse health effects which can manifest as serious illness, permanent incapacitation, or death. Regular rulemaking cannot be completed in time to address these significant and ongoing risks to workers presented by the COVID-19 pandemic.
13. Cal/OSHA's Aerosol Transmissible Diseases (ATD) standard, title 8, section 5199, provides important protections to workers in specified work settings from exposure to novel pathogens, including COVID-19, particularly in health care and corrections. However, the scope of section 5199 is limited. Thus, the majority of California workers are not covered by the protections afforded by section 5199.¹⁸
14. During its September 17, 2020, meeting, the Board considered Petition 583, which requested an emergency rulemaking to address the potential harm posed to workers by COVID-19. The Petition sought adoption of an emergency standard that would apply to employees in any facility, service category, or operation not covered by title 8, sections

¹⁷ Chen et al (June 2021). Excess mortality associated with the COVID-19 pandemic among Californians 18-65 years of age, by occupational sector and occupation: March through November 2020. *PLoS One*. 2021 Jun 4;16(6); accessed November 5, 2021. <https://pubmed.ncbi.nlm.nih.gov/34086762/>

¹⁸ Legislative Analyst's Office (LAO). COVID-19 and the Labor Market: Who are California's Frontline and Remote Workers? December 8, 2020. <https://lao.ca.gov/LAOEconTax/article/Detail/593>

5199 or 5199.1. In addition, the Petition sought a permanent regulation to protect employees from infectious diseases, including those caused by novel pathogens.

15. The Board voted to grant Petition 583 in part, agreeing that “COVID-19 is a hazard to working people” and that “an emergency regulation would enhance worker safety.” The Board requested the Division draft an emergency rulemaking proposal to protect all workers not covered by section 5199 from COVID-19 exposure in the workplace, for consideration no later than the November 19, 2020, Board meeting.¹⁹
16. Between February 1, 2020, and September 27, 2020, the Division received over 6,937 complaints alleging inadequate protections for and potential exposure to COVID-19 in workplaces. Between January and September 2021, the Division received 412 reports of worker fatalities caused by COVID-19; 1,147 reports of non-fatal cases; and over 3,116 complaints alleging inadequate protections against potential exposure to COVID-19 in workplaces.²⁰
17. Occupational safety and health standards within title 8 of the California Code of Regulations(CCR) protect workers from hazards in general. However, other than those employees who are covered under section 5199, there is currently no specific regulation that protects all workers from exposure to infectious diseases such as COVID-19.
18. Guidance currently exists from a number of different authorities—including the federal CDC, federal OSHA, CDPH and the Division—on how employers can best protect workers from COVID-19. However, guidance varies between federal, state, and local agencies and has occasionally contained some contradictory information. Employers and employees would benefit from a specific set of regulations related to COVID-19 prevention in all workplaces.
19. Adoption of the proposed emergency action is necessary to preserve worker safety and health by making existing general requirements, such as sections 3203, 3362, 3366, 5141, and 5144, specific to COVID-19 and easy to understand.

¹⁹ Occupational Safety and Health Standards Board; Petition File No. 583; Adopted Decision; September 17, 2020.

<https://www.dir.ca.gov/oshsb/documents/petition-583-adopteddecision.pdf>

²⁰ State of California. Open Data Portal. DOSH COVID-19. COVID-19 data reported to the Division of Occupational Safety and Health, Data and Resources for the period January to Sept 2021, updated November 5, 2021; accessed November 5, 2021.

<https://data.ca.gov/dataset/dosh-covid-19/resource/465980a9-fdd2-4328-9924-6c2a565f41e1>

20. The proposed emergency action is necessary to combat the spread of COVID-19 in California workers. The proposed regulation would significantly reduce the number COVID-19 related illnesses, disabilities and deaths in California's workforce.
21. Adoption of the proposed emergency regulation is necessary to strengthen the Division's enforcement efforts related to the hazard of COVID-19 in workplaces, through regulatory mandates specific to preventing the spread of the virus.

Basis for the Finding of Emergency Continued: Facts Leading up to November, 2020 Board Meeting

22. During the early stage of the pandemic, among other things, the Division was directed to "have primary focus on providing technical assistance and support to have maximum effect to address the risk of COVID-19" and to "focus enforcement efforts where there are allegations of the most serious violations impacting health and safety." (Executive Order N-27-20, March 15, 2020.)
23. At that point, and throughout the spring of 2020, the expected length of the pandemic was unclear. Stay-at-home orders had initially "flattened the curve" relative to other states, such as New York. Among the workplaces most affected by the pandemic, the existing ATD Standard, title 8, section 5199, protected many employees because they were involved in patient care or other activities covered by that section. For all other employees, the Division relied on existing regulations, including title 8, section 3203, Injury and Illness Prevention Program (IIPP).
24. In May 2020, businesses began to reopen according to the state's phased reopening plan. On May 20, 2020, the Board received the previously noted petition (Petition 583), filed by Worksafe and the National Lawyers' Guild, Labor & Employment Committee (Petitioners), requesting the Board amend title 8 standards to create new temporary emergency standards. Petitioners requested the Board provide specific protections to California employees who may have exposure to COVID-19, but who are not protected by the ATD standards (sections 5199 and 5199.1).
25. The Board directed Board staff to prioritize the evaluation of this petition and the efficacy of existing regulations to address the health and safety of workers in the wake of the novel coronavirus. The evaluation process included an analysis of current regulations, finding that while protections exist in Cal/OSHA's ATD standards (title 8, sections 5199 and 5199.1), they are limited in scope primarily to medical facilities. Employers not included in the scope of the ATD standards have generally applicable

requirements, which include the IIPP (section 3203), Washing Facilities (sections 1527, 3366, 3457, and 8397.4), Personal Protective Equipment (PPE) (section 3380), Respiratory Protection (section 5144), Sanitation (article 9), and Control of Harmful Exposures (section 5141).

26. While existing regulations (such as IIPP, section 3203) require employers to protect workers from harmful exposures, they do not necessarily identify specific measures that must be taken to fight the spread of a novel infectious disease. Instead, the responsibility is placed on employers, given their intimate knowledge of the hazards at issue and the workings of the place of employment, to devise such methods or procedures. Investigations in the field over the summer, along with rising positivity rates, showed that employers were struggling to address the novel hazards presented by COVID-19.
27. Given the unprecedented nature of the COVID-19 pandemic, and informed by analysis performed by Board staff and the Division, on September 17, 2020, the Board found a specific emergency regulation in title 8 is necessary to provide clear instructions to employers and employees on what needs to be done to protect workers from COVID-19, eliminating any confusion and enhancing compliance. The Board requested the Division work with Board staff to expeditiously submit a proposal for an emergency regulation to protect all workers not covered by sections 5199 and 5199.1 from COVID-19 exposure in the workplace, for consideration no later than the November 19, 2020 Board meeting.
28. Throughout the course of the pandemic, the Division issued guidance for employers regarding safe reopening. This guidance, much of which was issued jointly with other state agencies, included industry-specific information. Nonetheless, cases began to rise precipitously in October and November 2020. Guidance was not sufficient to address the present increase in cases and the risk of occupational spread. Furthermore, the proposed emergency regulations introduced specific requirements, such as employer-provided testing, that are critical to reduce occupational spread during the ongoing rise in infections. The threat of exponential growth in COVID-19 cases demanded immediate action.
29. On November 19, 2020, the Board approved the adoption of sections 3205 and 3205.1 – 3205.4. These emergency regulations became effective on November 30, 2020.

Basis for the Finding of Emergency Continued: Recent Developments

30. On April 6, 2021, Governor Newsom announced plans to reopen the state on June 15, 2021, if certain conditions were met. Many employees were not fully vaccinated by that date; many presently remain unvaccinated. This is especially true in areas of the state where vaccination rates are lower; rates vary significantly by zip code. Rates also vary by race, with state data showing the lowest rates of full vaccination among persons who are multi-race, Latino, Black, and American Indian or Alaska Native.²¹ As of November 5, 2021, CDPH reports that, among the population age 12+, the quartile with the least healthy community conditions, based on CDPH metrics, also has the lowest rate of vaccination, with 65.7 percent of residents fully vaccinated in the bottom quartile compared to 84.1 percent fully vaccinated in the top quartile.²² Additionally, among all demographic groups and regions of the state, some employees will have medical conditions that preclude vaccination or will refuse vaccination for other reasons.²³
31. Increased vaccination has decreased COVID-19 illnesses and deaths and will likely continue to do so over time. However, the Division presently continues to receive COVID-19 related complaints and reports of COVID-19 illnesses at work. From January 1 to September 29, 2021 the Division received 412 reports of worker fatalities caused by COVID-19 and 1,147 reports of non-fatal cases despite the large number of vaccinations administered during that period.²⁴
32. CDPH records about outbreaks suggest underreporting of COVID-19 to the Division. From January 1, 2020 to April 19, 2021, the Division received reports of 987 COVID-19 illness across all industries, 332 of them fatal. CDPH data from a similar period, January 1, 2021 through April 5, 2021 showed 5,603 outbreaks across industries, resulting in 57,164 associated cases.²⁵ Of those, 943 outbreaks and 11,914 associated cases had occurred in the final 30 days, despite the increase in vaccination rates during that time.

²¹ CDPH. Tracking COVID-19 in California. "Vaccination progress by group, Race and Ethnicity," updated November 5, 2021; accessed November 5, 2021. <https://covid19.ca.gov/vaccination-progress-data/#progress-by-group>

²² CDPH. Tracking COVID-19 in California. "Vaccination progress by group, Vaccine Equity Metric," updated November 1, 2021; accessed November 2, 2021. <https://covid19.ca.gov/vaccination-progress-data/#progress-by-group>

²³ The effectiveness of the vaccines continues to be evident in case numbers, with a 6.8 times higher COVID-19 case rate among unvaccinated versus vaccinated Californians, as of October 24, 2021. Unvaccinated people were 9.5 times more likely to be hospitalized and 18.2 times more likely to die from COVID-19. CDPH. Office of Communications. State Officials Announce Latest COVID-19 Facts, updated November 5, 2021 (data from October 11, 2021 to October 17, 2021); accessed November 5, 2021. <https://www.cdph.ca.gov/Programs/OPA/Pages/NR21-322.aspx>

²⁴ State of California. Open Data Portal. DOSH COVID-19. COVID-19 data reported to the Division of Occupational Safety and Health, Data and Resources for the period January to Sept 2021, updated November 5, 2021; accessed November 5, 2021. <https://data.ca.gov/dataset/dosh-covid-19/resource/465980a9-fdd2-4328-9924-6c2a565f41e1>

²⁵ California Dept. of Public Health, "COVID-19 Outbreaks January 1, 2021 to April 5, 2021," and its key "COVID-19 Outbreaks Data Dictionary," accessed April 25, 2021. <https://data.chhs.ca.gov/dataset/covid-19-outbreak-data>

This includes 101 outbreaks in retail; 73 in accommodation and food services; 71 in manufacturing (including food manufacturing); 56 in education; 37 in transportation and warehousing; 35 in public administration; 33 in construction; and 20 in wholesale trades. By August 2021, reporting began to show signs of the Delta variant, with rises in outbreaks, total cases, and cases per outbreak.²⁶

33. On June 9, 2021, CDPH issued updated Guidance for the Use of Face Coverings.²⁷ The guidance states, in part: “The COVID-19 vaccines are effective in preventing infection, disease, and spread. Unvaccinated persons are more likely to get infected and spread the virus which is transmitted through the air and concentrates indoors. Risk for COVID-19 exposure and infection will remain until we reach full community immunity. The purpose of this guidance is to align with CDC recommendations and provide information about higher risk settings where masks are required or recommended to prevent transmission to persons with prolonged, cumulative exposures (e.g., workers), or to persons whose vaccination status is unknown. When people who are not fully vaccinated wear a mask correctly, they protect others as well as themselves. Consistent and correct mask use by people who are not fully vaccinated is especially important indoors.”

34. As reflected in the proposed emergency regulations, the use of effective vaccines has reduced the need for some of the protections put into place by the November 30, 2020 emergency temporary standards, when transmission rates were rising precipitously. However, a serious hazard to employees remains, as evidenced by the emergence of the Delta variant of SARS-CoV-2, for which viral loads were found to be on average about 1,000 times greater compared to SARS-CoV-2 (alpha) lineages present during the first months of the pandemic.²⁸ The risk of hospital admission, ICU admission and death for COVID-19 was much higher for individuals infected with the Delta variant, compared to strains that were not “variants of concern.” The need for ICU admission increased 241 percent and the likelihood of death increased 121 percent.²⁹ Worker protections continue to be urgently needed in the event another variant emerges which can compete successfully with Delta.

²⁶ State of California. Open Data Portal. CDPH. COVID-19 Outbreak Data; accessed November 5, 2021.

<https://data.ca.gov/dataset/covid-19-outbreak-data>

²⁷ CDPH. Guidance for the Use of Face Coverings; updated June 9, 2021; accessed June 9, 2021.

<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/guidance-for-face-coverings.aspx>

²⁸ Baisheng Li, et al. Viral infection and transmission in a large, well-traced outbreak caused by the SARS-CoV-2 Delta variant. *medRxiv*. Posted July 23, 2021; accessed November 5, 2021. <https://www.medrxiv.org/content/10.1101/2021.07.07.21260122v2.full>

²⁹ Fisman and Tuite. Progressive Increase in Virulence of Novel SARS-CoV-2 Variants in Ontario, Canada. Preprint posted August 4, 2021; accessed November 5, 2021. <https://www.medrxiv.org/content/10.1101/2021.07.05.21260050v3>

35. Due to changes in social norms, as mask-wearing and physical distancing decline (or end completely) for many people, those precautions are likely to decline among unvaccinated people as well.³⁰ Unvaccinated employees will therefore be particularly at risk, especially given the spread of especially contagious SARS-CoV-2 variants, unless protective measures are taken.
36. At this time, emergency regulations are necessary to continue providing worker protections and furthering recovery from the pandemic. Although the state will continue to reopen as conditions dictate, the emergence of the Delta variant underscores that COVID-19 will likely remain a significant workplace hazard for months and potentially years to come.

AUTHORITY AND REFERENCE CITATIONS

These regulations are submitted pursuant to the Occupational Safety and Health Standards Board's authority under Labor Code section 142.3.

California Labor Code section 142.3 establishes that the Board may adopt, amend, or repeal occupational safety and health standards or orders. Section 142.3 permits the Board to prescribe suitable protective equipment and control or technological procedures to be used in connection with occupational hazards and to provide for monitoring or measuring employee exposure for the protection of employees.

Additionally, California Labor Code section 144.6 requires the Board, when dealing with standards for toxic materials and harmful physical agents, to “adopt that standard which most adequately assures, to the extent feasible, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to a hazard regulated by such standard for the period of his working life.” Section 144.6 also requires that the Board base standards on research, demonstrations, experiments and other appropriate information, taking into consideration the latest scientific literature, the reasonableness of the standards, and the experience gained under the health and safety laws.

California Labor Code section 6409.6, among other things, requires employers to provide certain written notification to employees, employers of subcontracted employees, and

³⁰ Scott E. Bokemper, Maria Cucciniello, Tiziano Rotesi, Paolo Pin, Aryn A. Malik, Kathryn Willebrand, Elliott E. Paintsil, Saad B. Omer, Gregory A. Huber, and Alessia Melegaro. Experimental evidence that changing beliefs about mask efficacy and social norms increase mask wearing for COVID-19 risk reduction: Results from the United States and Italy. Published online October 11, 2021. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8504748/>

employees' exclusive representative of potential exposure to COVID-19, as well as notification on the employer's disinfection and safety plan.

Authority: Labor Code section 142.3.

Reference: Labor Code sections 142.3, 144.6, and 6409.6.

INFORMATIVE DIGEST OF PROPOSED ACTION/ POLICY STATEMENT OVERVIEW

Summary of Existing Regulations and the Effect of the Proposed Regulation

Labor Code sections 60.5 and 6308 provide that the Division is charged with the administration and enforcement of the provisions of the California Occupational Safety and Health Act, commencing with Labor Code section 6300, as well as other provisions of law affecting the health and safety of employees in the State of California.

Labor code section 6401 requires employers to furnish and use safety devices and safeguards, and to adopt and use practices, means, methods, operations, and processes that are reasonably adequate to render such employment and place of employment safe and healthful. LC section 6401 also requires employers to do every other thing reasonably necessary to protect the life, safety, and health of employees.

Labor code section 6402 prohibits employers from requiring or permitting any employee to go or be in any employment or place of employment that is not safe and healthful.

Labor code section 6404 prohibits employers from occupying or maintaining any place of employment that is not safe and healthful.

Labor code section 6409.6, which shall remain in effect only until January 1, 2023, requires employers that receive a notice of potential exposure to COVID-19 to, within one business day of the potential exposure, provide written notice, as specified, to all employees, and the employers of subcontracted employees, who were on the premises at the same worksite as the COVID-19 case within the infectious period that they may have been exposed to COVID-19. Section 6409.6 also requires employers to provide written notice of COVID-19 exposure, as specified, to the exclusive representative, if any, of employees who had a close contact with the COVID-19 case. This section further requires employers to provide notice to employers of subcontracted employees, all exposed employees, and their exclusive

representative, if any, of the cleaning and disinfection plan being implemented. The section further requires the employer to provide exposed employees and their exclusive representative, with information regarding COVID-19-related benefits to which they may be entitled to under the law, as well as anti-retaliation and anti-discrimination protections.

Existing law, title 8, section 342, "Reporting Work-Connected Fatalities and Serious Injuries," requires employers to report immediately to the Division any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.

Existing law, title 8, section 3203, "Injury and Illness Prevention Program," establishes a general framework for the identification, evaluation, and correction of unsafe or unhealthy work conditions and practices; communication with employees; and employee safety and health training.

Existing law, title 8, section 3204, "Access to Employee Exposure and Medical Records," requires employers to provide employees with access to records of their exposure to toxic substances or harmful physical agents (e.g., viruses, etc.), and employee medical records, including laboratory tests. Employers must provide authorized representatives with employee exposure records, and employee medical records of any employee who has given them specific written consent.

Existing law, title 8, section 3380, "Personal Protective Devices," contains general requirements for personal protective equipment (PPE). Requirements for specific types of PPE are given in existing law, title 8, sections 3381 (Head Protection), 3382 (Eye and Face Protection), 3383 (Body Protection), 3384 (Hand Protection), and 3385 (Foot Protection). However, none of these sections require PPE to help prevent the transmission of COVID-19.

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Existing law, title 8, section 5140, "Definitions," states that a "harmful exposure" is an "exposure to dusts, fumes, mists, vapors, or gases" which are either "(a) In excess of any permissible limit prescribed by section 5155; or (b) Of such a nature by inhalation as to result in, or have a probability to result in, injury, illness, disease, impairment, or loss of function." There is no permissible exposure limit prescribed by section 5155 for SARS-CoV-2, the virus that causes COVID-19; however, inhalation of the virus does have a probability to result in injury, illness, disease, impairment, or loss of function. Exposure to COVID-19 is considered a harmful

exposure, as exposure to aerosols (in the breath of infected persons) containing SARS-CoV-2 has the probability to result in illness, disease, impairment, or loss of function.

Existing law, title 8, section 5141, "Control of Harmful Exposure to Employees," lists the hierarchy of controls that employers shall follow to address employee exposure to harmful air contaminants. Employers shall first rely on engineering controls whenever feasible, but if engineering controls are not feasible or do not achieve full compliance, administrative controls shall be implemented "if practicable." When engineering and administrative controls fail to achieve full compliance, then respiratory protective equipment shall be used.

Existing law, title 8, section 5144, "Respiratory Protection," requires respirators be used to protect the health of employees when effective engineering controls to prevent harmful atmospheres are not feasible.

Existing law, title 8, section 5155, "Airborne Contaminants," sets permissible exposure limits for particular substances. No permissible exposure limit is listed for SARS-CoV-2, the virus that causes COVID-19.

Existing law, title 8, section 5199, "Aerosol Transmissible Diseases," requires specific protections for novel pathogens such as COVID-19; however, it does not protect all workers. Its scope is limited to work in specified health care facilities, services, or operations, as well as in specified non-health care facilities, services, or operations. The majority of workers not covered by section 5199 are at risk for COVID-19 infection.

Existing law, title 8, section 3350, "Labor Camp Permits," requires that every employer operating a labor camp under the provisions of the California Employee Housing Act obtain a valid permit issued by the Department of Housing and Community Development or by a local governmental agency authorized to issue such permits by the Department. The employer shall either post or have available a valid and current permit.

Existing law, title 8, section 3362, "General Requirements" (Sanitation), requires that workplaces are kept in a clean and sanitary condition. It also requires that buildings be cleaned and maintained to prevent harmful exposures (defined in section 5140 – see above).

Existing law, title 8, section 3366, "Washing Facilities," requires that washing facilities be reasonably accessible to all employees. However, the section does not specifically require measures to ensure that employees are able to maintain personal hygiene, such as allowing time for employee handwashing, and the provision of hand sanitizer by the employer.

Existing law, title 8, section 14300.35, "Employee Involvement." requires employers to provide employees, former employees, their personal representatives, and their authorized employee representatives with access their injury and illness records, including, Cal/OSHA 300 forms. The employer must redact the personal identifying information from the records provided to the authorized employee representatives but not the others subjects to certain privacy concern exceptions.

Federal Regulations and Statutes

On June 10, 2021, federal OSHA issued emergency temporary standards for COVID-19 in healthcare, 29 CFR 1910.502 through 1910.509. These federal emergency regulations address COVID-19 hazards in some healthcare services and healthcare support services, with specified exceptions.

These federal regulations apply to a subset of the facilities, services, and operations which California addresses under existing regulation title 8, section 5199 [Aerosol Transmissible Diseases] rather than the current proposal. There is no federal regulation governing airborne exposure to infectious disease such as SARS-CoV-2 in general industry.

On November 5, 2021, federal OSHA issued an emergency temporary standard for COVID-19 vaccination, testing, and face coverings, 29 CFR 1910.501. This federal regulation covers all employers with a total of 100 or more employees at any time and requires compliance with most of its requirements beginning on December 6, 2021. However, the requirements related to vaccination and testing have an effective date of January 4, 2022. Excluded from coverage from this regulation include settings where any employee provides healthcare services or healthcare support services when subject to the requirements of 29 CFR 1910.502; employees who do not report to a workplace where other individuals such as coworkers or customers are present; employees while working from home; and employees who work exclusively outdoors.

The federal emergency regulation, among other things, would require vaccination or weekly testing of employees; require employers to determine employees' vaccination status; and require employees with COVID-19 to be excluded from the workplace until specified conditions are met. However, as of November 17, 2021, enforcement of the emergency temporary standard has been enjoined by the Fifth Circuit.

Federal OSHA also has the "General Duty Clause" in section 5(a)(1) of the Occupational Safety and Health Act of 1970. The clause states the following:

Each employer shall furnish to each of his [sic] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

The General Duty Clause is used by federal OSHA to address conditions that are not subject to other federal OSHA regulations. As such, it can be used by federal OSHA to require employers to protect employees from harmful airborne pathogens, such as SARS-CoV-2.

Other federal OSHA regulations, such as those governing respiratory protection (29 Code of Federal Regulations (CFR) section 1910.134), sanitation and washing facilities (29 CFR section 1910.141), PPE (29 CFR sections 1910.132, 1910.133, and 1910.138), and employee access to medical and exposure records (29 CFR section 1910.1020), are similar to their counterpart regulations in the CCR, title 8, discussed above. Likewise, the mandatory COVID-19 Health Care Emergency Temporary Standard which became effective June 21, 2021 (29 CFR section 1910.502) has similarities with title 8, section 5199, although the latter is more protective. The federal OSHA regulation governing temporary labor camps (29 CFR section 1920.142) is more detailed than its counterpart regulation in title 8, section 3350, discussed above.

Amended Section 3205. COVID-19 Prevention.

This readopted emergency regulation would continue the existing CCR title 8 section 3205, "COVID-19 Prevention," which is located in Subchapter 7. General Industry Safety Orders; Introduction; directly after section 3204. Access to Employee Exposure and Medical Records. The readopted regulation would include the following specific requirements.

New Subsection 3205(a). Scope.

Proposed subsection (a)(1) establishes the application of the proposed regulation to all workplaces, with four exceptions: (A) work locations with one employee who does not have contact with other persons; (B) employees working from home; (C) employees when covered by section 5199; and (D) teleworking employees from a location of the employee's choice, which is not under the control of the employer.

The subsection is necessary to establish the places of employment for which employers will be required to comply with the proposed regulation and take action to protect employees from exposure to COVID-19.

Proposed subsection (a)(2) clarifies that nothing in this section is intended to limit state or local health department mandates or guidance that are more protective or stringent than this section.

This subsection is necessary because state or local health department mandates or guidance may be more stringent than this section, and it is important that such mandates or guidance are not in any way limited by the provisions of this section.

New Subsection 3205(b). Definitions.

Proposed subsection (b) provides definitions for the terms "close contact," "COVID-19," "COVID-19 case," "COVID-19 hazard," "COVID-19 symptoms," "COVID-19 test," "exposed

group,” “face covering,” “fully vaccinated,” “high-risk exposure period,” “respirator,” and “worksite,” as used in sections 3205 through 3205.4.

The subsection is necessary to clarify the application and meanings of terms used in the proposed regulations.

New Subsection 3205(c). Written COVID-19 Prevention Program.

Proposed subsection (c) requires employers to establish, implement, and maintain an effective, written COVID-19 Prevention Program (Program). The subsection allows the written Program to be integrated into the employer’s written IIPP, required by section 3203, or kept as a separate document. Subsection (c) establishes the basic elements that an employer is responsible for including in their Program. They are as follows:

New Subsection 3205(c)(1). System for communicating.

Proposed subsection (c)(1) requires employers to take the actions described in subsections (c)(1)(A) through (c)(1)(D). These actions are designed to ensure that employers have methods in place, and use those methods, to exchange information with employees about COVID-19.

Subsection (c)(1)(A), asks employees to provide information to their employers about COVID-19 symptoms, possible close contacts, and possible COVID-19 hazards at the workplace without the fear of reprisal. Subsection (c)(1)(B) would require employers to communicate with employees about how to seek accommodations for medical or other conditions that put them at increased risk of severe COVID-19 illness. Subsection (c)(1)(C) would require employers to provide information about access to COVID-19 testing when testing is required under this section, section 3205.1, or section 3205.2. Subsection (c)(1)(D) would require employers to communicate information about COVID-19 hazards to employees and to other employers, persons, and entities in or in contact with the employer’s workplace, along with the employer’s COVID-19 policies and procedures.

These subsections are necessary, as communicating information, from employees to their employers, and from employers to their employees and others, is critical in preventing the spread of COVID-19 in workplaces.

New Subsection 3205(c)(2). Identification and evaluation of COVID-19 hazards.

Proposed subsection (c)(2) requires employers to take the actions described in subsections

(c)(2)(A) through (c)(2)(H). These actions are designed to ensure that employers have methods in place, and use those methods, to identify and evaluate COVID-19 hazards.

The subsection is necessary, as identifying and evaluating COVID-19 hazards in the workplace is critical in preventing the spread of COVID-19 in workplaces.

Proposed subsection (c)(2)(A) requires employers to allow employees and authorized employee representatives to participate in the identification and evaluation of COVID-19 hazards.

This subsection is necessary because it is important to include employees and employee representatives in the process of identifying and evaluating COVID-19 hazards, due to their intimate knowledge of specific work practices and workplace conditions.

Proposed subsection (c)(2)(B) requires employers to develop and implement a process for screening employees for and responding to employees with COVID-19 symptoms. It allows the employer to ask employees to evaluate their own symptoms before reporting to work. If the employer conducts the screening indoors at the workplace, the employer must ensure that face coverings are used during screening by both screeners and employees and, if temperatures are measured, that non-contact thermometers are used.

This subsection is necessary, as it is important for employers to have a process to screen employees for potential symptoms of COVID-19, and effectively respond to those symptoms, to prevent or reduce the risk of transmission of COVID-19 in the workplace. Allowing employers to ask employees to evaluate whether or not they have symptoms of COVID-19 before reporting would prevent ill employees from coming to work, thus reducing the potential spread of COVID-19. Requiring the use of face coverings by screeners and employees and non-contact thermometers during screening would minimize possible exposure to COVID-19 to screening employees and employees being screened.

Proposed subsection (c)(2)(C) requires employers to develop policies and procedures to effectively respond to individuals at the workplace who are a COVID-19 case.

This subsection is necessary, as it is important for employers to effectively respond to individuals at the workplace who are COVID-19 cases, to prevent or reduce the risk of transmission of COVID-19.

Proposed subsection (c)(2)(D) requires employers to conduct a workplace-specific identification of all interactions, areas, activities, processes, equipment, and materials that could potentially expose employees to COVID-19 hazards. The proposed subsection requires

employers to treat all persons, regardless of symptoms or negative COVID-19 test results, as potentially infectious. Proposed subsection (c)(2)(D)1. requires employers to include in their workplace assessment the identification of places and times when people may congregate or come in contact with one another, regardless of whether employees are performing an assigned work task or not. Proposed subsection (c)(2)(D)2. requires an evaluation of employees' potential workplace exposure to all persons at the workplace or who may enter the workplace. Further, it requires employers to consider how employees and other persons enter, leave, and travel through the workplace, in addition to addressing stationary work.

These subsections are necessary, as conducting a thorough evaluation and identifying and evaluating COVID-19 hazards is critical in preventing the spread of COVID-19 in the workplace. It is important to assume that all persons are potentially infectious for COVID-19, as many infectious persons have no symptoms of COVID-19, and some may test negative for the virus.

Proposed subsection (c)(2)(E) requires, for indoor locations, the employer to evaluate how to maximize ventilation with outdoor air; the highest level of filtration efficiency compatible with the existing ventilation system; and whether the use of portable or mounted High Efficiency Particulate Air (HEPA) filtration units, or other air cleaning systems, would reduce the risk of COVID-19 transmission.

This subsection is necessary as increased ventilation in indoor locations and increased filtration of indoor air dilutes the concentration of any infectious COVID-19 virus in the air, thus reducing the potential for employee exposure to the virus.

Proposed subsection (c)(2)(F) requires employers to review applicable orders and guidance from the State of California and the local health department related to COVID-19 hazards and prevention.

This subsection is necessary, as it is important for employers to become familiar with the information in such orders and guidance documents to reduce the risk of transmission in the workplace.

Proposed subsection (c)(2)(G) requires employers to evaluate existing COVID-19 prevention controls at the workplace and the need for different or additional controls.

This subsection is necessary as it is important to evaluate COVID-19 prevention controls to determine if they are effective at minimizing employee exposure to COVID-19 in the workplace.

Proposed subsection (c)(2)(H) requires employers to conduct periodic inspections to identify unhealthy conditions, work practices, and work procedures related to COVID-19, and to

ensure compliance with employers' COVID-19 policies and procedures.

This subsection is necessary to evaluate conditions that may change over time, and to identify and correct situations where employers' policies and procedures are not adhered to.

New Subsection 3205(c)(3). Investigating and responding to COVID-19 cases in the workplace.

Proposed subsection (c)(3) requires employers to take the actions described in subsections (c)(3)(A) through (c)(3)(C). These actions are designed to ensure that employers have methods in place, and use those methods, to investigate and respond to COVID-19 cases in the workplace.

The subsection is necessary, as investigating and responding to COVID-19 cases is critical in preventing the spread of COVID-19 in the workplace.

Proposed subsection (c)(3)(A) requires employers to have effective procedures to investigate COVID-19 cases in the workplace. This includes procedures for seeking information regarding COVID-19 cases and close contacts, test results and onset of COVID-19 symptoms, and identifying and recording COVID-19 cases.

This subsection is necessary, as it is important to have procedures in place to gather information needed to investigate and respond to COVID-19 cases in the workplace.

Proposed subsection (c)(3)(B) requires employers to take specified actions when there has been a COVID-19 case at the place of employment. These actions include: 1. determining the day and time the COVID-19 case was last at work, and, to the extent possible, the date of the positive test(s) and/or diagnosis, and the date the COVID-19 case first had one or more COVID-19 symptoms, if any; 2. determining who may have had a close contact; 3. giving written notice within one business day, in a specified manner, that people at the worksite may have been exposed to COVID-19 and providing a disinfection plan and guidelines, to all employees, independent contractors, and employers at the worksite during the high-risk exposure period; 4. providing the notice required by Labor Code section 6409.6(a)(2) and (c), within one business day, to the authorized representative of the COVID-19 case and employees who had a close contact, and also provide the notice required by Labor Code section 6409.6(a)(4) to the authorized representative of any employees on the premises of the same worksite as the COVID-19 case during the high risk exposure period; 5. making COVID-19 testing available at no cost during paid time to all employees who had a close contact in the workplace, and providing employees with information on certain benefits, with an exception, under specified conditions, for COVID-19 cases who returned to work; and 6. investigating whether workplace conditions

could have contributed to the risk of COVID-19 exposure and what could be done to reduce exposure to COVID-19 hazards.

This subsection is necessary to ensure that employers do a thorough investigation of any COVID-19 cases in the workplace and to ensure that employees, independent contractors and other employers are informed about potential exposure during the high-risk exposure period.

Making COVID-19 testing available at no cost to employees following a potential exposure to COVID-19 in the workplace (except for certain employees who are unlikely to develop a COVID-19 illness)³¹ and providing information about benefits available to them will encourage these employees to get tested for COVID-19 and also to not report to work following a COVID-19 exposure. These steps are necessary to prevent the spread of COVID-19 in the workplace, when there has been a COVID-19 case present at the place of employment. This subsection is also needed to clarify and make specific portions of Labor Code 6409.6, and to incorporate portions of that statute within the relevant regulation in order to ease compliance and enforcement.

Proposed subsection (c)(3)(C) requires employers to keep personal identifying information of COVID-19 cases or persons with COVID-19 symptoms, and any employee medical records required by sections 3205 through 3205.4, confidential unless disclosure is required or permitted by law. All COVID-19 testing or related medical services provided by the employer under sections 3205 through 3205.4 shall be provided in a manner that ensures the confidentiality of employees. Unredacted information on COVID-19 cases shall be provided to the local health department, CDPH, the Division, and the National Institute for Occupational Safety and Health (NIOSH) immediately upon request, and when required by law.

This subsection is necessary to ensure that personal identifying information with regard to COVID-19 is kept confidential, as required by law, while ensuring that it is promptly available to government agencies engaged in COVID-19 response.

New Subsection 3205(c)(4). Correction of COVID-19 hazards.

Proposed subsection (c)(4) requires employers to implement effective policies and/or procedures to correct unsafe or unhealthy conditions, work practices, and procedures related to COVID-19 in a timely manner based on the severity of the hazard.

The subsection is necessary, as correcting unsafe or unhealthy conditions, work practices,

³¹ CDC; Interim Public Health Recommendations for Fully Vaccinated People, Updated April 2, 2021. Accessed on April 26, 2021. https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html#anchor_1617376520653; CDC; Interim Guidance on Duration of Isolation and Precautions for Adults with COVID-19, Updated February 13, 2021. Accessed on April 26, 2021. <https://www.cdc.gov/coronavirus/2019-ncov/hcp/duration-isolation.html>

and procedures related to COVID-19 in a timely manner is critical in preventing the spread of COVID-19 in the workplace.

New Subsection 3205(c)(5). Training and instruction.

Proposed subsection (c)(5) requires employers to provide training and instruction to employees on the topics described in subsections (c)(5)(A) through (c)(5)(J). Required topics include the employer's COVID-19 policies and procedures to protect employees from COVID-19 hazards, and how to participate in the identification and evaluation of COVID-19 hazards under subsection (c)(2)(A) (training as required in subsection (c)(5)(A)); information on benefits to which an employee may be entitled (subsection (c)(5)(B)); how COVID-19 is spread, and that an infectious person may have no symptoms (subsection (c)(5)(C)); the fact that particles containing the virus can travel more than six feet, especially indoors, so that a combination of physical distancing, face coverings, increased ventilation indoors, and respiratory protection decreases the spread of COVID-19 (subsection (c)(5)(D)); the employer's policies for providing respirators and the right of employees who are not fully vaccinated to request a respirator for voluntary use as stated in section 3205, without fear of retaliation and at no cost to the employees; and, when respirators are provided for voluntary use under the proposed regulations, how to properly wear the respirators, perform a seal check, and the fact that facial hair can interfere with a seal (subsection (c)(5)(E)); information about hand washing and using hand sanitizer (subsection (c)(5)(F)); proper use of face coverings and the difference between respirators and face coverings for COVID-19, an airborne disease (subsection (c)(5)(G)); COVID-19 symptoms, and the importance of not coming to work and obtaining a COVID-19 test, if the employee has COVID-19 symptoms (subsection (c)(5)(H)); information on the employer's COVID-19 policies and how to access COVID-19 testing and vaccination, and the importance and efficacy of vaccination (subsection (c)(5)(I)), and the conditions under which face coverings must be worn at the workplace and that face coverings are additionally recommended for people who are not fully vaccinated when outdoors where six feet of distance between people cannot be maintained; and that employees can request face coverings from the employer at no cost and can wear them at work, regardless of vaccination status, without fear of retaliation (subsection (c)(5)(J)).

The subsection is necessary, as providing employees with knowledge about the hazards of exposure to COVID-19, including how it is spread, along with methods used in the workplace to minimize exposure to COVID-19, the importance of not coming to work and obtaining a COVID-19 test, if the employee has COVID-19 symptoms, and the importance of vaccination is critical in preventing the spread of COVID-19 in the workplace.

New Subsection 3205(c)(6). Face coverings.

Proposed subsection (c)(6) requires employers to take the actions described in subsections (c)(6)(A) through (c)(6)(I). These actions are designed to ensure that employees are provided with and use face coverings in the workplace, under specified conditions. The subsection is necessary, as the use of face coverings is recommended to reduce the transmission of COVID-19.³²

Proposed subsection (c)(6)(A) requires employers to provide face coverings and ensure they are worn by employees who are not fully vaccinated when indoors or in vehicles.

This subsection is necessary, as it sets parameters for when face coverings are required, and also takes into account the increased likelihood of transmission of COVID-19 in indoor spaces and in vehicles compared to outdoor spaces,³³ and that vaccinated persons are at lower risk for COVID-19 infection and transmission. Evidence exists that infectious virus particles can travel more than six feet through the air,³⁴ and face coverings reduce the amount of particles that are emitted into the air from an infected person.³⁵

Proposed subsection (c)(6)(B) requires that when CDPH orders require face coverings to be worn regardless of vaccination status, employers shall provide face coverings and ensure they are worn by all employees.

This subsection is necessary to ensure consistency with CDPH orders and to protect workers where there is a public health need for additional face coverings.

Proposed subsection (c)(6)(C) requires employers to ensure that required face coverings are clean and undamaged, and that they are worn over the nose and mouth. The subsection also clarifies that face shields are not a replacement for face coverings, but may be worn with face coverings for additional protection.

This subsection is necessary to ensure that required face coverings are sanitary, not damaged,

³² CDPH; Guidance for the Use of Face Coverings, Face Covering Guidance issued on July 28, 2021, accessed December 3, 2021. <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/guidance-for-face-coverings.aspx>

³³ CDC; Choosing Safer Activities, Updated April 27, 2021. Accessed on April 27, 2021.

<https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/participate-in-activities.html>

³⁴ CDC; How COVID-19 Spreads, Updated October 28, 2020. Accessed on November 6, 2020.

<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>

³⁵ Lindsley WG, Blachere FM, Law BF, Beezhold DH, Noti JD. Efficacy of face masks, neck gaiters and faceshields for reducing the expulsion of simulated cough-generated aerosols. Health Effects Laboratory Division, National Institute for Occupational Safety and Health, CDC, October 7, 2020.

<https://www.medrxiv.org/content/10.1101/2020.10.05.20207241v1.full.pdf>

and worn in a way that reduces the amount of any infectious particles that may be exhaled by the wearer.

Proposed subsection (c)(6)(D) provides five exceptions to the face covering requirements of section 3205 or sections 3205.1 through 3205.4.

This subsection is necessary to recognize that under specified conditions in (c)(6)(D) 1. through 5., employees are not required to wear face covering, either because exposure to COVID-19 is presumed to be unlikely [(c)(6)(D) 1. and 3.], or because the wearing of face coverings is incompatible with the conditions listed [(c)(6)(D)2., 4. and 5.].

Proposed subsection (c)(6)(E) addresses situations where an employee is unable to wear a face covering that is otherwise required by this section, e.g., due to a medical or mental health condition.

This subsection is necessary to ensure that procedures are in place to provide adequate protection from COVID-19 to employees working in an area where another employee is unable to wear a face covering.

Proposed subsection (c)(6)(F) requires that an unvaccinated employee who is not wearing a face covering under (c)(6)(D)4. or 5. (i.e., for medical/mental health reasons or because a particular task makes it infeasible), or an acceptable alternative when allowed by (c)(6)(E), must be six feet apart from all other persons unless the unmasked employee is tested at least weekly for COVID-19 at no cost to the employee. The provisions of this subsection cannot be used as an alternative to face coverings when otherwise required.

This subsection is necessary to ensure that procedures are in place to provide adequate protection from COVID-19 to employees who are unable to wear a face covering, and to protect the employees working near such individuals.

Proposed subsection (c)(6)(G) explicitly prohibits employers from preventing any employee from wearing a face covering when not required by this section, unless it would create a safety hazard. Since “face coverings” are defined to include respirators worn voluntarily, this includes employees who choose to wear an N95 or similar. Some fully vaccinated employees may still wish to wear face coverings, particularly individuals with medical conditions that leave them with a greater risk of post-vaccination COVID-19. Some individuals who are not fully vaccinated may choose to wear face coverings in settings where they are not mandated, such as outdoor areas, to reduce the risk of transmission and/or to follow public health recommendations.

This subsection is necessary to ensure that employees are permitted to wear face coverings when they choose to do so, even when not required by this section.

Proposed subsection (c)(6)(H) requires employers to provide face coverings to employees upon request, regardless of vaccination status, when face coverings are not required by this section or by sections 3205.1 through 3205.4.

This subsection is necessary to ensure that all employees will be provided with face coverings upon request, so they may wear them when they choose to do so, even when not required by this section. An employee may have information, unknown to the employer, giving that employee reason to believe that their coworkers should be protected from potential transmission by wearing a face covering. For instance, not all employees will report symptoms. Likewise, an employee may have a medical reason for wearing a face covering, even when not mandated by this section, to provide additional droplet protections.

Proposed subsection (c)(6)(I) requires employers to implement measures to communicate to non-employees the requirements for the use of face coverings on their premises.

This subsection is necessary to ensure that non-employees are made aware of the requirements to wear face coverings when in the particular workplace. The required communication with non-employees will minimize COVID-19 exposure to employees by increasing the likelihood that non-employees will wear face coverings when in the workplace.

New Subsection 3205(c)(7). Other engineering controls, administrative controls, and personal protective equipment.

Proposed subsection (c)(7) requires employers to take the actions described in subsections (c)(7)(A) through (c)(7)(E). These actions are designed to ensure appropriate control measures are implemented to minimize employee exposure to COVID-19 hazards in the workplace.

The subsection is necessary, as the implementation of control methods is important in minimizing employee exposure to COVID-19.

Subsection (c)(7)(A) requires employers to maximize the quantity of outside air provided to the extent feasible, for buildings with mechanical or natural ventilation, except in cases when the United States Environmental Protection Agency (U.S. EPA) Air Quality Index is greater than 100 for any air pollutant, or if maximizing outdoor air would cause a hazard to employees.

This subsection is necessary to reduce employee exposure to COVID-19 in the workplace, as increased ventilation reduces the concentration of potentially infectious material in the indoor air.³⁶

Subsection (c)(7)(B) requires employers to implement cleaning and disinfecting procedures in their workplace, with specific requirements after there has been a COVID-19 case.

This subsection is necessary to reduce employee exposure to COVID-19, as potentially infectious material may be present on surfaces that have not been cleaned and disinfected, particularly surfaces recently used by a COVID-19 case.³⁷ The provisions of this subsection are designed to reduce transmission of COVID-19 that may occur after an employee touches a contaminated surface, then touches their eyes, nose, or mouth.

Subsection (c)(7)(C) requires employers to evaluate its handwashing facilities and policies.

This subsection is necessary to protect employees from COVID-19 hazards by encouraging and allowing time for employee handwashing, and providing employees with hand sanitizer. The provisions of this subsection are designed to reduce transmission of COVID-19 that may occur after an employee touches a contaminated surface, then touches their eyes, nose, or mouth.

Proposed subsection (c)(7)(D) requires employers to take the actions described in subsections (c)(7)(D)1. through (c)(7)(D)4. These actions are designed to ensure that appropriate personal protective equipment (PPE) is and used to minimize employee exposure to COVID-19 hazards in the workplace.

Subsection (c)(7)(D)1. requires employers to evaluate the need for PPE to protect employees from exposure to COVID-19, and provide such equipment as needed. Whenever an employer provides respirators for voluntary use under the proposed regulations, the employer must encourage their use and ensure that employees are provided with a respirator of the correct size. Subsection (c)(7)(D)2. requires that, upon request, employers provide respirators for voluntary use in compliance with section 5144(c)(2) to unvaccinated employees working indoors or in vehicles with more than one person. Whenever an employer makes respirators for voluntary use available, under this section or sections 3205.1 through 3205.4, the employer shall encourage their use and shall ensure that employees are provided with a respirator of the correct size. Subsection (c)(7)(D)3. requires employers to provide and ensure the use of respirators in accordance with section 5144 when deemed necessary by the Division

³⁶ CDC; Ventilation in Buildings, Updated Mar. 23, 2021. Accessed on April 27, 2021. <https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html>

³⁷ CDC; Cleaning and Disinfecting Your Facility, Updated April 5, 2021. Accessed on April 26, 2021. <https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html>

through Issuance of Order to Take Special Action, in accordance with section 332.3. Subsection (c)(7)(D)4. requires employers to provide and ensure use of eye protection and respiratory protection in accordance with section 5144 when employees are exposed to procedures that may aerosolize potentially infectious material such as saliva or respiratory tract fluids.

Subsection (c)(7)(E) requires that employers make COVID-19 testing available, at no cost and during employees' paid time, to employees who are not fully vaccinated and have COVID-19 symptoms.

These subsections are necessary to minimize employee exposure to COVID-19 by ensuring appropriate PPE will be provided and used, and that respirators of the correct size are provided and used. The requirements recognize that being in a vehicle with another person represents a condition in which airborne transmission of COVID-19 may occur, and that wearing a respirator will help to protect the wearer from such transmission. Likewise, these requirements recognize that unvaccinated employees require additional protections in the form of respirators for voluntary use, and available testing. As described in this subsection, PPE is designed to protect employees from exposure to potentially infectious material they may come into contact with, either on surfaces or in the air, while respirators are designed to protect employees from potentially infectious material in the air they breathe. When employees are exposed to procedures that may aerosolize potentially infectious material such as saliva or respiratory tract fluids, a respirator worn in accordance with the requirements of section 5144 is needed to provide adequate respiratory protection.

New Subsection 3205(c)(8). Reporting, recordkeeping, and access.

Proposed subsection (c)(8) requires employers to take the actions described in subsections (c)(8)(A) through (c)(8)(D). These actions are designed to ensure that employers report information about COVID-19 cases and outbreaks at the workplace to the local health department (subsection(c)(8)(A)). In addition, subsection (c)(8)(B) requires employers to maintain records of the steps taken to implement the written COVID-19 Prevention Program in accordance with section 3203(b), while subsection (c)(8)(C) requires the COVID-19 Prevention Program to be made available at the worksite to employees, authorized employee representatives, and to representatives of the Division immediately upon request. Finally, subsection (c)(8)(D) requires the employer to keep a record of and track all COVID-19 cases at the workplace, including specified information about the employee and their presence at the workplace.

These subsections are necessary to ensure that important information about COVID-19 cases in the workplace is maintained and reported to the local health department, to be used in the event that further surveillance or investigation is needed. In addition, access to employees and

employee representatives to information on COVID-19 cases, as well as to the employer's written COVID-19 Prevention Program is important to ensure that employers are taking the steps needed to minimize employee exposure to COVID-19 in the workplace.

New Subsection 3205(c)(9). Exclusion of COVID-19 cases and employees who had a close contact.

Proposed subsection (c)(9) requires employers to take the actions described in subsections (c)(9)(A) through (c)(9)(F). These actions are designed to ensure that per subsection (c)(9)(A), COVID-19 cases are excluded from the workplace until the return to work requirements of subsection (c)(10) are met.

Per subsection (c)(9)(B), employees who had a close contact are excluded from the workplace until the return to work requirements of subsection (c)(10) are met, with exceptions under specified conditions given for asymptomatic, fully vaccinated employees and, under certain conditions, those who previously were COVID-19 cases.

Subsection (c)(9)(C) requires that employers who do not exclude an employee who had a close contact as permitted by exceptions in subsections (c)(9)(B)1., 2. or 3., shall provide the employee with information about any applicable precautions recommended by the CDPH for persons with close contact.

Subsection (c)(9)(D) requires that for employees excluded from work under subsection (c)(9), employers must maintain an employee's earnings, wages, seniority, and all other employee rights and benefits, including the employee's right to their former job status, as if the employee had not been removed from their job, and must pay wages at the usual time. For the sake of clarity and ease of both compliance and enforcement, the proposed subsection states that such payments are subject to existing laws regarding wage payment obligations and existing enforcement mechanisms. Exception 1 provides that subsection (c)(9)(D) does not apply where the employee received disability payments or was covered by workers' compensation and received temporary disability. Exception 2 provides that subsection (c)(9)(D) does not apply where the employer demonstrates that the close contact is not work related. If an employer determines that one of the exceptions applies, it shall inform the employee of the denial and the applicable exception.

Subsection (c)(9)(E) states that this subsection does not limit any other applicable law, employer policy, or collective bargaining agreement that provides for greater protections.

Subsection (c)(9)(F) requires that at the time of exclusion, the employer shall provide the employee the information on benefits described in this section.

These subsections are necessary to limit transmission of COVID-19 in the workplace. Toward this end, it is important that employees who are COVID-19 cases or had a close contact do not come to work. Maintaining employees' earnings and benefits as usual, when they are excluded from the workplace, is important to ensure that employees will notify their employers if they test positive for COVID-19 or have a close contact. These provisions encourage employees to stay away from the workplace when they may be infectious. By clarifying that these provisions are subject to existing laws regarding wages, the regulation ensures that existing enforcement mechanisms apply.

New Subsection 3205(c)(10). Return to work criteria.

Proposed subsection (c)(10) specifies when employees who are COVID-19 cases, with or without symptoms, may return to work. Specifications are given in subsections (c)(10)(A) through (c)(10)(F).

The subsection is necessary to inform employers and employees of the conditions under which an employee may return to work following exclusion, and to ensure that employees do not return to work until they do not pose a significant risk of exposing others to COVID-19 in the workplace. Proposed subsection (c)(10)(A) specifies three criteria that must be met before a COVID-19 case with COVID-19 symptoms may return to work.

This subsection is necessary to maintain consistency with criteria established by CDPH and to ensure that people do not return to work while still infectious.

Proposed subsection (c)(10)(B) specifies criteria that must be met before a COVID-19 case who tested positive but never developed COVID-19 symptoms may return to work.

This subsection is necessary to maintain consistency with criteria established by CDPH and CDC guidance, and to ensure that people do not return to work while still infectious.³⁸

Proposed subsection (c)(10)(C) clarifies that a negative COVID-19 test shall not be required for an employee to return to work, if the employee has already remained out of work for the time required by this section.

This subsection is necessary because polymerase chain reaction (PCR) tests can remain positive long after an individual is no longer infectious, so proof of a negative test must not be required prior to an individual returning to the workplace after a documented COVID-19 infection.

³⁸ CDC; Ending Isolation and Precautions for People with COVID-19: Interim Guidance, Updated September 14, 2021. Accessed on November 5, 2021. <https://www.cdc.gov/coronavirus/2019-ncov/hcp/duration-isolation.html>

Requiring a negative test before returning to work could impermissibly discriminate against employees who have previously tested positive for COVID-19.

Proposed subsection (c)(10)(D) specifies criteria that must be met before a person who had a close contact may return to work, depending on when the person had the close contact or whether the person developed COVID-19 symptoms, to exclude COVID-19 cases and exposed employees from the workplace until they are no longer an infection risk.

This subsection is necessary in order to ensure that close contacts who may have contracted COVID-19 do not return to work until it is safe to do so. This subsection is also needed in order to be in compliance with Executive Order N-84-20,³⁹ which requires that exclusion periods and return to work criteria specified in section 3205(c)(10) shall not exceed any applicable quarantine or isolation period recommended by the CDPH or ordered by a local health officer, whichever is longer.

Proposed subsection (c)(10)(E) specifies criteria that must be met before an employee who was issued an isolate, quarantine, or exclusion order by a local or state health official may return to work.

This subsection is necessary to maintain consistency with criteria established by CDPH and to ensure that people do not return to work while potentially infectious.

Proposed subsection (c)(10)(F) specifies criteria under which the Division may, upon request, allow employees to return to work on the basis that the removal of an employee would create undue risk to a community's health and safety.

This subsection is necessary to ensure that control measures are in place to prevent COVID-19 transmission in the workplace before allowing any such employees to return to work.

New Section 3205.1. Multiple COVID-19 Infections and COVID-19 Outbreaks.

This proposed emergency regulation, new section 3205.1, would be in Subchapter 7. General Industry Safety Orders; directly after proposed section 3205. COVID-19 Prevention. The regulation would include the following specific requirements.

New Subsection 3205.1(a). Scope.

This proposed subsection (a)(1) establishes the application of the proposed regulation to a workplace covered by section 3205 if three or more employee COVID-19 cases within an

³⁹ Gavin Newsom, Governor of California; Executive Order N-84-20; December 14, 2020. <https://www.gov.ca.gov/wp-content/uploads/2020/12/12.14.20-EO-N-84-20-COVID-19.pdf>

exposed group visited the workplace during their high-risk exposure period during a 14-day period.

The subsection is necessary to establish the conditions in which employers will be required to comply with the proposed regulation and to take action to reduce the further spread of COVID-19 at the workplace.

Proposed subsection (a)(2) sets forth the requirement to comply with this section until there are no new COVID-19 cases detected in the exposed group for a 14-day period.

The subsection is necessary to ensure that all COVID-19 cases associated with a COVID-19 outbreak are identified and specified actions are taken to reduce the spread of COVID-19 at the workplace, until the outbreak has been controlled.

New Subsection 3205.1(b). COVID-19 testing.

Proposed subsection (b)(1) requires employers to make COVID-19 testing available at no cost to its employees within the exposed group, during employees' paid time. Two exceptions are provided: (A): employees who were not present during the relevant 14-day period(s) under subsection (a); and (B): under specified circumstances, certain COVID-19 cases who have returned to work.

The subsection is necessary to provide employees who were present during the relevant 14-day period(s) the opportunity to get tested for COVID-19 without being deterred by cost or feasibility and for the employer to identify additional COVID-19 cases. With testing, employees who test positive and have symptoms can get care earlier. Contacts can be traced and self-isolation or quarantine can be started sooner to help stop the spread of the virus. Exceptions to the testing requirements recognize that, for employees who have been a COVID-19 case in the previous 90 days, testing is unlikely to have benefits.⁴⁰

Proposed subsection (b)(2) establishes specific timeframes for which testing must be made available to all employees covered by this section. In proposed subsection (b)(2)(A), it provides that testing must be made available to all employees in the exposed group immediately upon being covered by this section, and then again one week later. It further establishes that negative COVID-19 test results of employees with COVID-19 exposure shall

⁴⁰ CDC; Interim Guidance on Duration of Isolation and Precautions for Adults with COVID-19, Updated February 13, 2021. Accessed on April 26, 2021. <https://www.cdc.gov/coronavirus/2019-ncov/hcp/duration-isolation.html>

not impact the duration of any quarantine, isolation, or exclusion period required by, or orders issued by, the local health department.

The subsection is necessary to ensure that employers follow the specific instructions of their local health department on managing the COVID-19 outbreak.

Subsection (b)(2)(B) establishes that after the first two COVID-19 tests required by subsection (b)(2)(A), employers must make COVID-19 testing available to employees in the exposed group who remain at the workplace, at least once per week, or more frequently if recommended by the local health department, until this section no longer applies pursuant to subsection (a)(2).

The subsection is necessary to specify an increased testing frequency to prevent the spread of COVID-19 in the workplace when there have been three or more COVID-19 cases within an exposed group and also to ensure that employers provide all additional COVID-19 testing as instructed by the local health department.

New Subsection 3205.1(c)

Subsection (c) requires employers to provide additional testing when deemed necessary by the Division through the Issuance of Order to Take Special Action, in accordance with title 8, section 332.3.

The subsection is necessary to ensure that employers provide all additional COVID-19 testing as instructed by the Division.

New Subsection 3205.1(d)

This proposed subsection requires the employer to comply with all applicable provisions of section 3205. It further specifies that the employer must (1) require employees to wear face coverings when indoors, or when outdoors and less than six feet from another person, unless one of the exceptions in section 3205(c)(6)(D) applies; (2) give notice to employees in the exposed group of their right to request a respirator for voluntary use under section 3205(c)(7)(D)2., if they are not fully vaccinated; and (3) evaluate the need for physical distancing and/or cleanable solid partitions, as specified.

The subsection is necessary to remind employers that they must comply with all applicable provisions of section 3205 when they become subject to section 3205.1. When three or more employees become COVID-19 positive in a 14-day period, that indicates that vaccination progress and other controls have not been sufficient to protect employees, so the use of face coverings in specified conditions, voluntary use of respirators for employees who are not fully

vaccinated, and evaluation of the need for physical distancing and/or partitions are necessary to prevent further transmission of COVID-19.

New Subsection 3205.1(e). COVID-19 Investigation, review and hazard correction.

This proposed subsection requires that following a COVID-19 outbreak, the employer immediately perform a review of potentially relevant COVID-19 policies, procedures, and controls and implement changes as needed to prevent further spread of COVID-19.

The subsection is necessary to ensure that a thorough investigation is conducted and review of COVID-19 hazards are identified and corrected to control and prevent further spread of the disease in the exposed workplace.

Subsection (e)(1) establishes the elements of the investigation of new or unabated COVID-19 hazards to include the employer's leave policies and practices, whether employees are discouraged from remaining home when sick, and the employer's COVID-19 testing policies. The subsection further requires the employer to identify and evaluate specific conditions in the exposed workplace that the employer would need to control to prevent further COVID-19 transmission.

This subsection is necessary to ensure that employers review their leave policies and practices and working environment to ensure they identify conditions that contribute to the transmission of COVID-19.

Subsection (e)(2) establishes the review be updated every 30 days during which the section continues to apply, in response to new information or to new or previously unrecognized COVID-19 hazards, or when otherwise necessary.

The subsection is necessary to allow time for the employer's improvements to take effect. It is also necessary that the employer update the review after responding to any new information or to new or previously unrecognized COVID-19 hazards that an employer is likely to identify or be made aware of should an outbreak continue to occur, or when otherwise necessary.

Subsection (e)(3) establishes that the employers implement changes to reduce the transmission of COVID-19 based on the investigation and review required by subsections (e)(1) and (e)(2). The employer shall consider moving indoor tasks outdoors or having them performed remotely, increasing outdoor air supply when work is done indoors, improving air filtration, increasing physical distancing as much as feasible, respiratory protection, and other applicable controls.

The subsection is necessary to ensure that the employer implement changes for COVID-19 hazards identified by the investigation and review. The employer is required to consider specific measures that will help to control and prevent further COVID-19 transmission.

New Subsection 3205.1(f).

Proposed subsection (f) specifies requirements for employers to filter recirculated air with Minimum Efficiency Reporting Value (MERV) 13 or higher efficiency filters, or if not compatible with the ventilation system, requires employers to use the filters with the highest compatible filtering efficiency. It also requires employers to evaluate whether HEPA filtration units or other air cleaning systems would reduce the risk of transmission, and, if so, implement their use to the degree feasible.

The subsection is necessary to reduce employee exposure to COVID-19 in the workplace, as filtering the air reduces the concentration of potentially infectious material in the indoor air.⁴¹

New Section 3205.2. Major COVID-19 Outbreaks.

This proposed emergency regulation, new section 3205.2, would be in Subchapter 7. General Industry Safety Orders; directly after proposed section 3205.1. Multiple COVID-19 Infections and COVID-19 Outbreaks. The regulation would include the following specific requirements.

New Subsection 3205.2(a). Scope.

This proposed subsection (a)(1) establishes the application of the proposed regulation to a workplace covered by section 3205 if 20 or more COVID-19 cases in an exposed group visited the workplace during their high-risk exposure period within a 30-day period.

The subsection is necessary to establish the conditions in which employers will be required to comply with the proposed regulation and to take action to reduce the further spread of COVID-19 during a major outbreak at the workplace.

Proposed subsection (a)(2) sets forth the requirement to comply with this section until there are fewer than three COVID-19 cases detected in the exposed group for a 14-day period.

The subsection is necessary to ensure that all COVID-19 cases associated with a major COVID-19 outbreak are identified and specified actions are taken to reduce the spread of COVID-19 at the workplace, until the outbreak has been contained.

⁴¹ CDC; Ventilation in Buildings, Updated Mar. 23, 2021. Accessed on April 27, 2021. <https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html>

New Subsection 3205.2(b).

This proposed subsection requires the employer to continue to comply with all applicable provisions of section 3205.1, except that COVID-19 testing shall be made available to all employees, regardless of vaccination status, twice a week, or more frequently if recommended by the local health department.

The subsection is necessary to ensure that employers are aware they must continue to comply with all applicable provisions of section 3205.1 when they become subject to section 3205.2. In addition, when there is a major COVID-19 outbreak, the requirements are necessary to specify an increased testing frequency, and to test all employees, regardless of vaccination status, to prevent the spread of COVID-19 in the workplace. If there have been 20 cases among employees in 30 days, it is possible that the employer may have inadequate or incorrect information about who is fully vaccinated. Furthermore, responding to an outbreak of this size requires complete information, which can only be achieved by testing of all employees in the group.

With testing, employees who test positive and have symptoms can get care earlier. Contacts can be traced and self-isolation or quarantine can be started sooner to help stop the spread of the virus.

New Subsection 3205.2(c).

This proposed subsection clarifies that, in addition to the requirements of sections 3205 and 3205.1, employers must take specified actions.

Proposed subsection (c)(1) sets forth the requirements that the employer shall provide a respirator for voluntary use, in compliance with subsection 5144(c)(2), to employees in the exposed group. The employer must also determine the need for a respiratory protection program or changes to an existing respiratory protection program under section 5144 to address COVID-19 hazards.

Proposed subsection (c)(2) requires that under specified conditions, employees in the exposed group shall be separated from other persons by at least six feet.

Proposed subsection (c)(3) that under specified conditions, an employer shall install cleanable solid partitions that effectively reduce transmission between the employee and other persons.

Proposed subsection (c)(4) sets forth the requirement for the employer to evaluate whether to halt some or all operations at the workplace until COVID-19 hazards have been corrected.

Proposed subsection (c)(5) sets forth the requirement that the employer implement any other control measures deemed necessary by the Division through the Issuance of Order to Take Special Action, in accordance with title 8 section 332.3.

These subsections are necessary to establish additional measures employers will be required to reduce the further spread of COVID-19 when there is a major outbreak at the workplace.

New Section 3205.3. COVID-19 Prevention in Employer-Provided Housing.

This proposed emergency regulation, new section 3205.3 would be in Subchapter 7. General Industry Safety Orders; directly after section 3205.2. Major COVID-19 Outbreaks. The regulation would include the following specific requirements.

New Subsection 3205.3(a). Scope.

Proposed subsection (a) establishes the application of the proposed regulation to employer-provided housing.

The purpose of the definition is to inform the regulated community of the type of housing covered by the regulation.

The purpose of subsection (a)(1) is to exempt the applicability of the proposed regulation for the purpose of emergency response, where either (A) the employer is a government entity; or (B) the housing is provided temporarily by a private employer and is necessary to conduct the emergency response operations. This exemption recognizes that the imminent risks associated with an emergency response operation supersede the risks associated with not enforcing the proposed housing requirements in emergency-response operations.

The purpose of subsection (a)(2) is to exempt the applicability of subsections (c), (d), (e), (f), and (h) to employer-provided housing where the residents maintained a household together prior to residing in employer-provided housing, such as family members, when no other persons outside the household are present. This exemption is necessary as individuals who maintain a household together are assumed to spend time in close proximity to one another within their household.

The purpose of subsection (a)(3) is to exempt the applicability of the proposed regulation for employees covered by section 5199.

The purpose of subsection (a)(4) is to exempt employer-provided housing used exclusively to house COVID-19 cases, or where a housing unit houses one employee. This exemption is necessary because these two housing conditions do not present potential transmission of COVID-19 to their resident(s).

The purpose of subsection (a)(5) is to exempt the applicability of subsections (b) through (f) for housing in which all residents are fully vaccinated. This exemption recognizes that the risk of transmission of COVID-19 is lower among fully vaccinated persons than in unvaccinated persons.⁴²

These subsections are necessary to specify the types of employer-provided housing for which employers will be required to comply with the proposed regulation and take action to protect employees from exposure to COVID-19. Shared worker housing presents unique challenges for preventing and controlling the spread of COVID-19. Consistent application of the proposed regulatory requirements can help reduce the COVID-19 exposure risk among workers in shared housing.

New Subsection 3205.3(b). Assignment of housing units.

The purpose of the proposed subsection (b) is to require employers to reduce exposure to COVID-19 hazards, to the extent feasible, by assigning employee residents to distinct groups and ensuring that each group remains separate from other such groups during transportation and work. In addition, the subsection establishes a prioritization order for employers to use when assigning employees to shared housing units. The prioritization order is necessary to limit the number of persons coming in contact with employees residing in employer-provided housing, and is consistent with CDC recommendations for preventing and controlling the spread of COVID-19 in shared worker housing.⁴³

The purpose of proposed subsection (b)(1) in requiring employers to first prioritize shared-housing units by assigning residents who usually maintain a household together outside of work, such as family members, to the same housing unit without other persons is to limit the number of persons coming in contact with employees residing in employer-provided housing, and is necessary to reduce the spread of COVID-19.

The purpose of proposed subsection (b)(2) in requiring employers to next prioritize shared-housing units by assigning residents who work in the same crew or work together at the same

⁴² CDC; Interim Public Health Recommendations for Fully Vaccinated People, Updated October 15, 2021. Accessed on November 4, 2021. https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html#anchor_1617376520653

⁴³ CDC; COVID-19 Guidance for Shared or Congregate Housing, Updated December 31, 2020. Accessed on April 26, 2021. <https://www.cdc.gov/coronavirus/2019-ncov/community/shared-congregate-house/guidance-shared-congregate-housing.html>

workplace to the same housing unit without other persons is to limit the number of persons coming in contact with employees residing in employer-provided housing, and is necessary to reduce the spread of COVID-19.

The purpose of proposed subsection (b)(3) is to provide employers with an option to assign employees who do not usually maintain a common household, work crew, or workplace to the same housing unit in situations where no other housing alternatives are feasible. This subsection is necessary to ensure housing for all employees requiring shared housing.

The above subsections governing housing assignment and prioritization are necessary to reduce the spread of COVID-19 transmission in both the workplace and employer-provided housing by minimizing the number of different individuals who come into close contact with each other.⁴⁴

New Subsection 3205.3(c). Ventilation.

Proposed subsection (c) requires employers to take the actions described.

These actions are designed to maximize the quantity and supply of outdoor air and increase the filtration of indoor air to minimize resident employee exposure to COVID-19 hazards.

The purpose of proposed subsection (c) is to require employers to maximize the quantity and supply of outdoor air and increase the filtration efficiency to the highest level compatible with the existing ventilation system. Federal OSHA recommends that employers increase ventilation rates and/or the percentage of outdoor air (as close to 100% as possible) that circulates in the system.⁴⁵ If there is not a MERV-13 or higher filter in use, portable or mounted HEPA filtration units must be used, to the extent feasible, in all sleeping areas.

This subsection is necessary to reduce the indoor concentration of the virus, thereby reducing the risk of employee exposure to COVID-19 in each employer-provided housing unit. Evidence exists that increased ventilation and air filtration, when used along with the other control measures required in this section, such as face coverings and cleaning, can reduce risk from airborne transmission of COVID-19.⁴⁶ In shared sleeping areas, where people remain for hours without face coverings, filtration is especially valuable.

⁴⁴ See CDC. Agriculture Workers and Employers, Updated November 6, 2020. Accessed on November 6, 2020.

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.html>

⁴⁵ Federal OSHA. Additional Considerations for Workers Who Reside in Communal Living Arrangements. Accessed on November 6, 2020.

<https://www.osha.gov/SLTC/covid-19/workers-in-shared-housing.html>; OSHA. Publication: COVID-19 Guidance on Ventilation in the Workplace. Accessed on November 6, 2020. <https://www.osha.gov/sites/default/files/publications/OSHA4103.pdf>

⁴⁶ EPA. Ventilation and Coronavirus (COVID-19). Accessed on November 6, 2020. <https://www.epa.gov/coronavirus/ventilation-and-coronavirus-covid-19>; CDC. COVID-19 Employer Information for Office Buildings, Updated October 29, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html>

New Subsection 3205.3(d). Face coverings.

The purpose of this proposed subsection is to require employers to provide face coverings to all residents and provide information to residents on when they should be used in accordance with state or local health officer orders or guidance.

The subsection is necessary, as the use of face coverings has been demonstrated to reduce the transmission of COVID-19.⁴⁷

New Subsection 3205.3(e). Cleaning and disinfecting.

This proposed subsection requires employers to implement cleaning and disinfecting procedures in their employer-provided shared housing units. Transmission of COVID-19 may occur after a resident touches a contaminated surface, then touches their eyes, nose, or mouth.

Proposed subsection (e)(1) requires employers to ensure shared housing units, kitchens, bathrooms, and indoor common areas are effectively cleaned to prevent the spread of COVID-19 and disinfected after a COVID-19 case was present during the high-risk exposure period, if another resident will be there within 24 hours of the COVID-19 case. Such cleaning and disinfecting shall be done in a manner that protects the privacy of residents.

Proposed subsection (e)(2) requires employers to instruct residents not to share unwashed dishes, drinking glasses, cups, eating utensils, and similar items.

These subsections are necessary to reduce employee exposure to COVID-19, as potentially infectious material may be present on surfaces when a COVID-19 case was recently present.⁴⁸

New Subsection 3205.3(f). Screening.

This proposed subsection requires employers to encourage residents to report COVID-19 symptoms.

⁴⁷ CDC. CDC Newsroom Release: CDC calls on Americans to wear masks to prevent COVID-19 spread, dated July 14, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html>; Lindsley WG, Blachere FM, Law BF, Beezhold DH, Noti JD. Efficacy of face masks, neck gaiters and face shields for reducing the expulsion of simulated cough-generated aerosols. Health Effects Laboratory Division, National Institute for Occupational Safety and Health, CDC, October 7, 2020. <https://www.medrxiv.org/content/10.1101/2020.10.05.20207241v1.full.pdf>

⁴⁸ CDC. Agriculture Workers and Employers, Updated November 6, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.html>; CDC; Considerations for Restaurants and Bars, updated October 29, 2020. Accessed on October 15, 2020 and November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html>

This subsection is necessary, as it is important for employers to know which residents are experiencing potential symptoms of COVID-19 so the employer may effectively respond to such symptoms to prevent or reduce the risk of transmission of COVID-19 in the workplace and employer-provided shared housing units.

New Subsection 3205.3(g). COVID-19 testing.

This proposed subsection requires employers to establish, implement and maintain effective policies and procedures for COVID-19 testing of residents, and communicate these to the residents. In addition, subsection (g) requires employers to test all residents of employer-provided housing in which there were three or more COVID-19 cases in 14 days.

The subsection is necessary to minimize the transmission of COVID-19 in employer-provided housing because diagnostic testing identifies which residents are infected and in need of isolation to prevent further spread to employees and residents.

New Subsection 3205.3(h). COVID-19 cases and close contacts.

Proposed subsection (h) requires that employers ensure that COVID-19 cases are isolated from all residents who are not COVID-19 cases, and that persons who had a close contact are effectively quarantined from all other residents in the employer-provided shared housing unit.

Proposed subsection (h)(1) requires employers to effectively quarantine residents who had a close contact from all other residents. Subsection (h)(1) defines effective quarantine to include providing residents who had a close contact with a private bathroom and sleeping area. An exception to this requirement is provided, under specified conditions, for those who previously were COVID-19 cases.

This subsection is necessary to limit transmission of COVID-19 in the workplace and employer-provided housing. Toward this end, it is critically important that residents who had a close contact quarantine to further prevent the spread to other residents. The exemption recognizes that some people, such as those who are asymptomatic and were COVID-19 cases in the past 90 days, are less likely to transmit the virus.

Proposed subsection (h)(2) requires employers to effectively isolate COVID-19 cases from all residents who are not COVID-19 cases. Subsection (h)(2) defines effective isolation to include housing COVID-19 cases only with other COVID-19 cases, and providing COVID-19 case residents with a sleeping area and bathroom that is not shared by non-COVID-19 case residents.

This subsection is necessary to limit transmission of COVID-19 in the workplace and employer-provided housing. Toward this end, it is critically important that residents who are COVID-19 cases or who had a close contact isolate to further prevent the spread to other residents.

Proposed subsection (h)(3) requires employers to keep confidential personal identifying information regarding COVID-19 cases and persons with COVID-19 symptoms in accordance with subsection 3205(c)(3)(C).

This subsection is necessary to ensure compliance with state and federal privacy laws.

Proposed subsection (h)(4) requires employers to end isolation in accordance with subsections 3205(c)(9) and (c)(10) and any applicable local or state health officer orders.

This subsection is necessary to limit transmission of COVID-19 in the workplace and employer-provided housing. Toward this end, it is critically important that residents who are COVID-19 cases or who had exposure to COVID-19 do not expose other residents.

New Section 3205.4. COVID-19 Prevention in Employer-Provided Transportation.

This proposed emergency regulation, new section 3205.4 would be in Subchapter 7. General Industry Safety Orders, directly after section 3205.3. COVID-19 Prevention in Employer-Provided Housing.

The regulation would include the following specific requirements.

New Subsection 3205.4(a). Scope.

Proposed subsection (a) establishes the application of the proposed regulation to employer-provided motor vehicle transportation of an employee during the course and scope of employment.

The purpose of this subsection is to inform the regulated community of the type of employer-provided transportation covered by the regulation.

Proposed subsection (a)(1) exempts the applicability of the proposed regulation in employer-provided transportation where the driver and all passengers are from the same household outside of work, such as family members, or when a driver is alone in a vehicle.

This exemption is necessary as individuals who maintain a household together are assumed to spend time in close proximity to one another within their household.

Proposed subsection (a)(2) exempts the applicability of the proposed regulation in employer-provided transportation when necessary for emergency response, including firefighting, rescue, and evacuation, and support activities directly aiding response such as utilities, communications, and medical operations.

This exemption is necessary as it recognizes that the imminent risks associated with an emergency response operation supersede the risks associated with not enforcing the proposed transportation requirements in transporting employees for emergency response.

Proposed subsection (a)(3) exempts the applicability of the proposed regulation for employees covered by section 5199.

This exemption is necessary to clarify that the requirements of section 5199, rather than this section, apply to employees covered by section 5199.

Proposed subsection (a)(4) exempts the applicability of the proposed regulation for vehicles in which all persons are fully vaccinated.

This exemption recognizes that the risk of transmission of COVID-19 is low among fully vaccinated persons.

Proposed subsection (a)(5) exempts public transportation.

This exemption is necessary in recognition that public transit is dissimilar to other forms of employer-provided transportation. Employees who are working on public transportation will still be covered by section 3205 and will therefore not lack COVID-19 protections.

These subsections are necessary to specify the types of employer-provided transportation for which employers will be required to comply with the proposed regulation.

New Subsection 3205.4(b). Assignment of transportation.

The purpose of the proposed subsection (b) is to require, to the extent feasible, employers to reduce exposure to COVID-19 hazards by assigning employees sharing vehicles to distinct groups and ensuring that each group remains separate from other such groups during transportation, at work and in employer-provided housing. In addition, the subsection

establishes a prioritization order for employers to use when assigning employees to shared transportation.

The assignment and prioritization order in this subsection is necessary to limit the number of persons coming in contact with employees in shared transportation and is consistent with CDC guidance for preventing and controlling the spread of COVID-19 in shared vehicles.

Proposed subsection (b)(1) requires employers to first prioritize shared-transportation by assigning employees residing in the same housing unit to the same shared vehicle.

This subsection is necessary to reduce the number of persons coming in contact with employees, and thus, reduce employee exposure to COVID-19. The proposed prioritization order is consistent with CDC guidance for preventing and controlling the spread of COVID-19 in employer-provided transportation.⁴⁹

Proposed subsection (b)(2) requires employers to next prioritize shared transportation by assigning employees who work in the same crew or workplace to the same shared vehicle.

This subsection is necessary to reduce the number of persons coming in contact with employees, and thus, reduce employee exposure to COVID-19. The proposed prioritization order is consistent with CDC recommendations for preventing and controlling the spread of COVID-19 in employer-provided transportation.⁵⁰

Proposed subsection (b)(3) requires employers to assign employees who do not share the same household, work crew, or workplace to the same shared vehicle only when no other transportation alternatives are feasible.

This subsection is necessary to ensure employees receive safe transportation to and from work when no other alternatives are available.

The above subsections are necessary to reduce the spread of COVID-19 transmission in the workplace by minimizing the number of different individuals who come into close contact with each other while using employer-provided transportation.⁵¹

⁴⁹ CDC. Agriculture Workers and Employers, Updated November 6, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.html>

⁵⁰ CDC; Agriculture Workers and Employers, Interim Guidance from CDC and the U.S. Department of Labor, Updated February 2, 2021. Accessed on April 26, 2021. https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.html#anchor_1590853438023

⁵¹ CDC. Agriculture Workers and Employers, Updated November 6, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.html>

New Subsection 3205.4(c). Face coverings and respirators.

Proposed subsection (c) requires employers to take the actions described in subsections (c)(1), (c)(2) and (c)(3).

These actions are necessary to ensure that employees use face coverings as specified while waiting for transportation, and in employer-provided shared transportation, to minimize employee exposure to COVID-19 hazards.

Proposed subsection (c)(1) requires employers to ensure that the face covering requirements of subsection 3205(c)(6), if applicable, are followed for employees waiting for transportation.

This subsection is necessary to minimize employee exposure to COVID-19 while waiting for transportation through the use of face coverings, when required.

Proposed subsection (c)(2) requires employers to ensure that all employees in the vehicle are provided with a face covering, which must be worn unless an exception under subsection 3205(c)(6)(D) applies.

This subsection is necessary to minimize employee exposure to COVID-19 in employer-provided transportation.

Proposed subsection (c)(3) requires employers to ensure that upon request, employers shall provide respirators for voluntary use in compliance with subsection 5144(c)(2) to all employees in the vehicle who are not fully vaccinated.

The subsection is necessary, as being in a vehicle with another person represents a condition in which airborne transmission of COVID-19 may occur, and that wearing a respirator will help to protect the wearer from such transmission.

New Subsection 3205.4(d). Screening.

This proposed subsection requires employers to develop, implement, and maintain effective procedures for screening and excluding drivers and riders with COVID-19 symptoms prior to boarding shared transportation.

This subsection is necessary, as it is important for employers to screen drivers and riders of employer-provided transportation for potential symptoms of COVID-19, and effectively respond to those symptoms to prevent or reduce the risk of transmission of COVID-19 in the workplace.

New Subsection 3205.4(e). Cleaning and disinfecting.

This proposed subsection requires employers to implement cleaning and disinfecting procedures in employer-provided transportation. Transmission of COVID-19 may occur after an employee touches a contaminated surface, then touches their eyes, nose, or mouth.

Proposed subsection (e)(1) requires employers to ensure that all high-contact surfaces (door handles, seatbelt buckles, armrests, etc.) used by passengers are cleaned to prevent the spread of COVID-19 and are disinfected after use by a COVID-19 case during the high-risk exposure period, if the surface will be used by another employee within 24 hours of use by the COVID-19 case.

Proposed subsection (e)(2) requires employers to ensure that all high-contact surfaces used by drivers, such as the steering wheel, armrests, seatbelt buckles, door handles and shifter, are cleaned to prevent the spread of COVID-19 between different drivers, and are disinfected after use by a COVID-19 case during the high-risk exposure period, if the surface will be used by another employee within 24 hours of use by the COVID-19 case.

Proposed subsection (e)(3) requires employers to provide sanitizing materials and ensure that they are kept in adequate supply.

These subsections are necessary to reduce employee exposure to COVID-19, as potentially infectious material may be present on surfaces that have not been cleaned, or cleaned and disinfected when a COVID-19 case was present in the past 24 hours.⁵²

New Subsection 3205.4(f). Ventilation.

This proposed subsection requires employers to ensure, that when transporting employees, the vehicle windows are kept open, and the ventilation system is set to maximize outdoor air rather than to recirculate air.

Proposed subsection (f)(1) exempts the applicability of proposed subsection (f) in employer-provided transportation when the vehicle has functioning air conditioning in use and excessive outdoor heat would create a hazard to employees.

Proposed subsection (f)(2) exempts the applicability of proposed subsection (f) in employer-provided transportation when the vehicle has functioning heating in use and excessive outdoor cold would create a hazard to employees.

⁵² CDC; Cleaning and Disinfection for Non-emergency Transport Vehicles; Accessed on October 15, 2020.
<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/disinfecting-transport-vehicles.html>

Proposed subsection (f)(3) exempts the applicability of the proposed regulation in employer-provided transportation when protection is needed from weather conditions, such as rain or snow.

Proposed subsection (f)(4) exempts the applicability of the proposed regulation in employer-provided transportation when the vehicle has a cabin air filter in use and the United States EPA Air Quality Index for any pollutant is greater than 100.

These subsections are necessary to reduce employee exposure to COVID-19, as increased ventilation has been demonstrated to reduce the concentration of potentially infectious material in the indoor air.⁵³ The exemptions are necessary to relieve an employer from compliance with subsection (f) when weather and/or air quality hazards pose a greater and immediate risk to employee health than the transmission of COVID-19.⁵⁴

New Subsection 3205.4(g). Hand hygiene.

This proposed subsection requires employers to provide hand sanitizer without methyl alcohol in each vehicle and ensure that all drivers and riders sanitize their hands before entering and exiting the vehicle.

This subsection is necessary to protect employees from COVID-19 hazards by providing drivers and riders with hand sanitizer and requiring them to sanitize their hands before entering and exiting shared vehicles. Hand hygiene has been demonstrated to reduce the transmission of COVID-19 and is an important part of the United States response to the international emergence of COVID-19.⁵⁵

New Subsection 3205.4(h).

The proposed subsection states that section 3205.4 will take precedence when in conflict with section 3205.

This is necessary for clarity, to ensure that employers and employees that fall within the scope of both sections know which provisions take precedence.

⁵³ U.S. EPA. Ventilation and Coronavirus (COVID-19). Accessed on November 6, 2020. <https://www.epa.gov/coronavirus/ventilation-and-coronavirus-covid-19>; CDC. Protect Yourself When Using Transportation, Updated October 21, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/using-transportation.html>

⁵⁴ CDC. COVID-19 Considerations for Cleaner Air Shelters and Cleaner Air Spaces to Protect the Public from Wildfire Smoke, Updated May 1, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/php/cleaner-air-shelters.html>; CDC. Employer Information for Heat Stress Prevention during the COVID-19 Pandemic, Updated August 26, 2020; Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/heat-stress-employers.html>

⁵⁵ CDC. Hand Hygiene Recommendations, Updated May 17, 2020; Accessed on October 15, 2020 and November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/hcp/hand-hygiene.html>

Policy Statement and Anticipated Benefits

The Board is proposing these emergency regulations, title 8, new sections 3205 through 3205.4, to preserve worker health and safety and to clarify employers' existing obligations, making compliance easier and more straightforward.

Emergency rulemaking is required in this matter to address the immediate potential threat to employees from exposure to COVID-19. Infection with COVID-19 may result in a serious illness that can include difficulty breathing, pneumonia, and hospitalization. In some cases, the disease can progress, and organ failure and death may result. COVID-19 symptoms can sometimes persist for months. The virus can damage the lungs, heart, and brain, which increases the risk of long-term health problems. Regular rulemaking, which requires a fiscal analysis and approval from the Department of Finance, cannot be completed in time to address the risks to workers presented by the current pandemic.

As COVID-19 continues to infect workers, the proposed regulation will reduce the number of COVID-19 infections in the workplace. This in turn will reduce the financial costs caused by medical care and lost workdays, costs that may be borne by employees, their families, employers, insurers, and public benefits programs.

Thus, the benefits of the proposed regulation are two-fold:

- 1) Monetary benefits, including lowered costs to employers, insurers, employees, their families and public benefits programs; and
- 2) Non-monetary benefits, including a reduction in the pain and suffering associated with COVID-19 illnesses and deaths for those affected, directly or indirectly, by COVID-19.

These emergency regulations are also proposed in response to the Board's September 17, 2020, Petition Decision to partially grant Petition 583, to protect employees from exposure to COVID-19.

Current regulations are not sufficiently specific as to what employers are required to do during the COVID-19 pandemic. This results in confusion on behalf of both employers and employees, leaving many employees unprotected.

This confusion also causes the Division to expend staff resources to respond to questions to be answered by title 8, new sections 3205 through 3205.4.

Controlling the spread of COVID-19 is a challenge. A person who is infected with COVID-19 may have no obvious symptoms, or no symptoms at all, yet still be infectious to others.⁵⁶ Therefore, the proposed regulations require, in some cases, employers to implement multiple methods of protection from exposure to COVID-19 at its workplace. These include identifying and controlling COVID-19 hazards in the workplace; investigating and responding to COVID-19 exposures and illnesses; training its employees; ensuring physical distancing and the use of face coverings; implementing engineering and administrative controls; providing and ensuring the use of PPE; and excluding COVID-19 cases from the workplace.

Over the course of the pandemic, many public health jurisdictions required that face coverings be worn when it is not possible to maintain a distance of at least six feet from another person. Evidence exists, however, that infectious virus particles can travel more than six feet through the air.⁵⁷ Further, there is an increased likelihood of transmission of COVID-19 in indoor spaces compared to outdoor spaces.⁵⁸

The emergency regulations, COVID-19 Prevention, title 8, new sections 3205 through 3205.4, will provide clear and specific requirements to employers so that they may better protect employees from the harmful effects of COVID-19.

Evaluation of Inconsistency/Incompatibility with Existing State Regulations

Under California Labor Code 142.3, the Occupational Safety and Health Standards Board is the only agency in the state authorized to adopt occupational safety and health standards. The Board has reviewed existing regulations on this topic and has concluded that the proposed regulations are not inconsistent or incompatible with existing state regulations.

DOCUMENTS INCORPORATED BY REFERENCE

Pursuant to California Code of Regulations, title 1, section 52(c), the Board hereby incorporates by reference the rulemaking record of OAL File Nos. 2020-1120-01E and 2021-0617-03EFP.

⁵⁶ Furukawa NW, Brooks JT, Sobel J. Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic. *Emerging Infectious Diseases*. July, 2020. <https://doi.org/10.3201/eid2607.201595>

⁵⁷ Setti L, Passarini F, De Gennaro G, et al. Airborne Transmission Route of COVID-19: Why 2 Meters/6 Feet of Inter-Personal Distance Could Not Be Enough. *Int J Environ Res Public Health*. 2020;17(8):2932. April 23, 2020. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7215485/pdf/ijerph-17-02932.pdf>

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TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES,
REPORTS, OR DOCUMENTS RELIED UPON

For the following documents, as well as all documents cited in footnotes, please be aware that links may lead to websites and/or documents that have been revised, altered, or removed since they were originally accessed. The original documents are available to view at the Standards Board's office. See instructions at the end of this section.

The Board has relied upon the following documents as part of this emergency action:

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6. Division of Occupational Safety and Health's Evaluation of Petition 583; July 30, 2020. <https://www.dir.ca.gov/oshsb/documents/petition-583-dosheval.pdf>
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9. Wei WE, Li Z, Chiew CJ, Yong SE, Toh MP, VJ. L. Presymptomatic Transmission of SARS-CoV-2 — Singapore, January 23–March 16, 2020. ePub: April 1, 2020. MMWRMorb Mortal Wkly Rep. 2020. <http://dx.doi.org/10.15585/mmwr.mm6914e1>

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These documents are available for review BY APPOINTMENT Monday through Friday, from 8:00 a.m. to 4:30 p.m., at the Standards Board's office at 2520 Venture Oaks Way, Suite 350, Sacramento, California 95833. Appointments can be scheduled via email at oshsb@dir.ca.gov or by calling (916) 274-5721.

MANDATE ON LOCAL AGENCIES OR SCHOOL DISTRICTS

There is no local mandate imposed by these proposed regulations. The Board has determined that proposed sections 3205 through 3205.4 do not impose a mandate on local agencies or school districts requiring reimbursement by the State pursuant to Part 7 of Division 4 of the Government Code (commencing with section 17500).

NON-DUPLICATION

Portions of the proposed regulations repeat or rephrase, in whole or part, state statutes and regulations. This duplication is necessary so that employers and employees will be able to review all provisions specific to prevention of COVID-19 in the workplace within the same portion of title 8, making compliance and enforcement easier.

COST ESTIMATES OF PROPOSED ACTION

Costs or Savings to State Agencies

The majority of the requirements in the proposal are consistent with guidance and orders from the CDPH and are thus already followed by state employers. For all parts of this analysis, the Board has used the average wage for the first quarter of 2020, the most recent data available at the time of the fiscal analysis. According to EDD, this wage is \$30.22 per hour.⁵⁹

Subsection 3205(c) [Written COVID-19 Prevention Program]

Under existing section 3203, employers in California are already required to have a written and effective IIPP that expressly requires, among other things, a system for ensuring that employees comply with safe and healthy work practices; a system for communicating with employees on matters relating to occupational safety and health; procedures for identifying and evaluating

⁵⁹ EDD, Occupational Employment (May 2019) & Wage (2020 1st Quarter) Data, released June 2020, available at <https://www.labormarketinfo.edd.ca.gov/data/oes-employment-and-wages.html#OES> (State of California 2020 1st Quarter).

workplace hazards including scheduled periodic inspections; a procedure to investigate and respond to occupational injury or occupational illness; methods and/or procedures for correcting unsafe or unhealthy conditions; and training and instruction.

All these requirements already apply to the hazard of COVID-19; indeed, the Division has issued COVID-19-related citations to employers based on section 3203. The Division has also issued guidance and done outreach to warn employers that COVID-19 is a workplace hazard under section 3203.

Proposed section 3205(c) provides information about how to apply section 3203 in the specific context of COVID-19. Much of that subsection makes explicit actions that are already required by existing section 3203, such as creating COVID-19 prevention policies, and/or includes requirements which are already mandated by local government entities. Additional quantified and unquantified costs have been identified as follows.

Reviewing and updating written COVID-19 Prevention Program for the elements below: The Board believes that all state agencies already have comprehensive written COVID-19 prevention programs, which are unlikely to need major revisions as a result of this regulation. Executive Orders issued by Governor Newsom order all residents to follow the guidance of state and local health officials. The proposed section 3205 corresponds to public health orders and guidance, thus it should require no alteration of state entity employers' written policies, relative to those documents or to the existing section 3203 and other existing regulations.⁶⁰

Nonetheless, state employers will likely review their plans to ensure compliance with this regulation and to determine whether to modify some policies or procedures relative to the June 17, 2021 initial readoption of the emergency regulations enacted Nov. 30, 2020, but this cost cannot be quantified. The speed of review will vary significantly depending on the size of the state workforce covered by a particular program, the nature of the state entity's operations, and what units within the entity (if any) have their own distinct policies and plans. To provide some idea of the number of establishments involved, in the first quarter of 2020 there were 13,607 state entity establishments, according to EDD.⁶¹ State entities may revise written polices to reflect the policies needed during the circulation of the Delta variant in mid to late 2021, in accordance with CDPH orders and guidance and consistent with the proposed regulations.

⁶⁰ Executive Order N-25-20 (March 4, 2020) <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.12.20-EO-N-25-20-COVID-19.pdf>, and Executive Order N-33-20 (March 19, 2020) <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>.

⁶¹ EDD; Quarterly Census of Employment and Wages, California – Statewide, 2020 – First Quarter, accessed 10/13/20 from <https://www.labormarketinfo.edd.ca.gov/qcew/qcew-select.asp>

Subsections 3205(c)(1) [System for communicating] and (c)(2) [Identification and evaluation of COVID-19 hazards]

The proposal requires employers to allow employees and their authorized representatives to participate in the identification and evaluation of COVID-19 hazards. The particular hazard of an infectious virus requires employee participation in order to be addressed effectively. This should not be a significant issue for state employers; they have unionized workplaces and therefore already have methods of allowing employee participation in safety and health matters.

The remaining requirements in these subsections should already be provided by the employer under existing section 3203(a)(3) and (a)(4), including the most time-intensive tasks such as the worksite specific evaluation of COVID-19 hazards and updating written policies and procedures. It is not possible to evaluate COVID-19 hazards, as required by section 3203, without doing so in a manner specific to the employer's operations at the worksite, after reviewing government-provided information about the virus. Similarly, the items in the proposed 3205(c)(1) are necessary in order to have an effective "system for communicating with employees," about COVID-19 as required by existing section 3203(a)(3). A virus, unlike some safety hazards, requires communication about matters beyond the existence of the hazard and how to avoid it—for instance, communication would not be "effective" if employees at particular risk of severe illnesses were unaware of what they should do, or if workers did not know how to get tested.

State entities were already reviewing public health orders and guidance in compliance with "California's Plan for Reducing COVID-19 and Adjusting Permitted Sector Activities to Keep Californians Healthy and Safe," also titled the "Blueprint for a Safer Economy."⁶² This review will continue as the state has moved beyond the Blueprint into new phases of responding to the COVID-19 public health crisis.

Employers are required to *evaluate* the need for HEPA filtration units and how to maximize both outdoor air and filtration efficiency, but the proposed section 3205 does not require employers to update any ventilation systems or purchase filtration units. This minimal evaluation is already required by the existing section 3203.

As for screening, this regulation allows employers to ask employees to evaluate their own symptoms before reporting to work, which should have minimal cost. To the Board's knowledge, this is already being performed by state agencies.

⁶² See Statewide Public Health Officer Order, August 28, 2020, available at https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/8-28-20_Order-Plan-Reducing-COVID19-Adjusting-Permitted-Sectors-Signed.pdf.

Subsection 3205(c)(3) [Investigating and responding to COVID-19 cases in the workplace] The CDPH data from October 14, 2020 showed that there were 675,889 confirmed COVID-19 cases among Californians over 18 and under 65.⁶³ This was the best available data at the time of the fiscal analysis. These numbers may change over time, but are not likely to result in significant changes to this fiscal analysis. Although people outside this age range certainly work, the CDPH category for people “65+” has not been included because the high proportion of retirees within that group makes it less representative of the working population. DOF population estimates for 2020 show 24,854,968 residents in the selected age group.⁶⁴ Dividing cases by population, that gives a confirmed COVID-19 case rate of about 0.02719.

Please note that past infections are not necessarily a reflection of future infections. Indeed, the Board expects that the infection rate in the second half of 2021 will be lower than 2020 or early 2021, in large part because of the availability of COVID-19 vaccines. Transmission rates have dropped significantly relative to the peak of the pandemic in California. However, given that the Board cannot predict the course of the virus, this provides a basis for estimating COVID-19 cases among employees.

According to EDD data, in the first quarter of 2020 (the last quarter available at the time of the fiscal analysis), there were 476,242 employees working in state government in California.⁶⁵ The following state employees were likely not covered in the proposal:

State Government Employees Not Covered by Proposal

NAICS	Industry	Employees, Q1 2020	Assumed % not covered by proposal	Reasoning	Employees not covered
54	Professional and Technical Services	4,229	50%	Remote or solowork during pandemic	2,115
62	Healthcare and Social Service ⁶⁶	65,392	80%	Covered by 5199	52,314

⁶³ CDPH “California COVID-19 By the Numbers,” October 15, 2020, numbers as of October 14, 2020, accessed from <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx#COVID-19%20by%20the%20Numbers> on October 15, 2020.

⁶⁴ DOF, “Total Estimated and Projected Population of California by Age: July 1, 2010 to July 1, 2060 in 1-year Increments,” available at <http://www.dof.ca.gov/forecasting/demographics/Projections/>, accessed Oct. 2020.

⁶⁵ EDD projections for 2021, used elsewhere in this analysis, could not be used for this purpose or for state cost estimates, because they did not include sufficient detail about public employment. EDD Quarterly Census of Employment and Wages, California – Statewide, 2020 – First Quarter, accessed 10/13/20 from <https://www.labormarketinfo.edd.ca.gov/qcew/cew-select.asp>. The Legislative Analyst’s Office (LAO) estimated in December 2020 that about 7.6 million California workers (40%) are able to work remotely; this may have changed since that time. Legislative Analyst’s Office (LAO). COVID-19 and the Labor Market: Who are California’s Frontline and Remote Workers? Dec 8, 2020. Available at <https://lao.ca.gov/LAOEconTax/article/Detail/593>. (pp. 7-8 of full report).

⁶⁶ Of these, 56,428 work in hospitals.

921	Executive, Legislative, & Gen Government	34,590	15%	Remote or solowork during pandemic	5,189
922	Justice, Public Order, and Safety Activities ⁶⁷	71,780	70%	Covered by 5199	50,246
923	Administration of Human Resource Program	33,876	20%	Remote or solowork during pandemic	6,775
925	Community and Housing Program Admin	962	10%	Covered by 5199	96
926	Administration of Economic Programs	43,250	20%	Remote or solowork during pandemic	8,650
				TOTAL	125,385

Subtracting the total number of state government employees not covered by the proposal, 125,385, from a total of 476,242 state government employees shows that **350,857 state government employees are covered by the proposal**. Applying the estimated COVID-19 rate for persons 18-64 of 0.02719 (as described above), this provides an estimate of 9,540 cases.

The existing section 3203 already requires effective procedures to investigate workplace illnesses. In the case of COVID-19, this necessarily requires employers to determine the infected person's exposure to other people at the worksite, alert all potentially exposed persons so that they can take the necessary precautions, and investigate whether any workplace condition contributed to the illness. Without these steps, an investigation will not be adequate because it will not aid the employer in its efforts to arrest the spread of the virus.

With regard to the notice requirements for people exposed to COVID-19, in addition to requirements under existing section 3203 and local government requirements, starting January 1, 2021, Labor Code 6409.6 required employers to give written notice of COVID-19 cases to employees, including employees of subcontractors, those employees' exclusive representatives (i.e. unions), and other employers onsite. The proposed regulations largely conform to these statutory requirements and therefore do not impose any additional costs, except that the proposed regulation requires employers to verbally alert employees, as soon as practicable, if the employer has reason to believe that a worker did not receive the written notice or has limited literacy in the language of the notice. Given that most state employees

⁶⁷ Of these, 48,805 work in correctional institutions.

have employer-provided email accounts, and email service is expressly permitted, verbal notice is expected to be extremely rare and to impose either no cost or a very minimal one.

Furthermore, a statewide order of the Public Health Officer required counties to adhere to “California’s Plan for Reducing COVID-19 and Adjusting Permitted Sector Activities to Keep Californians Healthy and Safe,” also titled the “Blueprint for a Safer Economy, which includes the CDPH document “Responding to COVID-19 in the Workplace for Employers.”⁶⁸ Although additional and updated guidance has also been issued by CDPH, “Responding to COVID-19 in the Workplace” remains in place as of this writing. That document requires “contract tracing...of close contacts of confirmed cases,” notification to workers who may have been exposed, and maintenance of confidentiality for employees with known or suspected COVID-19 cases.

Proposed subsection (c)(3) primarily describes how to perform this investigation and contact tracing effectively, rather than add new requirements—for example, an effective investigation cannot be performed without determining when/where the COVID-19 case was present and which individuals may have been exposed. However, the Board recognizes that employers may become more systematic in their investigations as a result of the specificity of the proposed subsection, which will slow down their investigations slightly to ensure that all of the activities of the COVID-19 case have been considered, all potentially exposed persons have been given notice, etc. To account for the specificity of 3205(c)(3), the Board estimates that **each confirmed case will require an additional .5 work hours** under the proposal. This does not mean that each investigation will require only half an hour, rather the proposed subsection may increase the level of detail during investigations that should already be occurring under existing law.

This subsection also requires employers to offer testing to COVID-19 exposed employees. This should already be covered by public employees’ workers’ compensation insurance or their health insurance. Nonetheless, the Division requested information about testing costs from the CDPH Occupational Health Branch, in October 2020. The Division was told that, based on information from the CDPH Testing Task Force, the cost of a PCR testing for SARS-CoV-2 can range from \$80 - \$250 per person, depending on the test. The cost of antigen testing can range from \$5 - \$40 per person. The proposed regulation does not specify PCR or antigen testing. COVID-19 tests are now widely available throughout California at both public and private testing sites, and the per-unit price may therefore be lower throughout the remainder of 2021 and 2022 than it was in October 2020.

To the extent that a state agency incurs some part of these costs, that cannot be quantified. Even if the above estimate of future infections turned out to be correct, there is no way to

⁶⁸ Statewide Public Health Officer Order, August 28, 2020, available at https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/8-28-20_Order-Plan-Reducing-COVID19-Adjusting-Permitted-Sectors-Signed.pdf. “Responding to COVID-19 in the Workplace for Employers,” released June 16, 2020, revised September 18, 2020, available at <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Workplace-Outbreak-Employer-Guidance.aspx>.

estimate the number of individuals who might be exposed, as defined in this proposal, for every given confirmed case. A COVID-19 case will generate few exposures if the infected person is able to practice physical distancing at work. But if the infected person regularly spends 15 minutes or more within six feet of a large number of different people, perhaps because they work in a small space with many other individuals or travel to multiple workstations where physical distancing is impossible, then more potential exposures will result. The Board is unaware of any estimate of how many close contacts of this kind occur to the average state worker or workers in general, since the number will vary by workplace and may even change from day to day. Falling transmission rates throughout the state during the fall of 2021, however, suggest that the number of occupational close contacts is likely to decrease over time.

Subsection 3205(c)(4) [Correction of COVID-19 hazards]

Correction of unsafe or unhealthy conditions is already expressly required by existing section 3203(a)(6).

Subsection 3205(c)(5) [Training and instruction]

Employers are already required to provide training and instruction regarding COVID-19 hazards and prevention under section 3203(a)(7), and the specifics listed in the proposed subsection can be incorporated into employers' existing COVID-19 related training. The Board believes that most employers are already implementing all or most of the training requirements, such as handwashing and face covering information. Because employers had to have specific benefits information on hand in order to meet the requirements of Labor Code section 6409.6(a)(3) on January 1, 2021, and must provide that information to employees as specified in that section, compiling that information will not incur any additional costs for the purposes of this regulation.

This proposed subsection requires specific training when an employer provides respirators for voluntary use under this section through section 3205.4. Although this will impose a cost, it cannot be estimated because the proposed sections require, in various provisions, that such respirators to be provided to unvaccinated employees under specified conditions. The number of vaccinated employees is increasing, and the Board expects state employees to be especially likely to be vaccinated. It is therefore impossible to estimate the number of employees or workplaces where this training will actually be required.

Subsections 3205(c)(6) [Face coverings]

Based on its COVID-19 inspections and related research, the Board believes that the proposal will be consistent with state and local requirements on or before the effective date. For the majority of the pandemic, face coverings were required by state and local orders, so employers were providing face coverings to their workers before this proposal.

The CDPH has issued guidance, effective on June 15, 2021 and updated July 28, 2021,⁶⁹ to accommodate the fact that a growing number of Californians are vaccinated for COVID-19. Under most circumstances, the proposed regulation does not require face coverings for employees working outside, or for vaccinated employees. It is unknown how many employees will require face coverings, but the numbers will decrease over time, as more employees become vaccinated.

To take advantage of the provisions for vaccinated employees, here and in other portions of the proposed regulations, employers will need to document their employees' vaccination status. Although gathering this information in order to benefit from the provisions is not mandatory, the Board expects that many employers will choose to do so. The Board is not certain how many state employers would seek such documentation, even without this proposal, either to comply with other state and local requirements, or based on their own internal evaluation of COVID-19 hazards.

If employers determine that they need documentation of vaccination status, then as the cost of documentation rises, the cost of providing face coverings (or respirators such as N95s; see below) will decrease. The Board expects that documenting vaccination status will have a significantly lower per-employee cost than providing face coverings to employees who are not fully vaccinated and who are working indoors or in vehicles.

Employees may request face coverings even when not required by this proposal. However, the Board expects that the majority of costs associated with this subsection will be incurred on behalf of employees for whom face coverings are mandated.

3205(c)(7) [Other engineering controls, administrative controls, and personal protective equipment]

The Board believes that state employers are currently in compliance with the handwashing and cleaning/disinfection protocols required here.

This subsection requires employers to maximize the quantity of outside air unless it creates a hazard or is above a certain pollution level. This essentially means keeping windows open more often and/or continuing to use existing ventilation systems, so the Board has not estimated additional costs.

For the requirement related to aerosolizing activities, the majority of such activities are covered by the existing section 5199 and therefore exempt from proposed section 3205. This provision mainly applies to dental offices that meet the requirements necessary to be exempt

⁶⁹ CDPH; Guidance for the Use of Face Coverings; updated June 9, 2021. Accessed June 9, 2021.
https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Guidance-for-Face-Coverings_06-18-2020.pdf
Guidance for the Use of Face Coverings, Face Covering Guidance issued on July 28, 2021, accessed December 3, 2021.
<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/guidance-for-face-coverings.aspx>

from 5199. Such offices are already required to provide the specified respiratory protection under existing section 5144, but this subsection allows all COVID-19 requirements to be located in the same part of title 8.

Employers are required, upon request, to provide respirators for voluntary use to employees who are not fully vaccinated, when they are working indoors or in vehicles with more than one person. In late 2020, to evaluate the cost of a new regulation requiring respirators in certain wildfire smoke conditions (title 8, section 5141.1), the Division conducted research and estimated the average cost of a disposable N95 respirators to be \$0.95 for public employers in 2021, and \$0.81 thereafter. For all voluntary respirators provided under this proposed section through proposed section 3205.4, employers must ensure that employees receive the correct size, which will also require some initial staff time.

The Board cannot estimate the number of respirators that would be required by this regulation, given that 1) not all employees entitled to request a respirator will actually do so; 2) the Board does not know the specific percentage of state workers who are fully vaccinated; and 3) the number of vaccinated employees is increasing.

As above, the Board cannot estimate how many state employees will remain unvaccinated, but expects that state workers will be particularly likely to be vaccinated and therefore not in need of such respirators.

As described above, the cost of documenting employees' vaccination status is unknown, but is expected to be significantly less than the cost of providing N95s.

Employers must make testing available to unvaccinated employees with COVID-19 symptoms, at no cost to the employees' and on paid time. See above for estimated cost of tests. The Board is not aware of the proportion of state employees who are already fully vaccinated, but expects it to be higher than the general population because many state employees work in fields that were initially prioritized for vaccination, and vaccination is now readily available to all persons age 12 and over. As vaccination rates increase, the number of employees who could be subject to this provision will decrease.

Subsection 3205(c)(8) [Reporting, recordkeeping and access]

Reporting to CDPH will not take more time than existing requirements that employers report to that agency.

Existing section 3203 already requires employers to maintain illness records and records of steps taken to implement COVID-19 hazard correction. Because this proposed subsection specifies particular information to be collected by the employer, employers will have to ask for

and record additional information such as the workers' last day at the site and the date of any positive COVID-19 test. This does not require extensive questions, but since it will require a few more questions and some additional data entry, the Board estimates that will require **an additional .2 hours per COVID-19 case**, as indicated in the table below.

Subsections 3205(c)(9) [Exclusion of COVID-19 cases and employees who had a close contact] and (c)(10) [Return to work criteria]

Exclusion of confirmed cases in accordance with accepted medical and public health practices is necessarily required under existing section 3203 in order to correct a significant occupational hazard, namely transmission of COVID-19 between employees. Although the proposed subsection provides for pay for excluded workers under certain circumstances, the cost of this cannot be determined because the Board cannot determine how many excluded state employees are likely to require payment under this subsection. Nothing in this provision prevents employers from requiring employees to exhaust existing leave during the exclusion period, when they are legally permitted to do so.

A portion of the cost of this pay can be attributed to a different legal requirement, Labor Code section 248.2, rather than this proposed section. Labor Code section 248.2 requires both public and private employers with more than 25 employees to provide supplemental sick leave for reasons including COVID-19 quarantine or isolation. Additionally, costs have been reduced by exceptions which allow fully vaccinated employees, and recently recovered COVID-19 cases, to return to work immediately under some specified circumstances.

Ensuring that employees are excluded pursuant to these subsections is a performance standard but presumably requires alerting employees to the fact that they cannot immediately return to work, which will sometimes require a phone call, email, or some other kind of communication to the infected person. Employers will also have to provide the excluded employee with the required information regarding benefits (which, as described above, employers must compile for reasons other than the proposed regulation). Although employers can meet these obligations with a quick email, the Board recognizes that, in many cases, employers will spend a few minutes discussing these issues with the employee, especially given the potential seriousness of a COVID-19 illness. The Board has therefore estimated an **average cost of .3 employee hours per COVID-19 case**.

Sections 3205.1 [Multiple COVID-19 Infections and COVID-19 Outbreaks] and 3205.2 [Major COVID-19 Outbreaks]

This section applies to employers covered by proposed section 3205 only when there are three or more employee infections in a 14-day period within a workplace. CDPH informed the Division that, as of September 30, 2020, the department was aware of nearly 400 COVID-19 outbreaks in settings in California that were not covered by existing section 5199. At the time, that was

likely an undercount, since CDPH relied on reporting from other entities, including heavily burdened local health departments, and employers in some counties were not obliged to report outbreaks to their local health department until September 18, 2020.⁷⁰

The Board is aware that the government employers most likely to experience “major COVID-19 outbreaks” as defined in this proposal are hospitals, residential nursing centers (including those for the elderly), other medical facilities, homeless shelters, and correctional facilities. These are circumstances largely covered by section 5199 and would usually be exempt from this proposal. Major outbreak costs under 3205.2 have thus not been estimated for state or local government entities.

The information provided by CDPH did not distinguish between public and private employers. This is true of both 2020 and 2021 data. Thus, for incidents involving three COVID-19 cases in 14 days (i.e. a COVID-19 outbreak) and meeting the requirements of proposed section 3205.1, the Board does not have information about how many state entities have had such an incident. Additionally, such incidents are likely to decline in number throughout the remainder of 2021, as more people become fully vaccinated. In the absence of evidence, the Board presumed that 10 was a reasonable estimate, each one requiring 10 hours of response.⁷¹

In locations covered by this proposed section, the employer would have to provide additional COVID-19 testing, the cost of which cannot be quantified (see above), and additional review/correction of its COVID-19 policies and prevention methods, which is estimated to require 10 hours per outbreak.

It is possible that a state entity employer could have to repeat this reevaluation, if the outbreak continued for more than 30 days. However, the Board cannot presently quantify this cost, because the agency lacks data about the length of outbreaks. Though CDPH has provided information about the number of outbreaks to which this section would apply, it did not provide information about the number of days each incident continued to qualify as an outbreak.

Under section 3205.1, employers are required to use the highest efficiency filter compatible with existing ventilation systems indoors. The cost of this should be marginal, as the proposed

⁷⁰ “Responding to COVID-19 in the Workplace for Employers,” released June 16, 2020, revised September 18, 2020, available at <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Workplace-Outbreak-Employer-Guidance.aspx>.

⁷¹ CDPH data from January 1, 2020 to April 5, 2020 showed 94 outbreaks in all Public Administration (236), subtracting Public safety, including police, fire, and correctional institutions (134), most of which would be covered by 5199, along with Military (1) and National security and international affairs (7), which are generally federal and thus usually outside Division jurisdiction. However, a number of these 94 instances likely occurred at private employers. Similarly, the Board cannot distinguish between state and local employers.

regulation does not require installation/improvement of existing ventilation systems but merely requires employers to use the best filters compatible with their existing systems. Employers are also required to evaluate portable or mounted HEPA units and use them when feasible to reduce COVID-19 transmission. The cost of air purifiers varies from approximately \$650 or less,⁷² to well over \$4,000 for some 900 CFM purifiers.⁷³ However, the Board cannot determine how often this would be required of state employers, many of whom would choose to institute teleworking or other remote policies during an outbreak, if at all possible. Public employees are especially likely to be vaccinated, given how many of them were in categories prioritized for vaccination, so the number of future outbreaks is especially uncertain. Costs for the provision requiring respirators for voluntary use cannot be estimated, for similar reasons, but see above regarding respirator prices.

Employers covered by 3205.1 would need to evaluate the cost of physical distancing and in, some cases, partitions; neither physical distancing nor partitions are specifically mandated. If partitions were installed, the cost would depend on the dimensions, location, and number.

Section 3205.1 also requires employees to wear face coverings when indoors, or when outdoors and less than six feet apart. This will have some cost, though the number of additional employees who would need to wear face coverings is unknown. Face coverings not already mandated by section 3205 would only be required for a limited period, while 3205.1 continued to apply.

Sections 3205.3 [COVID-19 Prevention in Employer-Provided Housing] and 3205.4 [COVID-19 Prevention in Employer-Provided Transportation]

No housing or transportation costs have been estimated. The Board is aware that the Department of Forestry and Fire Protection (CalFire) maintains employer-provided housing, but that housing is exempted, along with transportation to and from such locations, since that housing and transportation serves firefighting purposes. The Board cannot quantify any additional costs associated with section 3205.4, if any, because it does not apply to vehicles in which all persons are fully vaccinated. Given that many state employees had priority for vaccination due to the nature of their jobs, and that many others are currently working remotely, the Board does not expect significant costs. Please see above regarding voluntary use of respirators, when provided upon request to employees who are not fully vaccinated.

⁷² Although air purifiers are available in the 250-400 range as well, the Division has based this cost on air purifiers designed for spaces over 1,000 square feet. Prices determined online at manufacturer's websites by Division staff on 10/13/20: Coway Airmega 400 Smart Air Purifier with 1,560 sq. ft. coverage, suggested retail \$649.00; Alen BreatheSmart Classic Large Room Air Purifier, 1,100 sqft, \$630.99.

⁷³ Prices determined online by Division staff on 10/14/20 at grainger.com: ExtractAll Portable Air Scrubber, model 800-UCA1-WH, \$4,659.60, model 800-UCA1-BL \$4,236.00.

Quantifiable annual costs of proposal (State Government)

Subsection 3205(c)(3): Employer response to COVID-19 cases in the workplace (\$30.22 * .5 hours * 9,540 cases)	\$144,149
Subsection 3205(c)(9): Recordkeeping for COVID-19 cases (\$30.22 * .2 hours * 9,540 cases)	\$57,660
Subsection 3205(c)(10): Exclusion of employees with COVID-19 cases (\$30.22 * .3 hours * 9,540 cases)	\$86,490
Section 3205.1: Multi-infection incidents (\$30.22 * 10 hours * 10 cases)	\$3,022
Total	\$291,321

As described in detail above, please note that **these are only the quantifiable costs.**

The primary savings to state agencies would come from reduced COVID-19 occupational transmission and thus fewer COVID-19 illnesses. The amount of this reduction is unknown and depends on the course of the pandemic. The proportion of any future reduction that could be attributed to the proposal, as opposed to other state or local mandates, cannot be determined in advance.

Savings would result not only from improved health among state employees, but also from an overall reduction in the statewide COVID-19 transmission rate, which would lead to a reduction in the costs associated with publicly-provided medical care and benefits.

The benefit from reduced COVID-19 infections is unquantifiable, but could result in fewer deaths, hospitalizations, and long-term injuries including harm to patients' pulmonary systems, respiratory systems, and neurological function.

A reduction in the spread of COVID-19 will also allow for increased reopening of businesses and public services. This would increase employment and the overall economy.

The Division expects that it would receive fewer queries about COVID-19 if proposed sections 3205 through 3205.4 are enacted, in comparison to the period before any COVID-19 emergency regulations were adopted. The proposed regulations would also make it easier and faster for Division staff to respond to questions. However, this is unlikely to lead to any fiscal savings. Those staff who have been diverted from their usual duties in response to COVID-19-related issues would simply be returned to their usual enforcement activities.

Costs to Any Local Agency or School District Which Must be Reimbursed in Accordance with Government Code Sections 17500 through 17630:

None.

Other Nondiscretionary Cost or Savings Imposed on Local Agencies:

The above analysis for state agencies’ costs and savings applies to local agencies as well. Costs have been estimated in the same manner as above. Items that cannot be estimated for state employers, including testing costs, the provision of respirators for voluntary use, and physical distancing/partitions during outbreaks, are equally uncertain for local entity employers.

Given that local government entities are particularly likely to be aware of—and comply with—the requirements and guidance of their own local health departments and CDPH, the Board does not believe that changes are likely to be needed in local government entities’ current COVID-19 prevention policies relative to the existing section 3203. As described above with regard to state employers, the Board is aware that local entities will still review their existing COVID-19 prevention programs to ensure compliance with this regulation, but the time required will vary dramatically between public agencies and cannot be quantified. The speed of review will depend on the size of the agency, the nature of its operations, and what units within the entity (if any) have their own distinct policies and plans. To provide some idea of the number of establishments involved, there were 19,380 local government establishments in the first quarter of 2020, according to EDD.⁷⁴

According to EDD data, in the first quarter of 2020 (the last quarter available at the time of the fiscal analysis), there were 1,829,639 employees working in local government in California.⁷⁵ The following local government employees were likely not covered by the proposal:

Local Government Employees Not Covered by Proposal

NAICS	Industry	Employees, Q1 2020	Assumed % not covered by proposal	Reasoning	Employees not covered
488	Support Activities for Transportation	11,787	5%	Remote or solo work during pandemic	589

⁷⁴ EDD Quarterly Census of Employment and Wages, California – Statewide, 2020 – First Quarter, accessed October 13, 2020. <https://www.labormarketinfo.edd.ca.gov/qcew/qcew-select.asp>.

⁷⁵ EDD projections for 2021, used elsewhere in this analysis, could not be used for this purpose or for state cost estimates, because they did not include sufficient detail about public employment. See footnote 74 for source.

51	Information	14,495	30%	Remote or solo work during pandemic	4,349
52	Finance and Insurance	3,810	30%	Remote or solo work during pandemic	1,143
54	Professional and Technical Services	1,430	50%	Remote or solo work during pandemic	715
62	Health Care and Social Assistance ⁷⁶	114,367	80%	Covered by 5199	91,494
921	Executive, Legislative, & Gen Government	182,635	15%	Remote or solo work during pandemic	27,395
922	Justice, Public Order, and Safety Activities ⁷⁷	186,011	70%	Covered by 5199	130,208
923	Administration of Human Resource Program	98,016	20%	Remote or solo work during pandemic	19,603
925	Community and Housing Program Admin	5,460	10%	Covered by 5199	546
926	Administration of Economic Programs	15,964	20%	Remote or solo work during pandemic	3,193
				TOTAL	279,235

Subtracting the total number of local government employees not covered by the proposal, 279,235 from 1,829,639 local government employees in the first quarter of 2020 gives a total

⁷⁶ Of these, the majority (95,567) worked in hospitals.

⁷⁷ This includes police, corrections, and public health administration, among other things. The exact amount of corrections-related employment is suppressed from public EDD data, but it reasonably assumed that this constitutes a significant portion of this category.

of **1,550,404 local government employees covered by the proposal**. Applying the estimated COVID-19 rate for persons 18-64 of 0.02719 (as described above), this provides an **estimate of 42,155 cases**.

Local government employers most likely to experience “major COVID-19 outbreaks” as defined in this proposal are hospitals, residential nursing centers (including those for the elderly), and other circumstances covered by section 5199 and thus exempt from this proposal. Major outbreak costs have thus not been estimated for local government entities.

As described above, 2020 CDPH information on the 400 outbreaks not covered by 5199 does not distinguish between public and private employers, or between state and local entities; nor does 2021 information. In the absence of data, the Board has estimated 30 such outbreaks would be covered by the proposed section 3205.1 for local entities.

Local government employers have been exempted from the employer-provided housing and transportation requirements while conducting emergency operations. For instance, public employers may create temporary housing sites and provide transportation during wildland firefighting operations. Outside of those circumstances, the Board is not aware of any public provision of housing which would be covered by this proposal. The Board cannot quantify any additional costs associated with the transportation requirements of section 3205.4, if any, because it cannot be certain of the number of vehicles/rides involved. The proposed section does not apply to vehicles in which all persons are fully vaccinated, and many local agency employees had priority for vaccination due to the nature of their jobs. Additionally, public transportation is excluded from that proposed section.

Please see above regarding the voluntary use of respirators.

Quantifiable annual costs of proposal (Local Government)

Subsection 3205(c)(3): Employer response to COVID-19 cases in the workplace (\$30.22 * .5 hours * 42,155 cases)	\$636,962
Subsection 3205(c)(9): Recordkeeping for COVID-19 cases (\$30.22 * .2 hours * 42,155 cases)	\$254,785
Subsection 3205(c)(10): Exclusion of employees with COVID-19 cases (\$30.22 * .3 hours * 42,155 cases)	\$382,177
Section 3205.1: Multi-infection incidents (\$30.22 * 10 hours * 30 cases)	\$9,066
Total	\$1,282,990

As described in detail above, please note that **these are only the quantifiable costs**.

Annual savings for local government employers cannot be determined; please see the section on savings for state entities, above.

Costs or Savings in Federal Funding to the State:

None.