

## “UPDATED”

May 20, 2021

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

**Submitted electronically:** [oshsb@dir.ca.gov](mailto:oshsb@dir.ca.gov)

### **RE: New COVID-19 Emergency Temporary Standards Amendments**

Dear Chair Thomas and Members of the Board:

The California Chamber of Commerce and the undersigned organizations submit this letter to provide comment upon, and underline the need for clarification of, the proposed re-adoption of the COVID-19 Emergency Temporary Standard (Section 3205, or “ETS”), and its differences from the existing provisions of the ETS (the “Amended ETS”).

Many of us, including the California Chamber of Commerce, have been engaged and provided repeated comments regarding the ETS, including participating in Cal/OSHA’s advisory committee meetings held in February of 2021 related to the drafting of the Amended ETS (“February Advisory Committee”).

Overall, we are glad to see that many provisions of the Amended ETS correspond to improved science and best practices about COVID-19. However, given recent federal and state changes, we believe the Amended ETS is already behind best practices, and will be increasingly out of date as time passes.

#### **I. Introduction**

Our comments below are guided by three core concerns: (1) clarity regarding employer obligations; (2) feasibility for employers to implement; and (3) consistency with up-to-date best practices and science.

Regarding consistency: the Amended ETS will be behind recent state and federal changes to best practices and guidance as soon as it is passed, and will only grow more inconsistent with time. Below are two recent examples:

- The Centers for Disease Control and Prevention (CDC) recently released guidance that “*Fully vaccinated people can resume activities without wearing a mask or physically distancing . . .*”<sup>1</sup> In contrast, the Amended ETS doesn’t allow relaxation of physical distancing until July 31<sup>st</sup>, unless “all employees are fully vaccinated” at a location.
- Governor Newsom has repeatedly expressed his intent to re-open the state on June 15<sup>th</sup> of 2021, and re-iterated that masking would be reduced at that point. In contrast, the Amended ETS continues to apply its face covering obligations without regard to the June 15<sup>th</sup> deadline, or its own July 31<sup>st</sup>, 2021 deadline (which is applicable to other portions of the Amended ETS).
- As the nation and California move towards opening, the Amended ETS is adding completely new and considerable obligations, such as providing N95 respirators to every unvaccinated, indoor employee in the state (discussed more fully below).

---

<sup>1</sup> This guidance is available here: <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html>. While we respect that the text of the ETS was in progress prior to this May 13<sup>th</sup> update, the CDC’s direction is clearly in conflict with the Amended ETS – despite California having better COVID-19 numbers than much of the country.

While we appreciate that it is difficult to keep pace with evolving knowledge regarding COVID-19, we are very concerned that the Amended ETS, if passed as written, will freeze employers into a compliance model that is already out-of-date, and will only grow more outdated in the coming months.

## **II. Substantive Discussion of Amendments**

### **a. Appreciated Amends**

We appreciate the overdue improvements contained in the Amended ETS text. Below is a sampling of the most significant improvements – but it is certainly not all encompassing. Most significantly, we are glad to see vaccination (and post-infection immunity) integrated into the Amended ETS, though we have some substantive and clarity concerns regarding those provisions, as discussed below. We are also glad to see considerable improvements in the feasibility of the Housing and Transportations sections of the Amended ETS (Sections 3205.3 & 3205.4). Similarly, improvements to cleaning and disinfection requirements have been made that bring them more in line with recent science regarding the surface-based transmissibility of COVID-19. In the interests of efficiency and constructively moving forward, we will focus the remainder of this letter on how the Amended ETS must be improved.

### **b. Critical Substantive Concerns**

The following provisions of the Amended ETS are of urgent concern, and we believe must be addressed as soon as possible – either by amends by the Standards Board prior to passage, or, should the Amended ETS pass, by subsequent amendments or clarifications.

**Vaccination and Immunity Should be Treated Consistently – (Various)** – The Amended ETS treats vaccination and immunity (acquired after a COVID-19 infection) as interchangeable in some sections, but not in others. For example, Sections 3205(c)(10)(B)(2) [regarding exclusion and earnings] and 3205.1(b)(1)(C) [regarding testing during an outbreak] both provide exemptions for vaccinated employees or employees who have naturally acquired immunity by surviving a COVID-19 infection. However, multiple other sections of the regulation ignore post-infection immunity, including Sections 3205(c)(6)(C)(1) [pre-July 31<sup>st</sup> physical distancing], 3205(c)(7)(A)(1) [face coverings], and 3205.3(a)(5) [housing requirements]. We see no reason for this distinction – an employee has immunity in both cases and should be treated as such.

**Employers Should Not be Providing N95s to Unvaccinated Employee – (Various)** – The Amended ETS includes an entirely new mechanism: providing unvaccinated employees with N95 respirators (in the correct size) to be used in compliance with voluntary use standards and related training.<sup>2</sup> The scale of this obligation is not small. Prior to July 31<sup>st</sup>, employers must provide N95 respirators to unvaccinated employees during outbreaks, as well as to unvaccinated employees in vehicles.<sup>3</sup> And that demand pales in comparison to the post July 31<sup>st</sup> obligation to provide respirators to all unvaccinated employees working indoors<sup>4</sup> in perpetuity.

On a policy level, this is the wrong direction and makes no sense. Under the ETS, up until now, face masks have been provided if an employee is outdoors and within 6 feet of another employee, or when indoors. Now, with vaccination increasing and case rates diminishing, employers are being compelled to provide *much more expensive equipment* – N95 respirators – where face masks have had great success in reducing transmission in the workplace. Moreover, this requirement creates the incorrect incentives, because it

---

<sup>2</sup>See Section 3205(c)(8)(E)(1).

<sup>3</sup> See Sections 3205.1(g) & 3205.4(c)(3).

<sup>4</sup> See Section 3205(c)(8)(E)(2) - “Starting July 31, 2021, employers shall provide respirators for voluntary use in compliance with subsection 5144(c)(2) to all employees working indoors who are not fully vaccinated.” Notably, this obligation is subject to certain limitations, such as being alone in a room, but those limitations are not likely to significantly diminish the demand in our estimation.

burdens the employer based on a choice made by the employee (i.e., to not be vaccinated). Finally, this will drive employers across all sectors of the California economy into competition with healthcare, critical industries, and first responders for the existing supply of N95s. Moreover, it may even, depending on the scale of the consumption, deny this critical equipment to healthcare workers in other parts of the world where COVID-19 is surging, such as India.

Mathematically, we estimate these provisions as requiring employers across California to stockpile and consume significant amounts of N95 respirators. Putting aside the vagueness as to how often the N95's will need to be provided, we can assume that approximately 20% of Californians will remain vaccine hesitant (or be unable to be vaccinated) past the July 31<sup>st</sup> deadline.<sup>5</sup> Out of a workforce of 20 million, that means 4 million workers. Assuming about half of those work indoors, that means we have potentially 2 million workers who will need to regularly be provided N95's for voluntary use pursuant to the Amended ETS for the duration of the Amended ETS.<sup>6</sup> To be clear, this obligation is far beyond the stockpiling required by the recent Protection from Wildfire Smoke Regulation, in that it applies across the entire economy (all sectors), and is not seasonal. In order to avoid these unnecessary costs and shortages in healthcare and supply issues, we believe employers should not be required to hand out N95s to each indoor, unvaccinated employee.

Logistically, it should be noted that the requirement to provide such masks in the correct size for each employee is yet another problem. Theoretically, the Amended ETS does not require fit testing . . . but without fit testing, how can employers determine the appropriate size for each employee?

We would ask for urgent amendments to correct this issue prior to July 31<sup>st</sup>. However, alternatively, Cal/OSHA should immediately provide clarification via an FAQ that: (1) N95's, to the extent they are made available, can be re-used by the same employee for multiple days; (2) that N95's need not be handed out, but must be available if requested, pursuant to Section 5144's voluntary requirements.

**Verbal Notice is Not Feasible as Written and Must be Clarified – 3205(c)(3)(B)(3)(a)** – The Amended ETS adds a requirement of follow-up verbal notice in a language understandable by the employee “as soon as practicable” if the employer should reasonably know that an employee has not received the notice or has “limited literacy in the language used in the notice.” This requirement was never discussed at the February Advisory Committee and poses both clarity and feasibility concerns. To be workable, the trigger for verbal notice must be clear for large and small employers because they are required to take action “as soon as practicable.” With that in mind, we believe “limited literacy” is too vague to yield quick and clear determinations for employers. For example - how should an employer define “limited literacy”? What if a worker can read, but below a high school reading level? Conversely, is “limited literacy” only intended to reflect whether the worker understood the basic point of the notice (i.e., that COVID-19 was at the worksite at one point recently)? Without clarifying “limited literacy” or replacing it, this standard will be unworkable for employers and trigger waves of unnecessary and difficult verbal notice.

**Exposed Group Should Only Include Employees – 3205(b)(7)** – Under the present ETS, an outbreak can be triggered by non-employees who visit a store to shop. This is unacceptable because employers could be placed under costly outbreak obligations by three non-employees standing in their workplace for 15 minutes, without any workplace spread of COVID-19. We had anticipated, based on the February Advisory Committee discussions and draft text, that this issue would be resolved by limiting the population that is considered for purposes of outbreaks<sup>7</sup> to employees. However, we see that this improvement was dropped out of the final text of the Amended ETS. This must be corrected – employers should not be placed in outbreak precautions without any workers carrying or transmitting COVID-19 in the workplace.

---

<sup>5</sup> As of the date of this letter, approximately 50% of Californians are vaccinated, but we expect this number to rise. See <https://covid19.ca.gov/vaccination-progress-data/#progress-by-group>.

<sup>6</sup> We acknowledge that these estimates are basic, but believe they accurately reflect the approximate scale of potential demand for N95's under the Amended ETS in the next 6-12 months.

<sup>7</sup> Previously “exposed workplace” under the ETS, and now “exposed group” under the Amended ETS. See Section 3205(b)(7).

**Outbreak Precautions Must Remain Feasible – 3205.1** – The Amended ETS makes a number of changes to outbreak requirements applicable to employers, to which we have concerns regarding feasibility and consistency.

**Re-instituting Engineering Controls Upon Outbreaks Is Not Feasible - 3205.1(d)(3)** - The Amended ETS requires employers to install partitions (similar to what is presently required under 3205(c)(8)(A)) if an outbreak occurs. This is infeasible and unrealistic as written. Installation and removal of barriers is not a trivial matter in the workplace, nor is their long-term storage for the periods when they are not being used. Businesses will not be able to quickly swap partitions in and out of place. Recognizing the importance of barriers, we would suggest that this provision is better placed in the major outbreak section of the regulation, which will ensure it is triggered if an outbreak is not quickly quelled via the other precautions in the Amended ETS.

- **Portable HEPA Filtration at Every Outbreak is Not Feasible – 3205.1(f)** – The Amended ETS moves a requirement previously only applied to major outbreaks (3205.2) to all outbreaks (3205.1) - the obligation to install improved air filtration and acquire portable High Efficiency Particulate Air filters (HEPA filters). The text requires employers to evaluate whether HEPA filters would “reduce the risk of transmission and, if so, [use them] to the degree feasible.” Because increased air filtration is virtually certain to hypothetically reduce the risk of transmission, we are concerned this effectively compels the rental (or purchase) of portable HEPA filters by employers in the event of three COVID-19 cases. We see this as more appropriately located among the major outbreak precautions in Section 3205.2, given the potential cost of such measures.
- **Exclusion Pay Calculation Must be Clarified – 3205(c)(10)** – The Amended ETS requires employers to pay the “regular rate of pay” for exclusion pay and then specifies this pay can be enforced in the same way as wages. The calculation for “regular rate of pay” is confusing and challenging for employers to determine what forms of payment or included versus excluded. This confusion is exacerbated by the threat of litigation under the Private Attorney General Act (PAGA), which exposes employers to excessive and burdensome costs and penalties for unintentional errors. The Legislature and Governor have acknowledged both of these challenges by recently excluding enforcement of COVID-19 supplemental paid sick leave from PAGA and providing an easier method for employers to calculate leave, as set forth in Labor Code section 246(l). We would urge Cal/OSHA to follow this same structure for exclusion pay.

### **c. Other Concerns Requiring Clarification**

**Documentation Required to Demonstrate That Employees Are Vaccinated or Immune – 3205(b)(9)** – The Amended ETS requires employers to maintain documentation of which employees meet the definition of “fully vaccinated”.<sup>8</sup> There is considerable concern among employers, particularly small employers, about how such documentation may be maintained while respecting the employee’s privacy and medical information. Moreover, putting aside legal concerns, there are also practical concerns – many employees who have been vaccinated may have already lost their vaccine ID’s, and may have no desire to go get a new one, because the only burden for not having such is on the employer (I.e., to provide N95’s and other precautions). An FAQ to clarify what documentation employers should maintain and address these difficulties is needed as soon as possible such that employers can prepare to utilize the vaccine-related provisions of the Amended ETS as soon as it goes into effect.

**“Location” Where All Employees Are Vaccinated – 3205(c)(6)(C)(2)** – The Amended ETS includes an exemption for physical distancing for “locations at which all employees are fully-vaccinated . . .” As an aside, this exception ignores immunity from recovered COVID-19 cases as discussed above. In addition, the scope of the term “location” is vague at present. Similar to the definition of an “exposed group”,

---

<sup>8</sup> This same issue – documentation requirements – applies to noting which employees have recovered and therefore have natural immunity under various provisions of the Amended ETS.

employers are uncertain as to how large or small a “location” can be. For example – if four employees work in an open-floor office, and are all vaccinated – but in other parts of that floor or building, unvaccinated employees are working – then would that individual office be considered a “location”? Or, in a restaurant, if all workers in the kitchen and wait staff are vaccinated, but customers may not be – does the kitchen qualify as a location where all workers are vaccinated? What if there is no “door” to the kitchen, simply a space where staff quickly move in and out? These are the kinds of questions that require an FAQ urgently such that employers can accurately assess whether their workplaces qualify under the exemption.

**Spacing and Testing Exception to Face Coverings – 3205(c)(7)(C)** – The Amended ETS provides that “any employee not wearing a face covering . . . for any reasons, shall be at least six feet apart from all other persons unless . . . tested at least twice weekly . . .” This appears to ignore the exceptions, discussed above in 3205(c)(7)(A)(1-6), and compel spacing and testing even for employees who are not wearing a face covering *because they are vaccinated*. This application should be either amended or clarified via FAQ to exclude vaccinated or immune employees.

**Training Necessary When N95’s Are Provided – 3205(c)(5)(E)** – The Amended ETS provides that employers will provide training whenever N95 respirators are provided to employees for voluntary use addressing “how to properly wear the respirator provided” and “how to perform a seal check . . .” We have two issues with this language that need to be clarified. First – the use of “whenever” suggests training on an almost daily basis for millions of employees in California. We would request clarification as to whether this training must, in fact, be provided *every* time an N95 is provided, or whether this obligation requires employees to be trained such that when they receive an N95, training has already occurred. Second – the substance of this training is ambiguous presently. In order to ensure it is something which employers of all sizes and industries can quickly provide sufficient training, we would ask that Cal/OSHA prepare a handout or other similar easily admissible training model and makes it available to employers. We would suggest a form similar to the handout that presently exists under the Protection from Wildfire Smoke regulation.

**Outbreak Requirement Regarding Additional Precautions – 3205.1(d)(1)** – The Amended ETS outbreak provision includes a provision that may create an *additional threshold* inside of an outbreak. Section 3205.1(d)(1) provides that if “three cases occur among employees in the exposed group within a 14-day period . . .” then additional obligations are triggered. It is unclear if this provision is intended to simply refer to the trigger or an outbreak itself (already contained in 3205.1(a)) *or* whether this provision is intended to create an *additional* requirement: that if an outbreak occurs, and three additional cases are discovered among *employees*,<sup>9</sup> then these additional obligations are applied. This difference is critical to clarify, as employers in an outbreak must know when certain obligations apply to their workplace.

**15-day Delay in Respirators For Vehicles – 3205(c)(8)(E)(5)** – This provision appears confusingly similar to the requirement contained in the transportation section of the Amended ETS. Employers in California need clarification as to how it applies such that they can prepare to comply within 15 days of the Amended ETS going into effect.

## **Conclusion**

Despite our host of concerns, California’s business community supports amending the ETS to bring the current ETS up to date with best practices and recent science. However, we remain concerned that the Amended ETS, as written, adds more burdensome obligations to employers just as the federal government is loosening restrictions and California’s Governor appears to believe California is on track to open in June.

We hope that the Standards Board will consider pushing for specific textual fixes to the above-identified substantive concerns prior to passage of the Amended ETS. If the Amended ETS is passed as written, then we would urge the Standards Board and Division to move with all haste to hold an additional advisory

---

<sup>9</sup> Notably, the use of “employees” here is the only difference from the outbreak definition (which is triggered by cases among all persons, not just employees), and it is unclear if this is an error or intentional.

committee hearing as soon as the Amended ETS goes into effect. The substantive concerns outlined above, as well as the unclear provisions of the Amended ETS, must be examined, discussed, and rectified as soon as possible via either FAQs or a second round of amendments.

Sincerely,



Robert Moutrie  
Policy Advocate  
California Chamber of Commerce  
On behalf of

Acclamation Insurance Management Services  
Allied Managed Care  
California Apartment Association  
California Association of Joint Powers Authorities  
California Association of Winegrape Growers  
California Beer and Beverage Distributors  
California Builders Alliance  
California Business Roundtable  
California Craft Brewers Association  
California Gaming Association  
California Grocers Association  
California Farm Bureau  
California Restaurant Association  
California Retailers Association  
California Sheet Metal and Air Conditioning  
Contractors' National Association  
California State Association of Counties  
California Trucking Association  
Coalition of Small and Disabled Veteran  
Businesses  
El Dorado County Chamber of Commerce  
El Dorado Hills Chamber of Commerce  
Elk Grove Chamber of Commerce  
Family Business Association of California

Family Winemakers  
Flasher Barricade Association  
Folsom Chamber of Commerce  
Housing Contractors of California  
League of California Cities  
National Federation of Independent Business  
Pacific Association of Building Service  
Contractors  
Public Risk Innovation, Solutions and  
Management - PRISM  
Rancho Cordova Chamber of Commerce  
Roseville Area Chamber of Commerce  
Sacramento Regional Builders Exchange  
San Diego Regional Chamber of Commerce  
Santa Maria Valley Chamber of Commerce  
SMACNA of San Diego  
The Associated General Contractors, San Diego  
Chapter  
United Chamber Advocacy Network  
Western Electrical Contractors Association  
Western Growers Association  
Wine Institute  
Yuba-Sutter Chamber of Commerce

Copy: Douglas Parker	<a href="mailto:DParker@dir.ca.gov">DParker@dir.ca.gov</a>
Christina Shupe	<a href="mailto:Cshupe@dir.ca.gov">Cshupe@dir.ca.gov</a>
Eric Berg	<a href="mailto:EBerg@dir.ca.gov">EBerg@dir.ca.gov</a>
Susan Eckhardt	<a href="mailto:Seckhardt@dir.ca.gov">Seckhardt@dir.ca.gov</a>
Michael Wilson	<a href="mailto:Mwilson@dir.ca.gov">Mwilson@dir.ca.gov</a>