CLIENT ALERT

Cal/OSHA Enforcement of the COVID-19 Emergency Temporary Standard Coming Down the Pipeline: Employers Should Be Prepared Now

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Last week a San Francisco County state court order of February 25, 2021 denied a request for a preliminary injunction brought by a coalition of employer groups across several industries, including the National Retail Federation, the National Federation of Independent Businesses, and Relles Florist, to block enforcement of the Emergency Temporary Standards (ETS) issued by the California Occupational Safety and Health Standards Board (Cal OSHA) to prevent the spread of COVID-19. This Order leaves no doubt that employers in California will need to swiftly implement compliant policies and practices—to the extent they have not already—or else face potentially hefty penalties. Cal OSHA originally passed the COVID-19 ETS on December 1, 2020, but gave employers a two-month grace period to comply with the health and safety measures unique to this standard before imposing monetary penalties. That grace period expired in February 2021. Between that expiration and this latest Order, employers in California should be prepared for an uptick in enforcement measures in the coming weeks and months.

While many measures dictated by the ETS are not new—for example, physical distancing, face coverings, and PPE—there are several aspects that pose unique challenges for employers, which the coalition raised in its failed attempt to enjoin enforcement. One of the more onerous aspects of the ETS is the requirement that employers not only exclude employees from the workplace for 10-14 days following exposure to COVID-19 or a positive COVID-19 test, but also that employers maintain the workers' wages and benefits during the exclusion period, unless "the employer establishes the employee's exposure was not work-related." *See* COVID-19 Emergency Temporary Standards Frequently Asked Questions (ca.gov). The ETS does not, in itself, create a new sick leave law, but it has largely the same effect in practice.

In their motion for a preliminary injunction, plaintiff-employers objected that this obligation violated their due process rights, but that argument was swiftly rejected. The court pointed out that the ETS creates a rebuttable presumption—employers are not required to continue payment of wages if they can adduce evidence that the exposure was not work-related, such as workplace health and safety measures as well as the employee's nonoccupational risks of COVID-19 infection. As a practical matter, though, employers will want to proceed with caution before denying pay except in the most clear-cut cases of exposure outside the workplace—for example, if the employee volunteers that they tested positive following a household member testing positive and there are no known cases in the workplace. Employers should also be mindful when "investigating" how the employee contracted COVID-19 not to run afoul of privacy and related laws, such as the Americans with Disabilities Act and/or the Genetic Information Nondiscrimination Act. For example, employers are not permitted to ask about the health conditions of family members or seek proof of a family member's COVID-19 status. Employers may also run into problems if they are monitoring their employees' social media accounts or questioning them regarding lawful, off-duty conduct (*e.g.*, attending an extracurricular social gathering) as a basis for denying pay. This is particularly true with respect to unionized employees, as the National Labor Relations Act specifically prohibits employers from monitoring union activities and gatherings without prior bargaining and agreement with the union. And, as always, employers must treat each case of COVID-19 the same, so as to avoid accusations of disparate or discriminatory treatment.

Additionally, the requirement that exposed employees be excluded from the workplace could pose operational challenges, particularly for small businesses whose work cannot be performed remotely. In effect, each positive employee test—regardless of where the employee contracted COVID-19—may result in partial or complete closure of the business for 10-14 days. Additional challenges are raised because employers have limited authority to monitor their employees' off-duty conduct. While employers can (and, now, must) implement health and safety measures on-site, they can do little to prevent an employee from engaging in higher-risk activities outside of work, bringing COVID-19 into the workplace, and then causing (potentially repeated) closures. And, now, whenever an employee brings COVID-19 to the workplace, the employer must pay exposed employees for the time that they are out. Employers should plan for these types of business disruptions accordingly and consider operational controls, such as alternating shifts, to minimize the impact of a single employee exposing the worksite.

Lastly, employers should be mindful of additional regulations coming down the pipeline. In his first week in office, President Biden issued an Executive Order directing federal OSHA to issue COVID-19 guidance and to consider issuing a federal COVID-19 emergency standard on or before March 15, 2021. It would not be surprising for employers to see new federal mandates coming out in the next two weeks as well, which—for California employers—will need to be reconciled with the state Cal OSHA COVID-19 ETS. Employers should take this opportunity to review and refresh their policies and practices, and consult with counsel to the extent they have any doubt regarding the actions to be taken to maintain compliance.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Thomas P. Gies
Partner – Washington, D.C.
Phone: +1 202.624.2690
Email: tgies@crowell.com

Richard McNeil
Partner – Orange County
Phone: +1 949.798.1381
Email: rmcneil@crowell.com

Ira M. Saxe
Partner – New York
Phone: +1 212.895.4230
Email: isaxe@crowell.com

Katie Erno
Counsel – Washington, D.C.
Phone: +1 202.624.2926
Email: kerno@crowell.com

Suzanne E. Rode
Counsel – San Francisco
Phone: +1 415.365.7276
Email: srode@crowell.com

Daniel W. Wolff

Partner – Washington, D.C.
Phone: +1 202.624.2621
Email: dwolff@crowell.com