



# *California Labor Commissioner and Cal/OSHA: How these Departments are Addressing the Pandemic*

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# Cal/OSHA and COVID-19

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- IIPP
- ATD
- COVID-19 Regulations
- AB 685
- Cal/OSHA Enforcement
- Resources

# Injury and Illness Prevention Program (3203)

Found in Title 8, California Code of Regulations, Section 3203 (8CCR 3203)

Went into effect July 1991

The most cited Cal/OSHA regulation

Required of all employers in California



# IIPP Before the New COVID-19 Regulations

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Cal/OSHA has historically used the IIPP to cite employers where there is not a specific regulation that applies to unsafe or unhealthful work conditions

- Prior to November 30, 2020, the IIPP was used by Cal/OSHA to address COVID-19

# IIPP

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Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (IIPP)

The Program shall be in writing and must address 9 elements, including support documentation

# IIPP Elements

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1. Authority and Responsibility – who?
2. Methods of Compliance – how?
3. Communication\* – how?
4. Hazard Assessment\* – who and how often?
5. Correction of Unsafe Conditions\* – who and when?
6. Accident Investigations – who?
7. Training\* – who, what, and when?
8. **Employee Access to IIPP – NEW ELEMENT – effective July 1, 2020**
9. Documentation – what?

\*Most cited sections related to COVID-19

# Aerosol Transmissible Diseases (ATD) – 5199

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## Applies to:

- Health Care
- Police services during transport or detention of persons reasonably anticipated to be cases or suspected cases of ATD
- Public health services, such as communicable disease contact tracing or screening programs
- Facilities or operations that are identified as being at increased risk:
  1. Correctional facilities and other facilities that house inmates or detainees
  2. Homeless shelters
  3. Drug treatment programs
- Facilities or operations that perform aerosol-generating procedures on cadavers
- Laboratories that perform procedures with materials that contain or are reasonably anticipated to contain ATD

# Adoption of an Emergency Temporary Standard (ETS)

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An ETS was approved by the Occupational Safety and Health Standards Board in late November 2020, which was submitted to the Office of Administrative Law

OAL approved the new ETS on November 30, 2020 and the ETS became effective immediately

Expiration Date: October 2, 2021 unless amended



# The Five ETS Sections

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- 3205, *COVID-19 Prevention*
  - 3205.1, *Multiple COVID-19 Infections and COVID-19 Outbreaks*
  - 3205.2, *Major COVID-19 Outbreaks*
  - 3205.3, *COVID-19 Prevention in Employer-Provided Housing*
  - 3205.4, *COVID-19 Prevention in Employer-Provided Transportation to and from Work*

# 3205, COVID-19 Prevention -- Who Is Covered?

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Applies to all employees and places of employment



# Who Is Not Covered?

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These are the only exceptions:

- Workplace with 1 employee who does not have contact with other people
- Employees working from home
- Employees covered by Aerosol Transmissible Diseases (ATD), section 5199



# Written COVID-19 Prevention Program – 3205(c)

Employers shall establish, implement, and maintain an effective, written COVID-19 Prevention Program

- May be integrated into the Injury and Illness Prevention Program or maintained in a separate document

## COVID-19 Prevention Program (CPP) for [Name of Company, or name of the workplace if it's for a fixed location.]

This CPP is designed to control exposures to the SARS-CoV-2 virus that may occur in our workplace.

Date: [type date of last review]

### Authority and Responsibility

[Enter name or job title of the person(s)] has overall authority and responsibility for implementing the provisions of this CPP in our workplace. In addition, all managers and supervisors are responsible for implementing and maintaining the CPP in their assigned work areas and for ensuring employees receive answers to questions about the program in a language they understand.

All employees are responsible for using safe work practices, following all directives, policies and procedures, and assisting in maintaining a safe work environment.

### Identification and Evaluation of COVID-19 Hazards

We will implement the following in our workplace:

- Conduct workplace-specific evaluations using the Appendix A: Identification of COVID-19 Hazards form.
- Evaluate employees' potential workplace exposures to all persons at or who may enter our workplace.
- Review applicable orders and general and industry-specific guidance from the State of California, Cal/OSHA, and the local health department related to COVID-19 hazards and prevention.
- Evaluate existing COVID-19 prevention controls in our workplace and the need for different or additional controls.
- Conduct periodic inspections using the Appendix B: COVID-19 Inspections form as needed to identify unhealthy conditions, work practices, and work procedures related to COVID-19 and to ensure compliance with our COVID-19 policies and procedures.
- [Enter other identification and evaluation measures you take in your workplace].

### Employee participation

Employees and their authorized employees' representatives are encouraged to participate in the identification and evaluation of COVID-19 hazards by: [Describe how employees and their representatives, if any, may participate in COVID-19 hazard identification and evaluation.]

### Employee screening

We screen our employees by: [describe how this will be accomplished – i.e., directly screen employees when they come to work, or having them self-screen according to CDPH guidelines. Ensure that face coverings are used during screening by both screeners and employees and, if temperatures are measured, that non-contact thermometers are used.]

### Correction of COVID-19 Hazards

Unsafe or unhealthy work conditions, practices or procedures will be documented on the Appendix B: COVID-19 Inspections form, and corrected in a timely manner based on the severity of the hazards, as follows:

[Describe how the following will be accomplished:

The severity of the hazard will be assessed and correction time frames assigned, accordingly.]

# Written Program Elements

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1. Communication
2. Identification/Evaluation of Hazards
3. Investigation/Responding to Cases
4. Correction of Hazards
5. Training
6. Physical Distancing
7. Face Coverings
8. Controls (Engineering, Administrative, & PPE)
9. Reporting, Recordkeeping, & Access
10. Exclusion of COVID-19 Cases
11. Return to Work

# Multiple COVID-19 Infections and COVID-19 Outbreaks (3205.1)

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This section applies to a place of employment covered by section 3205 if it has been identified by a local health department as the location of a COVID-19 outbreak or when there are  $\geq 3$  COVID-19 cases in an exposed workplace within a 14-day period

This section shall apply until there are no new COVID-19 cases detected in a workplace for a 14-day period

# 3205.1 Overview

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- Testing - 3205.1(b)
- Exclusion - 3205.1(c)
- Investigation - 3205.1(d)
- Investigation, review and hazard correction - 3205.1(e)
- Notifications to the local health department - 3205.1(f)

# Major COVID-19 Outbreaks (3205.2)

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This section applies to any place of employment covered by section 3205 when there are  $\geq 20$  COVID-19 cases in an exposed workplace within a 30-day period

This section shall apply until there are no new COVID-19 cases detected in a workplace for a 14-day period



# 3205.2 Overview

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- Testing - 3205.2(b)
- Exclusion - 3205.2(c)
- Investigation - 3205.2(d)
- Hazard correction - 3205.2(e)
- Notifications to the local health department - 3205.2(f)

NOTE: Sections are similar to 3205.1, but more stringent

# COVID-19 Prevention in Employer-Provided Housing (3205.3)

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This section applies to employer-provided housing:

Employer-provided housing is any place or area of land, any portion of any housing accommodation, or property upon which a housing accommodation is located, consisting of: living quarters, dwelling, boardinghouse, tent, bunkhouse, maintenance-of-way car, mobile home, manufactured home, recreational vehicle, travel trailer, or other housing accommodations

Employer-provided housing includes a “labor camp” as that term is used in title 8 of the California Code of Regulations or other regulations or codes

# COVID-19 Prevention in Employer-Provided Transportation to and from Work (3205.4)

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This section applies to employer-provided motor vehicle transportation to and from work, which is any transportation of an employee, during the course and scope of employment, provided, arranged for, or secured by an employer including ride-share vans or shuttle vehicles, car-pools, and private charter buses, regardless of the travel distance or duration involved

# Assembly Bill 685 (Reyes)

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Enhances Cal/OSHA's enforcement of COVID-19 infection prevention requirements by allowing for Orders Prohibiting Use (OPU) and citations for serious violations related to COVID-19 to be issued more quickly (effective January 1, 2021 – January 1, 2023)

The law also requires employers to notify all employees who were at a worksite of all potential exposures to COVID-19 and notify the local public health agency of outbreaks (permanent change)

# What Changed how Cal/OSHA can Issue Citations for a Serious Violation Related to COVID-19?

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Citations are classified as serious when Cal/OSHA demonstrates there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation

Prior to AB 685, when Cal/OSHA planned to issue citations for a serious violation, it would first provide a form to the employer with at least 15 days of notice prior to issuing a citation with a serious violation (1BY)

# Cal/OSHA Enforcement

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## PRE-PANDEMIC AVERAGES

Complaints: 10,000 – 13,000

Onsite Inspections: 2,000 – 2,500

Letter Inspections: 4,000 – 7,000

## PANDEMIC-RELATED (2020)

Complaints: 10,000 (COVID)

Onsite Inspections: 1900 (COVID)

Letter Inspections: 8,300 (COVID)

Citations: 296 (COVID)

# Letter D Inspections

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Used for **non-formal complaints alleging a non-serious (general or regulatory) hazard**

Investigated by a letter asking the employer to conduct an investigation of the workplace in lieu of an inspection by the District Office

NOTE: Non-formal complaint alleges a workplace hazard or a violation of a Title 8 Safety Order, and is lodged by

- (1) An employee-complainant who does not or cannot give his or her name and address to the District Office
- (2) An employee representative who cannot give the name and address of the employee whom they represent to the District Office
- (3) A non-employee

# Letter M Inspections

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A **non-formal complaint alleging a serious hazard** shall be investigated by telephone contact followed by a facsimile or email letter in lieu of an onsite inspection

NOTE: Non-formal complaint alleges a workplace hazard or a violation of a Title 8 Safety Order, and is lodged by

- (1) An employee-complainant who does not or cannot give his or her name and address to the District Office
- (2) An employee representative who cannot give the name and address of the employee whom they represent to the District Office
- (3) A non-employee



# Cal/OSHA'S Coronavirus Page

Link: [www.dir.ca.gov/dosh/coronavirus](http://www.dir.ca.gov/dosh/coronavirus)

## Cal/OSHA COVID-19 Guidance and Resources ▶ español

Workplace safety and health regulations in California require employers to take steps to protect workers exposed to infectious diseases like the Novel Coronavirus (COVID-19), which is widespread in the community. Cal/OSHA has posted the following resources to help employers comply with these requirements and to provide workers information on how to protect themselves and prevent the spread of the disease.

Cal/OSHA recommends the guidance, educational materials, model programs and plans, and other resources that are provided below, be reviewed with an employer's existing procedures to ensure that workers are protected.



### COVID-19 Emergency Temporary Standards

Information and materials related to the new COVID-19 Prevention Emergency Temporary Standards



### Guidance by Industry

Produced by Cal/OSHA, CDPH, the Governor's Office and other state agencies



### Frequently Asked Questions

FAQs on reporting and recording COVID-19 illnesses, new laws and more



### Educational Materials and Other Resources

Fact sheets, videos and fillable written safety plans



### Webinars on COVID-19

Webinars available for multiple industries. All webinars are free to attend and industry-specific webinars are hosted by Cal/OSHA Consultation Services



### Cal/OSHA Training Academy

COVID-19 infection prevention online training courses for employers and workers through the Cal/OSHA Training Academy

# Cal/OSHA General Info

Link: [www.dir.ca.gov/DOSH](http://www.dir.ca.gov/DOSH)

- Regulations
- Publications / etools
- Reporting / Recording info
- Policies & Procedures

The screenshot shows the homepage of the California Department of Industrial Relations (DIR) website, specifically the Cal/OSHA section. The header includes the State of California logo and the Department of Industrial Relations name. A navigation bar contains links for Labor Law, Cal/OSHA - Safety & Health, Workers' Comp, Self Insurance, Apprenticeship, Director's Office, and Boards. The main content area features a large banner for Cal/OSHA with a description of the Division of Occupational Safety and Health (DOSH) and its activities. Below the banner are sections for Workers and Employers, each with a list of services and links. On the right side, there are sections for Emergency Response, Quick Links, and Cal/OSHA Branches & Units.

State of California  
Department of Industrial Relations

Cal/OSHA español

The Division of Occupational Safety and Health (DOSH), better known as Cal/OSHA, protects and improves the health and safety of working men and women in California and the safety of passengers riding on elevators, amusement rides, and tramways – through the following activities:

- Setting and enforcing standards
- Providing outreach, education, and assistance
- Issuing permits, licenses, certifications, registrations, and approvals

Cal/OSHA safety engineers at work

### Workers

- Health & Safety Rights: [Facts for California Workers](#)
- Protecting Temporary Agency Employees
- Report a labor law violation
- Report a bad employer in the underground economy
- Request benefits for a work injury
- Young workers program

[File a workplace safety complaint](#)  
*(interpretation services available)*

[File a workplace retaliation complaint](#)

### Employers

- Required for employers:
  - » [Notifications](#) » [Postings](#) » [Recordkeeping](#)
- Consultation Services and Partnership Programs
- Permits, registrations, certifications & licenses
- Payments—invoices and penalties
- Develop an injury & illness prevention program
- Appeal a Cal/OSHA enforcement action
- Develop a heat illness prevention plan

[Report a Workplace Accident:](#)  
Employer Reporting

### Emergency Response

- [Cal/OSHA Safety Guidance on Coronavirus](#)
- [Worker Safety and Health in Wildfire Regions](#)

### Quick Links

- [File a workplace safety complaint](#)
- [Obtain a free consultation](#)
- [Important Cal/OSHA updates](#)
- [Public records requests](#)

### Cal/OSHA Branches & Units

#### Branches

- [Enforcement](#)
- [Consultation Services](#)

#### Units

- [Amusement Ride and Tramway](#)
- [Asbestos and Carcinogen](#)
- [Census of Fatal Occupational Injuries](#)
- [Communications Program](#)
- [Crane](#)

# Cal/OSHA Consultation Services

Toll-Free Number: 800-963-9424

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- **LA/Orange**  
1 Centerpointe Drive, Suite 150  
La Palma, CA 90623  
(714) 562-5525
- **San Fernando Valley**  
6150 Van Nuys Boulevard, Suite 307  
Van Nuys, CA 91401  
(818) 901-5754
- **San Bernardino**  
464 W. 4th Street, Suite 339  
San Bernardino, CA 92401  
(909) 383-4567
- **San Diego**  
7575 Metropolitan Drive, Suite 204  
San Diego, CA 92108  
(619) 767-2060
- **Central Valley**  
2550 Mariposa Mall, Suite 2005  
Fresno, CA 93721  
(559) 445-6800
- **Northern California**  
**1750 Howe Avenue, Suite 490**  
Sacramento, CA 95825  
(916) 263-0704  
**NOTE: NEW ADDRESS EFFECTIVE JULY 2020**
- **San Francisco Bay Area**  
1515 Clay Street, Suite 1103  
Oakland, CA 94612  
(510) 622-2891

# Role of the California Labor Commissioner's Office in Regard to Exclusion Pay and Covid Reporting

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The Labor Commissioner has jurisdiction to enforce all provisions of the Labor Code not specifically vested in other agencies. [LC 95]

Among other duties the Labor Commissioner

operates a:

Wage Adjudication program

Retaliation Complaint Investigation unit

Bureau of Field Enforcement

# All 3 of these programs have responsibilities for COVID 19 regulatory enforcement

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## Wage Claim Adjudication

Accepts and adjudicates claims for unpaid and underpaid exclusion pay

## Retaliation Complaint Investigation Unit

Investigates claims of adverse actions taken against employees based on exercise of rights and prosecutes violations

## Bureau of Field Enforcement

Investigates failure to pay exclusion pay and failure to accurately report Covid infections. Violations may be prosecuted through citations or lawsuits pursuant to LC 98.3

# Supplemental Paid Sick Leave

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The Families First Coronavirus Recovery Act provided for 10 days of paid sick leave for employers with less than 500 employees nationwide.

The Emergency Order N-51-20 provided SPSL for workers in the food sector starting April 16, 2020 for employers with 500 or more employees nationwide.

AB 1867 expanded SPSL to employees for all business with 500 or more employees nationwide.

**Both Federal and State Covid Paid Sick Leave requirements expired at the end of 2020.**

SPSL FAQs can be accessed by Google search for:

“CA SPSL”

Leaves that commenced prior to the end of 2020 are covered in full.

# California Paid Sick Leave

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The requirements for Paid Sick Leave that went into effect in 2015 are still in place.

Employees at their discretion may utilize PSL for Covid related absences.

PSL FAQs can be accessed by Google search for:

“CA PSL”

# Covid specific responsibilities

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## Emergency Temporary Standard

Labor Commissioner enforces the requirement for payment of exclusion pay

Labor Commissioner investigates and prosecutes retaliation claims

## SB 1159 workers compensation presumption reporting requirement penalties

Labor Commissioner investigates failures to accurately report Covid positive test results to insurance administrators

Labor Commissioner issues penalty citations and/or files civil actions for penalties under LC 3212.88 (j)



# DOSH Emergency Temporary Standard

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ETS requires that the employer exclude employees from a workplace where there has been a Covid outbreak and the employee has been exposed to Covid:

DOSH has exclusive jurisdiction over enforcement of the requirement that employers exclude employees who have been exposed to Covid.

Labor Commissioner jurisdiction covers only enforcement of the requirement for exclusion compensation and the handling of retaliation claims.

# Requirement for Exclusion Pay

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## § 3205(C )

**For employees excluded from work under subsection (c)(10) and otherwise able and available to work, employers shall continue and maintain an employee's earnings, 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. Employers may use employer-provided employee sick leave benefits for this purpose and consider benefit payments from public sources in determining how to maintain earnings, rights and benefits, where permitted by law and when not covered by workers' compensation.**

## § 3205(c)

(10) Exclusion of COVID-19 cases. The purpose of this subsection is to limit transmission of COVID-19 in the workplace.

(A) Employers shall ensure that COVID-19 cases are excluded from the workplace until the return to work requirements of subsection (c)(11) are met.

(B) Employers shall exclude employees with COVID-19 exposure from the workplace for 14 days after the last known COVID-19 exposure to a COVID-19 case. [reduced to 10 days effective 12/14/20 EO-N-84-20]

# Eligibility for Exclusion Pay

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**(C) For employees excluded from work under subsection (c)(10) and otherwise able and available to work, employers shall continue and maintain an employee's earnings, 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. Employers may use employer-provided employee sick leave benefits for this purpose and consider benefit payments from public sources in determining how to maintain earnings, rights and benefits, where permitted by law and when not covered by workers' compensation.**

# Exceptions to requirement for exclusion pay

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- Any period of time during which the employee is unable to work for reasons other than protecting persons at the workplace from possible COVID-19 transmission
- Where the employer demonstrates that the COVID-19 exposure is not work related
- For employees who can telework

# Eligibility Scenarios

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## Scenario 1

**Employer excludes employee from the workplace due to COVID-19 exposure in the workplace and employee is otherwise available to work. Employee tests negative for COVID-19.**

**The employee meets all of the requirements for exclusion pay under the ETS. But for the employer's exclusion due to COVID-19 exposure, the employee would otherwise be available to work.**

# Eligibility Scenarios

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## Scenario 2

Employer excludes employee from the workplace due to COVID-19 exposure in the workplace and employee is “otherwise able and available to work”. Employee tests negative for COVID-19. Employee applies for Unemployment Insurance (UI) or State Disability Insurance (SDI) and receives some benefits for the time employee is quarantined.

The employee meets all of the requirements for *exclusion pay* under the ETS. But for the employer’s exclusion due to COVID-19 exposure, the employee would “otherwise be able and available to work”.

Employee must be paid the difference between what employee would have received in regular pay for the dates employer excluded employee from work due to COVID-19 exposure and what employee received from UI or SDI.

# Eligibility Scenarios

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## Scenario 3

Employee believes he/she has been exposed to COVID-19 in the workplace and excludes himself/herself from work to quarantine (self-help). Employee then requests *exclusion pay* from employer for period of time employee was under quarantine.

The employee does not meet all of the requirements for *exclusion pay* under the ETS. Specifically, the employer has not excluded employees from the workplace due to exposure in the workplace as required under section 10(B) of the ETS.

# Eligibility Scenarios

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## Scenario 4

Employer excludes employee from the workplace due to COVID-19 exposure in the workplace. Employee tests positive for COVID-19 and cannot work due to symptoms.

Employee is not eligible for *exclusion pay* because the employee is not “otherwise able and available” to work due to COVID-19 positive test and symptoms. The employee may be eligible for workers’ compensation or disability insurance. Additionally the employee could utilize PSL.



# Eligibility Scenarios

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## Scenario 5

**Employer excludes employee from the workplace due to COVID-19 exposure in the workplace. Employee tests positive for COVID-19 but is *asymptomatic*.**

**Since employee tested positive for COVID-19 due to exposure in the workplace, employee must file a claim for workers' compensation insurance**

**Employee may be entitled to partial disability benefits even if asymptomatic, if employer or medical professional excluded employee from the workplace due to testing positive**

# Eligibility Scenarios

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## Scenario 6

**Employer excludes employee from the workplace due to COVID-19 exposure in the workplace. Employee tests positive for COVID-19 but is *asymptomatic*. Employer does not have workers' compensation insurance.**

**If the employer does not have workers' compensation insurance, employee is not bound by the workers' compensation exclusive remedy and must be provided exclusion pay.**

**Employer will also be subject to a Stop Order and civil penalties under LC 3710.1 and/or under LC 3722.**

# Calculating Exclusion Pay

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During the exclusion period, the Labor Commissioner will enforce *exclusion pay* based on how the LCO enforces PSL and SPSL. This means the LCO will utilize the *regular rate of pay* in determining the rate of *exclusion pay* and will compute the number of hours based on the schedule of the worker (i.e., either the regularly scheduled hours or if variable based on the average as indicated in the FAQs on SPSL).

The scheduled hours during the pay period in which the employer excluded the worker will be used to determine number of hours and pay rate. Pay is due on the pay date for the pay period in which the employer excluded the employee.

# Calculating Exclusion Pay

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## **Regular Rate**

The regular rate of pay includes more than an hourly rate of pay. It will include other compensation such as commissions, production and other non-discretionary bonuses, value of lodging and other forms of compensation.

See the The DLSE Enforcement Policies and Interpretations Manual, Chpt. 49.

Google: “DLSE Manual”

# Calculating Exclusion Pay

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The quarantine period will be 10 days in most cases:

- Exposed but tests Negative to COVID-19.
- Exposed, tests Positive for COVID-19 and is asymptomatic.
  - ❖ This employee would be eligible to recover exclusion pay in a Berman hearing only if their employer is uninsured.
- Note: There may be some healthcare workers who are covered by the ETS in which case their quarantine period will be 7 days. Please refer to the Aerosol Transmission Diseases regulations for more info.

# Calculating Exclusion Pay

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## § 3205(C )

Employers may use employer-provided employee sick leave benefits for this purpose and consider benefit payments from public sources in determining how to maintain earnings, rights and benefits, where permitted by law and when not covered by workers' compensation.

The language of the ETS regulation and DOSH's FAQs make clear that employers may require employees to exhaust sick leave before receiving exclusion pay only where permitted by law. Under both Paid Sick Leave (PSL) and Supplemental Paid Sick Leave (SPSL), the employee must be able to elect whether or not to use sick leave.

Note that PSL provided separate from the state mandated PSL may be subject to exhaustion.

# Calculating Exclusion Pay

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There is no maximum daily or weekly pay. Therefore, the employee will receive the amount for their regularly scheduled hours at the regular rate of pay without the maximum applied during the exclusion period. This amount may be offset by an employer defense that the employee has applied for and received public benefits such as unemployment insurance or state disability insurance during the exclusion period.

# Additional remedies available

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*Exclusion pay* constitutes wage continuation during the exclusion period. Therefore, in addition to the unpaid amount of *exclusion pay*, **interest** will apply.

Also, **Labor Code section 210 penalties** for late payment and section 203 **waiting time penalties**, *may* apply to violations.



# Recovery Procedures

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A worker may pursue a claim for exclusion through the section 98 “Berman” wage adjudication procedure

The Labor Commissioner Bureau of Field Enforcement may investigate exclusion claim compliance and pursue claims for groups of employees denied exclusion pay through a section 98.3 civil action

# Retaliation Claims

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A worker is protected if he or she complains about exclusion pay, files a complaint related to exclusion pay, or in some other way exercises his or her right to exclusion pay.

❖ Labor Code §§ 98.6, 1102.5, 6310 and 6311

A worker who complains in error may still be protected if the complaint was reasonable or in good faith.

# Retaliation Claims

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The ETS includes other health & safety related requirements.

- ❖ Examples: Requiring that employees be able to maintain a distance of at least six feet, solid partitions when distancing is not possible, requiring use of face coverings, communications on how to report illness

A worker is also protected from retaliation if they exercise their rights related to the non-exclusion pay ETS requirements.

# Retaliation Claims

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If a worker is retaliated against for reporting his or her own COVID-19 illness or a coworker's illness, this may fall under section 6310

# Failure to accurately report Covid positive tests

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LC § 3212.88 (i)

(i) When the employer knows or reasonably should know that an employee has tested positive for COVID-19, the employer shall report to their claims administrator in writing via electronic mail or facsimile within three business days all of the following:

- (1) An employee has tested positive. For purposes of this reporting, the employer shall not provide any personally identifiable information regarding the employee who tested positive for COVID-19 unless the employee asserts the infection is work related or has filed a claim form pursuant to Section 5401.
- (2) The date that the employee tests positive, which is the date the specimen was collected for testing.
- (3) The specific address or addresses of the employee's specific place of employment during the 14-day period preceding the date of the employee's positive test.
- (4) The highest number of employees who reported to work at the employee's specific place of employment in the 45-day period preceding the last day the employee worked at each specific place of employment.

# Failure to accurately report Covid positive tests

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The information which must be reported to the claims administrator is utilized to determine whether there is a Covid outbreak and whether the statutory presumption of compensability applies to a claim for benefits.

Due to the critical nature of the information to be reported the legislature has incorporated a \$10,000 civil penalty in the statute.

# Failure to accurately report Covid positive tests

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(j) An employer or other person acting on behalf of an employer who intentionally submits false or misleading information or fails to submit information when reporting pursuant to subdivision (i) is subject to a civil penalty in the amount of up to ten thousand dollars (\$10,000) to be assessed by the Labor Commissioner.

The penalty may be recovered through a civil penalty citation or through a section 98.3 lawsuit

# Failure to accurately report Covid positive tests

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## **Procedures for contesting a citation**

A civil penalty assessment can be challenged within 15 business days after service of the citation

A hearing shall be held within 30 days

A decision shall be served within 15 days after the hearing

A writ challenging the decision may be taken within 45 days of service of the decision

If the party filing a writ of mandate is unsuccessful in challenging the decision of the hearing officer, the Labor Commissioner shall recover costs and attorney fees