

November 8, 2021

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Submitted electronically: rs@dir.ca.gov

RE: New COVID-19 Emergency Temporary Standards Amendments

Dear Acting Chief Lucido:

The California Chamber of Commerce and the undersigned organizations submit this letter to provide comment upon the proposed second re-adoption of the COVID-19 Emergency Temporary Standard (Section 3205, “ETS”, or “the Regulation”), and its differences from the existing provisions of the ETS (the “2nd Readoption ETS”).¹

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

Simply put – vaccination is the most effective preventative measure against COVID-19 and being vaccinated changes the likelihood of catching COVID-19 and severity of symptoms significantly. As has been reported widely and repeatedly – the vast majority of COVID-19 cases, hospitalizations, and deaths continue to be among the *unvaccinated*.² Moreover, there is new evidence noting that, where breakthrough cases occur, they appear to be most common in those with underlying health conditions, including seniors or immuno-compromised individuals.³ In fact, there are also some early signs that, contrary to initial concerns, when a breakthrough case does occur, it appears to not spread COVID-19 the same way that unvaccinated cases do.⁴

¹ Second Readoption ETS text with strikeouts/redlines for changes available here:

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

² California’s own data supports this reality. Updated data available at: <https://covid19.ca.gov/state-dashboard/#postvax-status>.

³ See *Massachusetts’s Institute of Technology, Medical* - “Breakthrough Infections: What you need to know”, Aug 5, 2021. Available at: <https://medical.mit.edu/covid-19-updates/2021/08/breakthrough-infections> (“In addition, the vast majority of those who do become seriously ill from breakthrough infections are older or have underlying medical conditions.”). See also John Hopkins Medicine, Health “Breakthrough Infections: Coronavirus after Vaccination”, available at: <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/breakthrough-infections-coronavirus-after-vaccination> (“Although any fully vaccinated person can experience a breakthrough infection, people with weakened immune systems caused by certain medical conditions or treatments (including organ transplants, HIV and some cancers and chemotherapy) are more likely to have breakthrough infections.”)

⁴ See “Virological characteristics of SARS-CoV-2 vaccine breakthrough infections in healthcare workers,” Preprint available at: <https://www.medrxiv.org/content/10.1101/2021.08.20.21262158v1>. See also National Public Radio, “Breakthrough infections might not be a big transmission risk. Here’s the evidence. Oct 12, 2021, available at: <https://www.npr.org/sections/health-shots/2021/10/12/1044553048/covid-data-vaccines-breakthrough-infections-transmission>.

With this background in mind and noting that we expect significant medical improvements before the 2nd Readoption ETS,⁵ we believe some of the additional requirements of the 2nd Readoption ETS text are not necessary. We have identified specific concerning changes between the present ETS and the 2nd Readoption ETS below.

Specific Provision Concerns

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

There has been nationwide press on the coming shortage of COVID-19 tests, (particularly rapid tests), including specific acknowledgements from the White House.⁶ We also anticipate an increase in testing demand due to the recently-released vaccine mandate for employers with 100+ employees, which will drive up demand nation-wide and affect California employers' ability to purchase such tests.

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

We believe the present ETS strikes a proper balance on this issue by not requiring testing of vaccinated individuals who are close contacts unless they develop symptoms.

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

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

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

For context – many workplaces across the state were re-organized to accommodate 6-foot spacing during the COVID-19 lockdown. Then, when California re-opened in June, workplaces across the state were able to return to normal spacing of workstations – which, for many involved physically relocating workstations or similar relocations of workplace equipment. These reorganizations are not trivial. Employers cannot be re-organizing their workplace on a per-person basis for a two-week period. As a result, the proposed new “alternative” is not feasible for some workplaces.

Troublingly, the other alternative – 14-day exclusion of vaccinated employees with no symptoms – is also not feasible. California is experiencing a labor shortage across multiple sectors and sending home fully vaccinated employees who are *far less likely* to catch COVID-19, or, if caught, *even less likely to have serious symptoms* makes no sense. In effect, such a policy removes a significant

⁵ Among these improvements, we expect children's vaccines and new antiviral pills from Merck and Pfizer to significantly improve vaccination rates in the total population, as well as COVID-19 hospitalization and death rates.

⁶ White House acknowledgement noted at <https://abcnews.go.com/Politics/white-house-promises-rapid-covid-19-tests-amid/story?id=80351004>.

portion of the benefit of vaccination for the employer community – ensuring that their workplaces are consistently able to function – by forcing exclusion of vaccinated employees.

We think this drastic change in policy is particularly surprising in that it would be in effect for 90 days (the duration of the second readoption) and then would disappear under the draft of the permanent regulation which has been publicly released. Such a drastic change doesn't make sense when California has been successful in reducing COVID-19 cases and hospitalization rates (despite the recent re-opening of schools and June re-opening of the economy) largely because of the effectiveness of vaccines.

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

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

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

As noted above, requiring institution of social distancing if a vaccinated employee returns prior to 14 days after an exposure is problematic for many workplaces – and particularly so for critical industries. These settings were recognized in the present ETS for special treatment particularly because they must be able to provide their services, and cannot do so without their personnel. For that reason, we believe that requiring these industries to re-institute social distancing for 7 days⁷ after a vaccinated person has a close contact (and a negative test) will potentially interfere with their ability to provide critical services.

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

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

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

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

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

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

We are concerned that the 2nd Readoption ETS text's change would require every employer who provides housing to purchase or rent multiple HEPA filtration units – creating a surge in demand that will create serious costs, potential supply shortages, and minimal benefits compared to the present ETS text. Also, we do not believe such purchases are justified given that the 2nd Readoption

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

will be in effect for only three months - meaning by the time the market supply adjusts, this text will be irrelevant.

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

We appreciate the opportunity to comment on the Second Readoption ETS.

Sincerely,



Robert Moutrie
Policy Advocate
California Chamber of Commerce
on behalf of

Agricultural Council of California
African American Farmers of California
Association of California Egg Farmers
California Association of Joint Powers Authorities
California Association of Wheat Growers
California Association of Winegrape Growers
California Attractions and Parks Association
California Bankers Association
California Bean Shippers Association
California Beer and Beverage Distributors
California Building Industry Association
California Business Properties Association
California Chamber of Commerce
California Citrus Mutual
California Cotton Ginners and Growers
Association
California Framing Contractors Association
California Fresh Fruit Association
California Gaming Association
California Grain and Feed Association
California League of Food Producers
California Manufacturers & Technology
Association
California Pear Growers Association
California Restaurant Association
California Retailers Association
California Rice Commission

California Seed Association
California Special Districts Association
California State Association of Counties
California State Floral Association
California Walnut Commission
California Warehouse Association
Construction Employers' Association
Family Business Association of California
Far West Equipment Dealers Association
Housing Contractors of California
League of California Cities
Mason Contractors Association of California
National Federation of Independent Business
Nisei Farmers League
Pacific Association of Building Service
Contractors
Pacific Coast Renderers Association
Pacific Egg & Poultry Association
Public Risk Innovation, Solutions and
Management (PRISM)
Residential Contractors Association
San Diego Regional Chamber of Commerce
Santa Maria Valley Chamber of Commerce
Western Agricultural Processors Association
Western Growers Association
Western Steel Council
Wine Institute

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