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Occupational Safety and Health Standards Board
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FINAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS

TITLE 8: New Sections 3205, 3205.1, 3205.2, and 3205.3
of the General Industry Safety Orders

COVID-19 Prevention

MODIFICATIONS AND RESPONSE TO COMMENTS RESULTING FROM THE 45-DAY PUBLIC COMMENT PERIOD

There are no modifications to the information contained in the Initial Statement of Reasons except for the following substantive, nonsubstantive or sufficiently related modifications that are the result of public comments and evaluation by the Occupational Safety and Health Standards Board (Board) and the Division of Occupational Safety and Health (Division or Cal/OSHA) staff.

Proposed section 3205 was modified as follows:

1. Subsection 3205(a)(1), Scope, was revised to reflect revisions to a cross-referenced subsection. This modification was necessary to harmonize the reference with the new numbering.
2. Subsection 3205(b)(1), the definition of "close contact," was revised to provide additional clarity regarding how to determine who is considered a close contact of a COVID-19 case. This modification was necessary to provide greater specificity to the regulated community and to be consistent with the new definition of "close contact" from the California Department of Public Health (CDPH).
3. Subsection 3205(b)(7)(A), the definition of "exposed group," was revised to remove the reference to face coverings. This modification was necessary to reflect the reality that few persons in the workplace wear face coverings at this time.
4. Subsection 3205(b)(11), the definition of "returned case," was revised to change the time period for being considered a returned case from 90 days to 30 days. The change to a 30-day period after infection was necessary to be consistent with the CDPH's "Updated Testing Guidance" (dated September 15, 2022), which itself was based on the growing understanding that newer variants of SARS-CoV-2 can re-infect people in under 90 days after being infected.
5. Subsection 3205(c)(1) has been revised to clarify the employer's responsibilities in determining measures to prevent COVID-19 transmission and identifying and correcting

COVID-19 hazards. The modification was necessary to emphasize that the principle of “Universal Precautions” (an approach to infection control), as applied to COVID-19, requires employers to *consider* all persons as potentially infectious, when determining measures to prevent transmission and identifying and correcting COVID-19 hazards.

6. Subsection 3205(e), regarding notice of COVID-19 cases, was revised in light of the signing of AB 2693 and the corresponding revisions to Labor Code section 6409.6. This modification was necessary to harmonize the regulation with the revised statute.
7. Subsection 3205(h)(1), regarding ventilation, was revised to clarify that employers must develop, implement, and maintain effective methods to prevent COVID-19 transmission including certain ventilation improvements. This modification was necessary to afford to employers the flexibility with respect to ventilation as a method of decreasing COVID-19 transmission in the workplace and stay consistent with recommendations from CDPH.
8. Subsection 3205(j), regarding reporting and recordkeeping, was revised to remove a requirement to report outbreaks to local health departments; to remove a contact-tracing requirement for close contacts; and revisions in light of the signing of AB 2693 and the corresponding revisions to Labor Code section 6409.6. This modification was necessary to harmonize the regulation with the revised statute.

Proposed section 3205.1 was modified as follows:

1. Subsection 3205.1(a)(2), Scope, was revised to change the threshold for exiting outbreak status from zero new COVID-19 cases in the exposed group for a 14-day period to one or fewer new COVID-19 cases in the exposed group for a 14-day period. This modification was necessary in light of improvements in health outcomes related to COVID-19.
2. Subsection 3205.1(e), COVID-19 investigation, review, and hazard correction, was revised to change the requirement to “immediately perform a review” to a requirement to perform a review “when this section initially applies and periodically thereafter.” This modification was necessary in light of improvements in health outcomes related to COVID-19.

Proposed section 3205.2 was modified as follows:

1. Subsection 3205.2(g)(2), COVID-19 cases and close contacts, was revised to replace the phrase “for the time period required by subsection 3205(c)(5)(B)” to “in accordance with subsection 3205(c)(5)(B).” This modification was necessary to harmonize “close contact” responses across the regulations.

SUMMARY AND RESPONSE TO WRITTEN AND ORAL COMMENTS
RESULTING FROM THE 45-DAY COMMENT PERIOD:

I. Written Comments

1. Helen Cleary, Director, on behalf of the Phylmar Regulatory Roundtable (PRR) Occupational Safety and Health, OSH Forum, by written comments dated September 9, 2022.

Comment 1.1

The commenter appreciates the changes from the COVID-19 Emergency Temporary Standard (ETS) that support flexibility and allow employers to follow changing guidance and orders issued by the California Department of Public Health (CDPH). They also support the alignment with the well-known and effective requirements in section 3203, the Injury and Illness Prevention Program (IIPP). The commenter states that the proposed text is better organized, more streamlined and provides additional clarity where the ETS falls short.

Response to Comment 1.1

The Board appreciates the commenter's support for these aspects of the proposed regulation.

Comment 1.2

The commenter urges the Board to ensure that the regulation's duration be "based in science," that the regulation cease treating COVID-19 as medically significant to every person, and that it align with public health and the state's approach to the disease. They ask the Board to sunset the regulation one year earlier than proposed, pointing to AB 2693, which would extend COVID-19 notification requirements until January 1, 2024. The commenter also urges the Board and the Division to reevaluate the regulation after six months, with reference to specific milestones and alignment with public health recommendations and state mandates (*e.g.*, if the state of emergency is repealed, the regulation should be too).

Response to Comment 1.2

The Board disagrees with the commenter's assertions and requests. Although the scope of the proposed regulation states that it shall apply for two years (and recordkeeping for three years), there remains flexibility. The Board may revoke the regulation through the rulemaking process prior to the end of the two years if circumstances warrant a revocation. The Board further disagrees with the commenter's premise that a non-emergency regulation is not needed. While it is always helpful to have more information regarding a disease that has spread significantly in the occupational context, the Board feels it has sufficient information regarding the spread of COVID-19 in workplaces to craft a regulation that continues and modifies the protections of the Emergency Temporary Standards (ETS) for a limited period of time.

Comment 1.3

The commenter suggests that the proposed regulation be revised to remove the requirements to notify employees when they have had a close contact and to create and maintain records of who has had a close contact. The commenter argues that individual contact tracing is ineffective and overly burdensome, and instead employers should be focusing on mitigating transmission. The commenter points out that the proposed regulation already includes requirements to: review current CDPH guidance for close contacts and implement effective methods (subsection 3205(c)(5)(B)); test close contacts (subsection 3205(d)); and notify close contacts in compliance with Labor Code section 6409.6 (subsection 3205(e)(2), (3)). The commenter argues that, when combined, these requirements ensure that close contacts will be appropriately managed and transmission reduced, and so the additional recordkeeping requirements both are not necessary to prevent transmission and also add additional requirements that do not support flexibility. The commenter proposes the following changes to the text of subsection 3205(e):

(e) Notice of COVID-19 cases.

~~(1) The employer shall notify employees and independent contractors who had a close contact, as well as any employer with an employee who had a close contact. The notice shall be provided as soon as possible, and in no case longer than the time required to ensure that the exclusion requirements of subsection 3205(5)(A) are met.~~

(i)[sic](2) The employer shall keep a record of and track all COVID-19 cases with the employee's name, contact information, occupation, location where the employee worked, the date of the last day at the workplace, and the date of the positive COVID-19 test and/or COVID-19 diagnosis. ~~The employer shall also keep a record of persons who had a close contact, including their names, contact information, and the date upon which they were provided notice of the close contact.~~ These records shall be retained for two years beyond the period in which the record is necessary to meet the requirements of this section or sections 3205.1 through 3205.3.

Response to Comment 1.3

The Board agrees with the suggested changes to the proposed text and has removed subsection 3205(e)(1) and amended subsection 3205(j)(2) through the 15-Day Notice issued on October 14, 2022.

The Board disagrees with the commenter that proposed subsection 3205(e) is solely duplicative of section 6409.6, that it should be removed from the proposed regulation, or that it should sunset with Labor Code section 6409.6. Proposed subsection 3205(e) includes possible future changes to Labor Code section 6409.6 and other applicable laws that relate to informing employees of COVID-19 in the workplace. Labor Code section 6409.6 has already been extended twice by the legislature and the Board does not know if it may be extended again in the future or if the legislature will create other laws in place of Labor Code section 6409.6.

If, in the future, there is no applicable law regarding informing employees of COVID-19 in the workplace, there would be no additional requirements on employers pursuant to subsection 3205(e). If this were to occur, the Board could then remove subsection 3205(e) through the rulemaking process.

Comment 1.4

The commenter stated it is imperative that Cal/OSHA and CDPH work together to create a definition that considers how outbreaks can be effectively and rationally managed in the workplace. The commenter encouraged the Board to ensure the occupational environment is represented in the definition and subsequent requirements of an outbreak. The commenter recommended, at a minimum, to limit the scope of testing during an outbreak, that subsection 3205.1(b)(3) be revised:

“Employees in the exposed group who had a close contact shall have a negative COVID-19 test...”

Response to Comment 1.4

The Board declines to adopt the commenter’s proposed modification. To prevent COVID-19 transmission in the workplace during an outbreak, employees who may be infectious must either have a negative COVID-19 test or meet the return-to-work requirements of subsection 3205(c)(5). Limiting the testing during an outbreak would not be consistent with the goal of the regulation.

Comment 1.5

The commenter recommends that the Board add parameters based on proximity to the proposed definition of “close contact” and that the number of COVID-19 cases that trigger an outbreak be considered relative to the size of the workforce. The commenter believes that the proposed changes impose great burdens on employers, made worse by the two-year span of the regulation, which far outweigh its benefits.

Response to Comment 1.5

The Board received similar comments, both written and oral, in opposition to the definition of “close contact.” The comments were offered by groups and individuals representing employers, employees, and policy advocates. In light of the broad consensus that this definition presented significant challenges, and after consulting with CDPH and experts within the Division, the Board proposes a revised definition of “close contact,” dependent on the size of the employer’s indoor space. Under the new definition, in indoor spaces of 400,000 or fewer cubic feet per floor, a close contact is defined as sharing the same indoor airspace as a COVID-19 case, for a cumulative total of 15 minutes or more over a 24-hour period, during the COVID-19 case’s infectious period. In indoor spaces of more than 400,000 cubic feet per floor, a close contact is defined as being within six feet of the COVID-19 case, for a cumulative total of 15 minutes or more over a 24-hour period, during the COVID-19 case’s infectious period.

Comment 1.6

The commenter urges the Board to change the proposed definition of “exposed group” to reflect today’s reality where few persons wear masks in the workplace. The commenter recommends that subsections 3205(b)(7)(A) and (B) be modified as follows:

(A) For the purpose of determining the exposed group, a place where persons momentarily pass through ~~while everyone is wearing face coverings~~, without congregating, is not a work location, working area, or a common area at work.

(B)[sic.] If the COVID-19 case visited a work location, working area, or a common area at work for less than 15 minutes during the infectious period, ~~and the COVID-19 case was wearing a face covering during the entire visit~~, other people at the work location, working area, or common area are not part of the exposed group.

Response to Comment 1.6

The Board agrees, in part, with the commenter’s suggestion. As a result, the proposed text in subsection 3205(b)(7)(A) has been amended to remove the reference to the wearing of face coverings, through the 15-Day Notice issued on October 14, 2022. However, the Board disagrees with the commenter’s suggestion to amend subsection 3205(b)(7)(C). The concept of the exposed group is to include a broad group of employees who may have been exposed to COVID-19 in the workplace. Removing the face covering requirement from subsection 3205(c)(7)(C) would not be consistent with this concept.

Comment 1.7

The commenter supports the removal of the exclusion pay requirements from the Proposed Text. They state that it is not appropriate for Cal/OSHA to determine and enforce requirements regarding pay and sick leave. They further state that employers have carried the burden of managing the COVID-19 crisis for far too long and this provision clearly illustrates that fact. They conclude that any benefit of exclusion pay should be left up to the State’s elected body.

Response to Comment 1.7

The Board appreciates the commenter’s support for this aspect of the proposed regulation.

Comment 1.8

The commenter states that the Division and Board must determine the effectiveness of the COVID-19 ETS before adopting a sweeping rule that will be in place until January 2025 and need to analyze actual data objectively. The Board does not provide any data to support a claim that the proposed regulation would significantly reduce the number of COVID-19 related illnesses, disabilities and deaths in California’s workforce. The commenter also states that the Board did not consider the worker compensation data when analyzing the cost or demonstrating the need for the proposed regulation. It has been said at Board meetings that worker compensation numbers are underreported and implied that this is the reason it should not be considered. While underreporting may be true, it is still relative data that is tracked and legally acted upon.

Underreported data can still be modeled and extrapolated to provide statistical insights that can aid in setting a baseline that is based on real data points.

Response to Comment 1.8

The Board disagrees that the effectiveness of the COVID-19 ETS must be determined before adopting a non-emergency regulation that will be in effect for two years. COVID-19 is a disease that is highly contagious and kills, on average, 26 Californians each day (as of July 12 – September 5, 2022),¹ and remains a significant health hazard to employees in California.

Comment 1.9

The commenter urges the Board to delete subsection 3205(c)(1). The commenter believes that such deletion does not eliminate an employer's responsibility to identify, correct, and address COVID-19 in the workplace because subsection 3205(c)(2) clearly establishes this.

Response to Comment 1.9

The Board has modified subsection 3205(c)(1) to improve clarity. Employers shall consider all persons to be potentially infectious "when determining measures to prevent COVID-19 transmission and to identify and correct COVID-19 hazards..."

The Board thanks the commenter for their input and participation in the rulemaking process.

- 2. Robert Moutrie, Policy Advocate, California Chamber of Commerce on behalf of Acclamation Insurance Management Services, Advanced Medical Technology Association, African American Farmers of California, Allied Managed Care, American Composites Manufacturers Association, Associated General Contractors, Association of California School Administrators, BizFed Los Angeles Business Federation, Building Owners and Managers Association, California Association of Joint Powers Authorities, California Association of Sheet Metal and Air Conditioning Contractors National Association, California Attractions and Parks Association, California Building Industry Association, California Business Properties Association, California Chamber of Commerce, California Construction and Industrial Materials Association, California Credit Union League, California Farm Bureau, California Framing Contractors Association, California Fresh Fruit Association, California Manufacturers & Technology Association, California New Car Dealers Association, California Restaurant Association, California Retailers Association, California Special Districts Association, California State Association of Counties, California Travel Association, California Trucking Association, Coalition of Small and Disabled Veteran Businesses, Construction Employers' Association, Dairy Institute of California, El Dorado County Chamber of Commerce, El Dorado Hills Chamber of Commerce, Elk Grove**

¹ State of California. Tracking COVID-19 in California. Updated September 29, 2022. Accessed September 30, 2022. <https://covid19.ca.gov/state-dashboard/>

Chamber of Commerce, Evans Hotels, Family Business Association of California, Flasher Barricade Association, Folsom Chamber of Commerce, Housing Contractors of California, League of California Cities, Lincoln Area Chamber of Commerce, NAIOP of California, Nisei Farmers League, Plant California Alliance, Rancho Cordova Area Chamber of Commerce, Residential Contractors Association, Rocklin Area Chamber of Commerce, Roseville Area Chamber of Commerce, San Gabriel Valley Economic Partnership, United Chamber Advocacy Network, Western Manufactured Housing Communities Association, Western Plant Health Association, Western Steel Council, Wine Institute, Yuba Sutter Chamber of Commerce, by written comments dated September 12, 2022.

Comment 2.1

The commenter offers two general comments regarding the proposed regulations. First, they note that the proposed regulations must be flexible to keep up with evolving science. In this regard, they argue that the method used for updating the ETS – periodic readoptions using the emergency rulemaking process – was “an imperfect method for constantly updating the ETS’s very proscriptive (and quickly outdated) textual provisions,” as it only “allowed for slight changes to be made.” They point out that this will not be workable for the proposed non-emergency regulations, and to the necessity for the proposed regulations to include “more flexible language to allow for up-to-date best practices without constant textual changes.” They note with approval that the proposed regulations represent a shift from “a more detail-oriented style to a more flexible approach via utilizing the Injury and Illness Prevention Program.”

Second, they note that the proposed regulations are “much more approachable than the ETS was,” an important consideration as employers continue to “attempt to integrate compliance into their workplaces on a non-emergency basis.” In particular, they point out that the emergency temporary standards governing Outbreaks and Major Outbreaks have been combined, “distilling responsibilities effectively.”

Response to Comment 2.1

The Board appreciates the commenter’s support for these aspects of the proposed regulation.

Comment 2.2

The commenter fundamentally objects to the proposed regulation’s existence, but supports limiting the duration of the proposed regulation. They argue that, “[o]ver time, we will know more about COVID’s longevity, capacity for evolution, and the effectiveness of improving medical advances to minimize COVID’s health consequences. We will know more about long COVID’s risks, and more about potentially disparate impacts on different populations. We will know better whether ongoing precautions are necessary or not – and, if necessary, whether they are better combined into a broader infectious disease regulation or on a disease-by-disease basis.”

Response to Comment 2.2

Please see response to comment 1.2.

Comment 2.3

The commenter raises several objections to the definition of “close contact.” First, they point out that the shift from a concrete, bright-line definition (being within six feet of a COVID-19 case, for 15 or more minutes, over a 24-hour period) to the proposed “sharing the same indoor space” as a COVID-19 case “has created a mess of confusion for California employers [...] the measure of a ‘close contact’ has been one of the most central, clear, and long-standing definitions in our COVID-19 response.” The commenter further argues that, although the previous definition “may not have been scientifically perfect, it certainly prioritized those at the greatest risk, and was feasible to enforce.” Next, the commenter objects to a perceived lack of precision in the proposed definition, which they argue will “require[] workplace-specific and case-specific analysis to attempt to identify who qualifies as a ‘close contact’ – including looking into factors such as the size of the space, the airflow, the location of the workers, etc.” The commenter argues that the foregoing analysis “remains ambiguous at best – and particularly difficult for smaller employers,” and in the case of larger workplaces, the definition “is overbroad to the point of absurdity.”

Response to Comment 2.3

Please see response to comment 1.5.

Comment 2.4

The commenter notes with approval the removal of exclusion pay from the proposed regulation. They note that exclusion pay mandates “effectively transferred the cost of supporting those sick with COVID-19 onto employers – despite the employer often having no role at all in causing the COVID-19 case.” They also criticize the content of the ETS’s exclusion pay provision, arguing that “employers struggled to implement it in parallel with existing (and thoroughly defined) leave programs.”

Response to Comment 2.4

The Board appreciates the commenter’s support for this aspect of the proposed regulation.

Comment 2.5

With respect to the notice provisions of the proposed regulation, the commenter notes that some of the notice provisions reference Labor Code section 6409.6. They explain the legislative history of Labor Code section 6409.6, including the sunset provision. They recommend making non-substantive changes to the proposed regulation to conform the language to AB 2693 (Reyes), which extends notice requirements for one year.

Response to Comment 2.5

The Board notes that on September 29, 2022, the Governor signed AB 2693 (Reyes) into law, thereby extending the duration of Labor Code section 6409.6 until January 1, 2024. In response, as part of the changes in the 15-day notice period, the Board has modified the proposed regulation to update the notice provisions so that they conform to the new text of Labor Code section 6409.6.

Comment 2.6

The commenter notes that subsection 3205(j)(1) of the proposed regulation requires that “employers shall report information about COVID19 cases and outbreaks at the worksite to the local health department whenever required by law and provide any related information requested by the local health department,” and point out that this provision may also potentially need revision, as AB 2963 will revise Labor Code section 6409.6 to rescind the requirement that local health departments notify CDPH when there is an outbreak.

Response to Comment 2.6

The Board notes that on September 29, 2022, the Governor signed AB 2693 (Reyes) into law, thereby rescinding the requirement that local health departments notify CDPH when there is an outbreak. In response, as part of the changes in the 15-day notice period, the Board has modified the proposed regulation to remove subsection 3205(j)(1) to conform to the new text of Labor Code section 6409.6.

Comment 2.7

The commenter objects to the contact tracing requirements of subsection 3205(j)(2). They point out that universal, individual contact tracing is no longer recommended by CDPH, and argue that the requirement “is a relic of an earlier phase of the COVID-19 pandemic.” They further note that the requirement “is burdensome for employers (particularly with recently-expanded definition of close contacts), and is out of step with CDPH’s present recommendations against such efforts[,]” and ask that it be removed from the proposed regulation.

Response to Comment 2.7

The Board received similar comments, both written and oral, requesting that the contact tracing requirements of subsection 3205(j)(2) be removed from the proposed regulations, from many members of the regulated community. In response to these comments, and in keeping with the most recent CDPH recommendations regarding individual contact tracing, this language will be removed from the proposed regulations in the 15-day notice.

Comment 2.8

The commenter objects to the threshold for exiting outbreak status. They note that the ETS’s outbreak exit condition – zero cases in 14 days – was created at a different stage in the pandemic, and maintaining that threshold in the proposed non-emergency regulations “fails to

update these outbreak thresholds in light of considerable improvements in health outcomes related to COVID-19[.]” They further argue that this exit threshold “has meant that once a workplace enters an outbreak, an outbreak will continue for months if the workplace has just one case every two weeks.” As a result, workplaces “remain[] in outbreak-level precautions of testing due to background social spread that has nothing to do with the workplace.” They propose replacing the zero cases in 14 days exit threshold with a one case in 14 days exit threshold.

Response to Comment 2.8

The Board received similar comments, both written and oral, regarding the exit threshold for outbreak status, from many members of the regulated community. In response to these comments, and after careful consideration of the issue, the Board proposes in the 15-day notice to change the exit threshold from zero cases in 14 days to one or fewer cases in 14 days.

Comment 2.9

The commenter objects to the requirement in both the ETS and the proposed regulation that employers “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” as soon as they determine that there is an outbreak. Citing widespread vaccine uptake, well-developed compliance policies, and a decrease in fatality and severe illness from COVID-19, the commenter argues that outbreak status (which they define as “three cases among employees”) should no longer require “a re-review of all policies.” They also argue that the existing requirement, which is not tied to “instances where COVID-19 was actually spread in the workplace,” means that “employers must re-examine policies for their workplace even when there is no evidence of any deficiency with those public health protective policies.” They urge that the requirement be changed so that employers must “periodically” review relevant procedures and update them as conditions and best practices evolve[.]”

Response to Comment 2.9

The Board received similar comments, both written and oral, regarding the requirement to review COVID-19 policies immediately upon entering outbreak status, from many members of the regulated community. In response to these comments, and after careful consideration of the issue, the Board proposes in the 15-day notice to change the requirement as follows: employers will be required to review COVID-19 polices when the proposed outbreak regulation first applies and periodically thereafter.

The Board thanks the commenter for their input and participation in the rulemaking process.

3. Derek Davis, CEO/HR-Risk and Safety Unit, Stanislaus County, by written comments dated August 5, 2022.

Comment 3.1

The commenter finds the proposed definition of “close contact” to be “extremely subjective and vague” and asks the Board to consider a “scientific or objective method” to determine when a close contact has occurred.

Response to Comment 3.1

Please see response to comment 1.5.

Comment 3.2

The commenter requests that in the case of an outbreak or major outbreak to please allow employers to offer free testing. The commenter further states that the current language in major outbreaks, which makes testing compulsory, has caused anger, frustration, work and time with angry unions and employees that refuse to be forced to test. The commenter states that they believe that when testing is offered rather than required, they get a higher compliance rate.

Response to Comment 3.2

The Board declines to adopt the commenter’s proposed modification. To prevent COVID-19 transmission in the workplace during an outbreak, employees who may be infectious must either have a negative COVID-19 test or, if the employee tests positive or refuses to test, meet the return-to-work requirements of subsection 3205(c)(5). Limiting the testing by allowing employers to make testing available – rather than requiring testing – during an outbreak would not be consistent with the goal of the regulation.

The Board thanks the commenter for their input and participation in the rulemaking process.

4. Ana Vitoria Valle Costa by written comments dated August 13, 2022.

Comment 4.1

The commenter requests that the Board reconsider how outbreaks are defined. They suggest the definition of outbreak be based on the rate of COVID-19 in a workplace (number of infected/number of employees) preferably compared to the rate of COVID-19 in the state (or county).

Response to Comment 4.1

Please see response to comment 12.3.

The Board thanks the commenter for their input and participation in the rulemaking process.

5. Andrea Abergel, Manager of Water Policy, on behalf of the California Municipal Utilities Association, by written comments dated September 8, 2022.

Comment 5.1

The commenter states that although COVID-19 remains an ongoing threat, it is beginning to look like the seasonal flu. They expect that treatment of COVID-19 in the workplace will reflect the virus' cyclical nature and they are committed to ensuring safety in the workplace to minimize the spread of the virus.

Response to Comment 5.1

The Board disagrees with the commenter's assertion that COVID-19 is beginning to look like the seasonal flu, or that treatment of COVID-19 in the workplace should reflect this assertion. The Board acknowledges that there are some unknowns with respect to COVID-19, but, for now, the Board knows that COVID-19 continues to be a serious workplace hazard that can lead to death, serious illness, and long-term disability and will continue to be so for the foreseeable future.

Comment 5.2

The commenter states that the Board should adopt CDPH's guidance for the general public so that Cal/OSHA standards automatically reflect the latest health guidance of the CDPH. Consistency in health guidelines for Californians in both their experience in the public and in the workplace will create less confusion and more compliance with health standards—consequently making all Californians safer. The commenter argues that subsection 3205(a)(1) rigidly requires compliance with these standards for two years, and suggests that compliance should be mandated for the period of two years, or the date California no longer declares a state of emergency related to COVID-19, whichever occurs first.

Response to Comment 5.2

The Board is aware that CDPH guidance is extremely helpful and has followed that guidance. The Board believes, however, that occupational health is different from public health generally and must address the unique setting of the workplace. With respect to the commenter's argument regarding the duration of the regulation, please see response to comment 1.2.

Comment 5.3

The commenter urges the Board to find a clearer definition for "close contact" that includes discrete spatial limitations. The proposed definition puts an enormous burden on public agency members who use large indoor workplaces with employees separated only by cubicles or partial walls, or not at all. The proposed definition considers an employee working in one corner of a large physical space a close contact if they shared the same indoor airspace as a COVID-19 case, regardless of distance from the case or airflow, which bear on the risk of infection. Notifying all close contacts would be costly and laborious and may cause unnecessary concern.

Response to Comment 5.3

Please see response to comment 1.5.

Comment 5.4

The commenter requests clarification over inconsistency with the definition of “COVID-19 test” in subsection 3205(b)(6) and the masking and time-out-of-office requirements of subsection 3205(c)(5). The commenter points out that the “COVID-19 test” definition in subsection 3205(b)(6) allows a self-administered test to satisfy return-to-work criteria of subsection 3205(c)(5). Subsection 3205(c)(5), however, does not include language that a test is required to return to work. The commenter, therefore, recommends deleting the language, “to meet the return-to-work criteria set forth in subsection 3205(c)(5)” from the beginning of subsection 3205(b)(6)(C) to resolve the confusion.

Response to Comment 5.4

The Board declines to make the recommended changes. Subsection 3205(c)(5)(B) requires employers to review current CDPH guidance for persons who had close contacts and develop, implement and maintain effective policies to prevent transmission of COVID-19 by persons who had close contacts. Current CDPH guidance recommends persons who had close contacts to take a COVID-19 test within three to five days after the close contact and the definition in subsection 3205(b)(6) will apply to this COVID-19 test.

Comment 5.5

The commenter suggests expanding the options by which employers can meet the notification requirements of subsection 3205(c)(6). They argue that it will be difficult for employers to determine the identities of close contacts in large indoor spaces. They also note that the current practice of sending a notice to all employees (not just close contacts) with details of a potential exposure should be streamlined, and suggest adding the following language to subsection 3205(c)(6)(1): “Employers may satisfy the requirements of this provision by providing notice to all employees of the date, time, and location of the potential close contact.”

Response to Comment 5.5

The Board notes that notification requirements are found in subsection 3205(e). The Board is not persuaded by the commenter’s argument about the notification, and declines to add language to the current requirements.

The Board thanks the commenter for their input and participation in the rulemaking process.

6. Christina Hildebrand, President/Founder, on behalf of A Voice for Choice Advocacy, Inc., by written comments dated September 10, 2022.

Comment 6.1

The commenter asks that the regulation include a sunset clause of, at most, two years, citing the dynamics of COVID-19 since 2020. After two years, the Board could revisit the regulation, to either revise or readopt it.

Response to Comment 6.1

Please see response to comment 1.2.

The Board thanks the commenter for their input and participation in the rulemaking process.

7. **Tricia Geringer, Vice President of Government Affairs, Agricultural Council of California; Richard Matoian, President, American Pistachio Growers; Todd Sanders, Executive Director, California Apple Commission, California Blueberry Association, California Blueberry Commission, and Olive Growers Council of California; Michael Miiller, Director of Government Relations, California Association of Winegrape Growers; Casey Creamer, President, California Citrus Mutual; Roger Isom, President/CEO, California Cotton Ginners and Growers Association and Western Agricultural Processors Association; Jim Houston, Administrator, California Farm Bureau Federation; Ian LeMay, President, California Fresh Fruit Association; Rick Tomlinson, President, California Strawberry Commission; Timothy A. Johnson, President/CEO, California Rice Commission and California Rice Industry Association; Robert Verloop, Executive Director/CEO, California Walnut Commission; William Schiek, Executive Director, Dairy Institute of California; Kirti Mutatkar, President/CEO, United Ag; Matthew Allen, Vice President, State Government Affairs, Western Growers Association; and Renee Pinel, President/CEO, Western Plant Health Association; by written comments dated September 12, 2022.**

Comment 7.1

The commenters do not believe an extension of the emergency regulation into a non-emergency regulation is appropriate, citing vaccines, as well as the virus's move to endemic status and its predictable spikes.

Response to Comment 7.1

The Board is not persuaded by the comment. COVID-19 continues to be a serious workplace hazard that can lead to death, serious illness, and long-term disability and will continue to be so for the foreseeable future. Employee protection from COVID-19 is needed now and for the next two years while a general infectious disease standard that includes COVID-19 and other respiratory infectious illnesses can be developed and discussed. The non-emergency COVID-19 regulation under consideration is simplified and more performance-oriented than the COVID-19 Emergency Temporary Standard. With daily deaths of 300-400 nationwide, the Board disputes the commenter's assertion that the virus is no longer a serious health risk.

The Board thanks the commenters for their input and participation in the rulemaking process.

8. Lupe Garza, Human Resources Director, on behalf of County of Tulare, by written comments dated September 8, 2022.

Comment 8.1

The commenter argues that the proposed regulations are better suited to temporary emergency measures lasting six to 12 months, and argues that additional, non-emergency regulations may be redundant and become burdensome. In addition, the benefits of regulation are uncertain given the effectiveness of other guidelines and measures they have already put into practice and the acknowledged future uncertainties of potential different COVID variants. The commenter is concerned about finding funds within tight working budgets, low candidate pools, and increased economic impacts to meet current requirements and states that staffing can be better allocated to other programs that impact and serve community members.

Response to Comment 8.1

Please see response to comment 7.1.

Comment 8.2

The commenter urges the Board to define what constitutes a “close contact” in open-area offices, especially given the presence of cubicles where there is no direct face-to-face contact among persons. The commenter is concerned the broader proposed definition is ambiguous and substantially increases the number of potential close contacts without giving adequate direction to employers.

Response to Comment 8.2

Please see response to comment 1.5.

Comment 8.3

The commenter requests the recordkeeping requirements be narrowed by minimizing the need to keep employee medical information and to maintain only necessary information for the Contact Tracing process. The commenter argues that requiring employers to maintain records of COVID cases, outbreaks, close contacts, and copies of their test results is overly burdensome. They point out that these records will contain employees' medical information. They also argue that the timeframe for maintaining these records is too long, and will require employers to use resources and monies that could otherwise be used for technology upgrades, programs, and additional staffing.

Response to Comment 8.3

Please see response to comments 2.6 and 2.7.

The Board thanks the commenter for their input and participation in the rulemaking process.

9. Lynn Mohrfeld, President and CEO, on behalf of the California Hotel & Lodging Association, by written comments dated September 9, 2022.

Comment 9.1

The commenter urges the Board and Cal/OSHA to return to the regulatory presence emphasizing compliance assistance that existed at the beginning of the pandemic citing a continuously changing landscape with COVID and that it no longer has the potential to overwhelm our hospitals and public health systems. The commenter states that Cal/OSHA should reserve its enforcement resources for those few employers that deserve the full force of it. The commenter also states that existing requirements under title 8 sections 3203 and 5143 provide robust protections for what is becoming a COVID-endemic situation, and attempting to add requirements to a situation we still do not fully understand will only add significant economic and emotional stress to employers and employees alike. If statutory changes impose COVID-related measures the Board is required to address, rulemaking should be limited to those measures.

Response to Comment 9.1

Please see response to comment 7.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

10. Dave White, Chief Executive Officer, on behalf of Opportunity Stanislaus, by written comments dated September 13, 2022.

Comment 10.1

The commenter offers two general comments regarding the proposed regulations. First, they note that the proposed regulations must be flexible to keep up with evolving science. In this regard, they argue that the method used for updating the ETS – periodic readoptions using the emergency rulemaking process – was “an imperfect method for constantly updating the ETS’s very proscriptive (and quickly outdated) textual provisions,” as it only “allowed for slight changes to be made.” They point out that this will not be workable for the proposed non-emergency regulations, and to the necessity for the proposed regulations to include “more flexible language to allow for up-to-date best practices without constant textual changes.” They note with approval that the proposed regulations represent a shift from “a more detail-oriented style to a more flexible approach via utilizing the Injury and Illness Prevention Program.”

Second, they note that the proposed regulations are “much more approachable than the ETS was,” an important consideration as employers continue to “attempt to integrate compliance into their workplaces on a non-emergency basis.” In particular, they point out that the emergency temporary standards governing Outbreaks and Major Outbreaks have been combined, “distilling responsibilities effectively.”

Response to Comment 10.1

The Board appreciates the commenter’s support for these aspects of the proposed regulation.

Comment 10.2

The commenter fundamentally objects to the proposed regulation’s existence, but support limiting the duration of the proposed regulation. They argue that, “[o]ver time, we will know more about COVID’s longevity, capacity for evolution, and the effectiveness of improving medical advances to minimize COVID’s health consequences. We will know more about long COVID’s risks, and more about potentially disparate impacts on different populations. We will know better whether ongoing precautions are necessary or not – and, if necessary, whether they are better combined into a broader infectious disease regulation or on a disease-by-disease basis.”

Response to Comment 10.2

Please see response to comment 1.2.

Comment 10.3

The commenter raises several objections to the definition of “close contact.” First, they point out that the shift from a concrete, bright-line definition (being within six feet of a COVID-19 case, for 15 or more minutes, over a 24-hour period) to the proposed “sharing the same indoor space” as a COVID-19 case “has created a mess of confusion for California employers [...] the measure of a ‘close contact’ has been one of the most central, clear, and long-standing definitions in our COVID-19 response.” The commenter further argues that, although the previous definition “may not have been scientifically perfect, it certainly prioritized those at the greatest risk, and was feasible to enforce.” Next, the commenter objects to a perceived lack of precision in the proposed definition, which they argue will “require[] workplace-specific and case-specific analysis to attempt to identify who qualifies as a ‘close contact’ – including looking into factors such as the size of the space, the airflow, the location of the workers, etc.” The commenter argues that the foregoing analysis “remains ambiguous at best – and particularly difficult for smaller employers,” and in the case of larger workplaces, the definition “is overbroad to the point of absurdity.”

Response to Comment 10.3

Please see response to comment 1.5.

Comment 10.4

The commenter notes with approval the removal of exclusion pay from the proposed regulation. They note that exclusion pay mandates “effectively transferred the cost of supporting those sick with COVID-19 onto employers – despite the employer often having no role at all in causing the COVID-19 case.” They also criticize the content of the ETS’s exclusion

pay provision, arguing that “employers struggled to implement it in parallel with existing (and thoroughly defined) leave programs.”

Response to Comment 10.4

The Board appreciates the commenter’s support for this aspect of the proposed regulation.

Comment 10.5

With respect to the notice provisions of the proposed regulation, the commenters note that some of the notice provisions reference Labor Code section 6409.6. They explain the legislative history of Labor Code section 6409.6, including the sunset provision. They recommend making non-substantive changes to the proposed regulation to conform the language to AB 2693 (Reyes), which extends notice requirements for one year.

Response to Comment 10.5

Please see response to comment 2.5.

Comment 10.6

The commenter notes that subsection 3205(j)(1) of the proposed regulation requires that “employers shall report information about COVID-19 cases and outbreaks at the worksite to the local health department whenever required by law and provide any related information requested by the local health department,” and point out that this provision may also potentially need revision, as AB 2963 will revise Labor Code section 6409.6 to rescind the requirement that local health departments notify CDPH when there is an outbreak.

Response to Comment 10.6

Please see response to comment 2.6.

Comment 10.7

The commenter objects to the contact tracing requirements of subsection 3205(j)(2). They point out that universal, individual contact tracing is no longer recommended by CDPH, and argue that the requirement “is a relic of an earlier phase of the COVID-19 pandemic.” They further note that the requirement “is burdensome for employers (particularly with recently-expanded definition of close contacts), and is out of step with CDPH’s present recommendations against such efforts[,]” and ask that it be removed from the proposed regulation.

Response to Comment 10.7

Please see response to comment 2.7.

Comment 10.8

The commenter objects to the threshold for exiting outbreak status. They note that the ETS’s outbreak exit condition – zero cases in 14 days – was created at a different stage in the

pandemic, and maintaining that threshold in the proposed non-emergency regulations “fails to update these outbreak thresholds in light of considerable improvements in health outcomes related to COVID-19[.]” They further argue that this exit threshold “has meant that once a workplace enters an outbreak, an outbreak will continue for months if the workplace has just one case every two weeks.” As a result, workplaces “remain[] in outbreak-level precautions of testing due to background social spread that has nothing to do with the workplace.” They propose replacing the zero cases in 14 days exit threshold with a one case in 14 days exit threshold.

Response to Comment 10.8

Please see response to comment 2.8.

Comment 10.9

The commenter objects to the requirement in both the ETS and the proposed regulation that employers “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” as soon as they determine that there is an outbreak. Citing widespread vaccine uptake, well-developed compliance policies, and a decrease in fatality and severe illness from COVID-19, the commenter argue that outbreak status (which they define as “three cases among employees”) should no longer require “a re-review of all policies.” They also argue that the existing requirement, which is not tied to “instances where COVID-19 was actually spread in the workplace,” means that “employers must re-examine policies for their workplace even when there is no evidence of any deficiency with those public health protective policies.” They urge that the requirement be changed so that employers must ““periodically”” review relevant procedures and update them as conditions and best practices evolve[.]”

Response to Comment 10.9

Please see response to comment 2.9.

The Board thanks the commenter for their input and participation in the rulemaking process.

11. Brian Mello, Associate Vice President, Engagement & Regulatory Affairs, on behalf of the Associated General Contractors (AGC) of California, by written comments dated September 14, 2022.

Comment 11.1

The commenter suggests that the Board consider a standard that can be tailored to categories of industries, as is the case with existing wage orders and is mirrored in construction specific safety standards. The commenter is concerned that the proposed regulation would be inefficient when dealing with continually changing guidance, and updated science, and its inability to provide transparency and consistency in language. The commenter urges the Board, and the Division to reevaluate the situation as COVID-19 is moving into endemic status, and our

policies must reflect that transition. The commenter notes that Cal/OSHA as a state-run plan has sufficient language written into its regulations to hold employers accountable and suggests that a permanent standard, if any, be evaluated by high-risk environments as is the case with Federal OSHA proposed COVID-19 Healthcare Standard.

Response to Comment 11.1

With respect to the criticism regarding the existence of a non-emergency regulation preventing COVID-19 transmission, please see response to comments 7.1 and 23.1. With respect to the arguments regarding the sufficiency of existing standards to address COVID-19 transmission in the workplace and regarding limiting protection against COVID-19 to individuals in high-risk environments, the Board is not persuaded. In particular, the Board notes that high-risk healthcare environments are already covered by the Aerosol Transmitted Diseases standard, section 5199.

Comment 11.2

The commenter urges a return to the prior six feet/fifteen minute standard for “close contact.” It notes that the old definition, while not “scientifically perfect,” was enforceable and prioritized those at greatest risk. By contrast, the new definition requires confusing workplace-specific and case-specific analyses to attempt to identify who qualifies as a “close contact.” For construction with its vast size potential (*e.g.*, a 20,000 to 30,000 square foot tilt up or warehouse fit out) and nature of construction projects with multiple trades, the new definition, read strictly, presents the possibility that everyone within a vast indoor space could be deemed a close contact to a COVID-19 case. The commenter also urges that a public health order, if made, should supersede the proposed regulation.

Response to Comment 11.2

Please see response to comment 1.5. The Board further notes that the proposed regulation, in subsection 3205.3(b)(1), already provides that, if “close contact” is defined differently by a regulation or order of CDPH, the CDPH definition shall apply.

Comment 11.3

With respect to the notice provisions of the proposed regulation, the commenters note that some of the notice provisions reference Labor Code section 6409.6. They explain the legislative history of Labor Code section 6409.6, including the sunset provision. They recommend making non-substantive changes to the proposed regulation to conform the language to AB 2693 (Reyes), which extends notice requirements for one year.

Response to Comment 11.3

Please see response to comment 2.5.

Comment 11.4

The commenter urges in subsection 3205.1(e) language which states “periodically” reviewing relevant procedures and update for consistency with existing IIPP based enforcement.

Response to Comment 11.4

Please see response to comment 2.9.

The Board thanks the commenter for their input and participation in the rulemaking process.

12. Rick Chan, County Safety Manager, on behalf of County of Orange, by written comments dated September 15, 2022.

Comment 12.1

The commenter finds that subsection 3205(b)(7)(A) and (C)’s definition of “exposed group” is inconsistent with the proposed definition of “close contact” and should include a 15-minute/24-hour-cumulative-time requirement. The commenter says that persons momentarily passing through a work location, working area, or a common area should not be considered part of an “exposed group,” regardless of whether they were wearing a face covering. In addition, the commenter urges the Board to remain consistent with CDPH and remove the face-coverings requirements for all persons, regardless of vaccine status. The commenter also urges the Board not to expand the definition of “exposed group” to include those where a COVID-19 case may momentarily pass through a work area for a short period of time and where transmission is unlikely to occur.

Response to Comment 12.1

Please see response to comment 1.6.

Comment 12.2

The commenter takes issue with the reference to CDPH and Division guidance regarding ventilation, as neither specifies what constitutes adequate or inadequate ventilation, and when ventilation is deemed to be inadequate, neither source specifies which “changes” are necessary to implement and to what scale. The commenter argues that this means employers are unable to discern what actions are necessary to comply with this provision or how enforcement will be measured given the lack of criteria or guidance.

Response to Comment 12.2

The Board believes that these issues would more appropriately be the subject of FAQs, not regulations, and notes with appreciation the suggestion to provide further guidance. The Board disagrees with this statement as guidance from CDPH referenced in the proposal provides specific information for determining adequate ventilation and filtration.

Comment 12.3

The commenter states that they do not believe that the Division is the appropriate authority to determine numerical values for what constitutes an outbreak or major outbreak without consideration for epidemiological linkage. The commenter further states that it would make more sense for the authority to solely be placed on the local health department in conjunction with CDPH to specify a numerical value or percentage based on their qualifications, analysis, and determination.

Response to Comment 12.3

The Board disagrees with each of the commenter's arguments. The Division is not determining numerical values for outbreaks or major outbreaks in general; instead, the Division is determining numerical values for outbreaks and major outbreaks *in the occupational context*. This is squarely within the Division's responsibilities, jurisdiction, and expertise. Further, the Board and the Division have worked closely with CDPH to address the COVID-19 pandemic, including in drafting the regulations regarding outbreaks and major outbreaks. In the proposed regulations, what constitutes an outbreak is aligned with the CDPH definition of outbreak. While the CDPH definition of outbreak includes the requirement that the COVID-19 cases be epidemiologically-linked, the proposed regulations rely on COVID-19 cases being within an exposed group. Per CDPH, epidemiological linkage may include individuals who are members of the same risk cohort (for example, students in the same classroom, or colleagues who work in the same area), even without identified close contact. A risk cohort is very similar to an "exposed group" as used in this proposal. Thus, COVID-19 cases in an exposed group are epidemiologically-linked, per the CDPH definition. As to the argument that local health departments should determine what constitutes an outbreak, the Board notes that this would necessarily lead to a multiplicity of conflicting outbreak thresholds from county to county, and would result in different standards for what constitutes an outbreak depending on where an employer is located in the state. In the interest of avoiding this sort of confusion and the establishment of local occupational health rules, the Board declines to make the proposed changes.

Comment 12.4

The commenter states that testing requirements and provisions for close contacts in outbreaks should be determined by the local health department based on their determination of risk and the potential of transmission/epidemiological linkage and not required by the Division. Additionally, they state that the three-to-five-day testing window is problematic for maintaining compliance and does not address situations where one/two of the three qualifying outbreak COVID-19 cases occurred beyond three to five days in a 14-day outbreak period. The commenter also states that recent CDPH Orders related to healthcare worker vaccine requirements do not require testing for workers with greater risk of infection (i.e., healthcare workers that are unvaccinated) to be tested on a consistent basis; this provision by the Division is antithetical to the referenced CDPH orders, as the proposed regulation is for general industry workers not anticipated to work with individuals seeking medical treatment. They state that

employers are already required to provide close contacts with COVID-19 tests at no expense to the employee.

Response to Comment 12.4

The Board disagrees with the commenter's assertions. First, with respect to the argument that local health departments should determine testing requirements and provisions for close contacts in outbreaks, the Board notes that this suggestion too would necessarily lead to a multiplicity of conflicting outbreak thresholds from county to county, and would result in different standards for what constitutes an outbreak depending on where an employer is located in the state. In the interest of avoiding this sort of confusion and the establishment of local occupational health rules, the Board declines to make the proposed changes. Second, the comment regarding testing purports to address subsection 3205.1(b)(3), but that subsection governs testing for employees who have had a close contact, not employees who are COVID-19 cases (and who count toward the three-employee-threshold to trigger the outbreak provisions). If a COVID-19 case occurs after five days into the 14-day outbreak period, the employer would be required to test any close contacts of that COVID-19 case within three to five days. Finally, testing remains one of the most helpful methods of controlling disease spread and thus outbreaks. Mandatory testing during an outbreak is in no way antithetical to the CDPH orders cited by the commenter, and in any event, healthcare workers are predominantly covered by a different standard (section 5199, Aerosol Transmissible Diseases).

Comment 12.5

The commenter states that unless it is extended, AB 685 will sunset on January 1st, 2023 and California employers will no longer be required to report outbreaks to the local health department. They further state that it is not reasonable to require employers to report major outbreaks to the Division, a labor regulatory agency, when is not the appropriate authority to legitimately determine if COVID-19 outbreaks occurred in the workplace under the definition set by CDPH (i.e., outbreaks defined via epidemiological linkage).

Response to Comment 12.5

The Board disagrees with the commenter's contentions. The requirement to report major outbreaks to the Division is not based on the goal of determining whether an outbreak at a workplace meets CDPH's definition for outbreaks in the public health context. The requirement to report major outbreaks to the Division is based on the goal of tracking outbreaks from an occupational, not public, health perspective. This is squarely within the Division's responsibilities and expertise.

The Board thanks the commenter for their input and participation in the rulemaking process.

13. Scott DuPriest, Safety & Risk Manager, on behalf of Bagatelos Architectural Glass Systems, Inc., by written comments dated September 14, 2022.

Comment 13.1

The commenter suggests that the Board consider a standard that can be tailored to categories of industries, as is the case with existing wage orders and is mirrored in construction specific safety standards. The commenter is concerned that the proposed regulation would be inefficient when dealing with continually changing guidance, and updated science, and its inability to provide transparency and consistency in language. The commenter urges the Board, and the Division to reevaluate the situation as COVID-19 is moving into endemic status, and our policies must reflect that transition. The commenter notes that Cal/OSHA as a state-run plan has sufficient language written into its regulations to hold employers accountable and suggests that a permanent standard, if any, be evaluated by high-risk environments as is the case with Federal OSHA proposed COVID-19 Healthcare Standard.

Response to Comment 13.1

Please see response to comment 11.1.

Comment 13.2

The commenter urges a return to the prior six feet/fifteen minute standard for “close contact.” It notes that the old definition, while not “scientifically perfect,” was enforceable and prioritized those at greatest risk. By contrast, the new definition requires confusing workplace-specific and case-specific analyses to attempt to identify who qualifies as a “close contact.” For construction with its vast size potential (*e.g.*, a 20,000 to 30,000 square foot tilt up or warehouse fit out) and nature of construction projects with multiple trades, the new definition, read strictly, presents the possibility that everyone within a vast indoor space could be deemed a close contact to a COVID-19 case. The commenter also urges that a public health order, if made, should supersede the proposed regulation.

Response to Comment 13.2

Please see response to comment 1.5.

Comment 13.3

With respect to the notice provisions of the proposed regulation, the commenter notes that some of the notice provisions reference Labor Code section 6409.6. They explain the legislative history of Labor Code section 6409.6, including the sunset provision. They recommend making non-substantive changes to the proposed regulation to conform the language to AB 2693 (Reyes), which extends notice requirements for one year.

Response to Comment 13.3

Please see response to comment 2.5.

Comment 13.4

The commenter states that the language in subsection 3205.1(e) made sense at the beginning of the pandemic but as we enter an “endemic” the situation has changed. They further stated

that language presented in the proposed regulation does not tie to instances where COVID-19 was actually spread in the workplace. External factors such as a holiday, or small gathering outside of work would then require evaluation policies for their workplace even when there is no evidence of any issue with those policies. The commenter urges revising subsection 3205.1(e) to add language which states “periodically” reviewing relevant procedures and update for consistency with existing IIPP based enforcement.

Response to Comment 13.4

Please see response to comment 2.9.

The Board thanks the commenter for their input and participation in the rulemaking process.

14. Tina Self, Vice President, Manufacturing Operations - Berkeley, Pharmaceutical Division, on behalf of Bayer Healthcare LLC, by written comments dated September 14, 2022.

Comment 14.1:

The commenter notes that these California State standards as promulgated by Cal/OSHA are far stricter than those recommended nationally by the CDC both in explicit terms (e.g., quarantine and isolation requirements for COVID-19 cases) and in effect, particularly through COVID-19 outbreak definitions which, both in the ETS, and the proposed regular rule, create extraordinary case management obligations that are not reflective of actual workplace health risks. The commenter requests the language of the scope be changed in the proposed rule in subsection 3205.1 (a)(1) to read:

(1) This subsection applies to a workplace covered by section 3205 if three or more employee COVID-19 cases arising out of or relating to work within an exposed group...

Response to Comment 14.1

The Board declines to adopt the commenter’s proposed modifications. Workplace outbreaks present a serious occupational health hazard to employees. Additionally, COVID-19 that is transmitted in a social setting can be brought to the workplace and then transmitted throughout the workplace. The opposite is also true, COVID-19 acquired in the workplace can then be spread throughout the community in social settings. Workplaces represent some of the highest risk settings as people are together for many hours on a daily basis.

Comment 14.2

The commenter states that the outbreak definitions, which can lead to workplace exclusion and extensive testing based on case counts that do not take into account industrial causation, result in extreme precautionary measures such as mandatory indoor masking in nearly all settings and working remotely whenever possible for most employees. The commenter further states that these burdens, while potentially lowering case counts at the worksite, do so in a way that ignores whether work-related transmission has occurred, which is the actual health and safety risk that the regulations are designed to protect against. They state that the need for continued

mask wearing and remote work impacts morale, incentive and employee productivity, as well as our ability to attract and retain top talent in a very competitive life sciences market.

The commenter requests a change to the language of subsection 3205.1(g) as follows:

(g) Major outbreaks. If 20 or more employee COVID-19 cases arising out of or relating to work within an exposed group within a 30-day period, the employer shall do the following while section 3205.1 applies:

Response to Comment 14.2

Major outbreaks in the workplace present a serious occupational health hazard to employees. Additionally, COVID-19 that is transmitted in a social setting can be brought to the workplace and then transmitted throughout the workplace. The opposite is also true, COVID-19 acquired in the workplace can then be spread throughout the community in social settings. Workplaces represent some of the highest risk settings as people are together for many hours on a daily basis. The Board declines to narrow the scope of this provision as suggested by the commenter, as that would be contrary to the goals of the proposed regulations (preventing the transmission of COVID-19 in the workplace).

The Board thanks the commenter for their input and participation in the rulemaking process.

15. Fielding Greaves, Senior Director, State Government Affairs, on behalf of Biocom California, by written comments dated September 15, 2022.

Comment 15.1

The commenter objects that the outbreak rules inhibit operations and note that they are “far stricter than those recommended nationally by the CDC[.]” The commenter states that under current rules for outbreaks (three or more infections in an exposed group in 14 days) this has the effect of creating the appearance of workplace “outbreaks,” where there is no indication of workplace transmission. They further state that this may inadvertently discourage some employers from providing extra testing. They also state that heightened testing can trigger rules that require masking in the workplace and, further, exclusion of asymptomatic workers, which will have adverse impacts on California-based jobsites, including productivity, as well as potentially on workers who may suffer unintended economic consequences from workplace exclusion.

The commenter requests the language of the scope be changed in the proposed rule in subsection 3205.1 (a)(1) to read:

(1) This section applies to a workplace covered by section 3205 if three or more employee COVID-19 cases arising out of or relating to work within an exposed group...

Response to Comment 15.1

Please see the response to comment 14.1. With respect to the commenter’s assertions regarding CDC recommendations, the Board notes that – as with all of the proposed regulation

– the outbreak provisions of the proposal were drafted with assistance and consultation from CDPH.

Comment 15.2

The commenter requests a language revision in subsection 3205.1(g) to read:

(g) Major outbreaks. If 20 or more employee COVID-19 cases arising out of or relating to work within an exposed group within a 30-day period, the employer shall do the following while section 3205.1 applies:

Response to Comment 15.2

Please see the response to comments 14.1 and 14.2.

The Board thanks the commenter for their input and participation in the rulemaking process.

16. Michael Pimentel, Executive Director, on behalf of the California Transit Association, by written comments dated September 14, 2022.

Comment 16.1

The commenter takes issue with language in subsection 3205(c)(1) that states, “An employee is potentially exposed to COVID-19 hazards when near other persons, whether or not the employee is performing an assigned work task.”

Response to Comment 16.1

The language to which the commenter objects reflects the principal of “Universal Precautions,” an approach to infection control under which “all human blood and certain human body fluids are treated as if known to be infectious for” various bloodborne pathogens. (Cal. Code Regs., tit. 8, subsection 5193(b).) Applying this concept in the context of COVID-19 will provide additional safeguards for worker health.

Comment 16.2

With respect to the proposed new definition of “close contact,” the commenter urges the Board to provide a definition of “same indoor airspace” that establishes “clear spatial parameters” that are “sensitive to the practical needs for implementation.” The commenter says that the proposed new definition of “close contact” is unclear and ambiguous and presents a much greater compliance burden on employers. This burden is compounded by the new definition’s concomitant obligations with respect to masking, exclusion, and testing requirements.

Response to Comment 16.2

Please see response to comment 1.5.

Comment 16.3

The commenter urges the Board to expand the exception to the definition of “close contact” from those employees who wore respirators while sharing indoor airspace with a COVID-19 case to include all employees who have “completed their primary vaccination with any authorized or approved monovalent COVID-19 vaccine and received the latest single dose booster of any authorized or approved bivalent COVID-19 vaccine.” The commenter opines that the expanded exception would incentivize employers to encourage full and current vaccination and lead to greater public health beyond the workplace.

Response to Comment 16.3

Please see response to comment 1.5. Additionally, the Board is not persuaded that adding a further exception to the definition of close contact for employees relating to vaccination would affect employer behavior with respect to vaccination at this point.

Comment 16.4

The commenter urges the Board to amend the proposed nonemergency regulation to include percentage thresholds for the definition of “outbreak” and “major outbreak” instead of fixed numbers to account for variability in workplace size.

Response to Comment 16.4

Please see response to comment 12.3.

Comment 16.5

The commenter urges the Board to modify testing requirements to require only that employers make testing available to employees with close contact and under a COVID-19 “outbreak” or “major outbreak” upon request. They argue that mandatory testing requirements are cost-prohibitive because employees often actively resist testing.

Response to Comment 16.5

The Board disagrees with the suggestion to require employers to make testing available upon request to employees who had close contacts under subsection 3205(d), or during outbreaks as specified in subsection 3205.1(b)(1), because testing of employees potentially exposed to COVID-19 remains an important way to prevent the spread of COVID-19 in workplaces. Therefore, testing should be encouraged by employers rather than requiring employees to ask to be tested.

Comment 16.6

The commenter urges the Board to add language that the regulation remain in effect for two years or until the state’s emergency orders are lifted, whichever is earlier, citing the effectiveness of vaccines and antiviral therapies and their blunting effect of COVID-19 on communities.

Response to Comment 16.6

Please see response to comment 1.2.

The Board thanks the commenter for their input and participation in the rulemaking process.

17. Jim Wunderman, CEO, on behalf of the Bay Area Council, by written comments dated September 14, 2022.

Comment 17.1

The commenter expresses concern that the proposed regulation seems to stray from the public health guidance issued by the CDC, changing the current emergency regulation to a permanent non-emergency regulation and setting a precedent for employers to have ongoing obligations regarding managing public health matters. The commenter strongly supports the intent of this regulatory proposal to reduce COVID-19 illness and transmission but the proposed changes would affect businesses throughout the entire region that are already challenged by lack of return to work. The commenter states that they align their substantive comments with the California Chamber of Commerce who have proposed a number of improvements in the proposed regulation that appropriately reflect the changing scientific tools to address COVID and the diminishing necessity of emergency-level precautions for California's workplaces.

Response to Comment 17.1

The Board appreciates the commenter's support for the proposed regulation's intent. The Board notes that the proposal is consistent with CDPH, as CDPH was consulted regularly and throughout development of the proposed regulation. Please see responses to comments 2.1 through 2.9 for the Board's responses to the comments of the California Chamber of Commerce.

Comment 17.2

The commenter feels that the proposed definition of "close contact" presents an unwarranted and expensive burden on employers with open-floor-plan offices. The commenter says that, if an employee tests positive for COVID and was in the office at any time, anyone on the same floor as that case, would be deemed a close contact, "potentially subject to quarantine and exclusion pay." The commenter also believes that the proposed definition could slow down efforts to get workers to return to Bay Area offices.

Response to Comment 17.2

Please see response to comment 1.5.

The Board thanks the commenter for their input and participation in the rulemaking process.

18. London N. Breed, Mayor, on behalf of the City and County of San Francisco, by written comments dated September 15, 2022.

Comment 18.1

The commenter states concern about the threshold for determining COVID-19 outbreak requirements and the high bar for exiting outbreak status. The commenter urged the Board to amend its threshold for implementing outbreak precautions from one case within 14 days, to two or more cases within that time period.

Response to Comment 18.1

Please see response to comment 2.8.

Comment 18.2

The commenter expresses concern regarding the thresholds for COVID-19 outbreaks. In particular, the commenter objects to the exit threshold, arguing that as written, if there is a single new COVID positive case within a 14-day period, the outbreak precaution rules remain until there are no more positive cases. The commenter urges the Board to amend its threshold for implementing outbreak precautions from one case within 14 days (as currently drafted), to two or more cases within that time period.

Response to Comment 18.2

Please see response to comment 2.8.

The Board thanks the commenter for their input and participation in the rulemaking process.

19. Sarah Bogner, Manager of Health and Safety, on behalf of the Contra Costa Water District, by written comments dated September 8, 2022.

Comment 19.1

The commenter states that maintaining the 14-day window for outbreaks has resulted in outbreak status continuing for 1-2 months in some exposed groups, often with cases more than a week apart. These cases are clearly not related, especially where the cases were not on-site at the same moment and were not close contacts. The commenter proposes two different alternatives to the current outbreak criteria: 1. Shorten the time period from 14 days to 5 days, in alignment with established average incubation period; or 2. Replace “exposed group” with “close contacts.”

Response to Comment 19.1

The Board received similar comments, both written and oral, regarding many aspects of the outbreak criteria, and has proposed modifications to the exit threshold in response to those comments, as set forth in the response to comment 2.8. The Board anticipates that these changes will also address this commenter’s concerns.

Comment 19.2

The commenter requests the language of section 3205.1 be amended to read, in subsections (a)(1) and (a)(2):

(a)(1) This section applies to a workplace covered by section 3205 if three or more employee COVID-19 cases within an exposed group, as defined by subsection 3205(b)(7), visited the worksite during their infectious period at any time during a ~~514~~-day period, unless a California Department of Public Health (CDPH) regulation or order defines outbreak..."

(a)(2) This section shall apply until there are no new COVID-19 cases detected in the close contacts of the outbreak cases ~~exposed group~~ for a ~~514~~-day period.

Response to Comment 19.2

Please see response to comments 2.8 and 19.1.

Comment 19.3

The commenter requested a change in language to subsection 3205.1(b)(1) to read: Immediately upon being covered by this section, the employer shall make COVID-19 testing available at no cost to ~~its employees~~ identified as close contacts ~~within the exposed group~~, regardless of vaccination status, during employees' paid time, except for returned cases and employees who were not present at the workplace during the relevant ~~514~~-day period(s) under subsection 3205.1(a).

Response to Comment 19.3

Please see response to comments 2.8 and 19.1 regarding the modification of outbreak threshold. The Board declines to adopt the commenter's proposed modification to replace "exposed group" with "close contact." Testing of employees potentially exposed to COVID-19 remains an important way to prevent COVID-19 transmission in the workplace during an outbreak. Limiting the testing to close contacts during an outbreak would not be consistent with the goal of the regulation.

Comment 19.4

The commenter suggests the following language for subsection 3205.1(b)(2):

(2) Employer shall then make testing available on a weekly basis to all employee close contacts of outbreak cases ~~in the exposed group~~ who remain at the workplace.

Response to Comment 19.4

See response to the comment 19.3.

Comment 19.5

The commenter recommends the following language change for subsection 3205.1(c):

(c) Face coverings. ~~Close contacts~~~~Employees in the exposed group~~, regardless of vaccination status, shall wear face coverings when indoors, ~~or when outdoors and less than six feet from another person~~, unless one of the exceptions in subsection 3205(f)(2) applies.

Response to Comment 19.5

The Board declines to adopt the commenter's proposed modification. As one means of preventing COVID-19 transmission in the workplace during an outbreak, all employees in the exposed group must wear face coverings indoors. Limiting the face covering requirement to close contacts – rather than everyone in the exposed group – during an outbreak would not be consistent with the goal of the regulation.

Comment 19.6

The commenter suggests the following language for subsection 3205.1(g)(1):

(1) The COVID-19 testing described in subsection 3205.1(b) shall be required of all employees ~~close contacts of the major outbreak cases in the exposed group~~, regardless of vaccination status, twice a week or more frequently if recommended by the local health department with jurisdiction over the workplace. Employee ~~close contacts in the exposed group~~ shall be tested or shall be excluded and follow the return-to-work requirements of subsection 3205(c)(5).

Response to Comment 19.6

The Board declines to adopt the commenter's proposed modification. As one means of preventing COVID-19 transmission in the workplace during a major outbreak, all employees in the exposed group who may be infectious must either have a negative COVID-19 test or meet the return-to-work requirements of subsection 3205(c)(5). Limiting the testing to close contacts – rather than everyone in the exposed group – during a major outbreak would not be consistent with the goal of the regulation.

Comment 19.7

The commenter suggests the following language for subsection 3205.1(g)(3):

(3) The employer shall provide respirators for voluntary use in compliance with subsection 5144(c)(2) to employee ~~close contacts in the exposed group~~, shall encourage their use, and shall train employees provided respirators for voluntary use, as set forth in subsection 3205(g).

Response to Comment 19.7

The Board declines to adopt the commenter's proposed modification. As one means of preventing COVID-19 transmission in the workplace during a major outbreak, the employer must provide all employees in the exposed group with respirators for voluntary use. Limiting the provision of respirators for voluntary use to close contacts – rather than everyone in the

exposed group – during a major outbreak would not be consistent with the goal of the regulation.

Comment 19.8

The commenter suggests the following language for subsection 3205.1(g)(4):

(4) Any employee ~~close contacts in the exposed group~~ who are not wearing respirators required by the employer and used in compliance with section 5144 shall be separated from other persons...

Response to Comment 19.7

The Board declines to adopt the commenter’s proposed modification. As one means of preventing COVID-19 transmission in the workplace during a major outbreak, employees in the exposed group who do not wear respirators required by the employer must adhere to physical distancing, except where the employer can demonstrate it is not feasible. Limiting this close contacts – rather than everyone in the exposed group – during a major outbreak would not be consistent with the goal of the regulation.

The Board thanks the commenter for their input and participation in the rulemaking process.

20. Andrew J. Sommer and Eric J. Conn, Conn Maciel Carey LLP, on behalf of the California Employers COVID-19 Prevention Coalition, by written comments dated September 12, 2022.

Comment 20.1

The commenter raises many general concerns regarding the proposal as a whole. They recommend not adopting the proposal because it represents prescriptive rulemaking, which cannot keep up with changes in medical science and new methods to manage transmission of COVID-19. They point to public health orders, which can be issued on a moment’s notice. By contrast, the procedural rules governing adoption of regulations impose on the Board a quasi-legislative process which cannot be as nimble as health department orders. They opine that the proposal is certain to be quickly outdated by advances in knowledge of the disease and the characteristics of its permutations and that it is out of step with the CDC and its recognition that COVID-19 conditions have evolved such that the old rules no longer apply. The commenter states that, instead of focusing on slowing transmission of the virus, the CDC now prioritizes preventing severe illness. The commenter argues that the Injury and Illness Prevention Program (IIPP, section 3203) and the Aerosol Transmittable Diseases Standard (ATD, section 5199) are more effective tools for addressing COVID-19 hazards in the workplace than the proposal. Finally, the commenter claims that the proposed regulation defers to guidance published by CDPH and Cal/OSHA, and claims that the Board lacks authority to do this in rulemaking, as general agency guidance cannot be relied upon in rulemaking and attempts to do so represent underground regulations.

Response to Comment 20.1

With respect to the criticism regarding the existence of a non-emergency regulation preventing COVID-19 transmission, please see response to comment 7.1. With respect to the argument regarding the IIPP standard, the Board disagrees that the IIPP standard provides the regulated community with the degree of guidance necessary to address the transmission of COVID-19 in the workplace; as to the argument that the ATD standard is sufficient, the Board reminds the commenter that the ATD standard does not apply to general industry. With respect to the commenter's contention that the proposed regulation constitutes underground rulemaking because it defers to guidance published by CDPH and the Division, the Board responds that this is incorrect. The proposed regulation directs employers to review this guidance, but does not require that employers follow this guidance.

Comment 20.2

The commenter states that the proposed regulation is a marked improvement over the ETS, in particular in how it streamlines the requirements for written COVID-19 Prevention Programs and employee training. They point to subsection 3205(c), which replaces the COVID-19 Prevention Program requirements and substitutes it with enforcement under the IIPP standard. They note that a performance standard such as the IIPP is particularly well suited for addressing COVID-19 prevention in the workplace in light of the evolving scientific knowledge over the virus, in that it makes a more prescriptive standard (like the ETS) "obsolete or impractical in numerous respects."

Response to Comment 20.2

The Board appreciates the commenter's support for this aspect of the proposed regulation.

Comment 20.3

The commenter supports requiring COVID-19 prevention training consistent with the IIPP's mandate for training on job safety specific to an employee's individual duties.

Response to Comment 20.3

The Board appreciates the commenter's support for this aspect of the proposed regulation.

Comment 20.4

The commenter argues that the sunset date for the proposed regulation (two years after effective date for most portions) is excessive and inflexible, asserting that COVID-19 will likely become endemic before this date. They suggest that the proposed regulation should automatically expire if the state of emergency over the COVID-19 pandemic is rescinded, or if the ICU hospitalization rates drop and remain below a certain level for a meaningful period, or if the proposed regulation is repealed by an executive order.

Response to Comment 20.4

Please see response to comment 1.2. Additionally, the Board disagrees that that the regulation's sunset date is excessive or inflexible, and particularly disagrees that COVID-19 will likely cease to be a significant hazard before the sunset date. To the contrary, it is unknown when COVID-19 will cease to be a serious workplace hazard. This proposal is consistent with Labor Code sections 6400, 6401, 6402, 6403, 6404, et al. that require employers to ensure all employees have safe and healthful workplaces.

Comment 20.5

The commenter asserts that the definition of close contact is ambiguous and unworkable. The definition is ambiguous in that it does not refer to proximity, which in turn makes it difficult for employers to determine whether their employees have experienced a close contact, particularly in large open spaces such as distribution centers, manufacturing facilities, warehouses, and hangars where employees work far apart from one another. The commenter requests that the six-foot benchmark be restored to the definition. Alternatively, the commenter suggests a definition under which employers are able to consider proximity to the COVID-19 case, airflow, configuration of any buildings or work areas, and engineering controls in determining who had close contact.

Response to Comment 20.5

Please see response to comment 1.5.

Comment 20.6

The commenter states that the definition of "COVID-19 test" should be revised so that a time/date stamp on a photograph of a test result is not required for tests that are both self-administered and self-read.

Response to Comment 20.6

The definition of "COVID-19 test" requires that self-administered and self-read tests have a means of independent verification. Time/date stamps on a photograph are just one example of providing verification of the test results. Employers may use other equally effective methods to independently verify test results for self-administered and self-read tests.

Comment 20.7

The commenter supports removal of the exclusion pay provision, citing the Supplemental Paid Sick Leave laws from 2020, 2021, and 2022 that provided sick leave specifically relating to COVID-19. They claim that it is unprecedented for an occupational health regulation to impose far-reaching wage mandates such as the exclusion pay mandates in the ETS. They opine that employer pay requirements are solely the province of the California legislature.

Response to Comment 20.7

The Board thanks the commenter for their support of this portion of the proposed regulation. However, the Board notes that the exclusion pay requirements in the COVID-19 emergency temporary standard were not without precedent. Medical removal with pay and benefit protection is found in various title 8 regulations.

Comment 20.8

The commenter does not believe that employers should have to provide an N95 respirator for voluntary use to any employee working indoors who requests one, arguing instead that the provision of N95 respirators should be limited to employees who have been identified by their health care professional as being at an increased risk of severe illness from COVID-19. In this regard, employers should also be able to request a doctor's note from the requesting employee as a condition for providing respirators.

Response to Comment 20.8

The Board disagrees. Limiting respirators to only employees with certain medical conditions and requiring a doctor's note to prove the medical condition would be a strong disincentive for employees to request a respirator, which is contrary to the goal of preventing the spread of COVID-19 at work.

Comment 20.9

The commenter requests changes to subsection 3205(h)(1), which requires employers to review the CDPH guidance regarding ventilation. Specifically, the commenter suggests adding a feasibility exception to the requirement to improve ventilation. The commenter points to multi-employer situations, such as construction subcontractors, where an employer may have no operational control over their ventilation system or access to information with which to evaluate the adequacy of the ventilation system.

Response to Comment 20.9

The Board will not eliminate the requirement that employers review CDPH ventilation guidance as it is important for employers to be properly informed before they decide what changes they would like to make to their ventilation system and air filtration. Regarding feasibility, the proposal lists possible improvements that employers can make to improve ventilation if necessary, but employers may make other equally effective changes that are not listed and comply with subsection 3205(h). The proposal also limits improvements in filtration to those compatible with the existing ventilation system so as to not require filtration that is not feasible. Subcontractors and employer lessees in should work together with building owners and operators regarding assessing and, if necessary, improving the ventilation. Since implementation of the California Occupational Safety and Health Act of 1973, construction employers have been required to work with building owners and operators to ensure their employees are protected from building-related hazards. Subcontractors, employer lessees, and employers who do not have direct access to the building's ventilation system may use portable

HEPA units temporarily to comply with subsection 3205(h) until they are able to work with building management to improve the air filtration or increase the outside air supply; alternatively, such employers may choose to use portable HEPA units on a longer-term basis in lieu of changes to the building's ventilation system.

Comment 20.10

The commenter requests that the recordkeeping requirement in subsection 3205(j) be shortened, and specifically that the preservation period should be changed to one year instead of two years to be consistent with subsection 3203(b) of IIPP. The commenter also requests that the Board clarify subsection 3205(j) by adding language that the 30-plus year retention period for employee medical records under section 3204 does not apply.

Response to Comment 20.10

The Board disagrees with both suggestions. The two year retention period is the minimum necessary for investigations of occupational illnesses and diseases such as COVID-19, which can have long lasting effects months or years after the initial infection. The normal retention period of 30 plus years for medical and exposure records in section 3204 does not apply as a more specific regulation (such as this proposal that contains specific to COVID-19 record retention requirements) prevails over a more general regulation (such as section 3204 that applies broadly to all medical and exposure records). A specific exemption from section 3204 is not needed.

Comment 20.11

The commenter suggests doing away with section 3205.1 (COVID-19: Outbreaks), as CDPH orders would be more effective than the outbreak section of the proposal. They also request that the Board add a work-relatedness component to any outbreak requirements, such that those requirements would only take effect if the COVID-19 cases are epidemiologically linked to the workplace.

Response to Comment 20.11

The Board will not delete section 3205.1 (COVID-19: Outbreaks). Workplace outbreaks present a serious occupational health hazard to employees. Additionally, COVID-19 that is transmitted in a social setting can be brought to the workplace and then transmitted throughout the workplace. The opposite is also true, COVID-19 acquired in the workplace can then be spread throughout the community in social settings. Workplaces represent some of the highest risk settings as people are together for many hours on a daily basis.

Comment 20.12

The commenter suggests that, if the outbreak section is kept, the number of cases that trigger the outbreak be increased from three to seven cases.

Response to Comment 20.12

Please see response to comments 2.8 and 14.1. Additionally, the Board disagrees that seven is the appropriate number to trigger an outbreak, and declines to adopt this proposed edit.

Comment 20.13

The commenter suggests that, if the outbreak section is kept, the number of cases to end an outbreak be increased from zero to three cases.

Response to Comment 20.13

Please see response to comment 2.8.

Comment 20.14

The commenter proposes that the ventilation requirements in subsection 3205.1(f) be moved to subsection 3205.1(g) (Major Outbreaks), because the number of cases that constitute an outbreak is so low (three) that all COVID-19 cases could be unrelated to the workplace. They argue that it is not reasonable to require costly ventilation updates when there are few cases and no evidence of transmission within the workplace.

Response to Comment 20.14

Ventilation is one of the principal prevention methods in the proposal as face coverings, physical distancing, respiratory protection, and barriers are no longer mandatory in most cases. Ventilation and filtration are critical to COVID-19 prevention and risk reduction since COVID-19 is an airborne transmissible disease. Additionally, COVID-19 that is transmitted in a social setting can be brought to the workplace and then transmitted throughout the workplace. The opposite is also true, COVID-19 acquired in the workplace can then be spread throughout the community in social settings. Workplaces represent some of the highest risk settings as people are together for many hours on a daily basis.

The Board thanks the commenters for their input and participation in the rulemaking process.

21. Lawrence Gayden, Policy Director, on behalf of the California Manufacturers & Technology Association (CMTA), by written comments dated September 15, 2022.

Comment 21.1

The commenter laments the proposed “close contact” definition as impractical for manufacturing operations that utilize large, open-floor spaces. It says that the definition potentially ensnares large groups of persons and subjects them to unnecessary and burdensome testing, tracing, and notification requirements. In placing the responsibility on employers to determine the proper distance and exposure time to meet the definition of “close contact,” the agency has shirked its duty to ensure that its health and safety standards are backed up by science and data, according to the commenter. The commenter predicts that, in the absence of individualized studies that take into account ventilation and other site-specific

factors, many employers will revert to the measurable and enforceable 6-feet /15-minute protocol.

Response to Comment 21.1

Please see response to comment 1.5.

Comment 21.2

The commenter believes that the proposed definition of “exposed group,” in addition to being redundant in light of the proposed definition of “close contact,” may ensnare enormous groups of employees in large open-floor spaces where transmission has not been shown to occur. For manufacturers, with large and heavily populated buildings and common entrances/exits, hallways or corridors, restrooms, and cafeterias, the outbreak requirements may be needlessly applied.

Response to Comment 21.2

Please see response to comment 1.6.

Comment 21.3

The commenter states that revisions to section 3205.3 appear to drastically shift components of the transportation provisions. They state that previously, the rule defined employer-provided transportation as “any transportation of an employee during the course and scope of employment, including transportation to and from different workplaces, jobsites, delivery sites, buildings, stores, facilities, and agricultural fields, provided, arranged for, or secured by an employer regardless of the travel distance or duration involved.” This language did not apply to the transportation of employees “to and from work.” The commenter states that the scope and rationale of this change is unclear and questionable. They propose maintaining a definition of specific employer-provided transportation requirements confined to transit within or between business operations. They further argue that the Board “has not provided evidence or data indicating that commuter transportation presents a new, heightened risk of transmission of the COVID-19 virus.”

Response to Comment 21.3

The Board disagrees that the scope of proposed section 3205.3 has been expanded. Subsection 3205.3(a) uses, in streamlined form, the same definition and scope for employer-provided transportation. The Board also notes that employer-provided transportation was not, as the commenter argues, confined to transit within or between operations; instead, subsection 3205.4(a), the analogous provision, states in plain language that “transportation to and from different workplaces” is included in the definition of “employer-provided transportation.”

The Board thanks the commenter for their input and participation in the rulemaking process.

22. Leo Dooley, by written comments dated September 15, 2022.

Comment 22.1

The commenter asks the Board to reject this regulation because the onerous and expensive requirements in the proposed regulation put California at a major disadvantage, and the proposed regulation will stay in effect through the end of 2024 even if the pandemic is declared over and the state of emergency is terminated before then. Numerous other states have rescinded their COVID-19 workplace regulations. The commenter suggests that if the Board is not willing to reject the proposed regulation entirely, it should include a sunset provision that allows the regulation to be easily deactivated upon a determination from Cal/OSHA and/or CDPH, the termination of the Governor's State of Emergency, and/or the pandemic being declared over by the World Health Organization.

Response to Comment 22.1

Please see response to comment 7.1.

Comment 22.2

The commenter states that a major issue with this regulation is the requirement for the workplace to pay for testing of any close contact, using the same broad definition as the record-keeping requirement. Further, they assert that as the pandemic winds down, COVID-19 testing will become harder and more expensive to access. They state that we've already started to see this when the federal government's free at-home tests stopped being available.

Response to Comment 22.2

Please see response to comment 16.4.

Comment 22.3

The commenter points out that maximizing the amount of outdoor air brought inside can significantly increase energy consumption of the building's HVAC systems, which results in a much higher utility bill, strains the power grid, and conflicts with the state's climate and energy efficiency goals. The commenter also notes that using high-grade filters can increase the amount of wear-and-tear on the HVAC system, further increasing costs and expenses.

Response to Comment 22.3

The Board notes that ventilation in indoor workplaces is a critical component in keeping workers safe from COVID-19. With respect to the provisions regarding ventilation in proposed subsection 3205(h), three methods of improving ventilation as a method of decreasing COVID-19 transmission in the workplace are listed in subsection 3205(h)(1)(A)-(C). Subsection 3205(h)(1) allows employers to choose from among these three options for prevention of COVID-19 through improved indoor air quality measures. These three options are consistent with recommendations from CDPH.

Employers are not required to take all three, or even two, of these methods. For example, employers located where the outdoor air may frequently be excessively cold or hot may not want to increase outside air supply due to increased costs of heating and/or cooling. In lieu of increasing the outdoor air supply, these employers could choose to upgrade their HVAC system to MERV-13 or better filtration for re-circulated air. Employers located in areas where the outside temperatures are normally temperate throughout the year may choose to increase outside air supply as the simplest solution for their workplace without much increase to cooling and heating costs. Finally, employers who do not have direct access to the building HVAC system may use portable HEPA units temporarily until they are able to work with building management to improve the air filtration or increase the outside air supply; alternatively, such employers may choose to use portable HEPA units on a longer-term basis in lieu of changes to the HVAC system.

With respect to the commenter's concerns regarding energy efficiency and the use of high-grade filters, improving the filtration efficiency on existing mechanically driven HVAC systems to MERV-13 will result in negligible to minimal increases to energy usage and costs. The 2019 Energy Efficient Standards in the California Code of Regulations title 24 already require MERV-13 filtration or better on newly constructed buildings, additions, alterations, and repairs to existing buildings. The California Energy Commission determined that the increase to MERV-13 filtration would have none, negligible, or minimal changes on pressure drop (resistance to air-flow) compared to low efficiency filters (MERV-6 to MERV-8). Pressure drop is directly related to the amount of energy needed to move air through a filter. Failure to change filters frequently results in much greater energy use than increasing the filtration efficiency.

Comment 22.4

The commenter strongly objects to the recordkeeping requirements associated with close contacts. The commenter argues that keeping a log of everyone who may have shared a room is extremely onerous, and in workplaces with shared amenities and common areas, is more or less impossible. The commenter asserts that it makes no sense that, "as the pandemic nears its end," the Board would add "onerous new requirements," especially in light of the recent rescission of longstanding COVID-19 public health orders by the California Department of Public Health.

Response to Comment 22.4

Please see response to comment 2.7.

The Board thanks the commenter for their input and participation in the rulemaking process.

23. Michael Miiller on behalf of the California Association of Winegrape Growers, the Wine Institute, and the Family Winemakers of California, by written comments dated September 15, 2022.

Comment 23.1

The commenter raises many concerns regarding the proposed regulation. First, the commenter argues that the proposed regulation is not consistent with the science and data and is contrary to the broad public move toward the endemic approach in response to COVID-19. Second, they argue that the proposed regulation ignores the efficacy of vaccines and keeps in place workplace requirements for two years regardless of the reduced risk to the employee due to vaccines, which undercuts employer efforts to get employees vaccinated. Third, the commenter argues that there is no need to keep the proposed regulation in place beyond December 31, 2023. They point out that Labor Code section 6409.6 is set to expire at the end of 2023, and urge that the sunset date for the proposed regulation be changed from two years after the effective date to one year after effective date. The commenter urges that the proposed regulation be rejected or substantially amended to be consistent with CDC, CDPH, the Biden administration, and the Newsom Administration approaches to COVID-19. They also urge the Board to consider a permanent infectious disease standard instead of a permanent adoption of the temporary COVID-19 Emergency Temporary Standard.

Response to Comment 23.1

With respect to the criticism regarding the existence of a non-emergency regulation preventing COVID-19 transmission, please see response to comment 7.1. Further, the Board notes that the proposal is consistent with CDPH as CDPH was consulted with regularly and throughout development of the proposal. The Board disagrees that the proposal disincentivizes vaccination among employees. The proposal contains preventative measures that augment vaccination consistent with recommendations from CDPH. The Board disagrees that the regulation should expire in one year. It is highly unlikely that COVID-19 will cease to be a serious workplace hazard in one year. This proposal is consistent with Labor Code sections 6400, 6401, 6402, 6403, 6404, et seq. that require employers to ensure all employees have safe and healthful workplaces. Nevertheless, the Board agrees with the suggested changes to the proposed text and has removed subsection 3205(e)(1) and amended subsection 3205(j)(2) through the 15-Day Notice issued on October 14, 2022. The Board also disagrees that is inconsistent with the Newsom Administration's approach to COVID-19.

Comment 23.2

The commenter states that the proposed regulation fails to recognize that the risks of exposure are reduced when outdoors, and point to subsection 3205(c)(1) (requiring employer to treat all persons as potentially infectious) and section 3205.1 (regarding outbreaks) as examples of this.

Response to Comment 23.2

The Board has modified subsection 3205(c)(1) to improve clarity. Employers must consider all persons as potentially infectious "when determining measures to prevent COVID-19 transmission and to identify and correct COVID-19 hazards..." Measures to prevent transmission and correct COVID-19 hazards would include, but not be limited to, moving certain indoor tasks

to outdoors. Additionally, with respect to the commenter's complaint about section 3205.1, the Board notes that outbreaks have occurred outdoors.

Comment 23.3

The commenter notes that Labor Code section 6409.6 is set to expire in January 2024, but subsection 3205(e) would be in place after that section has expired. Consequently, subsection 3205(e) would require compliance with a Labor Code section that would no longer exist. They recommend that subsection 3205(e) be deleted or sunset with Labor Code section 6409.6. The commenter also points out that the notice required in subsection 3205(e) is already required in the Labor Code, and argues that including a notice requirement in the proposed regulation is duplicative.

Response to Comment 23.3

Please see response to comment 1.3.

Comment 23.4

The commenter proposes removing the note in section 3205(j), which refers to the definition of "outbreak" in Labor Code section 6409.6, because under AB 2693, section 6409.6 no longer contains a definition of "outbreak."

Response to Comment 23.4

Please see response to comment 2.6.

Comment 23.5

The commenter alleges that the Division and the CDPH have failed to collect data on the number of COVID-19 cases that were contracted at work, that the requirements in section 3205.1 do not protect workplace safety or health, and that people are contracting COVID-19 in social settings and not at work. As a result, the commenter objects to the continued existence of the outbreak provisions, calling them "a relic."

Response to Comment 23.5

Please see response to comments 2.8, 14.1, and 20.11. Additionally, the Board notes that research has found that outbreaks can occur outdoors. The Board has also modified section 3205.1 to end an outbreak status sooner. Previously, the section applied after an outbreak occurred until there were zero cases in a 14-day period in an exposed group. This has been increased so that the section no longer applies after an outbreak occurs if there are one or fewer new COVID-19 cases detected in the exposed group in a 14-day period.

Comment 23.6

The commenter points out that if employees share a company vehicle to get to work, they are under the scope of the regulation, but if they choose to share a private vehicle, they are not covered by the regulation. Similarly, they note that if employees share employer-provided

housing, they are covered by the regulation, while if employees get their own shared housing, they are not covered. Based on the foregoing, the commenter argues that section 3205.2 (covering employer provided housing) and section 3205.3 (covering employer provided transportation) should be deleted as COVID-19 is a community-spread virus and not a workplace safety and health issue.

Response to Comment 23.6

The Board will not delete sections 3205.2 or 3205.3. The Board acknowledges that it does not have jurisdiction over housing and transportation that is not provided by the employer. However, when the employer does provide transportation and housing, the employer is responsible for providing minimum safe and health conditions.

The Board thanks the commenter for their input and participation in the rulemaking process.

24. Pat Fong Kushida, President/CEO, on behalf of the California Asian Pacific Chamber of Commerce (CalAsian Chamber), by written comments dated September 15, 2022.

Comment 24.1

The commenter opposes the proposed regulation. The commenter argues that this proposal will be debilitating for small and minority-owned businesses because of the continuous obligations businesses owners have to provide in managing health matters and more.

Response to Comment 24.1

Please see response to comment 7.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

25. Ken Smith, Executive Director of Environment Health & Safety, University of California, Office of the President, on behalf of the Regents of the University of California, by written comments dated September 14, 2022.

Comment 25.1

The commenter suggests removing subsection 3205(e)(1), which requires employers to notify, "as soon as possible," employees and independent contractors who had a close contact, as well as any employer with an employee who had a close contact. The commenter cites the following in support of this suggestion: California has shifted to an "endemic" approach to COVID-19, thus COVID-19 should be managed like other endemic infections (for example, influenza); the new definition of "close contact" and its effect on notification requirements; and a shift from individual to group contact tracing.

Response to Comment 25.1

The Board disagrees with the commenter's suggestion that proposed subsection 3205(e)(1)

should be removed from the proposed regulation. Subsection 3205(d) requires employers to make testing available to employees who had close contacts, because testing of employees potentially exposed to COVID-19 remains an important way to prevent the spread of COVID-19 in workplaces. Therefore, contract tracing is important to determine which employees may have been exposed to COVID-19, to notify these employees of the potential exposure and to make COVID-19 tests available to these employees.

Comment 25.2

The commenter argues that subsections 3205(e)(2) and (e)(3) are too prescriptive because of changes in the language of Labor Code section 6409.6 due to AB 2693. They propose simplifying and revising these subsections to state that “Employers shall comply with the notification requirements of Labor Code section 6409.6(a) or any successor law that is in effect.”

Response to Comment 25.2

Please see response to comment 2.5.

Comment 25.3

The commenter raises concerns about the environmental impacts of proposed subsection 3205(h)(1)(A). They point to the strain on the power grid involved in maximizing outside air for ventilation purposes in a building with HVAC, without regard for the temperature outside. They also note that “keeping windows open during hot weather puts a tremendous strain on air handler systems, is a waste of energy, terrible for the environment, and simply not justified given that COVID-19 has reached an endemic stage.”

Response to Comment 25.3

Please see response to comment 22.3.

The Board thanks the commenter for their input and participation in the rulemaking process.

26. Anne Katten, Pesticide and Work Health and Safety Specialist, on behalf of the California Rural Legal Assistance Foundation (CRLAF), and Cynthia L. Rice, Director of Litigation, Advocacy & Training, on behalf of the California Rural Legal Assistance, Inc. (CRLA), by written comments dated September 14, 2022.

Comment 26.1

The commenters express outrage at the proposal to eliminate exclusion pay and with it the language about maintaining earnings, seniority and other rights and benefits including right to retain job status (previously required in subsection 3205(c)(9)(C)). They state that essential employees who are at higher risk of contracting COVID-19 because they do not have the luxury of working from home should not be left without pay if they contract COVID-19 or need to quarantine due to a close contact at work. They further state that workers in industries like agriculture, non-union construction and food service lack employer provided sick leave that

would get them through the exclusion period. They state that ending exclusion pay undermines the entire regulation and will lead to increases in infection rates and outbreaks because employees who can't afford to take time off without pay will ignore possible symptoms and continue working. They forcefully condemn the elimination of exclusion pay, arguing that it "places the economic burden of the measure on employees who are unfortunate enough to have contracted or been exposed to the disease." In this regard, they note that the extended sick leave provisions are gone for employees of small businesses, and will soon expire for larger operations.

The commenters remind the Board that the removal of exclusion pay will disparately impact low wage and seasonal workers in essential industries, who are predominately persons of color and non-unionized, and who work in industries that have persistently disregarded the health needs and economic well-being of their workers by failing to provide health benefits and paid sick leave, except as mandated by law. They assert that by repealing the paid exclusion leave and retained benefits, seniority and retention protections, even long-term workers will be put at risk if they report their illness, and that by proposing a regulation without these protections, the Division and Board are turning its back on these workers and leaving them vulnerable to the economic pressure not to report an illness, or to come to work even when ill. They further state that this puts those workers who contract COVID-19 at risk, but more importantly given the charge of this body, puts the workers with whom they work at risk as well.

The commenters direct the Board's attention to the several standards that include provisions for exclusion pay, such as the Aerosol Transmissible Disease Standard, Lead Standard, and standards for cadmium, methylene chloride, formaldehyde, benzene, and cotton dust standards.

The commenters recommend that the following language from the ETS 3205(c)(9)(C) be inserted into 3205(c)(5) as new subsection F:

(F) For employees excluded from work under subsection 3205(c)(9), employers shall continue and 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. Employers may use employer-provided employee sick leave for this purpose to the extent permitted by law. Wages due under this subsection are subject to existing wage payment obligations and must be paid at the employee's regular rate of pay no later than the regular pay day for the pay period(s) in which the employee is excluded. Unpaid wages owed under this subsection are subject to enforcement through procedures available in existing law. If an employer determines that one of the exceptions below applies, it shall inform the employee of the denial and the applicable exception.

Exception 1: Subsection (c)(9)(C) does not apply where the employee received disability payments or was covered by workers' compensation and received temporary disability.

Exception 2: Subsection (c)(9)(C) does not apply where the employer demonstrates that the close contact is not work related.

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

(E) At the time of exclusion, the employer shall provide the employee the information on benefits described in subsections (c)(5)(B) and (c)(9)(C).

Response to Comment 26.1

The Board declines to amend the proposed regulation as suggested. The COVID-19 pandemic has changed substantially from when exclusion pay was first established in the Cal/OSHA emergency regulations two years ago. Vaccinations are widely available. In California, 80 million doses have already been provided and over 80 percent of the population has received at least one dose.² Vaccinations are effective in reducing serious acute illness which would necessitate long periods of leave from work and death.³ The updated booster shot, recently made available, will increase immunity against the original COVID-19 strain and also protect against new Omicron variants.⁴

Another change since the early days of the pandemic is that COVID-19 is now widespread in the population. And, while outbreaks in workplaces represent a serious risk to workers in many industries,⁵ the widespread nature of the disease makes it more difficult to identify the sources of transmission.

The emergency regulation and re-adoptions provided exclusion pay to employees with COVID-19 except where the employer demonstrates that the exposure did not happen at work. Meaning, exclusion pay would not apply in a case where a worker contracted COVID through community transmission such as from a family member. And workers who contracted COVID-19 at the workplace and are unable to work because of their symptoms were, and still are, eligible to apply for workers' compensation benefits.

Changes in quarantine rules have also made exclusion far less common than it was when the ETS first went into effect. Today, most workers are no longer required to be excluded after a close contact, as long as they are asymptomatic and test within three to five days after exposure. These workers can remain in the workplace.

² State of California. Tracking COVID-19 in California. Updated September 22, 2022. Accessed on September 28, 2022. <https://covid19.ca.gov/state-dashboard/>

³ Centers for Disease Control and Prevention (CDC). COVID Data Tracker. COVID-19 Vaccine Effectiveness Monthly Update. August 25, 2022. <https://covid.cdc.gov/covid-data-tracker/#vaccine-effectiveness>

⁴ State of California. Vaccines. Updated September 7, 2022. <https://covid19.ca.gov/vaccines/>

⁵ Heinzerling A, Nguyen A, Frederick M, et al. Workplaces Most Affected by COVID-19 Outbreaks in California, January 2020-August 2021. American Journal of Public Health. Published online August 2022; 112(8):1180-1190. <https://pubmed.ncbi.nlm.nih.gov/35830667/>

In terms of the impact of the removal of exclusion pay, research suggests that policies like exclusion pay most benefit low income and marginalized workers, as these workers are less likely to have access to paid time off than better-off workers.⁶ A recent study estimated that in the U.S., workers and their families lose \$22.5 billion in wages each year taking unpaid family and medical leave.⁷

Comment 26.2

The commenters strongly support the expansion of the definition of “exposed group” to include exposures within employer-provided transportation and housing.

Response to Comment 26.2

The Board appreciates the commenters’ support for these aspects of the proposed regulation.

Comment 26.3

The commenters strongly support retaining the requirement for employers to make COVID-19 tests available during worktime at no cost for employees who have had a close contact in the workplace. They state that this is especially important for farmworkers and other low wage workers who live and work in remote rural areas where it may be difficult to obtain test kits or lab tests.

Response to Comment 26.3

The Board appreciates the commenters’ support for these aspects of the proposed regulation.

Comment 26.4

The commenters strongly support retaining close contact notice requirements for employees, independent contractors, and employers of other employees. They argue that notice posted at the worksite in English and Spanish will not be readily understandable by employees who speak only other languages or who are not literate in English or Spanish, and recommend including a requirement to provide notification in a form readily understandable to employees regardless of amendments to Labor Code section 6409.6(a) that require notice posted in English and the predominant language spoken at the worksite or if Labor Code section 6409.6 expires.

Response to Comment 26.4

The Board appreciates the commenters’ support for these aspects of the proposed regulation. With respect to the languages in which the notice must be provided, the proposal should be

⁶ United States Department of Labor and Office of Disability Employment Policy. Access to Paid Leave for Family and Medical Reasons Among Workers With Disabilities. December 2021.

<https://www.dol.gov/sites/dolgov/files/ODEP/pdf/Access-To-Paid-Leave-For-Family-And-Medical-Reasons-Among-People-With-Disabilities.pdf>

⁷ Glynn, SJ. The Rising Cost of Inaction on Work-Family Policies. Center for American Progress. January 21, 2020.

<https://www.americanprogress.org/article/rising-cost-inaction-work-family-policies/>

consistent with the newly amended Labor Code section 6409.6(d), which only requires notice in English and the predominant language spoken at the worksite.

Comment 26.5

The commenters strongly support the requirement in subsection 3205(f)(4) that “[n]o employer shall prevent any employee from wearing a face covering, including a respirator, when not required by this section, unless it would create a safety hazard.” They urge supplementing this protection by retaining the current requirement in the ETS for employers to make face coverings readily available, without charge, for all indoor work areas, including vehicles as long as CDPH guidance recommends wearing masks indoors. They take issue with this guidance, arguing that it “illustrates CDPH’s lack of understanding or consideration of the fact that employees must breathe the air in indoor public places for full shifts even if they happen to be at high risk for severe disease or illness,” and therefore strongly urge adding a requirement for face coverings in vehicles and high occupancy indoor settings where ventilation is inadequate or when community disease levels are high.

Response to Comment 26.5

The Board appreciates the commenters’ support for the proposal. The Board declines at this time to make the proposed change to require employers to make face coverings readily available, without charge, for all indoor work areas, including vehicles as long as CDPH guidance recommends wearing masks indoors. Additionally, under subsection 3205(g), respirators must be made available. The CDPH guidance for the use of face masks was updated on September 20, 2022 and it no longer recommends all persons wear masks in all indoor settings at all times.⁸

Comment 26.6

The commenters strongly support the requirement in subsection 3205(g) to provide respirators upon request for voluntary use for indoor work, and suggest adding a requirement to inform employees of their right to request a respirator for voluntary use. They note with approval the shift to providing respirators upon request, as the previous proposal – which required employees to provide documentation of health conditions from health care professionals – would have inappropriately forced employees to disclose health conditions and been a barrier for lower income workers, who often do not have ready access to health care providers due to time, transportation, and insurance constraints.

Response to Comment 26.6

The Board appreciates the commenters’ support for the proposal. The Board is not persuaded that it is necessary to add a requirement to inform employees of their right to request a respirator for voluntary use. The proposed regulation clearly states that the employer shall

⁸ California Department of Public Health (CDPH). Guidance for the Use of Face Masks. September 20, 2022.

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

provide respirators upon request for voluntary use to all employees who are working indoors or in vehicles with more than one person. During outbreaks, subsection 3205.1(d) requires employers to notify employees of their right to request and receive a respirator for voluntary use.

Comment 26.7

The commenters support retaining a focus on improving ventilation, but argue that it confers limited benefit for the many building ventilation systems that little, if any, outdoor air supply, operable windows, or capacity to accommodate MERV 13 or other high level filtration. The commenters also support the addition of the requirement for addition of HEPA filtration units “where ventilation is inadequate to reduce the risk of COVID-19 transmission,” but assert that this provision is vague and will be hard to enforce. They also argue that the added limitation of “in indoor areas occupied by employees for extended periods” will make enforcement even more challenging. Finally, the commenters recommend adding either a definition for “inadequate ventilation” and “extended periods” or writing an FAQ explaining what these terms mean.

Response to Comment 26.7

The Board appreciates the commenters’ support for the proposal and notes the suggestion to define inadequate ventilation and extended periods in FAQs. The Board has amended subsection 3205(g) in the 15-Day Notice issued on October 14, 2022 to clarify and improve enforceability of ventilation requirements.

Comment 26.8

The commenters strongly support the requirement to maintain and keep records of close contacts for two years and the requirements regarding medical records confidentiality with exception for disclosure to health and work safety agencies, as drafted.

Response to Comment 26.8

The Board has determined that it is not necessary to require employers to keep a record of close contacts based on the current public health guidelines. CDPH released a statement supporting local health jurisdictions that have decided to shift focus and to prioritize case investigation and contact tracing (CICT) efforts for high-risk individuals or settings, and to leverage automated notifications and public education and information for cases and exposed persons in the general population. As the SARSCoV-2 virus has evolved (the shorter incubation period, dramatically increased transmissibility, and high proportions of asymptomatic cases), its transmission dynamics have reduced the impact and feasibility of universal case investigation and contact tracing. In addition, with the increasing availability of more effective prevention strategies at this stage of the pandemic, including vaccination, masking, ventilation, testing, and treatment, prioritizing CICT to the highest risk situations and leveraging other public health

tools will have a more efficient and higher impact on prevention of the most severe outcomes of COVID-19.⁹

Comment 26.9

The commenters strongly support the Division using its authority to issue Orders to Take Special Action to require an employer to take additional actions to protect employees from COVID-19 hazards.

Response to Comment 26.9

The Board appreciates the commenters' support for these aspects of the proposed regulation.

Comment 26.10

The commenters state they think that Cal/OSHA should retain authority over defining a workplace outbreak.

Response to Comment 26.10

The Board appreciates the commenters' assessment.

Comment 26.11

The commenters support the requirement to report major outbreaks to the Division.

Response to Comment 26.11

The Board appreciates the commenters' support for these aspects of the proposed regulation.

Comment 26.12

The commenters strongly support the retention of requirements for ventilation, provision of face coverings, reporting of symptoms, COVID testing, isolation of cases and quarantining of close contacts in section 3205.2.

Response to Comment 26.12

The Board appreciates the commenters' support for these aspects of the proposed regulation.

Comment 26.13

The commenters are concerned that allowing quarantining of close contacts together (in subsection 3205.2(g)(2)) could increase the number of employees who contract COVID-19.

⁹ CDPH. Shifting Public Health Case Investigation, Contact Tracing, and Outbreak Investigation Priorities. March 7, 2022. <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Case-Investigation-Contact-Tracing-Outbreak-Investigation-Priorities.aspx>

Response to Comment 26.13

The Board notes the commenters' concern. For employees who had a close contact, employers must review CDPH guidance and implement quarantine and other measures to prevent COVID-19 transmission in the workplace. CDPH guidance on isolation and quarantine provides general steps for isolation and quarantine. These steps include avoid sharing rooms/spaces with others and avoid using the same bathroom as others.¹⁰ The CDPH guidance also specifies other measures, which employers may take to prevent COVID-19 transmission in the employer-provided housing.

Comment 26.14

The commenters state that they think subsection 3205.2(b) should continue to specify: To the extent feasible residents who usually maintain a household together outside of work, such as family members shall be housed together.

Response to Comment 26.14

The Board declines to amend the proposed regulation as suggested. The proposed language clearly states that to the extent feasible, residents who usually maintain a household together shall be housed in a single housing unit without other persons.

Comment 26.15

The commenters state that section 3205.2 should refer to the applicable record keeping requirements in section 3205 so that the record keeping requirements are not overlooked.

Response to Comment 26.15

The Board is not persuaded by the comment. Subsection 3205(j) clearly states that the recordkeeping requirements of COVID-19 cases apply to section 3205 or sections 3205.1 through 3205.3.

Comment 26.16

The commenters raise grave concerns about narrowing the scope of the requirements of section 3205.3. The commenters point out that agricultural workers experience a higher risk of exposure during transportation in many areas of the state where buses and high capacity vans are used to transport workers to worksites that can be over an hour away from the employer provided housing or pick up points, and that this risk is increasing around the state because the industry has become more reliant on H-2A workers who are transported together for many hours or days from their place of recruitment to their California employer; are then transported daily to and from the fields; and then transported back home at the end of their contract. The commenters further note that these employees are dependent on their employers for

¹⁰ CDPH. Guidance for Local Health Jurisdictions on Isolation and Quarantine of the General Public. June 9, 2022. <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-on-Isolation-and-Quarantine-for-COVID-19-Contact-Tracing.aspx>

transportation to stores and health care. The commenters recommend, to protect these workers the regulation should continue to apply broadly and provide clear direction about covered transportation, that the following language from the ETS 3205.4(a) be inserted in section 3205.3 to retain the language of the current emergency standard:

(a) Scope. This section applies to employer-provided motor vehicle transportation, which is any transportation of an employee during the course and scope of employment, including transportation to and from different workplaces, jobsites, delivery sites, buildings, stores, facilities, and agricultural fields, provided, arranged for, or secured by an employer regardless of the travel distance or duration involved. The following exceptions apply:...

Response to Comment 26.16

The Board disagrees that the proposed language narrows the scope of the employer-provided housing provisions in the existing ETS, and declines to adopt the modification proposed by the commenter.

Comment 26.17

The commenters state they believe that the cross-reference to compliance with requirements of section 3205 does not clearly provide adequate notice of which requirements are applicable to workers within a vehicle. They further state that section 3205.3 should at least list the applicable subsections of section 3205 and should restate the requirement to maximize ventilation and to provide respirators upon request and inform employees of their right to request respirators. They further state that requirements should be added in section 3205.3 to make face coverings readily available for voluntary use.

Response to Comment 26.17

The Board disagrees that the proposed changes are necessary. First, the proposed language clearly states that employers shall comply with the requirements of section 3205 within a vehicle, which include the requirement to maximize the supply of outside air, to provide respirators upon request, and to inform employees of their right to request respirators. Secondly, section 3205 already requires employers to provide face coverings when required by a CDPH regulation or order. In addition, it requires employer to provide respirators for voluntary use upon request to all employees who are working indoors or in vehicles with more than one person.

The Board thanks the commenters for their input and participation in the rulemaking process.

27. Stephen Knight, Executive Director, and AnaStacia Nicol Wright, Staff Attorney, on behalf of WorkSafe, by written comments dated September 14, 2022.

Comment 27.1

The commenters argue forcefully for the proposed regulation to bring back the exclusion pay provisions of the ETS. They opine that the absence of exclusion pay “will greatly reduce the effectiveness of the Standard,” and will cause the burden to fall disproportionately on workers who are least able to bear it. They write, “For the last two years, exclusion pay has been a status quo reality for workers, one upon which California’s workers rely. Especially in a deeply problematic landscape where many workplaces do not allocate their staff with any more sick time than the three days required by California law. Additionally, workers will eventually lose whatever Supplemental Paid Sick Leave protections. SPSL only applies to larger businesses. There is no guarantee for how long SPSL may be continued if the legislature does extend it. In any event, Exclusion Pay offers different beneficial and needed protections for workers that Supplemental Paid Sick Leave does not cover. Exclusion pay is specific to being a work-related Covid case or close contact, to prevent exposures at work. SPSL passed by the legislature is for a broader array of reasons a worker may need to be out of work related to COVID, including child care and other reasons unrelated to a workplace exposure. Whether the legislature chooses to end or renew extended sick leave is not relevant to the occupational health rationale for exclusion pay in a Cal/OSHA standard. [...] Exclusion pay provisions are found in many other Cal/OSHA standards including the lead, cadmium, methylene chloride, formaldehyde, benzene, and cotton dust standards. Also, the proposed Federal OSHA Covid-19 Emergency Temporary Standard included exclusion pay. To remove exclusion pay while retaining exclusion sets a precedent that breaks from this history and practice.”

Response to Comment 27.1

Please see response to comment 26.1.

Comment 27.2

Despite their strong objections to the absence of exclusion pay in the proposed regulation, the commenters strongly support adoption of the proposed regulation.

Response to Comment 27.2

The Board appreciates the commenters’ support for the proposed regulation.

Comment 27.3

The commenters suggest adding explicit references to “[t]he broader set of control options to reduce close contacts such as physical distance, moving work outdoors, [and] changing work schedules[.]”

Response to Comment 27.3

The Board disagrees that it is necessary or advisable to add another reference to these control options, as they are explicitly set forth in subsection 3205(c)(2).

The Board thanks the commenters for their input and participation in the rulemaking process.

28. Victoria Wu, by written comments dated August 13, 2022.

Comment 28.1

The commenter supports the proposed regulations, citing her experience returning to in-person work and her increasing concern regarding the relaxing of protections from the CDC, local public health departments, and by the general public. The commenter urges that the Board ensure California workers are as protected as possible.

Response to Comment 28.1

The Board appreciates the commenter's support for the proposed regulation.

The Board thanks the commenter for their input and participation in the rulemaking process.

29. Shane Gusman, Legislative Advocate, Broad & Gusman, on behalf of the California Conference Board of the Amalgamated Transit Union, by written comments dated September 15, 2022.

Comment 29.1

The commenter requests the Board to revise the social distancing requirement to protect their members in public transit and all workers. The commenter believes that some workers will continue to be protected through social distancing rules, but many more will have no such protection; in particular, they believe that social distancing protections extend to office workers, but as one important example, will not apply to transit operators and their passengers.

Response to Comment 29.1

The proposed regulation does not differentiate between industries; to the extent that the proposed regulation includes physical distancing protections, these protections – like the rest of the proposed regulation – apply equally to all workers. The proposal will not include distancing requirements in most circumstances to be consistent with CDPH recommendations and based on the fact that COVID-19 is an airborne infectious disease that can be transmitted much farther than distancing recommendations such as six feet.

The Board thanks the commenter for their input and participation in the rulemaking process.

30. Saskia Kim, Lead Regulatory Policy Specialist, on behalf of the California Nurses Association/National Nurses United (CNA/NNU), by written comments dated August 26, 2022.

Comment 30.1

The commenter encourages the Board to recognize that this virus has become much more contagious, long COVID is a real debilitating threat to workers, and vaccines do not slow transmission as we hoped they would.

Response to Comment 30.1

The Board acknowledges the hazard of COVID-19 to workers. The Board however disagrees that vaccinations do not slow transmission of the SARS CoV-2 virus, as data are now showing that vaccination likely inhibits infection, in addition to protecting against disease, hospitalization, and death.

Comment 30.2

The commenter stated that they join their colleagues who have argued for the importance of exclusion pay protections which ensure that workers are not forced to make the impossible choice of going to work while sick or staying home without pay. They emphasize that supplemental paid sick leave is not a substitute. They explain that under California law, at least one in four workers is without access to the COVID-19 paid sick leave law. They strongly encourage the Board to retain exclusion pay as part of the Non-Emergency COVID-19 Prevention Regulation. They further state that workers need protection of job status when they are excluded from work. They point out that these protections are currently contained in the COVID-19 ETS, and encourage the Board to include them here as well.

Response to Comment 30.2

Please see response to comment 26.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

31. California Labor Federation, AFL-CIO; California Conference Board of the Amalgamated Transit Union; California Conference of Machinists; California Federation of Teachers; California Nurses Association; California School Employees Association; California Teamsters Public Affairs Council; Engineers & Scientists of California, International Federation of Professional and Technical Engineers (IFPTE), Local 20; Service Employees International Union (SEIU) California State Council; UNITE HERE; United Nurses Association of California/Union of Health Care Professionals; and Utility Workers Union of America, by written comments dated September 13, 2022.

Comment 31.1

The commenters state that the plan to delete exclusion pay—while requiring employers to exclude COVID-19 cases—would spike case numbers and fatalities during what remains a very deadly stage of the pandemic. They state they are stunned that this idea is under serious consideration and strongly urge Cal/OSHA and the Board to return exclusion pay to the standard. The commenters further state that this change would create a deeply concerning

precedent that workers can be sent home, without pay, as punishment for contracting a work-related illness through no fault of their own. Additionally, they state that workers' compensation temporary disability benefits will not apply in most cases and, even if applicable, typically take too long to be of much help to COVID-infected workers. They also state that evidence also suggests that working through COVID can raise the risk of long COVID, and that eliminating exclusion pay will leave many Californians with no option other than working while sick and their risk of winding up with this horrible disease will rise.

Response to Comment 31.1

Please see response to comment 26.1.

Comment 31.2

The commenters suggest that the proposed regulation retain the requirement for employers to notify employees and their representatives of COVID-19 cases and close contacts, and to report worksite outbreaks to local health departments, regardless of the outcome of AB 2693.

Response to Comment 31.2

The proposed regulation retains the requirement for employers to notify employers and their representatives of COVID-19 cases and close contacts. With respect to reporting worksite outbreaks to local health departments, the Board will not make this change as the Board seeks to keep the proposal in harmony with Labor Code section 6409.6 and existing law.

Comment 31.3

The commenters state that the Board should revert to the original definition of outbreak, consistent with CDPH, which simply stated that 3 or more cases constitutes a worksite outbreak, whether the cases are technically employees or not.

Response to Comment 31.3

The Board is aware that CDPH guidance is extremely helpful and has followed that guidance. The Board believes, however, that occupational health is different from public health generally and must address the unique setting of the workplace. The Board notes that the proposed regulations defer to CDPH if they define outbreak differently in a regulation or order.

The Board thanks the commenters for their input and participation in the rulemaking process.

32. Andrew Wylam, President, on behalf of Pandemic Patients, by written comments dated September 14, 2022.

Comment 32.1

The commenter states that they support the enactment of the General Industry Safety Orders published by the Board on July 29, 2022.

Response to Comment 32.1

The Board appreciates the commenter's support for the proposed regulation.

Comment 32.2

The commenter urges the Board to include greater specificity on training requirements, to include training on COVID-19 symptoms, viral transmission pathways, testing methods, how workers can protect themselves and others following a potential or confirmed exposure to COVID-19, the potential long-term health consequences of COVID-19 infection, and when to seek emergency medical care. The commenter also recommends that Cal/OSHA periodically issue standardized training materials to employers to ensure that the information they are providing to employees is up to date. The commenter asks the Board to do more to protect employees who report COVID-19 symptoms and remain home and incorporate these into 3205, (c)(3), specifically requiring employers to provide training to employees regarding any workplace benefits available to them (*e.g.*, paid sick leave) and instruct employees on the protections of Labor Code section 6311.

Response to Comment 32.2

The Board is seeking to shorten and simplify the ETS in this non-emergency proposal. The Board declines to make the requested change. With respect to the comment regarding requiring employers to provide training on workplace benefits, the proposed subsection 3205(c)(5)(E) already requires the employer to give the excluded employee information related to COVID-19 benefits.

Comment 32.3

The commenter states that they believe that additional employee benefits should be specifically noted in the Safety Orders. They state that subsection 3205(c)(5)(E) should require employers to provide information to employees regarding any available workplace disability benefits. They further state that employers should be required to furnish a copy of any relevant coverage documents to employees at this time.

Response to Comment 32.3

The Board disagrees that it is necessary to include a specific requirement that employers provide information to employees regarding any available workplace disability benefits in this proposal, because the list of benefits mentioned in proposed subsection 3205(c)(5)(E) is not exhaustive. In regard to requiring employers to furnish a copy of any relevant coverage documents to employees, proposed subsection 3205(c)(5)(E) already requires the employer to give the excluded employee information related to COVID-19 benefits and is sufficient to address this concern.

The Board thanks the commenter for their input and participation in the rulemaking process.

33. Amber Baur, Executive Director, on behalf of the United Food and Commercial Workers (UFCW) Western States Council, by written comments dated September 14, 2022.

Comment 33.1

The commenter urges the Board to enact a stronger and more protective regulation. The commenter opposes the exclusion pay deletion and lack of codifying worker and exclusive representative COVID-19 exposure notifications. The commenter also requests the Board to revise the social distancing requirement to protect their members in public transit and all workers.

Response to Comment 33.1

With respect to exclusion pay, please see the response to comment 26.1. With respect to physical distancing, please see the response to comment 29.1.

Comment 33.2

The commenter states their concern that as a result of the proposal to eliminate exclusion pay while requiring employers to exclude employees, workers without adequate sick leave would be forced to either lose their jobs or go home without pay for days or weeks, disproportionately impacting low-wage workers and workers of color who have the least amount of access to paid sick leave. They state that as most cannot absorb such a devastating loss of income, many would have to avoid this outcome by avoiding testing, and thus, contagious workers would have to quietly stay on the job, infecting other employees and members of the public. They further state that workers would fall ill, others would die, and the pandemic would worsen. The commenter also states that deleting exclusion pay would ignore the reality of long COVID faced by millions of California workers. They state that evidence suggests that working through COVID can raise the risk of long COVID.

Response to Comment 33.2

Please see response to comment 26.1.

Comment 33.3

The commenter urges the Board to codify and retain the requirement to notify employees and their representatives of COVID-19 cases and exposures in the proposed regulation. The commenter points out that these measures are scheduled to expire on January 1, 2023, long before COVID-19 will cease to dominate life in California. The commenter addresses AB 2693 (Reyes-2022), which would extend these provisions until January 1, 2024, and notes that this bill would also allow for notification of close contacts by workplace posting that includes certain information about the exposure.

The commenter also urges the Board to revise the proposed regulation to require that employers notify those who had close contact with a COVID-19 cases within one business day, arguing that “as soon as possible” is ambiguous and could lead to delayed reporting.

Response to Comment 33.3

Please see response to comments 2.5 and 26.4.

Comment 33.4

The commenter proposes that, when masking is required by CDPH, the exception to masking for “specific tasks which cannot feasibly be performed with a face covering” should include explicit safety precautions to protect the worker, such as requiring at least six feet of distancing and, if indoors, that the supply of outside or filtered air has been maximized to the extent feasible. The commenter also suggests clarifying that employers must provide face coverings upon request at no cost, even when masking is not required by the CDPH.

Response to Comment 33.4

The Board declines to make the proposed change to include additional safety precautions when use of face coverings is not feasible. The Board believes that the time limitation included in the exceptions to the face covering requirements (the time period in which such tasks are actually being performed) is sufficient here. With respect to the proposed addition of a requirement that employers maximize the supply of outside or filtered air to the extent feasible when indoors when the use of face coverings is not feasible, the Board disagrees that this is a necessary addition. Employers are already directed to take action to improve ventilation which may be done by maximizing the flow of outdoor air when indoors, among several options to address ventilation in subsection 3205(h).

Comment 33.5

The commenter notes that ventilation is a critical component in keeping workers safe from COVID-19 going forward, and asks that the requirement that employers “*may* take one or more of the following actions” be replaced with a requirement that employers “*shall* take one or more of the following actions.”

Response to Comment 33.5

The Board agrees with the commenter’s proposal. As one of the changes to the regulatory text submitted in the 15-Day Notice issued on October 14, 2022, the Board proposes revising the language of subsection 3205(h) to require that employers shall take one or more of the options set forth at subsections 3205(h)(1)(A)-(C).

Comment 33.6

The commenter states that the Board should revert to the original definition of outbreak, consistent with CDPH, which simply stated that 3 or more cases constitutes a worksite outbreak, whether the cases are technically employees.

Response to Comment 33.6

Please see response to comment 31.3.

The Board thanks the commenter for their input and participation in the rulemaking process.

34. Chris Laszcz-Davis, Member, Occupational Safety and Health Standards Board, by written comments dated August 18, 2022.

Comment 34.1

Board Member Chris Laszcz-Davis states that the following are a few elements in the rule that would benefit from benchmarking with other states:

- Which states still have COVID-19 workplace rules in place? Which states have rolled them back?
- What is the timeline for the active workplace rules and what are the triggers for when the rule will be rolled back?
- Is contact tracing and notification required for close contacts?
- Are employers required to keep records of close contacts? If so, for how long?
- What is the definition of outbreak and subsequent employer requirements?

Response to Comment 34.1

The only other states identified with current COVID-19 occupational safety and health regulation are Oregon and Washington. A summary of their requirements are the following:

Oregon general workplace settings (there are additional requirements for “exceptional risk settings”):

- Provide and allow for employee voluntary face covering use
- Cover costs of COVID testing if testing is conducted at the employer’s direction
- Optimize ventilation systems to reduce risk of COVID-19 transmission
- Follow Oregon Health Authority, public health, or medical care provider recommendations for isolation and quarantine of employees regarding COVID-19
- Provide notice within 24 hours to workers who had a potential work-related COVID-19 exposure
- No expiration date set: *“Oregon OSHA will fully repeal the rule when it is no longer necessary to address the COVID-19 pandemic. Because it is not possible to assign a specific time for that decision, Oregon OSHA will consult with the Oregon OSHA Partnership Committee, the Oregon Health Authority, the two Infectious Disease Rulemaking Advisory Committees, and other stakeholders as circumstances change to determine when all or parts of the rule can be appropriately repealed.”*

Washington (additional requirements for healthcare, corrections, and schools):

- Assess COVID-19 hazards in the workplace and adjust prevention measures
- Isolate workers known or suspected to have COVID-19
- Provide hand washing facilities and supplies, and regularly clean and sanitize surfaces.

- Educate workers about COVID-19 prevention in the language they understand best.
- Provide written notice of potential COVID-19 exposure within one business day to all workers, and the employers of subcontracted workers, who were at the same work site as a person who tested positive (without disclosing the person's identity).
- Report COVID-19 outbreaks
- Address COVID-19 notification, reporting, and prevention measures in the employer's workplace-specific, written Accident Prevention Program or equivalent safety program.
- Allow workers to voluntarily wear masks or respirators and PPE
- Some of these requirements apply to employers in Washington State during a public health emergency.

35. Laura Stock, Member, Occupational Safety and Health Standards Board, by written comments dated August 18, 2022.

Comment 35.1

Board Member Laura Stock asked why there was no exclusion pay provision in the proposed regulation and how the Division believed that would impact the ability of the regulation to prevent infection in the workplace. Board Member Stock asked specifically for the Division's professional opinion based on its enforcement experience and expertise on how to prevent workplace infection.

Response to Comment 35.1

Please see response to comment 26.1.

36. Pamela Murcell, President, on behalf of the California Industrial Hygiene Council (CIHC), by written comments dated September 15, 2022.

Comment 36.1

The commenter supports the proposed approach to address COVID-19 as a work environment hazard through the employer's Injury and Illness Prevention Program. The commenter also supports the sunset clause; specifically, two years after the effective date. However, the commenter is disappointed that additional COVID-19 Advisory Committee meetings were not convened to allow stakeholder participation to assist the Board and the Division with the path forward and proposed language for the non-emergency regulation.

Response to Comment 36.1

The Board appreciates the commenters' support for these aspects of the proposed regulation. With respect to the request for additional COVID-19 Advisory Committee meetings, both the ETS and the proposed regulation have been the subject of multiple advisory committee and Board meetings, and the Board feels there has been ample opportunity for stakeholder participation.

Comment 36.2

The commenter expresses concern about the proposed definition of “close contact” at subsection 3205, (b)(1). It believes that, “without quantifiable criteria to define ‘shared indoor space’ close contact is not enforceable and that it may extend to “close contacts” who were not in fact exposed to an infectious case.” It explains that the “issue is sharing air space in close enough proximity and for a long enough period of time to a person with active infection that someone has then been exposed to the virus.”

The commenter also points to a typographical error in the proposed definition of “close contact” at subsection 3205, (b)(1).

Response to Comment 36.2

Please see response to comment 1.5. Additionally, the Board notes that the text of the proposed regulation does not contain the typographical error identified by CIHC.

Comment 36.3

The commenter is concerned that the “potentially infectious” language from subsection 3205(c)(1) implies that all persons are potentially infectious at all times, notwithstanding lack of symptoms, vaccination status, or negative COVID-19 test results,” which would necessitate that employers quarantine nearly all employees and shut their doors.

Response to Comment 36.3

The Board disagrees that acknowledging all persons as potentially infectious necessitates widespread quarantine and disruption to business operations. The Board believes that all persons should be treated as potentially infectious in that all persons may present the hazard of infecting others with the virus and that employers should take steps to address that hazard. Subsection 3205(c)(1) was amended in the 15-Day Notice issued on October 14, 2022 to clarify its meaning.

The Board thanks the commenter for their input and participation in the rulemaking process.

37. Christa Jones, by written comments dated September 13, 2022.

Comment 37.1

The commenter, who teaches reading in an elementary school, objects to certain mask requirements. Specifically, they object that, when there is a COVID-19 case in a classroom, “only the teacher has to wear a mask for 10 days and the student can come back after 5 days with a negative test[,]” while the rest of the class does not need to wear a mask at all.

Response to Comment 37.1

The Board is sympathetic to the commenter’s confusion. Persons in school settings are subject to requirements set by several different entities. In this case, school district masking policies for

students have been set by individual school districts. By contrast, this proposal is specific to face coverings use by employees. This has resulted in different standards applying to students and teachers.

The Board thanks the commenter for their input and participation in the rulemaking process.

II. Oral Comments

Oral comments received at the September 15, 2022 Public Hearing in Sacramento, California.

38. Trestin Keys, on behalf of the Associated General Contractors (AGC) of California.

Comment 38.1

The commenter believes that the proposed definition of “close contact” injects ambiguity into the term, made worse in the construction industry with its ever-changing, multi-employer environments. The commenter urges the Board to return to the six-foot rule.

Response to Comment 38.1

Please see response to comment 1.5.

Comment 38.2

The commenter notes that, as written, subsection 3205(e) is no longer accurate with respect to the references to Labor Code section 6409.6.

Response to Comment 38.2

Please see response to comment 2.5.

Comment 38.3

The commenter states that the requirements in subsection 3205.1(e) for immediate review of all policies upon outbreak does not tie outbreaks to instances where COVID-19 could actually spread in the workplace. External factors such as gatherings or holidays would potentially require the employer to reevaluate policies for their workplace, even when there is no evidence of any issues. The commenter states that for these reasons, and due to the fact that we are transitioning to an endemic, they suggest a language change in subsection 3205.1(e) to periodically review employer’s policies consistent with IIPP-based enforcement.

Response to Comment 38.3

Please see response to comment 2.9.

The Board thanks the commenter for their input and participation in the rulemaking process.

39. Robert Moutrie, on behalf of the California Chamber of Commerce.

Comment 39.1

The commenter states that the proposed regulation is not necessary, given that updated science and availability of vaccines and drugs like Remdesivir and Paxlovid have really changed the realities of COVID and the fear of it. However, the commenter supports the move towards using IIPP and flexibility as science changes in the next two years. Although the commenter thinks that an appropriate time period to check back in might be one year, they see the two years as understandable.

Response to Comment 39.1

With respect to the commenter's objection to the necessity of the proposed regulation, please see the Board's responses to comments 1.2, 7.1, and 23.1. The Board appreciates the commenter's support for some aspects of the proposed regulation.

Comment 39.2

The commenter voices concerns from members over the proposed changes to the definition of "close contact." Members, the commenter says, regularly reach out to ask about the proposed definition applies to their offices and large spaces and what the notice requirements are.

Response to Comment 39.2

Please see response to comment 1.5.

Comment 39.3

The commenter echoes concerns raised by AGC regarding the language of subsection 3205(e), and argues that revisions are necessary in light of the changes to Labor Code section 6409.6 from AB 2693. The commenter opines that these changes could be non-substantive, and could be made without the 15-day notice and comment period.

Response to Comment 39.3

Please see response to comment 2.5.

The Board thanks the commenter for their input and participation in the rulemaking process.

40. Helen Cleary, on behalf of Phylmar Regulatory Roundtable.

Comment 40.1

The commenter supports the added flexibility and inclusion of IIPP with the rule but they have remaining concerns. The commenter states that the two-year effective period is arbitrary with no flexibility or transparent process for the regulation to sunset sooner. If adopted, the need for the rule should be reevaluated every six months using specific milestones. The commenter also states that the rule should align with the community and not be in place if the state of

emergency is repealed. At a minimum the timeline should align with AB 2693. If the Governor agrees that COVID legislation should not extend, Cal/OSHA's regulation should not be an outlier and in effect for an additional year or more.

Response to Comment 40.1

Please see responses to comments 1.2, 7.1, and 23.1.

Comment 40.2

The commenter states that despite under-reporting, multiple datasets and trends, including Workers' Compensation, should be analyzed and presented in the final rulemaking package. In industry employers are responsible to demonstrate the effectiveness of their safety and health programs. The commenter argues that the Division and Board should be required to do the same before implementing and enforcing a rule with such an expansive timeline and sweeping, regulatory impact.

Response to Comment 40.2

Please see response to comment 1.8.

Comment 40.3

The commenter supports that exclusion pay has not been included. They further state that this type of requirement should be made by the state and Legislature.

Response to Comment 40.3

The Board thanks the commenter for their support of this portion of the proposed regulation.

Comment 40.4

The commenter states that contact tracing continues to be the most burdensome element for large employers, and that this burden will be magnified by the expanded definition of close contact. Employees are continuously receiving general notifications of potential exposure with little detail, regardless of the level of risk related to the exposure. The commenter argues that this is compounded by the new requirement for employers to keep a record of close contacts. The commenter expresses concern that the added requirement to document will require contact tracing, even if the act of individual contact tracing is not necessary or recommended.

Response to Comment 40.4

Please see response to comment 1.3.

Comment 40.5

The commenter states that the definition of "outbreak" does not consider the size of the workforce, the size of the workplace, actual exposure, or other controls that mitigate transmission like state-of-the-art ventilation. The commenter recommends that the number of

COVID cases that trigger an outbreak should be relative to the size of the workforce and that the definition of “close contact” include parameters based on proximity.

Response to Comment 40.5

Please see response to comment 12.3.

The Board thanks the commenter for their input and participation in the rulemaking process.

41. Daniel Rodriguez, with Golden Gate Bridge, Highway & Transportation District.

Comment 41.1

The commenter requests to get rid of temperature checks and eventually get rid of the contact tracing process and protocols. The commenter states that they would like to get everybody back to work and continue the mass transit agency efforts that they provide to four counties within the Bay Area.

Response to Comment 41.1

The proposed regulation does not require temperature checks. With respect to contact tracing, the Board has modified the proposed regulation to remove some of these requirements. The Board agrees with the commenter that mass transit plays an important role in the laudable goal of returning workers to workplaces.

Comment 41.2

The commenter explains that, as the Close Contact Tracing Administrator for their employer, they were certain their employer had done everything they could possibly do to keep their employee case numbers low. However, they continued, not only is it a very lengthy and detailed process, but it involves a lot of worker hours, especially after a long weekend or a holiday weekend.

Response to Comment 41.2

Please see response to comment 25.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

42. Andrew Sommer, Conn Maciel Carey LLP, on behalf of the California Employers COVID-19 Prevention Coalition.

Comment 42.1

The commenter is concerned about the utility of the proposed regulation as the conditions with the pandemic evolving into endemic conditions have been fast-evolving, and there's been changes in medical science and new methods to manage the transmission of COVID-19. The

commenter believes that the IIPP combined with the public health orders will provide a sufficient mechanism in addressing COVID-19 related hazards.

Response to Comment 42.1

With respect to the criticism regarding the existence of a non-emergency regulation preventing COVID-19 transmission, please see response to comment 7.1. With respect to the commenter's position that the IIPP and public health orders will suffice to address COVID-19 transmission in the workplace, the Board is not persuaded.

Comment 42.2

The commenter voices concerns of its members over the proposed definition of "close contact." The commenter says that the lack of reference to proximity has generated great consternation among employers, particularly those with large spaces such as distribution centers, manufacturing facilities, warehouses, and hangars. The commenter says that clarifying the definition would be much more effective and workable for employers.

Response to Comment 42.2

Please see response to comment 1.5.

Comment 42.3

The commenter expresses that the outbreak provisions are not necessary at this point in the pandemic and that they are creating onerous requirements for employers. The commenter argues that the conditions now are so different from earlier in the pandemic, offering the example of fatality rates, which the commenter claims were 17 times higher in January 2021, and ICU hospitalization rates, which were 14 times higher in January 2021.

Response to Comment 42.3

Please see response to comment 20.11.

The Board thanks the commenter for their input and participation in the rulemaking process.

43. Mitch Steiger, on behalf of the California Labor Federation.

Comment 43.1

The commenter strongly urges the two-year readoption of the proposed regulation. The commenter states that although there are some pretty serious weaknesses, it has done a lot to save workers' lives and make fewer workers get hurt.

Response to Comment 43.1

The Board appreciates the commenter's support for the proposed regulation.

Comment 43.2

The commenter strongly disagrees with the assessment that the proposed regulation is not necessary because things are better now and fatality and hospitalization rates are pretty low. The commenter asks the Board to consider that the effect of long COVID in crafting the proposed regulation, as well as the fact that and this virus can always change. The commenter states that a strong standard is needed to protect against whatever may be coming in the future. The commenter opines that a strong two-year readoption as the best middle ground to allow the economy to keep going and keep workers safe.

Response to Comment 43.2

The Board appreciates the commenter's support for the proposed regulation. The Board acknowledges that COVID-19 continues to be a serious workplace hazard that can lead to death, serious illness, and long-term disability and will continue to be so for the foreseeable future.

Comment 43.3

The commenter states that the biggest weakness they see in this proposal is the deletion of exclusion pay. They further state that we would be setting up a system where, regardless of the workers' needs, regardless of how negligent the employer may have been, we're going to punish the worker for the fact that they got sick. They state that a lot of workers are going to make the impossible choice to either work while sick and just not tell their employer, or lose their jobs. The commenter strongly urges the return of exclusion pay to this standard.

Response to Comment 43.3

Please see response to comment 26.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

44. Anne Katten, on behalf of the California Rural Legal Assistance Foundation (CRLAF).

Comment 44.1

The commenter strongly supports the need for the proposed regulation. The commenter states that maintaining these key prevention protections including notification of cases in shared workspaces, shared air spaces, is critical for preventing spread of COVID in the workplace and in employer-provided housing and transportation. The commenter states that a growing number of studies indicate that long COVID poses serious, long-term health risks including diabetes, heart, cardiovascular disease, neuro-degeneration disorders. And there are also studies indicating that reinfection increases the risk of long COVID. While COVID infection rates are dropping in the more affluent coastal counties infection rates are still high in Kern, Kings, Merced and Madera counties at the moment, and rising in Tulare and Fresno counties, and moderate in many counties.

Response to Comment 44.1

The Board appreciates the commenter's support for the proposed regulation.

Comment 44.2

The commenter urges the Board to reinstate exclusion pay and rights to maintain earnings and seniority and other similar related rights, including the right to retain jobs status. They state that ending exclusion pay would undermine the entire regulation.

Response to Comment 44.2

Please see response to comment 26.1.

Comment 44.3

The commenter states that agriculture workers remain at high risk of exposure and infection in crowded employer house-provided housing, and during very long van and bus rides to work sites at distance locations. They further state that H2A workers are also transported together for many hours or days, from their places of recruitment to their California employers, and are dependent on employer-provided transportation to get to stores and healthcare and to get back home at the end of their contracts. They conclude that to protect these workers the regulation should continue to apply broadly to all employer-provided transportation.

Response to Comment 44.3

Please see response to comment 26.16.

The Board thanks the commenter for their input and participation in the rulemaking process.

45. Michael Miiller, on behalf of California Association of Winegrape Growers.

Comment 45.1

The commenter states that they have already submitted written comments in opposition to the proposed regulation. The commenter voices strong concerns that the regulation unfortunately continues an emergency response to the pandemic; that there is no data to support the need for or efficacy of the proposed regulation; and that the proposed regulation is contrary to the advice and counsel from President Biden, Governor Newsom, CDPH, CDC, and leading health expert experts across the country. The commenter states that the decision must be based on data and the Board has never made a serious attempt to collect the data for number of COVID-19 infections and number of hospitalizations and deaths attributable to workplace exposure to COVID-19. The commenter argues that the Board should be working on an infectious disease standard since President Biden and Governor Newsom have both said the COVID-19 pandemic has subsided. The commenter states that CDC makes it clear that the best way to reduce your risk of COVID is by getting vaccinated and that is what we need to be focusing on. The commenter also states that long-term COVID is mostly from a community spread exposure and it is not from the workplace and the proposed regulation ignores this fact. If the regulation

should move forward the commenter asks that the regulation should sunset in one year, not two.

Response to Comment 45.1

Please see response to comments 7.1 and 23.1.

Comment 45.2

The commenter asks the Board to make a clear distinction between indoor and outdoor workplaces throughout the regulation. In several places both are treated the same, even though the risks are much reduced when working outdoors.

Response to Comment 45.2

Please see response to comment 23.2.

Comment 45.3

The commenter requests that the Board remove the requirements to provide notice to employees of COVID-19 cases, alleging that they are duplicative of existing law and therefore in violation of the APA.

Response to Comment 45.3

Please see response to comment 1.3.

Comment 45.4

The commenter expresses that the outbreak provisions are simply outdated and don't reflect the real world today. The commenter states that everyone in the public hearing room will either have, or know someone who has, COVID-19. The commenter claims that it is highly likely that this will be the result of community spread, and states that it does not make sense to claim that workplace outbreaks are the cause.

Response to Comment 45.4

Please see response to comment 20.11.

Comment 45.5

The commenter states that they're very concerned that in the real world where our employers provide housing and transportation it is an option for employees. They further state that it is not required that they use it. In addition, they state that in many cases, our employers provide housing where there is none in the community or is simply unaffordable for the workers, so it's provided as an option. The commenter concludes that this punishes those employers for providing that housing by subjecting that housing to this regulation.

Response to Comment 45.5

Please see response to comment 23.6.

The Board thanks the commenter for their input and participation in the rulemaking process.

46. Jennifer M.

Comment 46.1

The commenter expresses concern that the proposed definition of “close contact,” combined with the notion of “airspace,” are so ambiguous that they give little guidance on determining who is and who is not a close contact. The commenter also would like further guidance on how to perform contact tracing given the changes.

Response to Comment 46.1

Please see response to comment 1.5.

Comment 46.2

The commenter recommended that the Board consider amending the definition of “outbreak,” perhaps by making the case count much larger or proportional to company size, or possibly narrowing the definition of “exposed groups” so that it more closely ties to close contacts versus the entire office space.

Response to Comment 46.2

With respect to the definition of outbreak, please see response to comments 2.8 and 19.1. Additionally, the Board declines to narrow the definition of “exposed group” as the commenter proposes. Additional precautions are required during outbreaks and major outbreaks, and are by their nature not necessarily limited solely to close contacts. Adopting the commenter’s proposed change would not be consistent with the goal of the regulation.

The Board thanks the commenter for their input and participation in the rulemaking process.

47. Andrew Wylam, on behalf of Pandemic Patients.

Comment 47.1

The commenter supports the implementation of workplace safety standards that are responsive to the danger presented by COVID-19. The commenter believes that state and federal regulatory agencies with jurisdiction over occupational health and safety must act with urgency to implement effective workplace safety standards to mitigate occupational exposure and community spread of COVID-19. The commenter also believes that the proposed regulation will limit workers occupational exposure to COVID-19 in California, and will prompt other states to follow California's example by implementing similar workplace safety measures.

Response to Comment 47.1

The Board appreciates the commenter’s support for the proposed regulation.

Comment 47.2

The commenter supports subsection 3205(c)(3) because it promotes greater awareness about COVID-19 at the workplace. The commenter, however, urges the Board to include greater specificity on training requirements, to include training on COVID-19 symptoms, viral transmission pathways, testing methods, how workers can protect themselves and others following a potential or confirmed exposure to COVID-19, the potential long-term health consequences of COVID-19 infection, and when to seek emergency medical care.

The commenter also recommends that Cal/OSHA periodically issue standardized training materials to employers to ensure that the information they are providing to employees is up to date.

Response to Comment 47.2

Please see response to comment 32.2.

Comment 47.3

The commenter urges the Board to do more to protect employees who report symptoms and remain home. While the commenter supports subsection 3205(c)(4), because it encourages employees to remain home as they begin experiencing COVID-19 symptoms, the commenter is concerned that employees will not comply for fear of wage loss or reprisal. The commenter, therefore, asks the Board to require employers to provide training to employees regarding any workplace benefits available to them that would support remaining home (*e.g.*, paid sick leave.)

The commenter also urges the Board to incorporate into subsection 3205(c)(3) that employers be required to instruct employees on the protections of Labor Code section 6311 as they relate to unsafe working conditions caused by COVID-19.

Response to Comment 47.3

Please see response to comment 32.2.

Comment 47.4

The commenter voices their support for the provision that requires employers to provide the affected employee with information about any benefits related to COVID-19 they may be entitled to. They state that additional employee benefits should be specifically noted in the safety orders. They further state that the regulation should require employers to provide information to employees regarding any available workplace disability benefits. They state that employers should also be required to furnish a copy of any relevant coverage documents to employees at this time. They point out that including this information at the time employees are excluded from work will help them apply for benefits if a need arises.

Response to Comment 47.4

The Board appreciates the commenter's support for this aspect of the proposed regulation. With respect to the commenter's desired additions, please see response to comment 32.3.

The Board thanks the commenter for their input and participation in the rulemaking process.

48. AnaStacia Nicol Wright, on behalf of Worksafe.

Comment 48.1

The commenter states that exclusion pay provides the means by which workers can afford to stay home and protect the public instead of exposing everyone around them to illness. They further state that the effectiveness of the standard will be greatly reduced if this vital component is left out. They state that by ensuring that workers who are required to quarantine from work will still receive their pay and job protections, we remove the incentive for those who live paycheck to paycheck and can't afford to miss one day of work, let alone five days of work to hide their illness from their employers and come to work sick and infect other employees. The commenter reiterates that the absence of provisions for exclusion pay will most heavily burden workers who are already disproportionately burdened by the pandemic.

The commenter states that workers will eventually lose supplemental paid sick leave protections, and there is no guarantee that it will come back nor is there a guarantee regarding how long it will be granted if it does get extended. They further state that exclusion pay offers different beneficial and needed protections for workers that supplemental sick pay does not.

The commenter respectfully urges the Board to include exclusion pay that California workers have come to know and expect and deserve during the last two years of this COVID pandemic.

Response to Comment 48.1

Please see response to comment 26.1.

Comment 48.2

The commenter expressed their strong support for the proposed regulation, even without exclusion pay, because the proposed regulation itself would still benefit California workers.

Response to Comment 48.2

The Board appreciates the commenter's support for the proposed regulation.

The Board thanks the commenter for their input and participation in the rulemaking process.

49. Tina Self, on behalf of Bayer Pharmaceuticals.

Comment 49.1

The commenter states that businesses like theirs have been unable to reopen to regular activities despite high vaccination rate. It is because of the challenges presented by the COVID-19 ETS and the proposed regulation that are far stricter than those recommendations recommended nationally by the CDC both in explicit terms, for example quarantine and isolation requirements for COVID cases. The commenter asserts that the proposed regulation's COVID-19 outbreak definitions create extraordinary case management obligations that are not necessarily reflective of actual workplace health risk. These include extensive testing requirements and the potential to exclude production workers engaged in the manufacture of critical life-enhancing and sustaining medicines.

Response to Comment 49.1

Please see response to comment 14.1.

Comment 49.2

The commenter requests that the Board revise the description of outbreaks in section 3205.1 to ensure that the cases counted towards a minor or major outbreak are only those that arise out of, or are related to work. The commenter would prefer that the language of the proposed regulation mirror the work-relatedness aspects of the ATD standard (title 8, section 5199) and the Employer Records of Occupational Injury or Illness standard.

Response to Comment 49.2

Please see response to comment 14.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

50. Bryan Little, on behalf of the California Farm Bureau.

Comment 50.1

The commenter urges the Board to refrain from imposing a permanent non-emergency version of the COVID-19 standard. The commenter states that employers should not be expected to continue to undertake extraordinary measures to protect employees against a highly contagious disease that they are as likely or more likely to be exposed to outside the workplace as at the workplace. The commenter states that the proposed regulation could not adapt and change with rapidly evolving science, because the regulatory process is simply too rigid in its required timeframes to permit the agency and the Board to act with expediency. The commenter also states that the proposed regulation represents and reflects some positive changes like limiting the rules duration to two years, but a one-year duration would be better still; removing the requirement for exclusion pay in light of the legislators repeated actions requiring employers to provide COVID-19 supplemental paid sick leave; and adopting a more performance-oriented injury and illness prevention plan-like approach.

Response to Comment 50.1

With respect to the criticism regarding the existence of a non-emergency regulation preventing COVID-19 transmission, please see response to comments 7.1 and 23.1. With respect to the commenter's support for certain aspects of the proposed regulation, the Board appreciates the commenter's support for these provisions.

Comment 50.2

The commenter notes that there has been a lot of concern expressed about long COVID and about other transmissibility issues related to COVID. The CDPH, CDC, and all the authorities and scientists tell us the most effective way to protect ourselves against this is being vaccinated and being boosted. The commenter states that the proposed regulation does not offer any encouragement for people to be vaccinated and to be boosted, because it treats everybody exactly the same way. The commenter suggests there should be incentives to be vaccinated in order to be proactive and protect themselves against COVID-19, against long COVID, and against all the other problems that seem to stem from it.

Response to Comment 50.2

The Board is not persuaded that the proposed regulation disincentivizes vaccination or that treating employees differently based on vaccination status would affect behavior with respect to vaccination at this point in time. Vaccinations are widely available. In California, 80 million doses have already been provided and over 80 percent of the population has received at least one dose.¹¹ As discussed in the response to comment 26.1, while vaccinations are still effective in reducing serious acute illness, which would necessitate long periods of leave from work and death.¹² The updated booster shot, recently made available, will increase immunity against the original COVID-19 strain and also protect against new Omicron variants.¹³

Comment 50.3

The commenter says that the proposed definition of "close contact" will continue to be problematic to implement if employers have no room to allow reasonable definition of workspaces. The commenter is concerned, for example, that the lack of floor-to-ceiling walls in a large packing shed with shields between workstations would constitute a shared indoor airspace and that a single visit by a single infectious person would make potentially dozens of employees in that packing shed close contacts.

Response to Comment 50.3

Please see response to comment 1.5.

¹¹ State of California. Tracking COVID-19 in California. Updated September 22, 2022. Accessed on September 28, 2022. <https://covid19.ca.gov/state-dashboard/>

¹² CDC. COVID-19 Vaccine Effectiveness Monthly Update. August 25, 2022. <https://covid.cdc.gov/covid-data-tracker/#vaccine-effectiveness>

¹³ State of California. Vaccines. Updated September 7, 2022. <https://covid19.ca.gov/vaccines/>

Comment 50.4

The commenter points out that the California Department of Public Health no longer recommends contact tracing because of the highly contagious but less virulent nature of the currently circulating variants, and states that CDPH recognizes contact tracing is an ineffective use of resources. The commenter complains that the proposed regulation does not recognize this.

Response to Comment 50.4

Please see response to comment 25.1.

Comment 50.5

The commenter states that since the regulation fails to distinguish between workplace-acquired and community-acquired infection the appearance of a single case in any given two-week period will actuate outbreak status with its attendant testing, record keeping and notice requirements.

Response to Comment 50.5

Please see response to comment 14.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

51. Amber Bauer, on behalf of United Food and Commercial Workers (UFCW) Western States Council.

Comment 51.1

The commenter strongly urges the Board to adopt the proposed regulation before the current ETS expires at the end of the year. The commenter requested the following changes on the proposed regulation: include exclusion pay back into the standard; codify the worker and employee representative COVID-19 notifications, as required by AB 685, AB 654, and potentially AB 2693, which is currently on the Governor's desk; require employers to take action related to ventilation; and align the definition of outbreak with the CDPH to capture three or more people, not employees. The commenter states that COVID-19 is not over and workers are still experiencing significant workplace exposures, especially workers who work in crowded workplaces like meatpacking and food processing, and workers who interact with the public like grocery store workers and cannabis retail workers.

Response to Comment 51.1

The Board appreciates the commenter's support for the proposed regulation. The Board has modified the proposed regulation to remove subsections 3205(j)(1) and (2) to conform to the new text of Labor Code section 6409.6. With respect to exclusion pay, please see response to comment 26.1. With respect to ventilation, please see response to comment 33.5.

Comment 51.2

The commenter states their significant concerns with the proposed standard eliminating exclusion pay but requiring employers to exclude workers, and strongly urges the Board to include exclusion pay into the non-emergency standard. They note that grocery store workers cannot afford to take unpaid leave to recover from COVID 19, and must instead return to work while symptomatic, trying to hide their COVID-19 symptoms or risk receiving warnings from their employers for coming to work sick.

Response to Comment 51.2

Please see response to comment 26.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

52. Pamela Murcell, on behalf of the California Industrial Hygiene Council (CIHC).

Comment 52.1

The commenter supports the proposed approach to address COVID-19 as a work-environment hazard through the employers' injury and illness prevention program. The commenter also supports the sunset clause, specifically now stated at two years from the effective date of the regulation.

Response to Comment 52.1

The Board appreciates the commenter's support for these aspects of the proposed regulation.

Comment 52.2

The commenter urges the Board to reevaluate the proposed definition of "close contact." The commenter believes that, without being quantifiable and having quantifiable criteria to define the "shared indoor space," the proposed definition of "close contact" is not enforceable. The commenter opines that the notion of "indoor space" is overly broad and portends the unintended consequence of capturing close contacts who were not in fact exposed to a COVID-19 infectious case. The commenter believes that the issue is not with sharing indoor space; the issue is with sharing *airspace* in close enough proximity, for a long enough period of time, to a person with an active infection. The proposed definition, according to the commenter, is not addressing this issue.

Response to Comment 52.2

Please see response to comment 1.5.

Comment 52.3

The commenter is concerned that subsection 3205(c)(1) implies all persons are potentially infectious, at all times, meaning that, even if someone does not have symptoms, has been fully vaccinated, and/or has negative COVID-19 test results, they are still infectious. The commenter

opines that applying the potentially infectious statement to what the employer is required to do, relevant to a close contact with a COVID-19 case, the employer would essentially have to have all or almost all employees quarantined—employers would need to shut their doors and everyone would have to go home.

Response to Comment 52.3

Please see response to comment 36.3.

The Board thanks the commenter for their input and participation in the rulemaking process.

53. Rebecca Ryan, COVID consultant for Ohlone College and Foothill College.

Comment 53.1

The commenter opined that the requirement to notify each individual close contact, in addition to acquiring contact information for each individual close contact, represents a step backwards. The commenter argued that identifying close contacts individually is extraordinarily time-consuming, costly for the employer because individual interviews take an enormous amount of time, and overall ineffective in mitigating the spread of COVID-19. Instead, the commenter supported and continues to support CDPH's change from individual contact tracing recommendations to group tracing recommendations. The commenter proposes that the Board adopt language that does not require individual contact tracing but instead allows for group contact tracing notifications.

Response to Comment 53.1

Please see response to comment 25.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

54. Len Welsh, representing the Western Steel Council, the California Hotel and Lodging Association, and Fresh Harvest.

Comment 54.1

The commenter states that the proposed regulation is not needed as section 3203 was working just fine. The commenter claims that the most effective work was done in the beginning when Cal/OSHA was in compliance-assistance mode. The commenter argues that section 3203 and Department of Health advisories are all we need.

Response to Comment 54.1

With respect to the criticism regarding the existence of a non-emergency regulation preventing COVID-19 transmission, please see response to comments 7.1 and 23.1. With respect to the arguments regarding IIPP and CDPH advisories, the Board is not persuaded.

The Board thanks the commenter for their input and participation in the rulemaking process.

55. Denise Kniter, on behalf of L.A. County Business Federal (BizFed).

Comment 55.1

The commenter asks for alignment with other agency regulations such as CDC, CDPH, and other regulating bodies. The commenter is concerned with the two-year sunset period that is seemingly arbitrary. The commenter requests that some of the adjustments being considered should be data-driven and fact-driven. The commenter also requests that there is a period for reconsideration during that two-year sunset period. The commenter supports the removal of exclusionary pay. The commenter echoes other commenters' statements about new tools, new medication, and treatment available for COVID. The commenter states that the workplace is no longer the major contributor of infection rates and they do not feel that the burden of managing the pandemic should fall primarily on employers.

Response to Comment 55.1

The Board appreciates the support of the commenter on exclusion pay. With respect to the comment on the sunset clause, the Board refers to its response to comment 1.2. The Board notes that the proposal is consistent with CDPH, as CDPH was consulted regularly throughout development of the proposed regulation. With respect to the comment that "workplace is no longer the major contributor of infection rates," the Board reminds the commenter that COVID-19 that is transmitted in a social setting can be brought to the workplace and then transmitted throughout the workplace. The opposite is also true, COVID-19 acquired in the workplace can then be spread throughout the community in social settings.

The Board thanks the commenter for their input and participation in the rulemaking process.

56. Zachary O'Hanen, on behalf of County of Humboldt Human Resources.

Comment 56.1

The commenter states that exclusion pay has been extremely hard to manage from the perspective of whether it is workplace-related or not and the burden on the employer to determine if it was or not, because it is seen now more as an environmental or non-workplace issue.

Response to Comment 56.1

The Board thanks the commenter for their support of this portion of the proposed regulation.

Comment 56.2

While offering their full support of protecting workers and their health, the commenter argues that contact tracing has been ineffective and highly burdensome on employers. The commenter

offers data analysis indicating that the biggest determining factor in stopping COVID-19 cases was masking practices: when the mask mandates were lifted, cases skyrocketed. On the other hand, the commenter notes, with mask mandates gone and widespread masking a thing of the past, contact tracing is both a massive burden and simultaneously it is not reducing the number of cases his employer is seeing. The commenter requests that the individual contact tracing requirements be removed from the proposed regulation.

Response to Comment 56.2

Please see response to comment 25.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

57. Mark Ramos, on behalf of United Food and Commercial Workers (UFCW) Local 1428.

Comment 57.1

The commenter urges the Board to keep exclusion pay in the non-emergency standards. The commenter explains that 70 percent of their members are part-time, and if a member was to miss a week or two weeks of work their healthcare is based on their hours of work, they would lose their healthcare. They stated that their members don't have the ability to work remotely.

Response to Comment 57.1

Please see response to comment 26.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

58. Nathan Williams.

Comment 58.1

The commenter states that the regulations and guidelines have gotten very relaxed. They further state that to protect our workers' safety, to protect their health, and protect their paychecks, we need to keep exclusion pay in the regulation.

Response to Comment 58.1

Please see response to comment 26.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

59. Jeff Hall, with Local 770 CVS.

Comment 59.1

The commenter encourages the Board to please keep the exclusion pay requirement. They

state that COVID is not going away. They further state that without exclusion pay, workers would have to make the difficult choice of, “Do I potentially go and infect the public,” that they are there to protect and to serve, or do they pay their rent? They conclude, stating that by keeping the exclusion pay, you're allowing workers to continue to put food on their table while protecting the public, which is why we've been doing what we've been doing for the last several years.

Response to Comment 59.1

Please see response to comment 26.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

60. Chris Myers, on behalf of California School Employees Association.

Comment 60.1

The commenter expresses shock to learn that with all the uncertainty still around COVID-19 and the possibility of new variants, the update to the Emergency Temporary Standard deleted exclusion pay. They state that without exclusion pay, half of our members who make less than \$30,000 a year will be forced to hide their symptoms or a positive test, and come to work in order to make ends meet.

Response to Comment 60.1

Please see response to comment 26.1.

Comment 60.2

The commenter proposes retaining the requirement to notify employees and their representatives of COVID-19 cases and close contacts, and also the requirement to continue to report worksite outbreaks to local health departments. The commenter expresses that providing more information as opposed to less is a better standard to meet.

Response to Comment 60.2

Please see response to comment 26.4.

Comment 60.3

The commenter states that the definition of “outbreak” should align with the CDPH’s definition.

Response to Comment 60.3

Please see response to comment 31.3.

The Board thanks the commenter for their input and participation in the rulemaking process.

61. Judith Neidorff.

Judith Neidorff spoke at the September 15, 2022 public hearing on the proposed COVID-19 prevention regulations, but did not offer comments on the proposed COVID-19 prevention regulations.

Because their comments were non-responsive to the subject matter of the public hearing, the Board declines to respond to them in this FSOR.

62. Cynthia Rice, on behalf of California Rural Legal Assistance (CRLA).

Comment 62.1

The commenter states that they join in the comments of the other worker advocates and requests to include exclusion pay. The commenter argues that the IIPP is not going to replace a clear standard that workers can rely on when requesting protective equipment and employers will understand when complying with the rules. The commenter states that the signing of AB 2693 will not impact the regulation as it is currently drafted or with respect to any changes that are urged by worker advocates. AB 2693 addresses the emergency or the immediate need to take emergency action the Board is developing a non-permanent, and non-emergency regulation. So AB 2693 and the sunset provisions and elimination of some specifics is not inconsistent with that and doesn't create an APA problem. The commenter asserts that the Workers' Compensation numbers are not relevant, particularly with respect to low-wage workers because the charge of the Board is not to reduce Workers' Compensation claims but rather to protect workers from issues of safety that create a hazard to their health. The commenter also asserts that housing or transportation is not an optional benefit for most of the workers that are provided employer housing these days, particularly in agriculture as it is a particular requirement of a federal program. The commenter asks the Board to keep the standard for housing and transportation as it creates larger risks due to confined spaces and extended exposure.

Response to Comment 62.1

The Board acknowledges the commenter's support for a specific standard for COVID-19 that include requirements for housing and transportation. Regarding exclusion pay, please see response to comment 26.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

63. Cassie Hilaski, with Nibbi Brothers General Contractors.

Comment 63.1

The commenter states that there should be a quick exit strategy from the proposed regulation

for when the fatality and hospitalization rates associated with COVID-19 are similar to those associated with the flu and pneumonia. The commenter concurs with Helen Cleary's suggestion on that point.

Response to Comment 63.1

Please see response to comment 39.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

64. Kristie Sepulveda-Burchit, on behalf of A Voice for Choice Advocacy, Inc.

Comment 64.1

The commenter opposes to the proposed regulation. If the Board moves forward with the standard, the commenter requests to have a reassessment every six months because the virus, along with vaccination treatments as well as CDC and CDPH guidance is ever-changing.

Response to Comment 64.1

With respect to the criticism regarding the existence of a non-emergency regulation preventing COVID-19 transmission, please see response to comment 7.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

65. Michael Pimentel, on behalf of California Transit Association.

Comment 65.1

The commenter aligns themselves to the comments that were registered by Mr. Moutrie of CalChamber, and others who have raised concerns with the proposed regulation. The commenter notes that there is dissonance between the general relaxation of federal and state and public health organizations' protocols as they applied to the general public, and what is being presented here relative to employers. The commenter argues that this descendant approach will shift the financial responsibility and the public health responsibility of addressing COVID-19 outbreaks on employers, including public transit agencies.

Response to Comment 65.1

The Board disagrees that the adoption of the proposed regulation will shift the financial responsibility and public health responsibility of addressing COVID-19 outbreaks on employers. Please see response to comments 7.1 and 23.1.

Comment 65.2

The commenter asks the Board to 1) define "same indoor airspace" with clear spatial parameters that are sensitive to the practical implementation needs of employers and 2)

expand the exception to “close contact” to include fully vaccinated and boosted employees (including having received the most recent bivalent booster shot).

Response to Comment 65.2

Please see response to comment 16.2.

Comment 65.3

The commenter requests a modification of the testing requirements to allow for employers to only make tests available upon request. They state that they’re finding that many agencies are establishing large operations to make testing available to their employees, and it isn't being utilized. They further state that is one that comes with extreme cost to the agencies and very little uptake from the workforce. They conclude that there may be an opportunity there for making that something that is not permissive, but rather something that is upon request.

Response to Comment 65.3

Please see response to comment 16.4.

Comment 65.4

The commenter requests a revision to the definition of “outbreak” and “major outbreak” to account for workplace size.

Response to Comment 65.4

Please see response to comment 12.3.

The Board thanks the commenter for their input and participation in the rulemaking process.

66. Beth Malinowski, on behalf of Service Employees International Union (SEIU) California.

Comment 66.1

The commenter notes the importance of potential language regarding notifications and the inclusion of exclusion pay, as well as the importance of having synergy with the CDPH definitions. The commenter states that depending on what moves forward, the provisions of the proposed regulation (in particular regarding notifications and exclusion pay) could encourage under-reporting, and potentially encourage the creation of job-based outbreaks as the majority of working Californians are spending the majority of their working hours at work sites where COVID-19 is still a reality. The commenter also states that today’s decisions and discussions have implications on future policies to not only address COVID-19, but to make sure we have a more permanent and broader infectious disease standard.

Response to Comment 66.1

The Board appreciates the commenter’s support for these aspects of the proposed regulation.

Comment 66.2

The commenter is particularly concerned about the potential of the exclusion pay deletion. They state that exclusion pay must be returned into the final prevention standard.

Response to Comment 66.2

Please see response to comment 26.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

67. Dr. Robert Blink.

Comment 67.1

The commenter states that making the proposed regulation a two-year standard is unwise because they think that things will be different a year later. The commenter opines that one year would probably be more appropriate.

Response to Comment 67.1

Please see response to comment 1.2.

Comment 67.2

The commenter opines that employers are not equipped to perform contact tracing well, emphasizing the burden of contact tracing, and echoing other commenters that the value of contact tracing is quite low. The commenter also argues that employers who have occupational medicine consultation or medical staff onsite should be given special consideration.

Response to Comment 67.2

Please see response to comment 25.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

68. Alex Torres, on behalf of Bay Area Council.

Comment 68.1

The commenter aligns their comments with CalChamber, L.A. BizFed, and the Restaurant Association on some of the concerns. The commenter states that there are a lot of businesses in the Bay area that have yet to bring employees back and that is creating challenges in terms of the businesses that are situated around where those once-thriving commercial corridors existed. The commenter urges the Board to consider those ramifications when making decision.

Response to Comment 68.1

The Board acknowledges the economic difficulties imposed by COVID-19. Please see response to comment 7.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

69. Sabrina Lockhart, on behalf of the California Attractions and Parks Association.

Comment 69.1

The commenter appreciates the positive changes made to the draft non-emergency regulation, streamlining rules, and providing flexibility. Recognizing the advances in science and how much has changed over the past two years about our understanding of COVID-19, the commenter aligns their comments to those already presented by the California Chamber of Commerce.

Response to Comment 69.1

The Board appreciates the commenter's support for these aspects of the proposed regulation.

Comment 69.2

The commenter urges the Board to work with CDPH to restore the previous definition of "close contact." The commenter says that the proposed definition has created great confusion for its members, employees, guests, and employers.

Response to Comment 69.2

Please see response to comment 1.5.

Comment 69.3

The commenter appreciates that the proposed regulation is aligned with AB 2693 with respect to notification. The commenter also expresses objections to including a requirement for individual contact tracing, as it requires significant time and resources, conflicts with CDPH and CDC guidance, and is ineffective in stopping the spread of the disease.

Response to Comment 69.3

Please see response to comment 25.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

70. Eddie Sanchez, on behalf of Southern California Coalition for Occupational Safety and Health (SoCalCOSH).

Comment 70.1

The commenter addresses comments that were made regarding the reduction in fatality and

hospitalization and the lack of data. The commenter states that people are experiencing physiological challenges from COVID-19 and the real impacts of COVID-19 are still being understood. The commenter asserts that vital controls, such as ventilation, exclusion pay, and other measures, are needed to protect workers from COVID-19.

Response to Comment 70.1

The Board appreciates the commenter's support for the proposed regulation. With respect to exclusion pay, please see the Board's response to comment 26.1. With respect to ventilation, please see response to comment 33.5.

Comment 70.2

The commenter advocates for the inclusion of exclusion pay for the non-emergency standard. They state that it is very important to everyone here today.

Response to Comment 70.2

Please see response to comment 26.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

71. Jane Thomason, on behalf of the California Nurses Association (CNA).

Comment 71.1

The commenter expresses their support for the need for an ongoing or permanent COVID regulation in order to protect California's workers from the Coronavirus. They state that the deletion of exclusion pay is extremely problematic and harmful, and they strongly encourage the Board to include exclusion pay in the non-emergency COVID regulation. The commenter points out that the COVID pandemic is not over. They state that while the COVID vaccines reduce the risk of severe infection and death, the data indicate that vaccines do not effectively prevent infection or prevent long COVID. They further state that the risk of long COVID increases with each reinfection, and the only way to prevent long COVID is to prevent infection. The commenter urges the Board to recognize the importance of a permanent standard to protect California workers from COVID. In addition, they strongly encourage the Board to retain exclusion pay as part of this regulation.

Response to Comment 71.1

The Board appreciates the commenter's support for the proposed regulation. With respect to the issue of exclusion pay, please see response to comment 26.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

72. Matt Sutton, on behalf of the California Restaurant Association.

Comment 72.1

The commenter urges clarification of the proposed definition of “close contact.” The commenter finds the proposed definition “incredibly hard to comply with and understand.”

Response to Comment 72.1

Please see response to comment 1.5.

Comment 72.2

The commenter states that on the exclusionary pay, they would definitely appreciate the movement to delete exclusion pay and think it's appropriate. They point out that also sitting on the Governor's desk is an extension of the emergency COVID paid sick leave, and think if that bill is signed protections will continue to allow the workforce the ability to leave when necessary under COVID conditions.

Response to Comment 72.2

The Board thanks the commenter for their support of this portion of the proposed regulation.

Comment 72.3

The commenter questions the public health value in requiring that records of close contacts be maintained for two years, opining that this requirement is excessive. The commenter also urges the Board to align the proposed regulation’s provisions regarding employer reporting of COVID-19 cases with AB 2693, instead of the current proposal of two years.

Response to Comment 72.3

Please see response to comment 2.7.

The Board thanks the commenter for their input and participation in the rulemaking process.

73. Tino Garcia-Barragan.

Comment 73.1

The commenter states that they do not see the need for the proposed regulation because CDC has loosened guidelines and placed a heavy emphasis on personal accountability and natural immunity. The commenter also states that the Board has the ability to hold an emergency meeting at any point and businesses are already very used to the type of guidelines, which makes it a very easy transition to implement them.

Response to Comment 73.1

With respect to the criticism regarding the existence of a non-emergency regulation preventing COVID-19 transmission, please see response to comments 7.1 and 23.1. The Board disagrees

that it has the ability to hold an emergency meeting at any point to enact guidelines for employers to comply. Any regulation adopted by the Board must follow APA process and is submitted to the Office of Administrative Law (OAL) for approval and submittal to the Secretary of State. This is a long process that does not necessarily allow for the timely implementation of necessary measures to protect workers in California that the commenter describes.

Comment 73.2

The commenter describes a meeting in June 2021, at which Deputy Chief for Health, Research, and Standards Eric Berg stated that masks were ineffective against aerosols; that aerosols were the main source of transmission; that masks only stop big droplets; and that big droplets do not carry the same risk as the small aerosols. The commenter states that the Board is contradicting OSHA guidelines regarding masks and personal protective equipment (PPE), as masks are not PPE. The commenter alleges that masks “have the ability to accumulate different types of pathogens, bacteria, fungi, and it can lead to different health risks that are very similar with symptoms as COVID-19.” The commenter acknowledges that N95 respirators are much more effective, but points out that N95s require fit testing and medical clearance.

Response to Comment 73.2

As Deputy Chief Berg noted at the September 15, 2022 public hearing, the commenter is mistaken and/or has misrepresented this information regarding masks. Proper masks are very effective as source control and very effective at preventing the spread of COVID-19 and other airborne infectious diseases. They are, however, not the same thing as N95 or other respirators, with which we presume the commenter confused them.

The Board thanks the commenter for their input and participation in the rulemaking process.

74. Diane Tucker, with the Association of Flight Attendants-Communications Workers of America (AFA-CWA).

Comment 74.1

The commenter, a flight attendant, supports the inclusion of exclusion pay, noting that in their work environment, “there is no six foot distance, there's no plastic shields, there's none of that.” They further state that an extraordinary number of their workers were affected with COVID and are still suffering the long-haul side effects. The commenter encourages the Board to reconsider this and possibly leave it in place for at least a year and then reevaluate it at that time.

Response to Comment 74.1

Please see response to comment 26.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

75. Kelly Kick, with United Food and Commercial Workers (UFCW).

Comment 75.1

The commenter urges the Board to keep exclusion pay in place. The commenter states that as a grocery worker, one in five of us contracted the virus during the last two-and-a-half years. They further state that having to make the choice between paying our bills or staying home or possibly going to work and infecting our coworkers is just not really a feasible option.

Response to Comment 75.1

Please see response to comment 26.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

76. Samantha Webster, with United Food and Commercial Workers (UFCW) Local 5.

Comment 76.1

The commenter states that it is important that we keep the non-emergency pay, exclusion pay. They explain that they caught COVID, as did their whole household. They state they were quarantined for almost 14 days, because their son was not allowed to return to preschool, and they had to take time away from work. They further state that if they didn't have this pay that time that they were away counts against the time and hours that they put in for work, which affects their medical benefits. The commenter urges the Board to please keep it in place, because we need it.

Response to Comment 76.1

Please see response to comment 26.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

77. Ken Smith, on behalf of the University of California, Office of the President.

Comment 77.1

The commenter criticizes the proposed regulation's case notifications and contact tracing requirements. They echo previous commenters regarding the burden on employers from these requirements. With respect to the provisions regarding case notifications, the commenter notes that AB 2693 streamlines the notification requirements. With respect to contact tracing, the commenter notes that CDPH has recommended deprioritizing individual contact tracing in favor of group contact tracing, and queries why the Board should make contact tracing a priority for employers when it is no longer a priority for the government agency that is supposed to be performing contact tracing.

Response to Comment 77.1

Please see response to comment 25.1.

Comment 77.2

The commenter raised concerns about the environmental impacts of proposed subsection 3205(h)(1)(A). They point to the strain on the power grid involved in maximizing outside air for ventilation purposes in a building with HVAC, without regard for the temperature outside. The commenter emphasized that the two exceptions – for inclement weather and air quality index – would not account for times when there are rolling power outages or during Flex Alerts.

Response to Comment 77.2

Please see response to comment 22.3. Additionally, in the event of a power outage, the Board is aware that the proposed means of improving ventilation would likely not be available, and believes Cal/OSHA would take that into account when evaluating compliance in these situations. In the event of Flex Alerts, which the Board notes are “voluntary calls for consumers to conserve electricity,” the Board understands that employers would need to balance their competing obligations with these voluntary requests.

The Board thanks the commenter for their input and participation in the rulemaking process.

78. Kevin Bland, representing the California Framing Contractors Association, Residential Contractors Association, and Western Steel Council.

Comment 78.1

The commenter “incorporate[s] by reference” the comments from the California Chamber of Commerce, Housing Contractors of California, the Phylmar Regulatory Roundtable, Conn Maciel Carey, AGC of California, California Association of Winegrape Growers, and the California Farm Bureau.

Response to Comment 78.1

The Board directs the commenter’s attention to the responses to comments from those commenters.

Comment 78.2

The commenter opposes the proposed regulation. The commenter believes that the IIPP is a great tool for effective workplace hazard prevention and it is enforceable for COVID-19.

Response to Comment 78.2

With respect to the criticism regarding the existence of a non-emergency regulation preventing COVID-19 transmission, please see response to comment 7.1. With respect to the argument regarding the IIPP, the Board is not persuaded.

Comment 78.3

The commenter opines on the topic of exclusion pay, stating that we know that the Legislature looks at that, has the ability to do that, should be on the Legislature to make those decisions regarding pay as it relates to this. They state that they agree with the proposal in that if it does stay that exclusion pay should be excluded.

Response to Comment 78.3

The Board thanks the commenter for their support of this portion of the proposed regulation.

Comment 78.4

The commenter suggests non-substantive changes to conform the proposed regulation to the changes to Labor Code section 6409.6 resulting from AB 2693 being signed.

Response to Comment 78.3

Please see response to comment 2.5.

The Board thanks the commenter for their input and participation in the rulemaking process.

79. Bruce Wick, on behalf of Housing Contractors of California.

Comment 79.1

The commenter states that the Board should not approve the proposed regulation as the highest exposure for COVID-19 is covered by the ATD standard and the specific regulation did not provide additional protection compared to using the IIPP. The commenter argues that the IIPP would be a valid way of prevention and enforcement for COVID-19. The commenter urges to exempt industries that have shown minimal exposure to COVID-19 such as construction.

Response to Comment 79.1

With respect to the criticism regarding the existence of a non-emergency regulation preventing COVID-19 transmission, please see response to comment 7.1. With respect to the argument regarding the IIPP, the Board is not persuaded.

The Board thanks the commenter for their input and participation in the rulemaking process.

Oral Comments by Members of the Occupational Safety and Health Standards Board:

80. Laura Stock, Member, Occupational Safety and Health Standards Board.

Comment 80.1

At the Board meeting on August 18, 2022, Board Member Laura Stock expressed concern about the lack of exclusion pay in the proposed regulation and how it may bear on infection and keeping infectious workers home. She said the Board would be voting on it. Board Member Stock asked the Division's Eric Berg to state his opinion on how the lack of exclusion pay would impact infection in the workplace.

Response to Comment 80.1

Please see response to comment 26.1.

81. Chris Laszcz-Davis, Member, Occupational Safety and Health Standards Board.

Comment 81.1

At the Board meeting on August 18, 2022, Board Member Chris Laszcz-Davis asks to explore what other states are doing in regards to the following elements:

- Which states still have COVID-19 workplace rules in place, and which states have rolled them back?
- What is the timeline for the active workplace rules? And what are the triggers for when the rule will be rolled back?
- Is contact tracing and notification required for close contacts?
- Are employers required to keep records of close contacts? If so, for how long?
- What is the definition of "outbreak" and "subsequent employer requirements?"

Response to Comment 81.1

Please see response to comment 34.1.

82. Nola Kennedy, Member, Occupational Safety and Health Standards Board.

Comment 82.1

At the August 18, 2022 Board meeting, the Division's Eric Berg responded to Board Member Laura Stock's question (Comment 80.1) about the impact of the proposed definition's lack of exclusion pay by saying that he would need to do research. In response, Board Member Nola Kennedy asked Mr. Berg how he intended to do that research.

Response to Comment 82.1

The Cal/OSHA Research and Standards Unit studied peer-reviewed and governmental publications regarding the impact on workers of paid leave benefits, and the absence of such benefits. Cal/OSHA continues to search for scientific studies on the effect of paid leave and the spread of COVID-19 in the workplace, but has not located anything specific yet.

Comment 82.2

At the August 18, 2022 Board meeting, Board Member Nola Kennedy asked the Division's Eric Berg if there was anything that he or another agency, like CDPH, could bring to bear on the impact of the regulation's lack of exclusion pay provisions on workplace infection. Board Member Kennedy asked Mr. Berg how the agency came to the decision to propose the regulation without an exclusion pay provision and how he or anyone at the Division, based on their experience, believed that the lack of exclusion pay would impact infection in the workplace.

Response to Comment 82.2

Please see response to comment 26.1.

83. Laura Stock, Member, Occupational Safety and Health Standards Board.

Comment 83.1

At the Public Hearing on September 15, 2022, Board Member Laura Stock emphasizes that the proposed regulation is not a permanent standard but rather two years standard. She states that there will be an opportunity to be able to continue to be responsive to what science says.

Board Member Stock states that an exit strategy will be needed at some point, but now is not the time to be exiting from the provisions that we've put in. She reminds the Board that we had encouraged staff to begin work on a general infectious disease regulation as other infectious diseases, such as monkeypox, are coming our way. She also states that one of the exit strategies could be developing general infectious disease regulation that will apply to all industries before the proposed regulation expires.

Board Member Stock asked the Division's Eric Berg and Chief Jeff Killip how they thought the omission of exclusion pay would impact the effectiveness of the standard. She opined that workers would be forced to work while sick and bring their infection into the workplace. She asked for the reasoning behind omitting exclusion pay.

Board Member Stock went on to express her concern that even Mr. Berg's comments reflected the Division's acknowledgment that the omission of exclusion pay would disproportionately impact low-wage workers, jeopardizing their health benefits and their ability to be housed and feed their families. She said that she hoped there would be room for this to be reconsidered as the final regulation is prepared for the Board's vote in December.

Board Member Stock also expressed her concern about how to demonstrate the work relatedness of infection.

Response to Comment 83.1

The Board appreciates Board Member Stock's comments regarding the duration of the proposed regulation and the need to have an exit strategy. On the issue of exclusion pay, please see response to comment 26.1.

Colloquy among Board Member Laura Stock, Board Member Barbara Burgel, and Deputy Chief, Health and Research and Standards Eric Berg

At the September 15, 2022 Public Hearing, Board Members Barbara Burgel and Laura Stock questioned Deputy Chief Health and Research and Standards Eric Berg regarding the proposed regulation's contact-tracing and recordkeeping requirements. Ms. Burgel noted that individual contact tracing is resource-intensive and opined that it was not important to maintain a list of contact traces, especially not for one to two years. She suggested that the Board consider modifying these requirements. Ms. Stock also requested clarification regarding what recordkeeping was required with respect to close contacts and contact tracing, as well as who received notice that was group notice.

Board Member Burgel also expressed her support of tightening up the proposed definition of "close contact" to make it as quantifiable as possible, which, she says, may not necessitate adding language on "proximity."

Board Member Burgel echoed Member Stock's comments on exclusion pay. She asked why exclusion pay was covered under the Aerosolized Transmissible Disease standard and other Cal/OSHA standards, but not for essential workers not subject to those standards.

Board Member Burgel opined that going through the "bit contrary and difficult" workers' compensation system would not be a solution, especially for those for whom English may not be a first language and who fear retaliation and other reprisals "well-known for our most vulnerable California workers."

Response to Colloquy

In response to the Board Members' comments regarding the contact tracing and recordkeeping requirements, as well as the many similar comments, both written and oral, from many members of the regulated community, the proposed regulation has been modified to remove the contact tracing requirements of subsection 3205(j)(2).

With respect to the Board Members' questions regarding recordkeeping requirements for close contacts and group notice, the proposed text of the regulation submitted for the 15-day notice period requires employers to maintain records, for two years, of "all COVID-19 cases with the employee's name, contact information, occupation, location where the employee worked, the date of the last day at the workplace, and the date of the positive COVID-19 test and/or COVID-19 diagnosis." (Subsection 3205(e)(1).) Employers must also "retain the notices required by

subsection 3205(e) in accordance with Labor Code section 6409.6(k) or any successor law.”
(Subsection 3205(e)(2.))

With respect to the definition of “close contact,” please see response to comment 1.5.

With respect to the comments regarding exclusion pay, please see response to comment 26.1.

With respect to the comments regarding the workers’ compensation system, while the Board acknowledges that navigating the workers’ compensation system can be complex, this is outside the scope of either this rulemaking or the Board’s jurisdiction.

84. Barbara Burgel, Member, Occupational Safety and Health Standards Board.

Comment 84.1

At the Public Hearing on September 15, 2022, Board Member Barbara Burgel states that she wholly supports a permanent standard. Board Member Burgel notes there are many strong points in this current draft, specifically the emphasis on ventilation and the emphasis on respirators going forward. She also notes that the housing and transportation protections in the current draft could be enhanced to include transportation to not just work but to other employer-provided transportation settings.

Board Member Burgel notes that the Board has looked at high-risk occupations, such as teachers, healthcare workers, grocery workers, transit workers, flight attendants, pharmacist, meat packing and food processing workers. She states that all those individuals would be at risk without a permanent standard and many of those individuals will not report their symptoms and do the right thing without exclusion pay.

Board Member Burgel states that she has not been in support of the CDC and the local and state health departments who have lessened the protections, especially in transportation. They have essentially taken a public health problem and shifted it to the shoulders of individuals and it is not a public health solution. Board Member Burgel does not think we are going to get a handle on this pandemic without exclusion pay when employers are not providing sick pay to many of these low-wage workers and many of them are part-time workers. Board Member Burgel suggests that the other solution without a permanent standard would be to enlarge the employers covered under the Aerosol Transmissible Disease standard.

Board Member Burgel states that the risk is being mitigated somewhat in healthcare and those covered under the ATD standard, especially in the inpatient setting. But other workers are not afforded the same protection as there is no testing or masking requirement. Board Member Burgel supports the proposed outbreak thresholds with raw numbers: three for an outbreak or 20 for a major outbreak.

Board Member Burgel requests to have the exclusion pay included in the proposed regulation.

Response to Comment 84.1

The Board appreciates Board Member Burgel's support for these aspects of the proposed regulation. On the issue of exclusion pay, please see response to comment 26.1.

85. Chris Laszcz-Davis, Member, Occupational Safety and Health Standards Board.

Comment 85.1

At the Public Hearing on September 15, 2022, Board Member Chris Laszcz-Davis asked why two years was chosen as the sunset period versus one year or the option to evaluate at six month intervals. She also asked what other states are doing in terms of transitioning to an endemic state.

Response to Comment 85.1

At the Public Hearing on September 15, 2022, DOSH Deputy Chief of Health Eric Berg responded to Board Member Chris Laszcz-Davis's questions. He responded that the Board decided on two years by consulting with CDPH and infectious disease experts on when they should sunset and the best time for that. He also answered that they did research on other states as requested at the last meeting and they identified two states that still have COVID-19 regulations - Oregon and Washington. He provided an overview for those two states: Oregon has different requirements for what they call "exceptional risk settings," and then "general settings." For general workplace settings they require the following:

- Provide and allow for employee voluntary face covering use
- Cover costs of COVID testing if testing is conducted at the employer's direction
- Optimize ventilation systems to reduce risk of COVID-19 transmission
- Follow Oregon Health Authority, public health, or medical care provider recommendations for isolation and quarantine of employees regarding COVID-19
- Provide notice within 24 hours to workers who had a potential work-related COVID-19 exposure
- Exclusion pay: employers with over 500 employees have to pay up to \$1,400 a week and employers with less than 500 employees have to pay up to \$1,000 a week

There is no specific end date for Oregon's regulation but they are supposed to revisit the issue.

Washington has general requirements and additional requirements for healthcare, corrections, and schools. General requirements are as follows:

- Assess COVID-19 hazards in the workplace and adjust prevention measures as needed
- Isolate workers known or suspected to have COVID-19
- Provide hand washing facilities & supplies, and regularly clean and sanitize surfaces.
- Educate workers about COVID-19 prevention in the language they understand best.

- Provide written notice of potential COVID-19 exposure within one business day to all workers, and the employers of subcontracted workers, who were at the same work site as a person who tested positive
- Report COVID-19 outbreaks
- Address COVID-19 notification, reporting, and prevention measures in the employer's workplace-specific, written Accident Prevention Program or equivalent safety program.
- Allow workers to voluntarily wear masks or respirators and PPE

Washington does not have a specific sunset date.

Mr. Berg stated that these two states' regulations are similar to those in California.

Comment 85.2

At the Public Hearing on September 15, 2022, Board Member Chris Laszcz-Davis questioned what the other states are doing other than two states that have regulations akin to California. She also expressed agreement with commenters about the ambiguity of concepts like contact tracing and close contact and encouraged staff to revisit those.

Response to Comment 85.2

To the best of the Board's knowledge, there are no other states with occupational health regulations directed at preventing COVID-19 transmission in the workplace. With respect to contact tracing and the definition of "close contact," the revisions to the proposed regulations submitted as part of the 15-day notice attempt to address these issues.

86. Kathleen Crawford, Member, Occupational Safety and Health Standards Board.

Comment 86.1

At the Public Hearing on September 15, 2022, Board Member Kathleen Crawford states that she is not yet convinced of the necessity for a permanent regulation. Board Member Crawford expresses a concern that we have been chasing for multiple years and still have not gotten ahead of that. She implores the Division to get ahead of things.

Board Member Crawford agrees with the comment that there is no exit strategy. She requests the Division to go back and seriously consider the comments from the business community as well as the comments from the labor community because she does not think it is all accounted for in the proposed regulation.

Response to Comment 86.1

With respect to the necessity of a permanent regulation, please see response to comment 7.1. With respect to Board Member Crawford's comment regarding exit strategy, the majority of the provisions of the proposed regulation will sunset in two years, and the Board has the authority

to request that the Division submit a modified proposal, or repeal the standard, if conditions change such that the proposed regulations are no longer necessary.

87. Dave Thomas, Board Chair, Occupational Safety and Health Standards Board.

Comment 87.1

At the Public Hearing on September 15, 2022, Board Chair Dave Thomas states that he does not care what other states are doing because they are not California and we have always been in the forefront ahead of everybody as far as protecting employees. Board Member Chris Laszcz-Davis responds that it is not a competition and it is really an opportunity to learn about new approaches and new ways of doing things to address the same issue that we have. Board Chair Thomas responded that he did not mean to imply it was a competition, but instead to communicate that California is leading on the issue of addressing COVID-19 transmission in the workplace.

Response to Comment 87.1

The Board thanks Board Chair Thomas and Board Member Chris Laszcz-Davis for their comments on these topics.

Comment 87.2

Board Chair Thomas states that there is no way to get ahead of it unless you go into the future and you look back to know what happened. He notes that there is no way to know what will happen with COVID-19 in a year or two but we need to try and protect the 20 million employees in California. Board Chair Thomas states that the exclusion pay is necessary because most employees will not be paid if they get COVID-19 except for the exclusion pay. He suggests to add the exclusion pay in the proposed regulation. Board Chair Thomas states that he understands the difficulty businesses are facing as a business person. He also states that COVID-19 prevention is a two-way street and can only succeed when businesses protect employees and employees do their best not to get infected or to infect other people.

Response to Comment 87.2

The Board thanks Board Chair Thomas for his comments and perspective regarding the existence of a non-emergency standard for COVID-19 prevention. With respect to exclusion pay, please see response to comment 26.1.

ADDITIONAL DOCUMENTS INCORPORATED BY REFERENCE

None.

ADDITIONAL DOCUMENTS RELIED UPON

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4. State of California. Tracking COVID-19 in California. Update for September 29, 2022. Accessed on September 30, 2022. <https://covid19.ca.gov/state-dashboard/>
5. State of California. Tracking COVID-19 in California. Updated for September 22, 2022. Accessed on September 28, 2022. <https://covid19.ca.gov/state-dashboard/>
6. Centers for Disease Control and Prevention. COVID Data Tracker. COVID-19 Vaccine Effectiveness Monthly Update. August 25, 2022. <https://covid.cdc.gov/covid-data-tracker/#vaccine-effectiveness>
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9. United States Department of Labor and Office of Disability Employment Policy. Access to Paid Leave for Family and Medical Reasons Among Workers With Disabilities. December 2021. <https://www.dol.gov/sites/dolgov/files/ODEP/pdf/Access-To-Paid-Leave-For-Family-And-Medical-Reasons-Among-People-With-Disabilities.pdf>
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12. CDPH. Shifting Public Health Case Investigation, Contact Tracing, and Outbreak Investigation Priorities. March 7, 2022.
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<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-on-Isolation-and-Quarantine-for-COVID-19-Contact-Tracing.aspx>
14. CDPH. Updated Testing Guidance. September 15, 2022.
<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Updated-COVID-19-Testing-Guidance.aspx>
15. Wagner J, Sparks TL, Miller S, et al. Modeling the impacts of physical distancing and other exposure determinants on aerosol transmission. Journal of Occupational and Environmental Hygiene. Published online September 13, 2021, Pages 495-509.
<https://doi.org/10.1080/15459624.2021.1963445>

**MODIFICATIONS AND RESPONSE TO COMMENTS RESULTING FROM
THE 15-DAY NOTICE OF PROPOSED MODIFICATIONS
October 14, 2022 – October 31, 2022**

No further modifications to the information contained in the Initial Statement of Reasons are proposed as a result of the 15-Day Notice of Proposed Modifications mailed on October 14, 2022.

**SUMMARY AND RESPONSE TO WRITTEN COMMENTS
RESULTING FROM THE 15 DAY COMMENT PERIOD:**

88. Derek Davis, CEO/HR-Risk and Safety Unit, Stanislaus County, by written comments dated October 14, 2022.

Comment 88.1

The commenter expresses disfavor with the proposed modification to the definition of “close contact,” wondering how the 400,000 cubic feet figure was arrived at, why no consideration was paid to HVAC improvements, and why no other aerosol transmissible disease is subject to this requirement.

Response to Comment 88.1

The proposed new definition of “close contact” is the definition adopted by CDPH in the State Public Health Officer Order of October 14, 2022. The definition is based upon the fact that COVID-19 is an airborne infectious disease meaning that it is transmitted through the air by dissemination of airborne droplet nuclei, small particle aerosols, or other particles containing the disease agent (SARS-CoV-2) that causes COVID-19. It also means that distance is not the only factor indoors affecting the risk of contracting COVID-19.

In indoor environments, exposure to COVID-19 can occur in multiple ways including:

- 1) From exposure to or inhalation of shorter range aerosols exhaled from a nearby person with COVID-19.
- 2) From inhalation of longer range aerosols exhaled from a person with COVID-19 in the same indoor space where the aerosols have spread out and remain airborne in the indoor air space.

Both shorter and longer range aerosols can lead to infection with COVID-19.

The risk of infection from shorter range aerosols depends primarily on the distance from the infected person, with the highest risk being within six feet, although such aerosols can travel significantly farther than six feet.

The risk of infection from longer range aerosols is similar for everyone in smaller indoor spaces regardless of the distance from the infected person. This is because everyone in smaller indoor spaces is exposed to roughly the same aerosol concentration of SARS-CoV-2 after it mixes throughout the room. CDPH determined that long-range aerosols pose an infection risk in indoor spaces that are 400,000 or fewer cubic feet in volume. In spaces larger than 400,000 cubic feet, longer range aerosol concentrations become sufficiently diluted to reduce risk substantively and the infection risk in these large settings is thus mainly limited to exposure to shorter range aerosols from a nearby infected person.

Since longer range aerosols are less of a risk in indoor air spaces larger than 400,000 cubic feet in volume, the definition of close contact only takes into consideration shorter range aerosols for these spaces. Thus, only persons within six feet of a COVID-19 case are close contacts in these larger spaces.

Since longer range aerosols are a substantial risk in indoor spaces of 400,000 or fewer cubic feet, the definition of close contact takes both short-range and long-range aerosols into consideration for these spaces. Thus, all persons sharing the same indoor space airspace of 400,000 or fewer cubic feet with a COVID-19 case are close contacts.

The Board thanks the commenter for their input and participation in the rulemaking process.

89. Bethany Hubbard, Human Resources Analyst, County of Humboldt, by written comments dated October 17, 2022.

Comment 89.1

The commenter believes that, with the move towards more personal responsibility for health, provisions regarding contact tracing should be eliminated and there should instead be more trainings on hygiene and how individuals can protect themselves from infection.

Response to Comment 89.1

The comment is outside the scope of the 15-Day Notice.

Comment 89.2

The commenter does not believe that modifications concerning measuring the cubic feet of airspace will mitigate the spread of COVID; it will instead strain organizations in their attempts to comply.

Response to Comment 89.2

Please see response to comment 88.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

90. Zachary O'Hanen, Director of Human Resources, on behalf of County of Humboldt, by written comments dated October 25, 2022.

Comment 90.1

The commenter expresses disfavor with the proposed modification to the definition of "close contact," arguing that it puts confusing and onerous responsibilities on employers when it should be simplifying compliance.

Response to Comment 90.1

Please see response to comment 88.1.

Comment 90.2

The commenter urges that subsection 3205(e) should be deleted in its entirety, because it is effectively contact tracing, which is ineffective at decreasing exposure, puts onerous burdens lay-person administrators, and is out of step with Public Health, which no longer does contact tracing, and the Governor's lifting of the state of emergency.

Response to Comment 90.2

The comment is outside the scope of the 15-Day Notice.

The Board thanks the commenter for their input and participation in the rulemaking process.

91. Todd Zey, Director of Safety, Silver Bay Seafoods, by written comments dated October 25, 2022.

Comment 91.1

The commenter opines that the standard in its entirety is no longer needed in that COVID should now be treated no differently from the flu.

Response to Comment 91.1

The comment is outside the scope of the 15-Day Notice.

The Board thanks the commenter for their input and participation in the rulemaking process.

92. Ryan McNeil, by written comments dated October 26, 2022.

Comment 92.1

The commenter opines that the standard should not last through 2025 but should instead expire with the Governor's February 2023 lifting of the state of emergency, as "common sense dictates" that there is no need for an emergency standard when there is no emergency.

Response to Comment 92.1

The comment is outside the scope of the 15-Day Notice.

The Board thanks the commenter for their input and participation in the rulemaking process.

93. Janet L. Halsey, Secretary/Treasurer, Halsey Electric, Inc., by written comments dated October 25, 2022.

Comment 93.1

The commenter urges the Board not to extend exclusion pay. Doing so, the commenter opines, is out of step with the stage of the pandemic (winding down) and imposes great financial hardship on contracting businesses, likely leading to such businesses closing and the loss of tax revenue for the state.

Response to Comment 93.1

The comment is outside the scope of the 15-Day Notice.

The Board thanks the commenter for their input and participation in the rulemaking process.

94. Rick Chan, County Safety Manager, CEO/Risk Management, on behalf of the County of Orange, by written comments dated October 28, 2022.

Comment 94.1

The commenter opines that the IIPP, the ATD standard (8 CCR section 5199), and CDPH requirements for high-hazard settings, along with the end of the state of emergency in February 2023, show that this regulation is not necessary.

Response to Comment 94.1

The comment is outside the scope of the 15-Day Notice.

Comment 94.2

The commenter believes that the proposed regulation is too rigid, locking employers into certain measures, when experience has shown that the science is still emerging on what is most effective. The commenter opines that the IIPP standard would instead allow employers to implement the most current and protective measures.

Response to Comment 94.2

The comment is outside the scope of the 15-Day Notice.

Comment 94.3

The commenter opines that throughout the iterations of the ETS, the effectiveness of placing the burden of preventing COVID-19 transmission in the workplace on employers – *e.g.*, diverting resources to contact tracing, implementing outbreak measures, and case reviews – has been unclear in terms of actually reducing workplace exposures. The commenter believes that the proposed regulation would wastefully perpetuate this unproven rule.

Response to Comment 94.2

The comment is outside the scope of the 15-Day Notice.

The Board thanks the commenter for their input and participation in the rulemaking process.

95. Rachel L. Conn, Partner, Nixon Peabody LLP, by written comments dated October 28, 2022.

Comment 95.1

The commenter expresses disfavor with the proposed modification to the definition of “close contact,” finding it vague and burdensome, and asks for a proximity element to be added and that the differentiation based on 400,000 cubic feet be removed. The commenter also objects to the exception to this definition for employees wear fit-tested respirators in compliance with section 5144, stating that is impractical and that face coverings are only required under the ETS when CDPH requires them.

Response to Comment 95.1

Please see response to comment 88.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

96. Dawn Stone, Director of Governmental Affairs, on behalf of the California State Association of Occupational Health Nurses (CSAOhn), by written comments dated October 28, 2022.

Comment 96.1

The commenter supports the proposed regulation's easing of outbreak requirements, clarification of the definition of "close contact," and the continued protection of workers demonstrated by extending the rule two years.

Response to 96.1

The Board appreciates the commenter's support for these aspects of the proposed regulations.

Comment 96.2

The commenter urges the Board to reassess the mandate for portable HEPA filtration units in outbreaks areas without MERV-13 filtration, opining that this one-size-fits-all standard may not work in all circumstances.

Response to 96.2

The comment is outside the scope of the 15-Day Notice.

The Board thanks the commenter for their input and participation in the rulemaking process.

97. John Frattali by written comments dated October 28, 2022.

Comment 97.1

The commenter states that the permanent COVID-19 standard and proposed modified language are not reducing the probability of COVID in the workplace, and are burdensome to employers and costing money to employers and employees. The commenter urges the Board to vote no on the permanent standard.

Response to Comment 97.1

The comment is outside the scope of the 15-Day Notice.

Comment 97.2

The commenter states that the proposed language for close contact is arbitrary at the least. The commenter questions how greater than 400,000 cubic feet of indoor space is safer when the requirement for proper ventilation and filtration exists regardless of room volume. This adds burden and hardship to employers and employees.

Response to Comment 97.2

Please see response to comment 88.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

98. Andrew Sommer and Megan S. Shaked, Conn Maciel Carey LLP, on behalf of the California Employers COVID-19 Prevention Coalition, by written comments dated October 31, 2022.

Comment 98.1

The commenters appreciate the revision to the “close contact” definition to return to the CDC’s measurable “close contact” standard, incorporating the 6-foot benchmark consistently relied upon for over two years. However, they believe this definition should apply to all indoor workspaces, not just large spaces greater than 400,000 cubic feet per floor. The commenter urges the use of the CDC definition including a component of physical proximity for all workspaces, regardless of the size. The commenter opines that, should the Board be inclined to retain the expansive close contact definition under subsection 3205(b)(1)(A), they encourage adding clarifying language recognizing the importance of proximity to the COVID-19 case, as well as the direction of airflow, the facility’s configuration and engineering controls, as considerations in determining close contacts. The commenter further states that otherwise, employers will lack the guidance to meaningfully determine whether there has been a close contact without unnecessarily implicating the entire workplace.

Response to Comment 98.1

Please see response to comment 88.1.

Comment 98.2

The commenters provided a summary of some of the applicable benefits and legal protections available under California law.

Response to Comment 98.2

The comment is outside the scope of the 15-Day Notice.

Comment 98.3

The commenters support omitting exclusion pay from the Proposed Non-Emergency Rule.

Response to Comment 98.3

The comment is outside the scope of the 15-Day Notice.

Comment 98.4

The commenters state that in light of Governor Newsom’s announced end of the State of Emergency, it is more critical than ever that an earlier sunset clause be recognized so the Rule can be aligned with the governor’s action.

Response to Comment 98.4

The comment is outside the scope of the 15-Day Notice.

The Board thanks the commenters for their input and participation in the rulemaking process.

99. Jennifer Oakley, Human Resources Technician, County of Humboldt – Human Resources, by written comments dated October 31, 2022.

Comment 99.1

The commenter believes that reliance on cubic feet to determine who is a close contact is highly impractical to execute and places a severe burden on employers. They further state that they have literally hundreds of buildings and work locations that accommodate over 2,000 employees, and it is overwhelming to consider what would need to be done to determine who in a work location would be a “close contact.” They opine that their current practice of designating “close contacts” on physical distance between employees and the time that they share in close parameters would allow for a clearer practice to determine who would be a close contact, and is a realistic and practical way to continue their tracing efforts.

Response to Comment 99.1

Please see response to comment 88.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

100. Hollis Magill, Director of Human Resources, on behalf of the County of Fresno, by written comments dated October 28, 2022.

Comment 100.1

The commenter states that the implementation of CDPH’s new definition of “close contact” as breathing the same air in a single-story, 200’ x 200’ x 10’ dimensions (400,000 cubic feet) creates a heavy burden in terms of staff resources and potential lost time, without delivering services and potential aid to staff with a higher probability of meaningful exposure.

Response to Comment 100.1

Please see response to comment 88.1.

Comment 100.2

The commenter states that there is no feasible way to create a reasonable cohort for an exposed group while the definition rests at 400,000 cubic feet or less. They further state that the result of this approach to contact tracing seems to encourage excessively large space and exposed group counts in terms of cubic footage and covered employees, and would lead to a higher propensity to enter “outbreak” and “major outbreak” status.

Response to Comment 100.2

The comment is outside the scope of the 15-Day Notice.

Comment 100.3

The commenter states that the major outbreak protocol continues to impose severe hardships for the delivery of critical services to the community they serve. They further state that due to a lack of a public health testing order for the local jurisdiction, and labor relations, they were unable to compel all staff to meet the twice-per-week testing threshold. They state that they sought and received an emergency waiver of the test-or-exclude component from the Division and complied with the terms of the waiver, at considerable expense.

Response to Comment 100.3

The comment is outside the scope of the 15-Day Notice.

Comment 100.4

The commenter states that the proposed regulation is lacking clarity as to exiting major outbreak status, and could be construed that a location will remain in that status until it is in fact completely out of “outbreak.”

Response to Comment 100.4

The comment is outside the scope of the 15-Day Notice.

Comment 100.5

The commenter questions why a standard should be maintained for two years, given that the pandemic is transitioning into its endemic state.

Response to Comment 100.5

The comment is outside the scope of the 15-Day Notice.

Comment 100.6

The commenter suggests that the Board remove, or substantially narrow, the definition of “close contact” to the original 6’ for 15 minutes, or reduce the cubic footage threshold to 25,000 cubic feet, or lower.

Response to Comment 100.6

Please see response to comment 88.1.

Comment 100.7

The commenter suggests that the Board provide a carve-out from the requirement to exclude workers during an outbreak for public agencies where the work is substantially related to economic, medical, or safety services – not including administrative services.

Response to Comment 100.7

The comment is outside the scope of the 15-Day Notice.

Comment 100.8

The commenter suggests that “major outbreak” be redefined as a function of population and square footage.

Response to Comment 100.8

The comment is outside the scope of the 15-Day Notice.

Comment 100.9

The commenter suggests that “exposed group” be redefined with a new section on guidance for sub-dividing work areas without full floor-to-ceiling barriers.

Response to Comment 100.9

The comment is outside the scope of the 15-Day Notice.

The Board thanks the commenter for their input and participation in the rulemaking process.

101. Felix Quan, by written comments dated October 31, 2022.

Comment 101.1

The commenter states that the rule change for close contact to require any shared air space under 400,000 ft³ would not be feasible because of the large size of many open workspaces which can be shared by multiple companies and divisions.

Response to Comment 101.1

Please see response to comment 88.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

102. Robert Moutrie, Policy Advocate, California Chamber of Commerce, on behalf of Acclamation Insurance Management Services, Advanced Medical Technology Association, Agricultural Council of California, Allied Managed Care, American Composites Manufacturers Association, Anaheim Chamber of Commerce, Associated Builders and Contractors of California, Associated General Contractors of California, Associated General Contractors – San Diego Chapter, Associated Roofing Contractors of the Bay Area Counties, Association of California Healthcare Districts, Auto Care Association, BizFed Los Angeles County Business Federation, Brea Chamber of Commerce, California Apartment Association, California Assisted Living Association, California Association of Health Facilities, California Association of Joint Powers Authorities, California Association of

Sheet Metal and Air Conditioning Contractors, National Association, California Association of Winegrape Growers, California Attractions and Parks Association, California Bankers Association, California Beer and Beverage Distributors, California Builders Alliance, California Building Industry Association, California Business & Industrial Alliance, California Business Properties Association, California Chamber of Commerce, California Cotton Ginners and Growers Association, California Craft Brewers Association, California Credit Union League, California Farm Bureau, California Framing Contractors Association, California Grocers Association, California Hotel & Lodging Association, California League of Food Producers, California Life Sciences, California Manufacturers and Technology Association, California New Car Dealers Association, California Restaurant Association, California Retailers Association, California Self Storage Association, California Special Districts Association, California Travel Association, California Trucking Association, Carlsbad Chamber of Commerce, CAWA - Representing the Automotive Parts Industry, Citrus Height Chamber of Commerce, Coalition of Small and Disabled Veteran Businesses, Construction Employers Association, Corona Chamber of Commerce, Costa Mesa Chamber of Commerce, Dairy Institute of California, Dana Point Chamber of Commerce, Family Business Association of California, Family Winemakers of California, Flasher Barricade Association, Fresno Chamber of Commerce, Garden Grove Chamber of Commerce, Glendora Chamber of Commerce, Greater San Fernando Valley Chamber of Commerce, Grower-Shipper Association of Central California, Harbor Association of Industry & Commerce, Housing Contractors of California, Imperial Valley Regional Chamber of Commerce, Laguna Niguel Chamber of Commerce, Lake Elsinore Valley Chamber of Commerce, Lomita Chamber of Commerce, Los Angeles Area Chamber of Commerce, Motion Picture Association, NAIOP California, National Association of Theater Owners of California, National Electrical Contractors Association, National Federation of Independent Business, Newport Beach Chamber of Commerce, Northern California Allied Trades, Oceanside Chamber of Commerce, Official Police Garages of Los Angeles, Palos Verdes Peninsula Chamber of Commerce, Painting and Decorating Contractors of California, Plumbing-Heating-Cooling Contractors Association of California, PRISM – Public Risk Innovation, Solutions, and Management, Rancho Cordova Area Chamber of Commerce, Redondo Beach Chamber of Commerce, Residential Contractors Association, Rural County Representatives of California, Sacramento Metropolitan Chamber of Commerce, Sacramento Regional Builders' Exchange, San Diego Regional Chamber of Commerce, San Gabriel Valley Economic Partnership, San Marcos Chamber of Commerce, San Pedro Chamber of Commerce, Santa Ana Chamber of Commerce, Santa Barbara South Coast Chamber of Commerce, Santa Maria Valley Chamber of Commerce, South Bay Association of Chambers of Commerce, Torrance Area Chamber of Commerce, Tulare Chamber of Commerce, United Ag, United Contractors, United Chambers of Commerce of the San Fernando Valley, Valley Industry & Commerce Association, West Ventura County Business Alliance, Western Agricultural Processors Association, Western Carwash Association, Western Electrical Contractors Association, Western Growers Association,

Western Steel Contractors, Wine Institute, Yorba Linda Chamber of Commerce, by written comments dated October 31, 2022.

Comment 102.1

The commenter does not believe this new confusing definition of close contact should be enshrined in the regulatory text. The commenter opines that the regulatory text should maintain the traditional six foot/fifteen-minutes standard, and CDPH's orders can supersede the text for their duration, with a return to the text when CDPH revokes their overriding orders. In particular, the commenter criticizes the choice of 400,000 cubic feet for delineating the size of indoor space when determining close contacts, stating, "the selection of 400,000 cubic feet seems bizarrely calculated, given it is based on an 8-hour exposure estimate, but the regulation's provisions are triggered by a 15-minute exposure."

Response to Comment 102.1

With respect to the complaints regarding the choice of 400,000 cubic feet, please see response to comment 88.1. The remainder of this comment is outside the scope of the 15-Day Notice.

Comment 102.2

The commenter supports the change in the regulation to the exit threshold for outbreaks.

Response to Comment 102.2

The Board thanks the commenter for their support of this portion of the proposed regulation.

Comment 102.3

The commenter supports the adjustment of the recordkeeping obligations in subsection 3205(j).

Response to Comment 102.3

The Board thanks the commenter for their support of this portion of the proposed regulation.

Comment 102.4

The commenter is concerned that the change to the ventilation requirements in subsection 3205(h) appears to create a mandatory obligation for employers to act, regardless of the workplace's situation.

Response to Comment 102.4

Please see response to comment 22.3. The commenter is correct that the change to the ventilation requirements in subsection 3205(h) does create a mandatory obligation for employers to act. However, as discussed in the response to comment 22.3, even with the shift to mandatory rather than permissive, employers are required to take the same one or more of the methods listed in subsection 3205(h)(1)(A)-(C) to improve ventilation as a method of

decreasing COVID-19 transmission. Employers are not required to take all three, or even two, of these methods.

Comment 102.5

The commenter supports the adjustment to the definition of Exposed Group to allow persons to momentarily pass through a space unmasked without bringing that space into the Exposed Group.

Response to Comment 102.5

The Board thanks the commenter for their support of this portion of the proposed regulation.

Comment 102.6

The commenter supports the adjustment to hazard analysis contained in subsection 3205(c)(1), which clarifies that employers must consider all employees as potentially contagious when determining measures to prevent transmission in the workplace.

Response to Comment 102.6

The Board thanks the commenter for their support of this portion of the proposed regulation.

Comment 102.7

The commenter supports the decision by the Division to not extend exclusion pay into the non-emergency regulation. The commenter then presents a discussion about exclusion pay, including information on protections and leaves available to workers besides exclusion pay.

Response to Comment 102.7

The comment is outside the scope of the 15-Day Notice.

The Board thanks the commenter for their input and participation in the rulemaking process.

103. Jim Wunderman, CEO, on behalf of the Bay Area Council, by written comments dated October 31, 2022.

Comment 103.1

The commenter states that the proposed change in the definition of “close contact” is for many employers (offices with 400,000 cubic feet or less of airspace per floor) more burdensome than the definition that has been in effect for the duration of the pandemic. They state that currently (and since the start of the pandemic) only employees who have been within six feet of the COVID positive employee for a cumulative total of 15 minutes or more over a 24-hour period have been a “close contact”.

Response to Comment 103.1

The Board would first like to clarify that under the current ETS, the CDPH definition of “close contact,” revised on October 13, 2022, applies. Because this new definition is included in a State Public Health Officer Order, it applies to the ETS. This means that determining who is a close contact has been dependent on the size of an employer’s indoor space since the CDPH definition was revised. For indoor spaces of 400,000 cubic feet or fewer, a close contact is someone who shares the same indoor airspace with a COVID-19 case for a cumulative total of 15 minutes or more over a 24-hour period during the COVID-19 case’s infectious period. For indoor airspaces of more than 400,000 cubic feet, a close contact is someone who is within six feet of a COVID-19 case for a cumulative total of 15 minutes or more over a 24-hour period during the COVID-19 case’s infectious period. Moreover, prior to the October 13, 2022 revision, a “close contact” was defined by CDPH order as sharing the same indoor airspace with a COVID-19 case for a cumulative total of 15 minutes or more over a 24-hour period during the COVID-19 case’s infectious period, regardless of the size of the indoor space. Thus, the commenter is incorrect that the six-foot, fifteen-minute definition has been in effect since the start of the pandemic.

Please also see response to comment 88.1.

Comment 103.2

The commenter believes the proposal obligates employers to update their Injury and Illness Prevention Program (IIPP) to address COVID. It states that “COVID-19 prevention measures include remote work, physical distancing, reducing the density of people indoors....” They state that the updated IIPP obligation regarding COVID appears to be a permanent ongoing obligation for employers.

Response to Comment 103.2

The comment is outside the scope of the 15-Day Notice.

Comment 103.3

The commenter believes the removal of the exclusion pay provision from the proposed regulation draft is a reasonable and appropriate change.

Response to Comment 103.3

The comment is outside the scope of the 15-Day Notice.

The Board thanks the commenter for their input and participation in the rulemaking process.

104. Anne Katten, Pesticide and Work Health and Safety Specialist, on behalf of California Rural Legal Assistance Foundation (CRLAF) and Cynthia L. Rice, Director of Litigation, Advocacy & Training, on behalf of California Rural Legal Assistance, Inc. (CRLA), by written comments dated October 31, 2022.

Comment 104.1

The commenters strongly support the need for and enactment of a non-emergency COVID-19 prevention standard, and urge the Board not to add an “escape clause” to the proposal that would terminate the proposed regulations earlier than the two-year period currently set by subsection 3205(a).

Response to Comment 104.1

The comment is outside the scope of the 15-Day Notice.

Comment 104.2

The commenters are deeply troubled that the proposed modifications to the proposed non-emergency standard fail to include the requirements for exclusion pay and job protection. They state that by eliminating exclusion pay, the regulation places the economic burden of the measure on employees who are unfortunate enough to have contracted or been exposed to the disease.

Response to Comment 104.2

The comment is outside the scope of the 15-Day Notice.

The Board thanks the commenters for their input and participation in the rulemaking process.

105. California Labor Federation, AFL-CIO; California Conference Board of the Amalgamated Transit Union; California Conference of Machinists; California Federation of Teachers; California Nurses Association; California School Employees Association; California Teamsters Public Affairs Council; Engineers & Scientists of California, International Federation of Professional and Technical Engineers (IFPTE), Local 20; Service Employees International Union (SEIU) California State Council; SMART-Transportation Division; UNITE HERE; United Food and Commercial Workers, Western States Council; and Utility Workers Union of America, by written comments dated October 25, 2022.

Comment 105.1

The commenters strongly urge the Board to return exclusion pay to the standard, along with language that protects workers’ “seniority, and all other employee rights and benefits ... as if the employee had not been removed from their job.”

Response to Comment 105.1

The comment is outside the scope of the 15-Day Notice.

Comment 105.2

The commenters state that the standard should retain the requirement to notify employees and their representatives of COVID-19 cases and close contacts.

Response to Comment 105.2

The comment is outside the scope of the 15-Day Notice.

Comment 105.3

The commenters state that the definition of outbreak should match the CDPH definition, in that three or more cases at a worksite qualifies, rather than an outbreak be limited to three or more "employee" COVID-19 cases.

Response to Comment 105.3

The comment is outside the scope of the 15-Day Notice.

Comment 105.4

The commenters note that the October 14th version of the standard further weakens the outbreak section (3205.1) by allowing employers out of outbreak status while a worker continues to test positive. The commenters argue that weakening the standard to apply for a shorter period of time during outbreaks defies reason.

Response to Comment 105.4

Please see response to comment 108.3.

Comment 105.5

The commenters opine that the proposed two-year readoption should continue for two years, and that time should be spent quickly developing the best possible general infectious disease standard to follow.

Response to Comment 105.5

The comment is outside the scope of the 15-Day Notice.

The Board thanks the commenters for their input and participation in the rulemaking process.

106. Michael Pimentel, Executive Director, on behalf of California Transit Association, by written comments dated October 31, 2022.

Comment 106.1

The commenter objects to the proposed regulation because it shifts the cost of addressing COVID-19 to employers, including public transit agencies, and because the prevention protocols in the proposed regulation are more stringent than those contemplated by the general relaxation of prevention protocols by federal and state public health organizations.

Response to Comment 106.1

The comment is outside the scope of the 15-Day Notice.

Comment 106.2

The commenter objects to the proposed regulation to the extent that it fails to differentiate between COVID-19 contracted in the workplace and COVID-19 contracted elsewhere.

Response to Comment 106.3

The comment is outside the scope of the 15-Day Notice.

Comment 106.3

The commenter proposes adding an exception to the definition of “close contact” based on employees’ vaccination status.

Response to Comment 106.3

The comment is outside the scope of the 15-Day Notice.

Comment 106.4

The commenter requests a revision to the definitions of “outbreak” and “major outbreak” based on percentage thresholds to account for variability in workplace size.

Response to Comment 106.4

The comment is outside the scope of the 15-Day Notice.

Comment 106.5

The commenter urges the Board to modify testing requirements during outbreak situations to require only that employers make testing available to employees with close contacts for both outbreaks and major outbreaks, upon employee request.

Response to Comment 106.5

The comment is outside the scope of the 15-Day Notice.

Comment 106.6

The commenter objects to the duration of the regulation and asks that the proposed regulation be revised to include language that specifies an end date of either two years after its effective date, or until the end of the COVID-19 State of Emergency, whichever is sooner.

Response to Comment 106.6

The comment is outside the scope of the 15-Day Notice.

The Board thanks the commenter for their input and participation in the rulemaking process.

107. Brian Mello, Associate Vice President, Engagement & Regulatory Affairs, on behalf of the Associated General Contractors of California, by written comments dated October 31, 2022.

Comment 107.1

The commenter takes issue with the revised definition of “close contact.” Specifically, the commenter argues that this new definition, while clearer, still raises concerns for the construction industry, because of various challenges in calculating cubic footage. The commenter proposes that the Board should consider better defining what constitutes an “indoor workspace.” The commenter urges the Board to return to a proximity-based definition.

Response to Comment 107.1

Please see response to comment 88.1.

Comment 107.1

With respect to exclusion pay, the commenter sets forth the several forms of wage replacement available to workers who are injured or sickened at work. The commenter notes that adding exclusion pay to the proposed regulation would necessitate revising the SRIA, and would complicate the timeline for voting on the proposed regulation.

Response to Comment 107.1

The comment is outside the scope of the 15-Day Notice.

The Board thanks the commenter for their input and participation in the rulemaking process.

108. Carmen Comsti, Lead Regulatory Policy Specialist, on behalf of the California Nurses Association/National Nurses United, by written comments dated October 31, 2022.

Comment 108.1

The commenter raises strong objections to the removal of the provisions for exclusion pay and job protections for workers who are required to be removed from the workplace because of a COVID-19 exposure or infection. They point to the other title 8 standards that include exclusion pay and job protections. They argue that in the absence of provisions for exclusion pay and job protections, workers are more likely to go to work sick, while employers will have little incentive to comply with the provisions on removing sick workers, and might be incentivized to punish workers who attempt to isolate or quarantine after an exposure.

Response to Comment 108.1

The comment is outside the scope of the 15-Day Notice.

Comment 108.2

The commenter objects to tying the definition of “close contact” in the proposed non-emergency regulation to the definition of “close contact” in Public Health Officer Orders issued by CDPH. The commenter points out that the revised definition of “close contact” would create tiers of protection for workers, based on a distinction (400,000cu feet) that is arbitrary and has no basis in evidence regarding aerosol transmission of COVID-19. They stress that what is appropriate for public health guidance should not determine what is appropriate for occupational safety and health precautions.

Response to Comment 108.2

Please see response to comment 88.1.

Comment 108.3

The commenter opposes the revisions, as part of the 15-day notice, to change the exit threshold for outbreak status from zero cases in a 14-day period to one case or fewer in a 14-day period.

Response to Comment 108.3

While the Board notes the commenter’s opposition, without this change to the exit threshold for outbreak status, businesses would be in a constant state of outbreak precautions when the circumstances (one case in a workplace over a 14-day period) did not warrant such precautions.

Comment 108.4

The commenter opposes the revision, as part of the 15-day notice, to change the definition of “exposed group” to remove language regarding exposure while all persons are wearing face coverings. They argue that this change weakens the definition of “exposed group.”

Response to Comment 108.4

The change to the definition of “exposed group” is limited to removing the reference to wearing face coverings. This change reflects the change in recommendations, guidance, and Public Health Orders from CDPH regarding masking.

Comment 108.5

The commenter opposes the changes made as part of the 15-day notice period to the recordkeeping requirements for close contacts in subsection 3205(j)(2). They note that, by removing the requirement for employers to keep records of persons who had close contacts with a COVID-19 case, they do not believe Cal/OSHA will be able to enforce the requirements of subsection 3205(e).

Response to Comment 108.5

Neither CDPH nor the CDC recommend the kind of individual contact tracing contemplated by the recordkeeping requirements for close contacts that have been removed as part of the 15-day notice regulatory language. This change is consistent with current recommendations and guidance from these authorities. With respect to the effect of these changes on enforcement of subsection 3205(e), the Board notes that these provisions operate differently and do not address the same recordkeeping and notification obligations.

Comment 108.6

The commenter appreciates several changes made as part of the 15-day notice period: the change to the definition of “returned case” (the duration for being considered a “returned case” was changed from 90 days to 30 days); that the changes to subsection 3205(c)(1) maintain an approach that considers asymptomatic and presymptomatic COVID-19 transmission; and the continued inclusion of clear requirements for ventilation as an engineering control to reduce transmission of COVID-19.

Response to Comment 108.6

The Board appreciates the commenter’s support for these aspects of the proposed regulations.

Comment 108.7

The commenter suggests that the Board consider clarifying the meaning of “periodically” in subsection 3205.1(e), and proposes that the Board require employers to review their COVID-19 policies at least annually.

Response to Comment 108.7

The Board notes the commenter’s suggestion as a topic for a potential FAQ.

The Board thanks the commenter for their input and participation in the rulemaking process.

109. Andrew Wylam, President, on behalf of Pandemic Patients, co-signers, COVID Survivors for Change and Long COVID Families, by written comments dated October 31, 2022.

Comment 109.1

The commenter supports the adoption of the proposed regulation, citing the continued occupational exposure to COVID-19; the ongoing risk of a case of COVID-19 turning into “long COVID” (symptoms lasting 120 days after infection), which in turn disrupts business operations; and principals of access and inclusion enshrined in the Americans with Disabilities Act.

Response to Comment 109.1

The Board appreciates the commenter’s support for the proposed regulation.

The Board thanks the commenter for their input and participation in the rulemaking process.

110. Orange County Superior Court, by written comments dated October 31, 2022.

Comment 110.1

The commenter objects to the revised definition of “close contact” set forth in the 15-day notice. They state that the revised definition will lead to a significant increase in the number of close contact notifications required to be sent by contact tracing teams; a significant increase in the number of tests that they would need to purchase (at public expense); and a substantial increase in the number of workers who would need to be excluded because the refuse to test during outbreaks. The commenter asks the Board to change the definition of “close contact” from 400,000 cubic feet to 10,000 cubic feet or less. The commenter also asks the Board to remove the requirement that close contacts test or be excluded during an outbreak, and to modify the regulation to require employers to make testing available to close contacts.

Response to Comment 110.1

Please see response to comment 88.1.

The Board thanks the commenter for their input and participation in the rulemaking process.

111. Ken Smith, Executive Director of Environment Health & Safety, University of California, Office of the President, on behalf of the Regents of the University of California, by written comments dated October 31, 2022.

Comment 111.1

The commenter insists that subsection 3205(e), governing notice of COVID-19 cases, must be removed from the proposed regulation. Instead, the commenter suggests replacing subsections 3205(e)(2) and (3) with the following language: “Employers shall comply with the notification requirements of Labor Code section 6409.6(a) or any successor law that is in effect.”

Response to Comment 111.1

The changes to subsection 3205(e) proposed as part of the 15-day notice mirror the changes proposed in this comment.

Comment 111.2

The commenter suggests adding the word “employee” before the clause “COVID-19 cases” in subsection 3205(j)(1), arguing that without this addition, the proposed regulation extends to anyone in the community that enters the workplace.

Response to Comment 111.2

The Board disagrees that the commenter’s proposed addition is necessary. The word “employee” is found twice in the same sentence, shortly after the clause the commenter

proposes revising, providing sufficient clarity that this recordkeeping requirement applies to employee COVID-19 cases.

The Board thanks the commenter for their input and participation in the rulemaking process.

112. AnaStacia Nicol Wright, Staff Attorney, on behalf of Worksafe, by written comments dated October 31, 2022.

Comment 112.1

The commenter urges the Board not to add “escape clause” language to the proposed regulation.

Response to Comment 112.1

The comment is outside the scope of the 15-Day Notice.

Comment 112.2

The commenter supports that the new definition of “close contact” takes into consideration that COVID-19 is an airborne virus, capable of traveling long distances and infecting people within a shared space.

Response to Comment 112.1

The Board appreciates the commenter’s support for this aspect of the proposed regulation.

The Board thanks the commenter for their input and participation in the rulemaking process.

113. Helen Cleary, Director, on behalf of Phylmar Regulatory Roundtable (PRR) Occupational Safety and Health, OSH Forum, by written comments dated October 31, 2022.

Comment 113.1

The commenter expresses appreciation for the efforts of the Board and the Division in revising the proposed regulations in response to the commenter’s (and others’) comments.

Response to Comment 113.1

The Board appreciates the commenter’s support for the revisions.

Comment 113.2

The commenter notes that, while they support the Board’s revisions to the threshold for exiting outbreak status, the revisions do not go far enough to alleviate “any of the employer’s unnecessary responsibility, time, and financial burden for ‘outbreak’ situations where none of the cases are connected or work-related.”

Response to Comment 113.2

The Board appreciates the commenter's support for this change to the proposal. With respect to the commenter's continued objections to the outbreak provisions, please see response to comment 20.11.

Comment 113.3

The commenter objects to the revised definition of "close contact." They argue that it remains too non-specific, and is an impractical approach for all workplaces; that it will be ineffective operationally; and that the impact will be untenable. They recommend a more specified definition of close contact, based on proximity, ventilation, size or workspace, and actual exposure to COVID-19 cases. They argue that the current definition "lock[s] in the CDPH's definition of close contact ... with no recourse to change it. [...] In the event that an order is not issued, the definition in the text remains in effect and cannot be altered."

Response to Comment 113.3

Please see response to comment 88.1. Additionally, the Board does not agree with the commenter's assessment that there will be no recourse to change CDPH's definition of "close contact" if an order is not issued; the regular rulemaking process will still be available should a change become appropriate.

Comment 113.4

The commenter objects to defining COVID-19 as a workplace hazard, even in light of the revisions proposed in the 15-day notice. They argue that maintaining this level of precaution for the proposed duration of the regulations is in conflict with current science and policy regarding reducing "medically significant disease." They argue that the proposed regulation places solely on employers the responsibility for preventing COVID-19 transmission, when COVID-19 "remains a public health disease fueled by community spread." They object that the proposed regulations "treat[] all workers and workplaces the same and assume[] the health risk is the same for all," when this is not the case. They state that the concept of universal precaution in the workplace, but not the community "where the disease thrives," is unbalanced.

Response to Comment 113.4

The comment is outside the scope of the 15-Day Notice.

Comment 113.5

The commenter expresses appreciation for the changes made to the definition of "exposed group."

Response to Comment 113.5

The Board appreciates the commenter's support for this aspect of the proposed regulation.

Comment 113.6

The commenter states that changing the time period for being considered a “returned case” from 90 days to 30 days is problematic, especially in the context of what the commenter describes as an “expanded” definition of “close contact.” The commenter also points to confusion regarding the type of test an employee must take, and what to do when an employee receives a positive test result but is no longer infectious.

Response to Comment 113.6

On the issue of the “expanded” definition of “close contact,” please see response to comment 88.1.

On the issue of the change in time period for being considered a “returned case,” the change to a 30-day period after infection is based on the CDPH “Updated Testing Guidance” (dated September 15, 2022). CDPH currently recommends that persons who are exposed to COVID-19 consider taking a COVID-19 test after 30 days from their previous COVID-19 positive test. This is less than the 90-day period previously recommended by CDPH because of the growing understanding that newer variants of SARS-CoV-2 can re-infect people in fewer than 90 days.

Comment 113.7

The commenter supports the changes to subsection 3205(j)(1), regarding recordkeeping for close contacts.

Response to Comment 113.7

The Board appreciates the commenter’s support for this change to the proposed regulation.

Comment 113.8

The commenter responds, in depth, to the discussion regarding exclusion pay at the October 20, 2022 Board Meeting.

Response to Comment 113.8

The comment is outside the scope of the 15-Day Notice.

Comment 113.9

The commenter reiterates their objection to the duration of the proposed regulation as well as their request an “escape clause” for the proposed regulation.

Response to Comment 113.9

The comment is outside the scope of the 15-Day Notice.

The Board thanks the commenter for their input and participation in the rulemaking process.

114. Robert Ragland, Chief Compliance Officer, on behalf of the County of Los Angeles Department of Public Health, by written comments dated October 31, 2022.

Comment 114.1

The commenter objects to the revised language in the 15-day notice that removes the requirement to report COVID-19 cases and outbreaks to the local health department.

Response to Comment 114.1

The requirement in the ETS to report outbreaks to the local health department stems from Labor Code section 6409.6. With the passage of AB 2693, this requirement has been removed from Labor Code section 6409.6. The revisions to this aspect of the proposed regulation reflect the changes to Labor Code section 6409.6.

Comment 114.2

The commenter argues that the proposed regulation should continue to include a requirement that employers must keep a record of workers who had close contacts. They suggest retaining the now-deleted subsection 3205(j)(1) that was in the original version of the proposed regulation.

Response to Comment 114.2

Please see the response to comment 108.5.

Comment 114.3

The commenter suggests adding language to the definition of “face covering” in subsection 3205(b)(8) to discourage the use of cloth face coverings. They argue that all persons wearing masks should optimize fit and filtration, ideally by using a respirator or a surgical mask.

Response to Comment 114.3

The comment is outside the scope of the 15-Day Notice.

The Board thanks the commenter for their input and participation in the rulemaking process.

115. Michael Miller, Director of Government Affairs, California Association of Winegrape Growers; Tricia Geringer, Vice President of Government Affairs, Agricultural Council of California; Matthew Allen, Vice President, State Government Affairs, Western Growers Association; Tim Schmelzer, Vice President, California State Relations, Wine Institute; Pete Downs, President, Family Winemakers of California; William Schiek, Executive Director, Dairy Institute of California; Dwayne Cardoza, Interim CEO, Raisin Bargaining Association; Rick Tomlinson, President, California Strawberry Commission; Joani Woelfel, President & CEO, Far West Equipment Dealers Association; Will Scott, Jr., President, African American Farmers of California; Manuel Cunha, Jr., President, Nisei Farmers League; C. Bryan Little, Director, Employment Policy, California Farm Bureau; Roger Isom,

President/CEO, California Cotton Ginners and Growers Association, and Western Agricultural Processors Association; Michelle M. Connelly, Executive Director & CEO, California Walnut Commission; Richard Matoian, President, American Pistachio Growers; Todd Sanders, Executive Director, California Apple Commission, California Blueberry Association, California Blueberry Commission, and Olive Growers Council of California; Casey Creamer, President, California Citrus Mutual; Debbie Murdock, Executive Director, Association of California Egg Farmers, California Pear Growers Association, and Pacific Egg & Poultry Association; Jane Townsend, Executive Officer, California Association of Wheat Growers and California Bean Shippers Association; Chris Zanobini, Chief Executive Officer, California Grain and Feed Association, and Pacific Coast Renderers Association; Ann Quinn, Executive Vice President, California State Floral Association, and California Warehouse Association; Donna Boggs, Associate Director, California Seed Association; and Aubrey Bettencourt, President/CEO, Almond Alliance of California; by written comments dated October 31, 2022.

Comment 115.1

The commenters raise their ongoing objection to the existence of the regulation, and align their comments with those of the California Chamber of Commerce and the Phylmar Regulatory Roundtable.

Response to Comment 115.1

The comment is outside the scope of the 15-Day Notice. With respect to the comments from the California Chamber of Commerce and the Phylmar Regulatory Roundtable, the Board directs the commenters' attention to the responses to comments 102.1-102.7 and 113.1-113.9.

Comment 115.2

The commenters object to the revised definition of "close contact," arguing that the proposed regulation should do no more than define close contact by reference to CDPH.

Response to Comment 115.2

Please see response to comment 88.1.

Comment 115.3

The commenters reiterate their ongoing objection to the outbreak provisions of the proposed regulation (section 3205.1), arguing that the virus is primarily community spread and thus "it makes no sense to have workplace outbreak requirements."

Response to Comment 115.3

The comment is outside the scope of the 15-Day Notice.

Comment 115.4

The commenters respond, in depth, to the discussion regarding exclusion pay at the October 20, 2022 Board Meeting.

Response to Comment 115.4

The comment is outside the scope of the 15-Day Notice.

The Board thanks the commenters' for their input and participation in the rulemaking process.

ADDITIONAL DOCUMENTS RELIED UPON

None.

ADDITIONAL DOCUMENTS INCORPORATED BY REFERENCE

None.

DETERMINATION OF MANDATE

This standard does not impose a mandate on local agencies or school districts as indicated in the Initial Statement of Reasons.

ALTERNATIVES CONSIDERED

The Board invited interested persons to present statements or arguments with respect to alternatives to the proposed standard. No alternative considered by the Board would be (1) more effective in carrying out the purpose for which the action is proposed; or (2) would be as effective as and less burdensome to affected private persons than the adopted action, or (3) would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. Board staff were unable to come up with any alternatives and no alternatives were proposed by the public that would have the same desired regulatory effect.