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## Regional Stay-at-Home Orders Lifted as California Returns to Tiered COVID System; Companies and Landlords Consider Ramifications of Mandatory Vaccine Programs

By [Jonathan August](#) and [Manuel Fishman](#)

On January 25, the State of California lifted its previously enacted emergency stay-at-home order for all 58 counties. The stay-at-home orders were put in place at the beginning of December and were designed to help ease the burden on ICUs throughout the state, which were becoming increasingly inundated with new COVID-19 patients. As a point of perspective, on December 1, California reported 9,365 hospitalized COVID-19 patients, which number increased to peak on January 6 of 22,853 hospitalized individuals. In fact, COVID-19 cases reached over 53,000 in a single day on January 1, but between January 29 and February 4, California went through a full week where less than 20,000 cases per day were reported statewide. The decline in cases and rise in ICU bed availability prompted the state to rescind the order.

The decision to rescind the emergency stay-at-home order has been met with mixed reactions, with some criticizing the state for ending the order too early in order to satisfy certain lobbying interests. Regardless of the state's rationale, all 58 counties returned to the previously enacted four-tier color-coded system established on August 28, 2020. As of the date of this publication, all but four rural counties in California fall into the most-restrictive tier: widespread. Within the widespread tier, certain businesses are permitted to reopen with limited capacities, including restaurants with outdoor dining, retail stores, and personal care services such as hair and nail salons.

The decision by the State of California to rescind the emergency stay-at-home order and return counties to designated tiers, however, does not change the fact that original state of emergency order concerning COVID-19 dating back to March 2020 remains fully in-place. The state of emergency permits the state to take certain actions related to combating COVID-19, while also permitting local municipalities to enact additional relief if they so desire. Accordingly, all eviction moratoriums throughout the state, which are only permissible due to the existence of the statewide state of emergency, remain in-place and unchanged.

Furthermore, the rescission of the regional stay-at-home order does not affect the previously enacted new Cal/OSHA regulations promulgated on November 20, 2020. These new rules codified various reporting and testing requirements for businesses and employees in the event of a confirmed positive COVID-19 case or outbreak. All

businesses, regardless of whether or not they are permitted to partially or fully re-open under the California tier system, must comply with the new Cal/OSHA regulations. These regulations include, but are not limited to, the development of an Injury and Illness Prevention Program and maintaining an employee's salary and benefits if they are excluded from work as a result of having, or being exposed to, COVID-19.<sup>1</sup>

The existence of new Cal/OSHA rules and the increased distribution of the COVID-19 vaccine has prompted unique questions for commercial landlords throughout the state: can a landlord require employees of tenants to obtain the vaccine before returning to work, or, conversely, can a tenant prevent employees or contractors of a landlord from entering a tenant's leased premises if the tenant requires all its employees and visitors to provide proof of vaccination? In general, the law is clear that employers can enact mandatory vaccination programs *for their own employees*, subject to honoring religious and medical accommodation requests. The Equal Employment Opportunity Commission, ("EEOC") in fact, recently promulgated guidance stating that employer-based mandatory vaccine programs were permissible.<sup>2</sup>

In the case of a tenant preventing a landlord's employees/contractors from entering its leased premises, given that there is no contractual relationship between a tenant and the landlord's employees/contractors and that a tenant is simply a renter of property, it is likely that the language of the lease would govern and that, subject to any contrary lease language, a landlord need simply comply with any notice requirements before entering a tenant's space. This does not alleviate the need for the landlord to comply, and cause others under its control to comply, with local and State protocols and orders applicable to landlord's employees. The risk of a tenant claim for damages based on negligence due to a tenant employee contracting COVID-19 as a result of a landlord employee's or contractor's failure to follow accepted guidelines and protocols is a clear risk—although one that a landlord and its property management team are well equipped to monitor. The risk also has reputational exposure issues for a landlord and its property management company.

The question of whether a landlord can require tenants to obtain a vaccine before returning to work is a more interesting issue given the duty of a landlord to maintain a safe office building. The EEOC's December guidance does not specifically address this question. While most office leases provide that the landlord may enact reasonable rules and regulations for all tenants in their buildings, it is likely that any such "building rule" would be subject to existing lease language and whether or not such a rule is reasonable. If challenged, courts would be required to make a determination as to whether a mandatory vaccine program by a landlord is similar in nature to requiring non-invasive temperature checks currently used in many buildings or if it is too overreaching by effectively changing the terms of an employee's contract with their employer (or if the purpose of the rule could be achieved by less invasive means).

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<sup>1</sup> A more in-depth analysis of the new Cal/OSHA regulations is contained in Buchalter's December 4, 2020 client alert, which can be found [here](#).

<sup>2</sup> The EEOC's guidance can be found [here](#).

In summary, even though mandatory vaccination programs are permitted between employers and their direct employees, whether this right extends to landlords and their tenants is unknown.<sup>3</sup> As a result, building operators should carefully consider enacting such a program or enacting less-restrictive testing measures already established by local and federal guidelines. In addition, as counties in California reduce their COVID-19 case numbers and move up in the state's tiered classification system, commercial landlords and their property management companies need to consider updated their re-opening plans to address vaccinations, social distancing and other protocols for building occupancies. Such modifications are likely to be a long-term and evolving process.

Buchalter is committed to helping our clients assess their rights with respect to COVID-19 and stands ready to assist in navigating these uncharted waters.



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<sup>3</sup> One can reasonably expect that in new single-tenant or multi-floor tenant leases where a tenant occupies substantially all floors of a building or a tower, or has its own lobby entranceway, that this issue will need to be addressed in future lease negotiations. While existing lease language that references property owners and tenants cooperating on safety protocols can be found in many leases, it is unclear whether the language is applicable to pandemic or public health emergencies.