

OSHA Update & Latest Legal Development for California Workplaces

Presented by:

Martha I. Casillas (Orange County)

Kevin D. Bland (Orange County)

November 10, 2021



Atlanta
Austin
Berlin
Birmingham
Boston
Charleston
Charlotte
Chicago
Cleveland
Columbia
Dallas
Denver
Detroit (Metro)
Greenville
Houston
Indianapolis
Kansas City
Las Vegas
London
Los Angeles
Memphis
Mexico City
Miami
Milwaukee
Minneapolis
Montréal
Morristown
Nashville
New Orleans
New York City
Oklahoma City
Orange County
Paris
Philadelphia
Phoenix
Pittsburgh
Portland (ME)
Portland (OR)
Raleigh
Richmond
Sacramento
San Antonio
San Diego
San Francisco
Seattle
St. Louis
St. Thomas
Stamford
Tampa
Toronto
Torrance
Tucson
Washington D.C.

**Ogletree
Deakins**

Speakers



Kevin D. Bland

Orange County

kevin.bland@ogletree.com

949.813.1120

Martha I. Casillas

Orange County

Martha.casillas@ogletree.com

714.800.7917



Agenda

- November 2021
- Fed OSHA ETS
 - Timelines and Application
 - Standards
 - California and State Plans
- Learn from the Cal/OSHA Defense Practitioners
 - Present Application
 - Requirements
 - Vaccinations and Testing
 - January 2022 Proposal
- Checklists and Action Item
- QUESTIONS – 20 MINUTES



Here we are November 2021

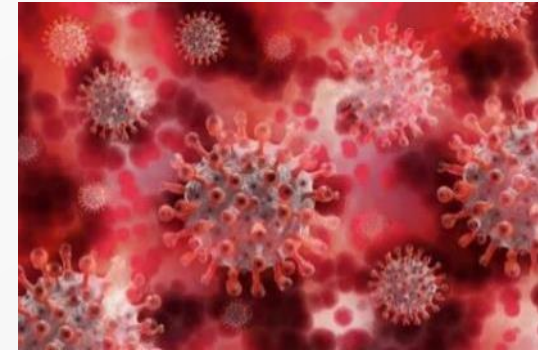
Fed OSHA Emergency Temporary Standard (ETS)

Cal/OSHA Covid ETS— June 2021 – Is that the current rule?

Litigation Against Fed OSHA and Cal/OSHA – who is suing?

Enforcement – What's the skinny?

Benchmarking – What are other businesses doing?



TRUE OR FALSE

With the November 5, 2021 publication of the Fed OSHA Covid-19 Emergency Temporary Standard for Vaccinations and Testing, all employers are required to implement vaccinations or testing by December 1, 2021.

Fed OSHA's New COVID-19 ETS



Atlanta
Austin
Berlin
Birmingham
Boston
Charleston
Charlotte
Chicago
Cleveland
Columbia
Dallas
Denver
Detroit (Metro)
Greenville
Houston
Indianapolis
Jackson
Kansas City
Las Vegas
London
Los Angeles
Memphis
Mexico City
Miami
Milwaukee
Minneapolis
Montréal
Morristown
Nashville
New Orleans
New York City
Oklahoma City
Orange County
Paris
Philadelphia
Phoenix
Pittsburgh
Portland (ME)
Portland (OR)
Raleigh
Richmond
Sacramento
San Antonio
San Diego
San Francisco
Seattle
St. Louis
St. Thomas
Stamford
Tampa
Toronto
Torrance
Tucson
Washington D.C.

FED OSHA COVID-19 ETS



- Employer options:
 - Implement a vaccine mandate (OSHA's preferred option)
 - Covered employers are exempt from the mandate requirement **if** a system allowing vaccination **or** weekly testing + face coverings for unvaccinated is put in place
- How can OSHA do this without notice-and-comment rulemaking?
 - OSHA made a finding that unvaccinated workers face a “grave danger”
 - This allows the issuance of an ETS

FED OSHA COVID-19 ETS – Effective Date

- Goes into effect: Publication in Federal Register
 - Deadline one: **December 5, 2021**
 - All provisions, except vaccination and testing for unvaccinated workers
 - Deadline two: **January 4, 2022**
 - Employees must be vaccinated
 - Testing for unvaccinated workers implemented
- ETS Expires: Six months after publication in Federal Register, unless made permanent through APA Notice-and-Comment Rulemaking
- The ETS serves as the proposal for a permanent standard – comments due December 5, 2021

FED OSHA COVID-19 ETS: 29 CFR 1910.501

- Scope: All Employers with “a total of **100 or more** employees at any time this section is in effect.”
- **Excludes:**
 - i. Federal Contractor workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors
 - ii. Healthcare settings subject to 29 CFR § 1910.502 *et seq.*

Exclusion From Scope – Workers with Covered Employers

- Employees who do not report to a workplace where other individuals such as coworkers or customers are present;
- Employees working from home; or
- Employees who work exclusively outdoors.

What are the options?

FED OSHA ETS is a floor, not a ceiling

- Employers can (and OSHA says they should) mandate vaccination
- Employer could require some (but not all) employees to be vaccinated based on nature of the work
- Employer could elect to follow the ETS as written



FED OSHA Key Questions – Vaccination

- Is PTO required?
 - Yes – up to 4 hours to obtain each shot
 - “Reasonable” PTO to recover from side effects
 - Employer can require employees to use existing sick leave to recover
- What kind of proof?
 - Vaccination card or something similar
 - If employee has lost or cannot produce a vaccination record, specific attestation form that includes statement that falsifying record may result in criminal penalty

CALIFORNIA HAS NUANCES AND DIFFERENCES

FED OSHA Key Questions – Vaccination

What kind of records must be kept?

- Employer must maintain a roster of who is vaccinated and who is not
- Must keep copies of vaccination cards and attestation forms
- This information must be produced within 4 hours of a request from OSHA



QUESTION: IS THIS DIFFERENT FROM CAL/OSHA REQUIREMENTS?

FED OSHA Key Questions – Testing



- How often is testing required?
 - Employee who comes into the workplace at least once each seven days must be tested every seven days
 - Employee who does not come into the workplace weekly must have a negative test taken within 7 days of entering the workplace

FED OSHA Key Questions – Testing

- What kind of test is acceptable?
 - FDA approved
 - Antigen at home tests may be used, but cannot be both “self-administered and self-read” – employer must see the employee take the test
 - Antibody or serology home test are not acceptable

QUESTION: IS THIS DIFFERENT FROM CAL/OSHA REQUIREMENTS?

OSHA Preemption

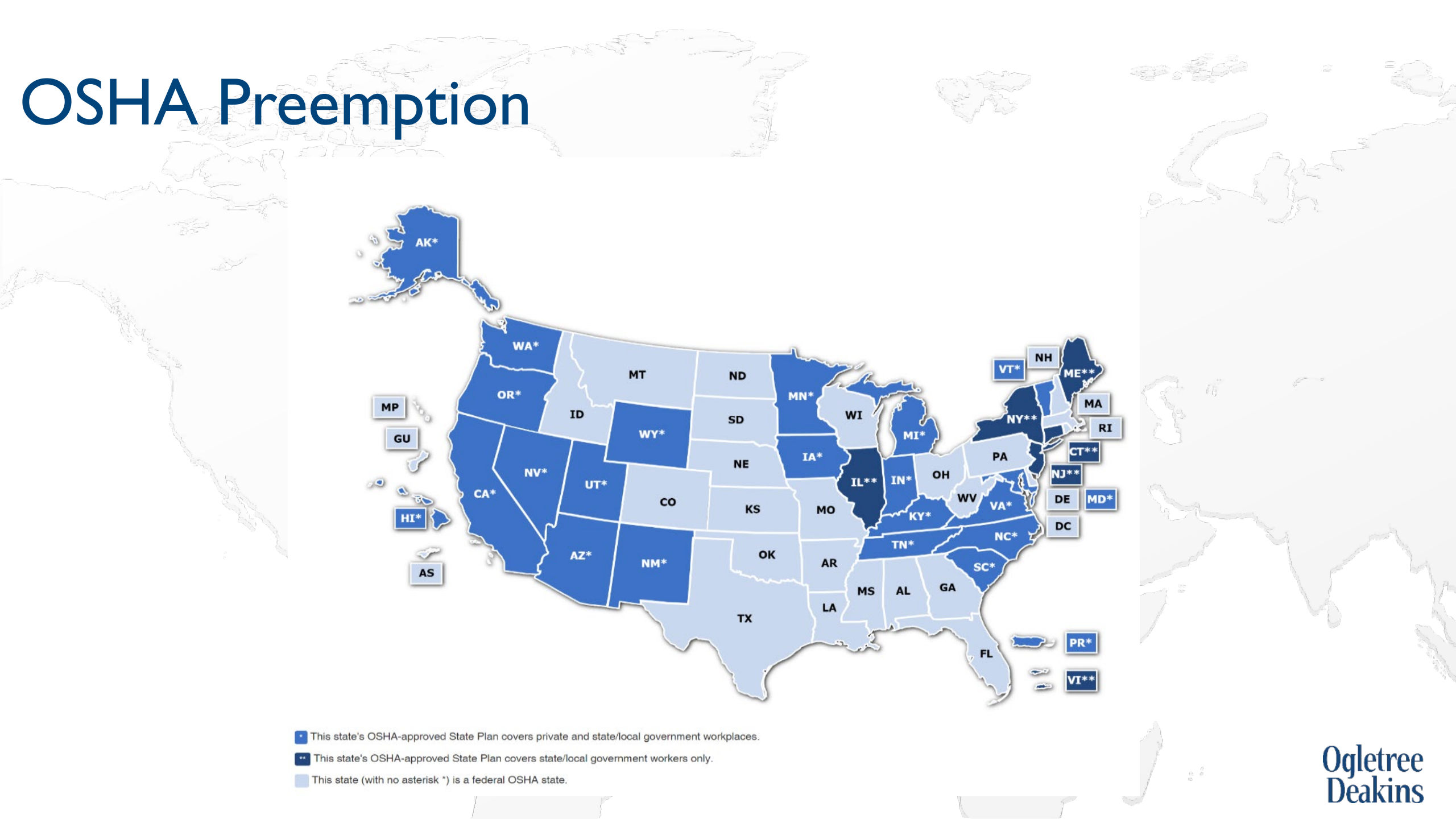
The map displays the following states categorized by their OSHA Preemption status:

- Dark Blue (*):** AK*, WA*, OR*, CA*, NV*, UT*, AZ*, NM*, MN*, IA*, MI*, IN*, KY*, TN*, NC*, SC*, VA*, WV, PA, NY**, ME**, MA, RI, CT**, NJ**, DE, MD*, DC.
- Light Blue (**):** MT, ND, SD, NE, KS, MO, OK, AR, LA, MS, AL, GA, FL, TX, CO, ID, WY, WI, OH, VT*, NH, PR*, VI**.

Legend:

- * This state's OSHA-approved State Plan covers private and state/local government workplaces.
- ** This state's OSHA-approved State Plan covers state/local government workers only.
- This state (with no asterisk *) is a federal OSHA state.

Ogletree Deakins



 This state (with no asterisk *) is a federal OSHA state.

LITIGATION AND COURT CASES

Fifth Circuit Case – TEMPORARY STAY

<https://www.ca5.uscourts.gov/opinions/unpub/21/21-60845.0.pdf>

https://ago.mo.gov/docs/default-source/press-releases/2021-11-05---osha-vaccine-mandate---petition-for-review---final.pdf?sfvrsn=76a943a9_2





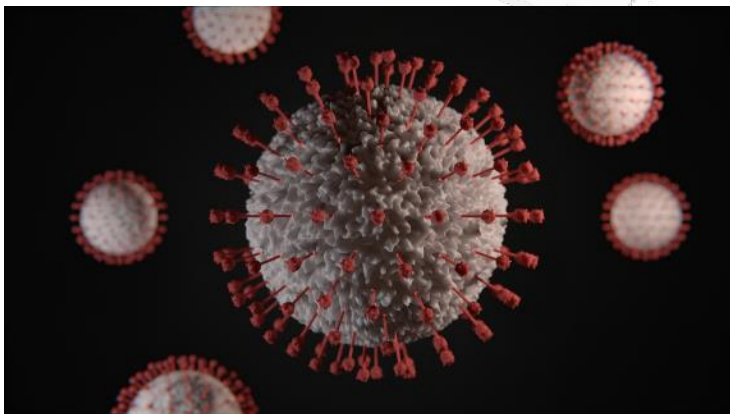
CALIFORNIA

Title 8

CCR 3502 et seq

Current California Covid-19 ETS

- ❑ California Employers other than those covered by the ATD (Aerosol Transmissible Disease) Standard
- ❑ Current Regulation – Title 8 CCR Section 3205
 - ❑ <https://www.dir.ca.gov/title8/3205.html>
 - ❑ Covid-19 Prevention Plan (CPP)
 - ❑ Last Updated June 2021
 - ❑ Outbreaks
 - ❑ Employer Provided Housing
 - ❑ Employer Provided Transportation



What are the requirements for my Covid Prevention Plan

Written Covid-19 Prevention Program -Applies to all employees and places of employment, with the following exceptions:

- (A) Work locations with one employee who does not have contact with other persons.
- (B) Employees working from home.
- (C) Employees with occupational exposure as defined by section 5199, when covered by that section.
- (D) Employees teleworking from a location of the employee's choice, which is not under the control of the employer.

FAQ

Can I continue to make the CPP available on the company intranet where all employees have access in compliance with this regulation? Should I have the employees acknowledge that they have read and understand the plan?



Enforcement Covid-19 ETS

- ☐ Healthcare Facilities

- ☐ Hospitals

- ☐ Senior Living

- ☐ Acute Care

- ☐ Meat Processing

- ☐ Foot Manufacturing

- ☐ Agriculture

- ☐ Fatalities and Hospitalizations!



Total Proposed Penalties for
all COVID-19 related citations

\$7,888,858.00

August 25, 2020 through August 5, 2021

<https://www.dir.ca.gov/dosh/COVID19citations.html>



Changes to Workplace Safety Under Newsom: SB 606

Regulation	Proposed Change
Labor Code 6317	If Employer has multiple worksites and there is a pattern or practice of the same violation, there shall be a rebuttable presumption that the violation is enterprise-wide
Labor Code 6317.8	Cal/OSHA can issue a citation to an egregious employer for each willful violation with each instance considered to be a separate violation
Labor Code 6317.9	Cal/OSHA can issue a subpoena if employer fails to provide information within a reasonable period of time
Labor Code 6323	If citation was issued on machine/equipment, Cal/OSHA may apply to superior court for an injunction restraining its operation until condition is corrected

Changes to Workplace Safety Under Newsom: SB 606

[Continued]

Regulation	Proposed Change
Labor Code 6324	Cal/OSHA can obtain an immediate TRO if submits declaration showing equipment is menace to life/safety and copy of the statute it violates
Labor Code 6324	Cal/OSHA can obtain an immediate TRO if submits declaration showing equipment is menace to life/safety and copy of the statute it violates
Labor Code 6429	Willful or repeat violations can be assessed a penalty not less than \$8,908 and not more than \$124,709
Labor Code 6602	Adds that appeals board shall issue an enterprise-wide abatement order in cases where an enterprise-wide violation was established

COVID-19: 2021 and Beyond

- COVID-19 Cal/OSHA Advisory Committee
- Fed's ETS
 - It's here
 - Vaccine Mandate and Testing
- January 14, 2022 Update to ETS (as it stands now)
- Permanent Pandemic Regulation(s)
 - California 2022
 - Drafting Right Now!

COVID-19: Proposed January 14, 2022 ETS

- 3205(c)(2): During screening for employees, face coverings must be used for both vaccinated and unvaccinated employees.
- 3205(c)(3)(B)(5): If a case occurs in the workplace, employers would be required to provide testing for all nonsymptomatic close contacts, including those who are vaccinated.
- 3205(c)(5): Employers are required to make COVID-19 testing available to both vaccinated and unvaccinated employees.
- 3205(c)(9): Changes to exclusion protocols after a close contact.
- Minor outbreak, transportation, and housing changes, too.

What do we do?

Martha: What are other employers doing for testing systems and processes to protect medical privacy?

- ✓ Public Resources – Cal/OSHA FAQs approve this method
- ✓ Healthcare Benefits based testing
- ✓ Pharmacies
- ✓ Mail in tests
- ✓ On site contractors for larger outbreaks or facilities

Password protection, database management, & confidentiality agreements w/ unions

TOP IDEAS FROM CLIENTS THIS WEEK

- ✓ Designated manager monitoring Fed/OSHA and Cal/OSHA regulations and updates;
- ✓ Internal training and communications plan for implementing vaccinations and testing
- ✓ Internal tracking and payroll integration for testing and reimbursement
- ✓ Written agreements with temp agencies
- ✓ Beefed up accommodation documenting

Helpful Checklist – Top Priorities



- My written program is implemented
- Process for tracking vaccinations?
- Am I ready to make changes and updates to my Covid-19 Prevention Plan?
- Do you have a testing program or a way to have employees tested at no cost to the employee?
- Confirm medical privacy protections in place
- Ready for a Holiday Uptick? - Outbreak management process is in place with a responsible individual

A satellite view of Earth at night, showing the curvature of the planet and numerous city lights glowing across the dark surface of the continents. The lights are concentrated in major urban areas, creating a network of golden-yellow points and lines against the deep blue and black of the oceans and night sky.

Martha and Kevin

**Next 20 minutes -
Questions**

Thank you!



Martha I. Casillas

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

695 Town Center Drive, Suite 1500

Costa Mesa, CA 92626

Cell Phone: 707.800.7917

martha.casillas@ogletree.com

Karen F. Tynan

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

500 Capital Mall, Suite 2500

Sacramento, CA 95814

Cell Phone: 707.508.8476

karen.tynan@ogletree.com

Kevin D. Bland

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

695 Town Center Drive, Suite 1500

Costa Mesa, CA 92626

Cell Phone: 949.813.1120

kevin.bland@ogletree.com

A stylized map of California, where the landmass is represented by a dense network of yellow and orange dots and lines, resembling a night-time satellite view of city lights and major roads. The map is set against a dark blue background.

Ogletree
Deakins

Upcoming Webinars



Employment Law & Benefits Update

December 9, 2021

[Registration Link](#)

January 11, 2021

[Registration Link](#)



OGLETREE RESOURCES

- <https://ogletree.com/insights/>
- <https://ogletree.com/seminars/2021-12-02/workplace-safety-symposium-7/>
- <https://ogletree.com/insights/osha-issues-covid-19-emergency-temporary-standard-employers-with-100-employees-must-ensure-workers-are-either-vaccinated-or-tested-weekly/>
- <https://ogletree.com/insights/court-of-appeals-stays-oshas-emergency-temporary-standard/>
- <https://ogletree.com/podcasts/2021-03-12/cal-oshas-covid-19-emergency-temporary-standards-part-3-covid-19-outbreaks/>
- <https://ogletree.com/insights/cal-osha-releases-proposed-language-for-next-readoption-of-covid-19-prevention-emergency-temporary-standards/>

FED AND CALIFORNIA RESOURCES


Fed/OSHA

- <https://www.osha.gov/coronavirus>
- <https://www.osha.gov/coronavirus/ets2>
- <https://www.osha.gov/coronavirus/ets2/faqs>
- <https://www.osha.gov/sites/default/files/publications/OSHA4162.pdf>

California

- <https://www.dir.ca.gov/dosh/coronavirus/Revisions-FAQ.html>
- <https://www.dir.ca.gov/dosh/coronavirus/Face-coverings-poster.pdf>
- <https://www.dir.ca.gov/dosh/COVID19citations.html>

Our 54 Offices



Atlanta
Austin
Berlin
Birmingham
Boston
Charleston
Charlotte
Chicago
Cleveland
Columbia
Dallas
Denver
Detroit (Metro)

Greenville
Houston
Indianapolis
Jackson
Kansas City
Las Vegas
London
Los Angeles
Memphis
Mexico City
Miami
Milwaukee
Minneapolis
Montreal

Morristown
Nashville
New Orleans
New York City
Oklahoma City
Orange County
Paris
Philadelphia
Phoenix
Pittsburgh
Portland (ME)
Portland (OR)
Raleigh

Richmond
Sacramento
San Antonio
San Diego
San Francisco
Seattle
St. Louis
St. Thomas
Stamford
Tampa
Toronto
Torrance
Tucson
Washington, D.C.