

Assembly Bill 2537: FAQs for Hospitals

New law requiring hospitals to maintain certain levels of PPE

March 2021

GENERAL PROVISIONS

Q1: What health care employers are covered by [Assembly Bill \(AB\) 2537](#)?

A: “Employer” means a person or organization that employs workers in the public or private sector to provide direct patient care in a general acute care hospital, as defined in Health and Safety Code 1250(a).

Q2: When does AB 2537 go into effect?

A: AB 2537 went into effect on January 1, 2021. However, several requirements have delayed implementation dates. The deadlines are:

- *January 1, 2021: Covered employers shall establish and implement effective written procedures for periodically determining the quantity and types of equipment used in its normal consumption.*
- *January 15, 2021: Covered employers shall be prepared to report to the Division of Occupational Safety and Health (Cal/OSHA), under penalty of perjury, its highest seven-day consecutive daily average consumption of personal protective equipment (PPE) during the 2019 calendar year, upon request by the department.*
- *April 1, 2021: Covered employers shall maintain a stockpile of seven specific items of PPE in the amount equal to three months of normal consumption.*

Q3: Who enforces AB 2537?

A: Cal/OSHA is the agency with enforcement authority.

Q4: What are the penalties for non-compliance?

A: AB 2537 specifies penalties for non-compliance with the stockpile requirement (see Q18 below). With respect to the remaining provisions, AB 2537 authorizes Cal/OSHA to enforce alleged violations through the issuance of a citation, pursuant to Labor Code 6317. Arguably, this gives Cal/OSHA authority to issue administrative penalties for violations of the remaining provisions, including the reporting requirement and requirement to maintain written procedures. First violations can be up to \$13,277, with increasing penalties for subsequent violations.

Q5: What guidance has Cal/OSHA provided to hospitals on the various requirements of AB 2537?

A: AB 2537 requires covered employers to undertake activities related to inventory and stockpile of PPE. CHA has been in discussion with Cal/OSHA since the fall in an effort to obtain clarity around many aspects of this law. That advocacy continues. Despite these conversations, much of the law remains unclear.

REQUIREMENT FOR WRITTEN PROCEDURES

Q6: What written procedures were required to be in place by January 1, 2021?

A: Cal/OSHA has not provided guidance on this requirement. However, this requirement would appear to be similar to other Cal/OSHA policy and procedure requirements. Thus, while covered employers may be periodically determining the quantity and types of equipment used, these policies and procedures should be documented.

REPORTING REQUIREMENT

Q7: What information are covered employers required to be prepared to report as of January 15, 2021?

A: Covered employers shall be prepared to report to the department, under penalty of perjury, their highest seven-day consecutive daily average consumption of PPE during the 2019 calendar year, upon request by the department.

Q8: Do I need to send this information to Cal/OSHA??

A: No, covered employers were not required to submit the data to Cal/OSHA on January 15. Rather, the information must be available as of that date and would be produced upon request of the department. While not specified and still subject to change, Cal/OSHA has informed CHA that it does not intend to collect this data on a widespread basis. Rather, Cal/OSHA's current intent is to request the data during the course of an inspection/investigation.

Q9: What personal protective equipment must be included in this report?

A: While not specified and still subject to change, Cal/OSHA has stated the data should be available for the seven items of PPE identified in section (c) of the bill:

- N95 filtering facepiece respirators*
- Powered air-purifying respirators with high efficiency particulate air filters*
- Elastomeric air-purifying respirators and appropriate particulate filters or cartridges*
- Surgical masks*
- Isolation gowns*
- Eye protection*
- Shoe coverings*

Q10: How should a covered employer calculate the daily average consumption for re-usable items such as PAPRs, elastomeric air-purifying respirators, non-disposable isolation gowns, and eye protection?

A: It is unclear how to calculate daily average consumption for these types of re-usable items. Covered employers should consider any reasonable basis, such as the number of items in stock or, where the items have disposable components, the utilization of the disposable components.

Q11: What should a covered employer do to meet the reporting requirement?

A: If a covered employer has the ability to calculate the highest seven-day consecutive daily average consumption of PPE during the 2019 calendar year, it should use that calculation. .

Q12: What if a covered employer did not capture daily consumption data for calendar year 2019?

A: Most covered employers have reported the inability to report daily consumption for calendar year 2019, as that data was not captured. CHA shared this information with Cal/OSHA. Cal/OSHA has advised that it will, nonetheless, request the highest seven-day consecutive daily average consumption of PPE

during the 2019 calendar year. If a covered employer does not have that information, Cal/OSHA will work with the covered employer to obtain information that is available.

Q13: What are the compliance options for covered employers that do not have 2019 consumption data?

A: At a minimum, CHA recommends covered employers evaluate their 2019 data in order to attest under penalty of perjury that the covered employer cannot reasonably provide such information. CHA also recommends that covered employers identify and locate the purchasing and/or distribution data of PPE utilized during the 2019 calendar year.

During CHA's discussions with Cal/OSHA on this issue, CHA shared language it believed would provide an appropriate proxy and likely more useful data:

- Daily average consumption may be calculated using 2019 calendar year purchase order and/or distribution data for each item of PPE to be used for the hospital workforce.

While the initial response was positive, ultimately Cal/OSHA stated it would not provide written guidance on what calculation may be acceptable if the covered employer does not have consumption data. Thus, covered employers that do not have consumption data available appear to have at least two options:

- Develop a proxy calculation, such as the daily average purchase order or distribution data for hospital utilization, to be available to Cal/OSHA upon request
- Wait for a Cal/OSHA inspection asking for the information and work with the investigator on an appropriate proxy calculation

STOCKPILE REQUIREMENT

Q14: What is required to be included in a covered employer's stockpile as of April 1, 2021?

A: The law requires covered employers to maintain a stockpile of the following equipment in the amount equal to three months of normal consumption:

- (A) N95 filtering facepiece respirators
- (B) Powered air-purifying respirators with high efficiency particulate air filters
- (C) Elastomeric air-purifying respirators and appropriate particulate filters or cartridges
- (D) Surgical masks
- (E) Isolation gowns
- (F) Eye protection
- (G) Shoe coverings

Single-use equipment in the stockpile shall be unexpired, new, and not previously worn or used.

Q15: How does a covered employer determine three months of normal consumption?

A: This phrase is not defined in the law. Currently, Cal/OSHA is planning to undertake emergency rulemaking to define that phrase. Assuming emergency rulemaking was undertaken, it would not be complete by the April 1 deadline. We have raised that concern with Cal/OSHA.

CHA believes it was the intent of the legislation to define "normal consumption" to be based on average consumption of PPE during the 2019 calendar year and has been advocating that approach.

During stakeholder meetings in advance of emergency rulemaking, Cal/OSHA provided the following three **proposals** to define "normal consumption" for purposes of the three-month stockpile. **These options were for discussion purposes only.** The emergency regulation will adopt one of these options or

a hybrid. Thus, until the emergency regulations are final, the definition of “normal consumption” for purposes of calculating the amount of PPE in the stockpile remains uncertain.

Option 1:

For purposes of (or, as used in) LC 6403.3, normal consumption means the average amount of the equipment specified by LC 6403.3(c)(1) for each category, type, and size of equipment, used by all employees who provide direct patient care or who provide services that directly support care to patients. Normal consumption reflects an average demand, which includes fluctuations in equipment usage, as they occur over a two-year period.

Normal consumption shall be calculated as follows:

For each year beginning April 1, the quantity of each category, type, and size of the specified equipment consumed in the facility during the preceding two calendar years shall be added up and then divided by 8. For example, three months of normal consumption for the year beginning April 1, 2021, and ending on March 31, 2022, shall be based on the total quantity of each category, type, and size of the specified equipment consumed during the period January 1, 2019, through December 31, 2020, divided by 8.

Option 2:

For purposes of (or, as used in) LC 6403.3, normal consumption means the average amount of the equipment specified by LC 6403.3(c)(1) for each category, type, and size of equipment, used by all employees who provide direct patient care or who provide services that directly support care to patients. Normal consumption reflects an average demand, which includes fluctuations in equipment usage, as they occur over a two-year period.

Normal consumption shall be calculated as follows:

For each year beginning April 1, the quantity of each category, type, and size of the specified equipment consumed in the facility during the preceding two calendar years shall be added up and then divided by 8. For example, three months of normal consumption for the year beginning April 1, 2021, and ending on March 31, 2022, shall be based on the total quantity of each category, type, and size of the specified equipment consumed during the period January 1, 2019, through December 31, 2020, divided by 8. In calculating average consumption over the two years, the quantity used to represent consumption during the second year shall be capped at 200% of the first year’s consumption. For example, if consumption of item X is as follows...

- 2019 is 1000 pieces
- 2020 is 3000 pieces
- 2021 is 1600 pieces

...then the quantity used for calculation of normal consumption for 2020 will be capped at 2000 pieces, and the quantity calculated for three months of normal consumption for the year starting April 1, 2021, will be $3000/8 = 375$ pieces. The calculation for three months of normal consumption for the year starting April 1, 2022, will be $(2000 \text{ plus } 1600)/8$, or 450 pieces. Using a cap of 200% means that the year-to-year increase in required inventory for any item is capped at 150% of the previous year.

Option 3:

For purposes of (or, as used in) LC 6403.3, normal consumption means the average amount of the equipment specified by LC 6403.3(c)(1) for each category, type, and size of equipment, used by all employees who provide direct patient care or who provide services that directly support care to patients, subject to any adjustment resulting from an employer’s periodic evaluation of

the quantity and types of equipment used in its normal consumption. Normal consumption reflects an average demand, which includes fluctuations in equipment usage, as they occur over a two-year period.

Normal consumption shall be calculated as follows:

For each year beginning April 1, the quantity of each category, type, and size of the specified equipment consumed in the facility during the preceding two calendar years shall be added up and then divided by 8, with the exception of any periods when a state of emergency due to pandemic conditions affecting the area where the facility is located is declared by the Governor, pursuant to its authority under GC 8625. For these two-year intervals, normal consumption shall be calculated by determining the average monthly quantity of each category, type, and size of the specified equipment consumed in the facility during the non-emergency periods and multiplying it by three.

Because Cal/OSHA recognizes that many hospitals may not have consumption data, Cal/OSHA proposed the following proxies a hospital may use to determine consumption for each category, type, and size of equipment:

- 1. The total quantity received in the facility from all sources except for those not for use by the facility*
- 2. The total quantity ordered by the facility from all sources except for those not for use by the facility*
- 3. The average monthly inventory*
- 4. The quantity distributed to units in which employees provide patient care and to units providing services that directly support patient care, through all distribution methods, including separately chargeable and non-separately chargeable items*

Note: The employer may use different methods of determining consumption for each category and type of equipment.

Q16: Where can the PPE in the stockpile be stored?

A: CHA and Cal/OSHA agree that the law does not specify where the stockpile must be maintained. There is further acknowledgement that the key is that a hospital have access to the items and ownership of the items. However, "access" has not yet been defined.

CHA believes that all PPE procured and secured by a hospital or health system are included for purposes of establishing and maintaining a stockpile, including but not limited to, PPE stored on-site, on campus, in centralized or regional warehouses, or with their respective intrastate or interstate suppliers. Cal/OSHA has not yet provided any guidance on this issue.

Q17: Who is responsible for providing PPE to contracted employees or for contracted services?

A: The law provides that, if an employer provides health care services in a facility or other setting controlled by a general acute care hospital employer, the general acute care hospital employer that controls the facility or other setting shall maintain the required equipment for the employer providing health care services in that facility or setting.

Q18: What are the penalties if a covered employer is unable to obtain a three-month supply of PPE by April 1, 2021?

A: The law provides that an employer that does not maintain the stockpile as required shall be assessed a civil penalty of up to \$25,000 for each violation. However, the law also gives Cal/OSHA discretion not to impose a penalty if it determines that the employer could not meet the requirement due to issues beyond

their control, such as the employer can demonstrate that equipment needed to meet the requirements of this section has been ordered from their manufacturer or distributor and not fulfilled, or has been damaged or stolen.