

OSHA UPDATE

RECORDING CASES OF

COVID-19

The Occupational Safety and Health Administration (OSHA) has issued another enforcement memo on how employers must go about determining whether an employee who is diagnosed with COVID-19 contracted the disease at work or elsewhere. This is the third such update and while trying to add clarity, may have just created more confusion and complicated the process of determining recordability.

In March, OSHA sent a memo reminding employers that any incidents of employees contracting COVID-19 at work are recordable illnesses based on recordkeeping criteria that have been in place since 2002 and thus subject to the same rules and fines for failure to record as any other workplace injuries and illnesses. In OSHA's [April 13, 2020 Memo](#) they backtracked to some degree, by relaxing those requirements which effectively eliminated most employers from having to record cases of COVID-19. Since then, employers outside of certain industries (i.e., healthcare) only needed to record an employee having the disease if there was "objective evidence" that the case was work-related and the evidence was "reasonably available" to the employer.

In OSHA's latest Enforcement [Memo Issued May 19](#), they basically return to the original recordkeeping criteria already in place. This revised guidance went into effect, May 26th. As an employer, you will be required to investigate COVID-19 cases as you would any other illness case. Under OSHA's recordkeeping requirements, COVID-19 is a recordable illness, and thus employers are responsible for recording cases of COVID-19, if:

1. The case is a confirmed case of COVID-19, as defined by the Centers for Disease Control and Prevention (CDC);^[2]
2. The case is work-related as defined by 29 CFR § 1904.5;^[3] and
3. The case involves one or more of the general recording criteria set forth in 29 CFR § 1904.7.^[4]

OSHA recognizes the difficulty in determining whether such a case is work-related or not, and is exercising enforcement discretion when assessing an employers' efforts in making this determination. However, employers must "make reasonable efforts" to investigate confirmed cases of COVID-19 in the workplace to determine if they were more likely or not work-related. To determine work-relatedness it is important the employer talk with the employee to:

1. Ask how he/she believes the illness was contracted.
2. Discuss his/her work and outside activities that may have led to the illness.
3. Review the employee's work environment for potential SARS-CoV-2 exposures, including whether other employees who work near the employee also contracted COVID-19.

In addition, employers should consider other evidence to determine work-relatedness such as:

- Whether the illness was contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation,
- When several cases develop among workers who work closely together and there is no alternative explanation,
- If his/her job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation,
- If he/she is the only worker to contract COVID-19 in his/her vicinity and their job duties do not include having frequent contact with general public regardless of the rate of community spread,
- If an employee frequently associates with someone outside the workplace who has COVID-19 and is not a coworker but exposes the employee during the period in which the individual is likely infectious.

If, after the reasonable and good faith inquiry, the employer can't determine whether it is more likely than not that exposure in the workplace played a causal role with respect to a particular case of COVID-19, there is no need to record that COVID-19 illness.

Regardless of whether or not a COVID-19 case is recordable, it is important to respond to all events appropriately to protect workers as a matter of their safety and welfare, as well as public health.

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