

OSHA Does an Abrupt Turn In Issuing New Guidance on Recording COVID-19

On May 19, 2020, the Occupational Safety and Health Administration (OSHA) published revised enforcement guidance detailing when employers must record COVID-19 illnesses. The new guidance reverses course on a prior guidance dated April 10, 2020, that relaxed the circumstances when most employers would need to record these illnesses. The new guidance becomes effective on May 26, 2020, and will remain in effect until further notice.

Pursuant to the new guidance, instances of COVID-19 will be considered recordable if all of the following are met:

1. The case is a confirmed case of COVID-19 (see [CDC information](#) on persons under investigation and presumptive positive and laboratory-confirmed cases of COVID-19);
2. The case is *work-related* (as defined by 29 CFR 1904.5); and
3. The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g., medical treatment beyond first aid, days away from work).

The guidance provides new information for employers on how to determine if COVID-19 is “work-related.” OSHA makes clear that employers must make a reasonable fact-based determination of whether a COVID-19 illness is work-related. The guidance acknowledges that, due to community spread, there is an inherent amount of uncertainty in determining whether the illness is work-related. As such, OSHA will exercise its enforcement discretion in reviewing employers’ work-related determinations. In considering whether the employer has made a reasonable fact-based inquiry, OSHA will consider multiple factors.

The Reasonableness of the Employer’s Investigation into the Work-Relatedness

While extensive medical inquiries are not required, employers should generally: (a) ask the employee how they believe they contracted COVID-19, (b) discuss with the employee the out-of-work activities in which they have participated that may have led to the illness, and (3) review the employees work environment for potential coronavirus exposure, e.g., determine whether multiple employees in the workplace have tested positive.

The Evidence Available to the Employer

The work-relatedness determination should be based on all the information reasonably available to the employer. Failure to consider all available evidence could result in a work-relatedness determination being deemed unreasonable and information subsequently learned will also be reviewed as part of this analysis.

The Evidence That COVID-19 Was Contracted at Work

The employer should consider factors that would suggest a causal connection that the illness is work-related such as the following in the absence of an alternative explanation: (a) evidence that shows multiple workers contracted the illness while working in close proximity, (b) evidence that shows an employee contracted COVID-19 shortly after exposure to an employee (or customer) with a confirmed case of COVID-19, and (c) evidence that shows an employee frequently works with the public in an area with ongoing community spread.

Additionally, employers should consider evidence that suggests that the illness is not work-related, such as: (a) if an employee is the only worker to contract COVID-19 and his or her job duties do not include contact with the public, and (b) if an employee has contact with, outside of the workplace, persons that are not co-workers who have COVID-19 and could have expose the employee to the



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illness.

If, after considering such factors, the employer cannot determine it is *more likely than not* that the workplace caused the employee's case of COVID-19, then it need not record the illness. OSHA will have the authority to review these decisions on a discretionary basis. As such, employers should be able to point to the factors that they considered in making their work-relatedness determination. This is best accomplished by documenting the considerations made regarding each COVID-19 illness. This will make OSHA review of determinations less burdensome and also show that employers are making good faith inquiries into whether COVID-19 illnesses are work-related as they are required to do.
