

OSHA Issues Revised Guidance Increasing Employers' Obligations Regarding COVID-19 Recordkeeping Requirements

By Matthew Tripp

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More than two months have passed since the World Health Organization declared the outbreak of COVID-19 a pandemic, causing economies around the world to abruptly grind to a seeming halt. Although the fight against COVID-19 and the process of economic recovery are far from over, we now have an enhanced understanding of the disease and its transmission and prevention, and businesses throughout the nation are starting to reopen. In light of these developments, the United States Department of Labor's Occupational Safety and Health Administration (OSHA) has [revised its enforcement guidance](#) regarding employers' obligation to record cases of COVID-19 in the workplace as occupational illnesses. The revised guidance will go into effect on May 26, 2020. Employers should be aware of their new obligations under the revised guidance and begin taking steps toward achieving compliance.

Under OSHA's existing recordkeeping guidance, employers (except for emergency response, healthcare, and correctional employers) are generally exempt from having to record cases of COVID-19, unless "objective evidence" exists that the illness was work-related. Under the revised guidance, **all employers that are subject to OSHA recordkeeping requirements must now make good-faith efforts to determine whether cases of COVID-19 among employees are work-related.** And all work-related cases must be recorded on the employer's OSHA Form 300 log.

OSHA's revised guidance does not eliminate the existing exemption from OSHA's recording requirements for employers with fewer than ten employees and employers in [specific low-hazard industries](#), such as education and finance. Employers that fall within either of those exemptions need only report work-related COVID-19 illnesses that result in a worker's death, inpatient hospitalization, amputation, or loss of an eye.

The revised guidance provides that covered employers must record cases of COVID-19 where:

1. The case is a confirmed case of COVID-19 as defined by the Centers for Disease Control and Prevention;
2. The case is work-related; and
3. The case involves one or more of the general recording criteria set forth in 29 C.F.R. § 1904.7, such as days away from work, medical treatment beyond first aid, or death.

Given the nature of COVID-19 and its transmission, it will often be difficult to determine whether an infection is work-related. OSHA has acknowledged that challenge and explained that it will exercise "enforcement discretion to assess employers' efforts in making work-related determinations." The agency will consider the following three factors, each of which is discussed in detail below, in assessing whether an employer has complied with its recording obligations in making a determination of work-relatedness: (1) the reasonableness of the employer's investigation into work-relatedness; (2) the evidence available to the employer; and (3) the evidence that COVID-19 was contracted at work.

Disclaimer: This article is not legal advice. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps business must take under applicable laws.

Reasonableness of the employer's investigation into work-relatedness.

According to OSHA, employers are not expected to undertake extensive medical inquiries. This is particularly true of small employers. And all employers, regardless of size, should be sensitive to employee privacy concerns.

OSHA advises employers that have learned that an employee has contracted COVID 19 to: (1) ask the employee how she believes she contracted the illness; (2) discuss with the employee her work and out-of-work activities that may have led to the illness, while respecting employee privacy; and (3) review the employee's work environment for potential exposure, including considering whether any other workers in that environment have contracted COVID-19.

Evidence available to the employer.

OSHA will consider evidence of work-relatedness based on the information reasonably available to the employer at the time it made its determination. But if the employer later learns information relevant to work-relatedness, OSHA will also take that information into account in assessing whether the employer's determination was reasonable.

Evidence that COVID-19 was contracted at work.

OSHA will consider all reasonably available evidence in determining whether an employer has complied with its recording obligations. That includes evidence of causation provided by public health authorities, medical providers, and sick employees.

In the absence of an alternative explanation for a COVID-19 illness, the following evidence may favor a finding that the illness is work-related:

- Multiple cases of COVID-19 have arisen among employees who work closely together.
- An employee's COVID-19 illness was contracted shortly after lengthy, close exposure to a coworker or customer with a confirmed case of COVID-19.
- The sick employee's job duties involve frequent, close exposure to the general public in an area with ongoing community transmission.

On the other hand, the following evidence may weigh against a determination of work-relatedness:

- An employee is the only worker to contract COVID-19 in her work area, and the employee's job duties do not involve frequent contact with the general public—regardless of whether there is community spread in the area.
- The sick employee closely and frequently associates with someone outside the workplace who is not a coworker and who has COVID-19, if the employee was exposed to that person when the person was likely infectious.

If, after conducting a reasonable, good-faith inquiry consistent with the guidelines above, an employer cannot determine whether it is more likely than not that a particular case of COVID-19 was caused by exposure in the workplace, the employer does not need to record the case. In all instances, however, employers should carefully examine cases of COVID-19 among workers and respond appropriately to protect employee and public health, regardless of work-relatedness.

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As OSHA's revised guidance makes clear, assessing work-relatedness and recordkeeping obligations can be a daunting task in the midst of a global pandemic. Employers are encouraged to work with counsel to ensure compliance.

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