

OSHA[®] UPDATE

DO I NEED TO RECORD AN EMPLOYEE'S CASE OF COVID-19 ON MY OSHA LOG?



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Let us begin with an update on the COVID-19 Pandemic. This first section applies to all employers with eleven or more employees. OSHA has stated that COVID-19 is a recordable illness and must be recorded on an employer's 300 log, if the following three criteria are met:

1. The employee has a confirmed case of COVID-19, as defined by the CDC (meaning that the employee has had at least one respiratory specimen that tested positive for SARS-CoV-2).
2. The case is work-related as defined by 29 CFR §1904.5; and
3. The illness results in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness, or the illness is a significant injury or illness diagnosed by a physician or other licensed health care professional.

The first step simply requires that you determine whether your employee has tested positive for COVID-19. If the answer is "no," you won't record the illness on your 300 log. An employee report of symptoms, without a confirmed positive test, is not sufficient to make an illness recordable. But, now that COVID-19 tests are easier to come by in most locations, we should expect to see more employees with confirmed positive cases.

Assuming your employee has tested positive for COVID-19, you must move on to the second step, and determine whether the illness is work-related. This can be tricky, depending on whether there are other cases of COVID-19 in your workforce, and whether there is community spread of the virus in your area.

To comply with the recordkeeping requirements of 29 CFR 1904, employers must make a "reasonable determination" as to whether an employee's COVID-19 case is work related. To make a "reasonable determination," you must first ask your employee how he believes he contracted the illness. Your employee's answer is likely to fall into one of three categories: (1) your employee

believes he contracted the virus from someone outside of work; (2) your employee believes he contracted the virus at work; or (3) your employee will not know how he contracted the virus. If your employee reports that he contracted the virus outside of work (for example, he reports that he caught it from close contact with a friend or relative known to have COVID-19), your inquiry can probably stop with this information, unless you also have known COVID-19 spread within your workforce.

But, if your employee reports that he does not know where he contracted the virus, or that he believes he was exposed to the virus at work, you must proceed to ask follow up questions about the employee's in and out of work activities. During this inquiry, you must be mindful of the employee's privacy and avoid questions that could expose you to liability under the ADA, Title VII, ADEA, etc. For example, you could ask your employee if anyone he lives with has tested positive for COVID-19, whether he has been in close contact (within 6 feet for more than 15 minutes) of a person known to have COVID-19, whether he has recently attended any large gatherings, and similar generic questions. You may find it helpful to prepare—in advance—a list of questions you will ask employees who report COVID-19 cases. You might also wish to have your questions reviewed by your employment counsel, to ensure your questions will not violate one of the many other laws that employers are required to comply with concerning employee privacy, protected status, etc.

Last, you should review the employee's work environment for potential sources of exposure. According to OSHA, cases are "likely work related" when there is no alternative explanation other than workplace exposure, and either: (1) several cases develop among workers who work closely together; (2) the virus is contracted shortly after a lengthy and close exposure to a customer or coworker who has the virus; or (3) the employee's job duties involve frequent and close exposure to the general public in a locality with ongoing community transmission. On the other hand, an employee's COVID-19 illness is likely not work-related if the employee is the only worker in his work area to contract the virus; his job duties do not include frequent contact with the general public; or if the employee, outside of work, closely associates with someone who has COVID-19.

You should be prepared to undertake this inquiry for COVID-19 cases reported by your own employees, as well as workers (not employed by you) that you supervise and/or control. For example, if you have temporary

workers on your jobsite, or if you exercise control over a subcontractor's employees, you will be required to record their work-related COVID-19 cases on your OSHA log unless the temporary employment agency agrees to log it on their 300 log. Remember it must be recorded on one log or the other, so this is something you might want to deal with in your contract with the temporary employment agency (see 29 CFR 1904.31(b)(2) and 1904.31(b)(4)). For that reason, you will need to make a reasonable determination as to the work-relatedness of those cases as well.

You must only record the case of COVID-19 if the case is "more likely than not" work-related. If you have conducted a reasonable investigation into the work-relatedness of the illness and cannot determine whether a workplace exposure played a causal role, the illness is not recordable. If it is a close call, and you decide not to record the illness, you would be well-served to document the reasons you decided not to record the illness on your log.

You will have seven days to record a case on your OSHA log. Thus, you will have about a week to investigate the source of the employee's illness and make your "reasonable determination" as to work-relatedness. If you initially determine that a case is not work related, but later learn that it is, you must record the illness at that time. To avoid a potential OSHA citation for untimely recording, you should document the reason you initially determined the illness was not work related, in addition to the date you learned information suggesting otherwise. Further, if you initially determine that the illness is work-related, but later learn that it is not, you should line through the entry on your OSHA log. (Do Not erase it!)

Assuming that your employee tested positive for COVID-19, and that you have determined the illness is work-related, you will need to determine whether the illness meets one of the other recording criteria (i.e. resulting in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness, or the illness is a significant injury or illness diagnosed by a physician or other licensed health care professional). Cases of COVID-19 will virtually always result in days away from work, and thus, there will be few, if any, situations where the third recording criteria is not met.

As always, the obligation to record work-related cases of COVID-19, along with other illnesses and injuries, only applies to employers with more than 10 employees in

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a calendar year.

Do I need to report a case of COVID-19 to OSHA?

This section applies to employers of any size. Only serious illnesses and injuries must be reported to OSHA – i.e. injuries and illnesses resulting in death, in-patient hospitalization, amputation and/or loss of an eye. Although work-related COVID-19 infections may result in hospitalization or even death, they are only reportable to OSHA under certain circumstances. A hospitalization must only be reported if the employee is admitted to the in-patient unit of the hospital for treatment within 24 hours of the work-related incident (i.e. exposure). It will likely be difficult to determine when an employee's work-related exposure occurred, and thus, difficult to determine whether the hospitalization occurred within 24 hours for purposes of reporting. If an employee dies from a work-related case of COVID-19, the death is reportable if it occurs within 30 days of the work-related exposure.

General OSHA Issues and Updates

Confidentiality of Injury and Illness Records

On June 4th, 2020 Magistrate Donna M. Ryu ruled against the Department of Labor in the case of *The Center of Investigative Reporting v. DOL* and held that employer injury and illness records filed with OSHA are not confidential and can be obtained by the media and/or just about anyone else under a Freedom of Information Act request. The decision seems to be based in some part on the 2016 rule proposed by OSHA (Dr. Michaels) that was not adopted and that would have posted all such records filed with OSHA on the OSHA website. This was referred to in 2016 as the "shaming rule" for obvious reasons. The rule did not reach the final rule stage, but now Magistrate Ryu has brought back at least some of what Dr. Michaels was trying to accomplish at that time.

In addition to the above, The D.C. Circuit Court of Appeals dismissed the attempt by the AFL-CIO to force OSHA to promulgate an emergency temporary standard on the COVID-19 pandemic. This decision was by a three-judge panel of the Court. The AFL-CIO has filed for an en banc hearing to have the entire bench of the D.C. Circuit hear the case.

Working with Subcontractors

Be careful with how you treat the employees of subcontractors regarding safety compliance. Be sure you address this issue in your contract with your subs. Be sure you have a clear procedure for ensuring the safety

compliance you require in your contract with your sub. In most cases I suspect that you will have procedures that maintain an arms-length relationship with your subs. So, be sure any employee you have in charge of overseeing the work of your subs strictly and consistently follows those procedures. I have recently become aware of a situation in which a company was cited for a fall protection violation where OSHA has taken the position that the contractor had a duty to ensure (guarantee) the safety of the employees of the sub's employees. The compliance officer intercepted the principle's employee as he was on his way to advise the site supervisor for the sub of the safety infraction, but before he could do so, OSHA has taken the position that the contractor's site supervisor should have dealt directly with the individual employees of the sub.

Multi-State Operations

If you are a contractor who works in multiple states or a company covered by the general industry standards and has facilities in more than one state you must be in compliance with the OSHA standards for the states in which you may work if they are state plan states. For example, in Utah, a company with an employee who has a serious injury must report to Utah OSHA within eight hours even if the employee was not hospitalized. The State of Washington, I believe, is unique in that they not only require you to determine the integrity of walking a working surface, (Federal OSHA standard at 1926.501(a)(2)) they require you to guarantee that the walking/working surface will support the weight of the employee and his/her equipment who will work on it. Getting back to the pandemic, Nevada has promulgated an emergency temporary standard limiting the number of employees in an aerial lift, scissors lift or JLG basket to one person. The point of this paragraph is to remind you that you are not just bound to the safety regulations in the state in which you are headquartered or in which you have your principle facility, but also to those to which you send employees or open new facilities.

Back to COVID-19

In the absence of a temporary emergency OSHA standard relating to COVID-19, OSHA continues to issue guidance and enforce safety and health practices under the general duty clause. OSHA issued more guidance for construction contractors in June, advising employers to perform a job hazard analysis at the beginning of each work day to determine whether the work for the upcoming day will place them in the lower, medium or high risk category, and then act appropriately with engineering

and/or administrative controls. I recently heard comments from a New England federal OSHA compliance officer that he expects the construction company to reevaluate their work, as far as exposure potential, throughout the day and adjust safeguards appropriately. The implication here is that whenever conditions on the site change in any way, a new JHA should be performed.

OSHA has defined the lower risk for construction as work that allows workers to remain six feet apart with little contact with the public. Medium risk work requires workers to be within six feet of each other and with customers, visitors and the public. High risk are those sites occupied by other workers, customers, or residents suspected or known to have COVID-19. In the guidance, OSHA lists engineering controls as closing doors whenever possible or erecting barriers such as plastic sheeting. OSHA recommends that employers continually reassess these barriers. For administrative controls, employers should follow CDC guidance and train employees on the spread of the disease.

Recommended training is extensive. It includes such things as training employees to recognize the signs and symptoms of COVID-19, and how the disease is spread. You should also train employees in all policies and procedures applicable to the employees' duties and provide information on social distancing and PPE. Remind employees to stay home if sick, how to properly wear face coverings and about EPA-approved cleaning chemicals. As with all other safety issues, you need to determine how to apply your safety progressive discipline program to COVID-19 pandemic issues.

The above measures are what OSHA considers to be "feasible" recommendations or guidance. For OSHA to allege a violation of the general duty clause, it must prove that an employer did not implement feasible work practices, administrative controls and engineering controls. So, if you determine that any of this guidance is not feasible or creates a greater hazard, you should document the analysis that led to your conclusion in case you are cited for a general duty clause violation. An example of greater hazard might be an increased risk of a heat related illness created by requiring employees to wear face coverings in a high or extremely high heat index environment.

As you can see, even though we do not have an emergency temporary standard from federal OSHA we can see that we are dealing with an ever-changing landscape.



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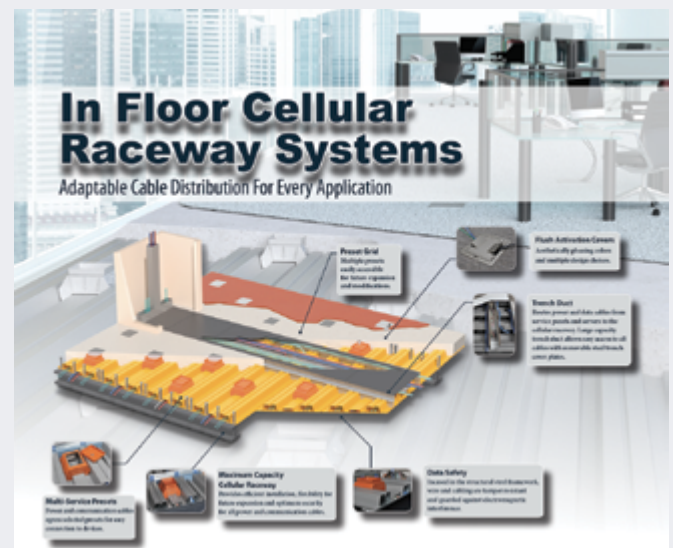
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