

# COVID-19 and OSHA: Why Employers May See More Inspection Activity and More Injuries and Illnesses Being Recorded as Work-Related

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**PRACTICES** OSHA, Employment Litigation, Labor and Employment, Litigation

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On May 19, 2020, OSHA issued two revised enforcement policies with respect to in-person workplace [inspections](#), and an employer's obligation to [record](#) occupational injuries and illnesses, specifically cases of COVID-19. As phased re-openings of businesses are occurring throughout the United States, OSHA explained that it revised its policies to ensure that employers are protecting the health and safety of their workers. In doing so, the agency communicated two revised enforcement strategies.

First, OSHA informed employers that it will return to its in-person (on-site) inspection planning policy that it relied upon before the pandemic regarding areas where community spread of COVID-19 has now significantly decreased. Previously, under its COVID-19 enforcement guidance issued on April 13, 2020, OSHA explained that it had prioritized conducting on-site workplace inspections to healthcare facilities and to COVID-19-related fatalities and imminent danger exposure cases in these settings. In other workplaces, OSHA communicated that it would generally rely on an informal process where employee safety-related complaints would be addressed by an employer responding to a letter from the agency explaining the nature of the employee complaint. Accordingly, in areas where COVID-19 spread has significantly decreased, employers should note that OSHA will continue to focus on COVID-19 cases and may now by-pass the informal letter process and proceed directly to conducting an on-site inspection.

Under this new enforcement policy, in areas experiencing sustained or increased levels of COVID-19 community spread, OSHA Area Directors will have the discretion to focus on-site inspection resources on COVID-19 fatalities and imminent danger exposure cases in high-risk workplaces (particularly healthcare settings) or workplaces with a high number of OSHA complaints regarding COVID-19. OSHA will continue to use the informal letter process where appropriate and particularly in other workplace settings. In these areas where COVID-19 cases have not significantly decreased, OSHA will also develop a program to conduct inspections from a randomized sampling of fatality or imminent danger cases where inspections were not initially conducted due to resource limitations.

Second, OSHA is revising its previous enforcement policy concerning when employers record cases of COVID-19 on their OSHA logs. Under OSHA's recordkeeping requirements, COVID-19 could be considered a recordable injury or illness on an employer's OSHA 300 logs, if:

1. The case is a confirmed case of COVID-19, as defined by the CDC (meaning detection of SARS-CoV-2RNA in a clinical specimen using a molecular amplification detection test);
2. The case is work-related, as defined by 29 CFR §1904.5; and
3. The case involves one or more of the following general recording criteria set forth by OSHA: death; days away from work; restricted work or transfer to another job; medical treatment

beyond first aid; or loss of consciousness. An employer must also consider cases that involve a significant injury or illness diagnosed by a physician or licensed health care professional.

Under previous COVID-19 enforcement guidance, issued on April 10, 2020, OSHA relieved employers of making this work-relatedness determination, except in certain limited circumstances, due to the difficulty in examining whether a COVID-19 exposure was job-related. At that time, employers in the healthcare industry, emergency response organizations, and correctional institutions were still required to make the work-relatedness determination.

As transmission and infection prevention have become better understood and employees are beginning to return to the workplace, OSHA has revised its previous April 10, 2020 guidance such that all employers must now evaluate whether a COVID-19 case is work-related. However, the agency recognizes that it can be challenging on employers to assess work-relatedness and, in turn, offers the following for employers to review as to whether they made a reasonable determination of work-relatedness:

- **The reasonableness of the employer's investigation into work-relatedness.** In light of employee privacy concerns and employers' lack of medical expertise in this area, employers should not undertake extensive medical inquiries. If an employer learns of an employee's COVID-19 illness, it is sufficient to: (1) ask the employee how the employee believes that he/she contracted the illness; (2) while respecting employee privacy, discuss the employee's work and out-of-work activities that may have led to the illness; and (3) review the employee's work environment for potential SARS-CoV-2 exposure and any other instances of workers in the environment becoming ill due to COVID-19.
- **The evidence reasonably available at the time the employer made its work-relatedness determination.** If the employer learns more information about the employee's illness after the employer initially became aware of it, then that information should be taken into account in determining the reasonableness of the employer's work-relatedness determination. In other words, even when an employer initially thought the employee's exposure occurred at home, it may not be reasonable for an employer to conclude a case is not work-related when subsequent cases reveal that fellow coworkers are also testing positive for COVID-19.
- **Evidence that the COVID-19 illness was contracted at work.** While OSHA states that this cannot be reduced to a formula, the following factors weigh in favor of a determination of work-relatedness:
  - Several cases develop among workers who work closely together and there is no alternative explanation;
  - COVID-19 was contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case and there is no alternative explanation; or
  - The employee's duties include frequent, close exposure to the general public in a locality with ongoing community transmission.

By contrast, according to OSHA, the following factors weigh against a finding of work-relatedness:

- The employee is the only employee to contract COVID-19 in his/her vicinity and the employee's job duties do not include frequent contact with the general public, regardless of the rate of community spread; or
- The employee, outside the workplace, frequently associates with someone (i.e., a family member, significant other, or close friend) who (1) has COVID-19; (2) is not a coworker; and (3) exposes the employee during the period in which the individual is likely infectious.

Employers with 10 or fewer employees and employers in low-hazard industries do not have these OSHA 300 log recording obligations, other than to report to OSHA work-related COVID-19 illnesses that result in a fatality or an employee's in-patient hospitalization, amputation, or loss of an eye.

Employers should remember that recording a COVID-19 illness does not, by itself, mean that any OSHA standard has been violated. However, this change in OSHA's enforcement policy will mean that employers may struggle more with reviewing and assessing whether a particular case is work-related. Accordingly, employers should ensure that employees responsible for maintaining OSHA logs review and follow this new enforcement policy. Finally, given the other policy directive, employers in areas where COVID-19 community spread has decreased significantly should ensure that they are implementing and monitoring the effectiveness of their COVID-19 safety controls for employees returning to work. Failure to do so may result in more than just an OSHA complaint letter to respond to as the initial contact with the agency could now be in the form of an on-site inspection.

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- [Checklist for Return to Work \(or Reinstatement\) for Employees Impacted by COVID-19](#)
- [Federal OSHA's New COVID-19 Enforcement Guidance](#)
- [OSHA Relaxes Requirement for Work-related Assessment for COVID-19 Recordkeeping for Certain Employers](#)
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