

May 23, 2020



## OSHA issues revised recordkeeping guidance for coronavirus (COVID-19)

By Andrea Chavez and Jeff Tanenbaum

As businesses begin to reopen and COVID-19 continues to spread, the Occupational Safety and Health Administration (“OSHA”) issued a [Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019](#) on May 19, 2020.

On May 26, 2020, OSHA’s previous guidance, issued April 10, 2020, will be rescinded, and the revised guidance will go into effect and remain in effect until further notice.

As with the previous guidance, the updated guidance acknowledges that in many instances, it is difficult to determine whether a coronavirus illness is work-related, especially when an employee has experienced potential exposure both in and out of the workplace. Regardless, the updated guidance places new obligations on employers to make reasonable efforts to ascertain work-relatedness.

Furthermore, unlike the prior guidance that carved out exceptions for non-healthcare employers, the updated guidance applies to employers in *all* industry sectors who are required to maintain a 300 Log.

### OSHA’s recordkeeping requirements for COVID-19 illnesses

Pursuant to OSHA regulations, a COVID-19 illness is recordable on an OSHA 300 Log if all of the following apply:

- The case is a *confirmed case* of COVID-19, as defined by the Centers for Disease Control and Prevention (i.e., the individual had at least one respiratory specimen that tested positive for SARS-CoV-2, the virus that causes COVID-19);
- The case is *work-related* (i.e., event or exposure in the work environment either caused or contributed to the COVID-19 illness); and
- The case *involves one or more of the general recording criteria* (i.e., days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness, and/or a significant injury or illness diagnosed by a physician or other licensed healthcare professional).

## **Determining work-relatedness**

The updated guidance focuses on work-relatedness determinations and departs from the April 2020 guidance that required non-healthcare employers to record coronavirus illnesses only if they had “objective evidence” that the illness was work-related.

In determining whether any employer has made a reasonable determination of work-relatedness, OSHA will now consider the following criteria.

### ***Reasonableness of employer’s investigation into work-relatedness***

OSHA notes that employers are not expected to undertake extensive medical inquiries, given employee privacy concerns and most employers’ lack of expertise in this area. When an employer learns of an employee’s COVID-19 illness, OSHA says that it is usually sufficient to:

- Ask the employee how they believe they contracted the COVID-19 illness;
- While respecting employee privacy, discuss with the employee their work and out-of-work activities that may have led to the COVID-19 illness; and
- Review the employee’s work environment for potential COVID-19 exposure (i.e., other instances of workers in that environment contracting COVID-19 illness).

### ***Evidence available to employer***

In determining whether an employer made a reasonable work-relatedness determination, OSHA will consider the information reasonably available to the employer at the time it made its work-relatedness determination. If the employer later learns more information, then that information must also be taken into account by the employer, and such information will also be considered by OSHA.

### ***Evidence that a COVID-19 illness was or was not contracted at work***

The guidance recognizes that there is no exact formula to determine whether a COVID-19 illness is work-related. OSHA states that it will give due weight to any evidence of causation provided by medical providers, public health authorities, or the employee. The guidance also provides examples of evidence that may weigh *in favor* of work-relatedness:

- Several cases develop among workers who work closely together and there is no alternative explanation.
- When the COVID-19 illness is contracted shortly after lengthy, close exposure to a particular customer or co-worker who has a confirmed case of COVID-19 and there is no alternative explanation.
- When an employee’s job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.

OSHA also notes that the following evidence may weigh *against* work-relatedness:

- The employee is the only worker to contract COVID-19 in their vicinity and their job duties do not include having frequent contact with the general public, regardless of the rate of community spread.
- The employee closely and frequently associates with someone (e.g., a family member,

significant other, or close friend) outside the workplace who (1) has COVID-19, (2) is not a co-worker, and (3) exposes the employee during the period in which the individual probably became infectious.

If, after a reasonable and good faith inquiry such as described above, the employer cannot determine whether it is *more likely than not* that exposure in the workplace played a causal role in the particular COVID-19 illness, the employer does *not* have to record that COVID-19 illness.

## **Takeaways**

The updated guidance imposes additional obligations on employers from all sectors to conduct reasonable and good faith inquiries to determine the work-relatedness of employees' COVID-19 illnesses. However, it also provides authority not to record if, after such a reasonable and good faith inquiry, a work-related determination cannot be made.

Interestingly, and unfortunately, while both the April and May guidance documents address recordkeeping, neither addresses and provides clarity on OSHA *reporting* obligations for COVID-19 illnesses.

Employers with additional questions regarding COVID-19 and OSHA recordkeeping or reporting obligations should consult with counsel. For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Andrea Chavez, 213-629-6089, [andrea.chavez@nixonpeabody.com](mailto:andrea.chavez@nixonpeabody.com)
  - Jeffrey Tanenbaum, 415-984-8450, [jtanenbaum@nixonpeabody.com](mailto:jtanenbaum@nixonpeabody.com)
-