
Client Alert: OSHA Changes Guidance for Reporting Cases of Coronavirus (COVID-19) in the Workplace

21 May 2020

[David L. Kelleher](#)

On May 19, the Occupational Safety and Health Administration announced changes to its previously issued guidance on reporting COVID-19 in the workplace, effectively reversing its six-week old policy which allowed a lesser standard of inquiry for employers outside the health care industry, emergency response organizations and correctional institutions. OSHA's new guidance demands that all employers conduct investigations of all COVID-19 cases. OSHA further now requires employers to take into account "all reasonable available evidence" when determining whether a COVID-19 case is work-related, and specifically warns employers that the determination must be case-by-case and "cannot be reduced to a ready formula"

OSHA's new guidance, which is effective May 26, is entitled *Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19)* and can be found [here](#) or at [osha.gov](#). OSHA's [previous guidance issued April 10](#), and highlighted in [Jackson and Campbell's Blog on May 13](#), is superseded by the new guidance.

What Has Not Changed --

Elements of OSHA's prior guidance have not changed.

COVID-19 in the workplace still is a recordable illness and must be reported in accordance with OSHA's general regulatory requirement governing injuries and illness in the workplace.

OSHA's reporting requirement for COVID-19 cases still is confined to (1) a confirmed COVID-19 case, as defined by the Center for Disease Control and Prevention; (2) which are determined work-related; and (3) which involve one or more of the general reporting criteria.^[1]

What Has Changed --

The revisions to OSHA's guidance are significant.

First, OSHA will no longer suspend enforcement of the requirement for employers outside the health care industry, emergency response organizations and correctional institutions, to make fact-based determinations of the work-relatedness of COVID-19 cases. All employers will be required to conduct a reasonable, good faith investigation into the work-relatedness of all COVID-19 cases.

Second, OSHA no longer will allow employers to base work-relatedness determinations on "objective evidence," as stated in prior guidance. Investigations now must take into account *all* reasonably available information. At minimum, OSHA now requires (1) asking the employee how she believes she contracted the illness; (2) discussing with the employee, while still respecting her privacy, her work and out-of-work activities that might have lead to the illness; and, (3) a review of the employee's work environment for potential COVID-19 exposure, including other instances of COVID-19 illness.

OSHA makes clear, however, that the minimum rarely will be sufficient. OSHA expects employers also to consider such matters as the general rate of community spread or lack of spread, statements of public health officials, media reports,

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industry reports, and any available medical information relevant to the individual's health and exposure.

Third, OSHA provides the following examples of how certain information, without alternative explanations, should be outcome-determinative of the employer's investigation:

- COVID-19 illness is likely work-related when several cases among workers develop who work closely together and there is no alternative explanation.
- COVID-19 illness is likely work-related if it is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation.
- COVID-19 illness is likely work-related if the employee's job duties include frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.
- COVID-19 illness likely is not work-related if the employee is the only worker to contract COVID-19 in her vicinity and her job duties do not include having frequent contact with the general public, regardless of the rate of community spread.
- COVID-19 illness likely is not work-related if the employee, outside the workplace, closely and frequently associates with someone (e.g., a family member, significant other, or close friend) who (i) has COVID-19; (ii) is not a coworker, and (iii) exposes the employee during the period in which the individual is likely infectious.

Fourth, OSHA makes clear that the employer's determination is based on a "more likely than not" standard. Only when, after conducting the reasonable and good faith inquiry demanded by OSHA's guidance, the employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role with respect to a particular case of COVID-19, is the employer exempt from reporting that COVID-19 illness. Even then, OSHA reminds employers that they must respond appropriately to protect other workers in the workplace.

It is plain that the range of information which employers must consider will change over time, and from time to time, and therefore will allow OSHA ample space for second-guessing employer judgments. Employers are well advised to develop a flexible checklist of factors to consider when making work-relatedness determinations and to maintain a complete record of the decision-making process to demonstrate the reasonableness of the employer's investigation, the employer's ultimate decision on work-relatedness, and the employer's steps to protect other workers.

This summary is not intended to contain legal advice or to be an exhaustive review. If you have any questions regarding this article, please contact [David L. Kelleher](#) at Jackson & Campbell, P.C.

[1] See 29 CFR 1904 and Jackson & Campbell's Client Alert issued May 13, 2020.

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TAGGED: COVID-19, OSHA, Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19), reporting COVID-19 in the workplace