

KIRKLAND & ELLIS

Blog Post

COVID-19: Evaluating OSHA Recording and Reporting Obligations

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As more and more COVID-19 cases are confirmed and some states may begin to lift workplace restrictions, businesses are facing the question of whether the Occupational Safety and Health Administration (“OSHA”) requires them to record and/or report instances where an employee has tested positive for COVID-19. Given the potential ramifications of recording or reporting an employee’s COVID-19 illness, employers should familiarize themselves with OSHA’s recording and reporting obligations, review OSHA’s enforcement guidance for recording cases of COVID-19 and consult with counsel to determine how these obligations may apply to their particular circumstances.

OSHA’s Recording Requirements

OSHA generally requires employers with 10 or more employees to keep a record of serious work-related injuries and illnesses, and maintain those records for at least five years; however, some employers are exempt based on the business’s North American Industry Classification System (“NAICS”) code, including certain energy and infrastructure employers (see below). A business must enter each recordable injury or illness on its OSHA 300 Log and complete an OSHA 301 Incident Report (or equivalent form) within seven calendar days of receiving information that a recordable injury or illness has occurred. A business’s OSHA 300A log summarizing all injuries from the previous year must be posted by February 1 (and remain visible until April 30) of the following year. Non-exempt businesses that are required to keep OSHA injury and illness records are also required to submit to OSHA the information from their completed OSHA 300A logs by March 2 of the following year. States with OSHA-approved State Plans may have different recording obligations.

Certain energy and infrastructure employers in industries with relatively low occupational injury and illness rates are not required to keep OSHA injury and illness records unless they are asked to do so in writing by OSHA, the Bureau of Labor Statistics (“BLS”), or a state agency operating under the authority of OSHA or the BLS. Some examples of these “partially exempt” industries include:

- Pipeline Transportation of Crude Oil (4861)
- Pipeline Transportation of Natural Gas (4862)
- Other Pipeline Transportation (4869)
- Wireless Telecommunications Carriers (Except Satellite) (5172)
- Data Processing, Hosting, and Related Services (5182)

Employers in other energy and infrastructure industries are expressly required to keep OSHA injury and illness records unless they qualify for the small employer exemption, including:

- Oil and Gas Extraction (2111)
- Drilling Oil and Gas Wells (213111)
- Support Activities for Oil and Gas Operations (213112)
- Electric Power Generation, Transmission and Distribution (2211)
- Natural Gas Distribution (2212)
- Utility System Construction (2371)
- Petroleum and Coal Products Manufacturing (3241)
- Petroleum and Petroleum Products Merchant Wholesalers (4247)
- Wired Telecommunications Carriers (5171)

For a full list of industries that are partially exempt from OSHA’s Recordkeeping Rule, see [here](#), and for a full list of covered industries, see [here](#).

Is COVID-19 a Recordable Illness?

OSHA has [stated](#) that COVID-19 can be a recordable illness if all of the following requirements are met:

1. The case is a confirmed case of COVID-19;
2. The case is work-related, meaning an event or exposure in the work environment either caused or contributed to the resulting case of COVID-19 or significantly

- aggravated a pre-existing case of COVID-19 (see discussion below); and
3. The case involves one or more of the general recording criteria, e.g., death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid or loss of consciousness.

OSHA's Reporting Requirements

All employers (including those with fewer than 10 employees or with an exempt NAICS code) are required to notify OSHA of any workplace incident that results in (i) in-patient hospitalization (i.e., formal admission to the in-patient service of a hospital or clinic for care or treatment) within 24 hours of the incident or (ii) death within 30 days of the incident.

- *Timing of Reporting.* The employer must report the incident within (i) 24 hours of learning that the hospitalization was the result of a work-related incident or (ii) eight hours of learning that the death was the result of a work-related incident.
- *How to Report.* Reporting requirements and methods may vary by state and depend on whether the state has an OSHA-approved State Plan, although many states with OSHA-approved State Plans have adopted the OSHA reporting requirements. Employers in states without OSHA-approved State Plans can report an incident by: (i) calling OSHA's 24-hour hotline ((800) 321-6742); (ii) calling the nearest [OSHA office](#) during normal business hours; or (iii) submitting an [online form](#).
- *What to Provide when Reporting.* When an employer reports the incident, it should be prepared to provide: the business's name; the location of the work-related incident; the time of the work-related incident; the type of reportable event (i.e., fatality or inpatient hospitalization); the number of employees who suffered the event; the names of the employees who suffered the event; a contact person and his or her phone number; and a brief description of the work-related incident.

Is COVID-19 a Reportable Incident?

An employee testing positive for COVID-19 may be a reportable incident if the normal criteria for reporting severe injuries are met, i.e., an employee contracts COVID-19 as a result of a work-related exposure and is then hospitalized within 24 hours of the work-related exposure or dies within 30 days of the work-related exposure.

Determining Whether a Specific COVID-19 Case is Recordable and/or Reportable

Whether a specific COVID-19 case is recordable and/or reportable depends on whether it is the result of a work-related incident. Work-relatedness is presumed for illnesses that result from events or exposures in the work environment, unless certain exceptions apply (e.g., the illness involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside of the work environment). For non-acute illnesses like COVID-19, however, it is often not obvious whether the precipitating exposure occurred in the work environment or away from work in the broader community.

In determining whether a specific COVID-19 illness is work-related, the employer should evaluate the employee's work duties and work environment to decide whether an exposure in the work environment caused the employee to contract COVID-19.

Relevant factors include:

- The nature of the work (e.g., healthcare-related work that involves a higher risk of exposure to COVID-19);
- The safeguards that the employer has put in place to mitigate the risk of exposure to COVID-19 (e.g., implementing social distancing, facilitating working from home, sanitizing, etc.); and
- The prevalence of COVID-19 in the broader community when compared to the prevalence in an employer's workforce.

OSHA Enforcement Guidance for Recording Cases of COVID-19

Recognizing that certain employers in areas where there is ongoing community transmission may find it difficult to determine whether a worker contracted COVID-19 because of a work-related exposures, OSHA issued [enforcement guidance](#) for recording (but not reporting) cases of COVID-19. Under this guidance, employers in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting and law enforcement services) and correctional institutions must continue to determine whether a confirmed case of COVID-19 is work-related (i.e., whether the case was caused, contributed to or significantly aggravated by an exposure in the work

environment). Until further notice, however, all other employers can assume that a confirmed case of COVID-19 is *not* work-related for purposes of recording, unless:

1. There is objective evidence that a COVID-19 case may be work-related (e.g., a number of cases among workers who work closely together without an alternative explanation); and
2. The evidence was reasonably available to the employer (e.g., information given to the employer by an employee or information that an employer learns in the ordinary course of managing its business and employees regarding its employees' health and safety).

Businesses Should Carefully Evaluate the Applicability of OSHA's Recording and Reporting Requirements

Businesses with employees who have tested positive for COVID-19 should carefully evaluate whether OSHA's recording and reporting requirements apply, because an employer's recording of a COVID-19 illness or reporting a COVID-19 hospitalization or death can have implications that extend beyond OSHA compliance. For instance, the act of recording or reporting could be used as evidence in a lawsuit or worker's compensation claim that the employer believed the COVID-19 illness was the result of a work-related exposure.

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Authors

[Paul D. Tanaka, P.C.](#)

Partner / [San Francisco](#) / [Houston](#)

[Toby Chun](#)

Partner / [Washington, D.C.](#)

[Jonathan E. Kidwell](#)

Partner / [Dallas](#) / [Washington, D.C.](#)

[Michael J. Mahoney](#)

Associate / [San Francisco](#)

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