July 10, 2020

Doug Parker
Chief, Division of Occupational Safety and Health
California Department of Industrial Relations
1515 Clay Street, Suite 1901
Oakland, CA 94612

RE: *Recording Requirements for COVID-19 - Frequently Asked Questions*

Dear Mr. Parker:

On behalf of the **Coalition for Uniformity in COVID-19 Recordkeeping**, we are writing to call your attention to an important matter regarding recent interpretive guidance issued by California's Department of Industrial Relations, Division of Occupational Safety and Health ("Cal/OSHA") related to COVID-19 recordkeeping. The guidance is in direct contravention of federal OSHA's recordkeeping requirements and is therefore not permitted under the law. We therefore respectfully request Cal/OSHA rescind and/or revise the guidance to comport fully with the requirements of federal OSHA recordkeeping regulations.

The Coalition for Uniformity in COVID-19 Recordkeeping is composed of a broad array of California employers that are significantly impacted by Cal/OSHA's COVID-19 recordkeeping requirements. Directly or through trade associations, the Coalition represents more than 20,000 employers with more than half a million workplaces and more than five million employees in California. Included among its members are individual employers representing segments of the retail industry; supermarkets and grocery stores; and the automotive, aerospace defense, chemical manufacturing, petroleum refining, construction, pharmaceutical, agricultural, and airline industries. The Coalition also is supported by various trade associations representing several of these industries and more, including the California Chamber of Commerce, the California Retail Association, the Retail Industry Leaders Association, the National Retail Federation, the Crane Owners Association, and the Food Industry Association (FMI). Given the number of Coalition members impacted by Cal/OSHA's COVID-19 recordkeeping requirements, the Coalition has a substantial interest in ensuring clear, consistent recordkeeping requirements, and hopes to work with you to resolve the Coalition's concerns.

On May 27, 2020, Cal/OSHA issued *Recording and Reporting Requirements for COVID-19 Cases, Frequently Asked Questions* ("FAQs") setting new requirements for logging COVID-19

cases on California employers' 300 Logs.[1] In several respects, these requirements differ materially from the corollary federal OSHA requirements for logging COVID-19 cases. Cal/OSHA's differing and inconsistent requirements will necessarily result in California employers recording COVID-19 cases on 300 Logs that would not be required to be and will not be recorded anywhere else in the country. This will undermine the purpose and benefit of recordkeeping for COVID-19 cases by contaminating the OSHA 300 Log data, rendering the data of little utility for multi-state employers, OSHA, the Bureau of Labor Statistics, labor unions, or researchers that will conduct COVID-19 related comparative analyses, risk assessments, and/or resource targeting. It is to avoid these very problems that OSHA promulgated a regulatory mandate preventing state recordkeeping regulations from differing from federal OSHA's.[2] Beyond this, as explained below, Cal/OSHA's different recordkeeping criteria will result in myriad negative consequences and unjustifiable burdens borne uniquely by California employers.

I. Cal/OSHA May Not Depart from Federal OSHA's Recordkeeping Requirements

Section 18 of the federal OSH Act mandates that State OSH Plans establish standards that are "as effective as" federal OSHA standards, but generally provides State Plans with authority to establish more stringent and/or supplemental requirements. *See* 29 U.S.C. Sec. 667(c)(2). State Plans, however, have no discretion to deviate from federal OSHA *recordkeeping* requirements for which cases must be logged and how to log them.

29 C.F.R. 1904.37(a) provides:

> *Basic requirement*. Some States operate their own OSHA programs, under the authority of a State plan as approved by OSHA. States operating OSHA-approved ***State plans must have occupational injury and illness recording and reporting requirements that are substantially identical to the requirements in this part.***

In explaining 1904.37(a), subsection (b) of that regulation states that state OSH Plans "***must have the same requirements as Federal OSHA for determining which injuries and illnesses are recordable and how they are recorded.***" 29 C.F.R. 1904.37(b). Accordingly, uniformity in recordkeeping is mandated by Section 1904.37(b)(1), and State Plans are not allowed to establish more or less stringent or restrictive requirements, or any difference in requirements at all. The language of the regulation is clear – in this regard, State Plan regulations "must have the same requirements" as federal OSHA.

The absolute mandate in 1904.37(b)(1) is made clearer when contrasted with subparagraph (b)(2), which states: "[f]or other Part 1904 provisions (for example, industry exemptions, reporting of fatalities and hospitalizations, record retention, or employee involvement), State-Plan State requirements may be more stringent than or supplemental to the Federal requirements." 29 C.F.R. Section 1904.37(b)(2).

---

[1] *See* https://www.dir.ca.gov/dosh/coronavirus/Reporting-Requirements-COVID-19.html

[2] Federal OSHA has been unambiguous in its mandate that State Plans' requirements be identical to federal requirements with regard to which cases are recordable and how to record them. *See* 29 CFR 1904.37.

OSHA's inclusion of Section 1904.37 in its recordkeeping regulations (along with other significant revisions) was the third and final piece of a major overhaul of the federal recordkeeping requirements two decades ago. In explaining the objective of these revisions, OSHA stated in the preamble to the 2001 Final Recordkeeping Rule, that the "revisions to the final rule will also create more consistent statistics from employer to employer," and that more consistent records "will improve the quality of analyses comparing the injury and illness experience of establishments and companies with industry and national averages and of analyses looking for trends over several years." 66 Fed.Reg. 5916-6135, 5918 (Jan. 19, 2001). Pointedly, OSHA explained:

> "State Plans ***must have recording and reporting regulations that impose identical requirements*** for the recordability of occupational injuries and illnesses and the manner in which they are entered. These requirements must be the same for employers in all the States, whether under Federal or State Plan jurisdiction . . . **to *ensure that the occupational injury and illness data for the entire nation are uniform and consistent so that statistics that allow comparisons between the States and between employers located in different States* are created**.

Id. at 6060.

It is hard to imagine a clearer statement regarding the importance of ensuring the exact same set of injuries and illnesses are recorded in every state, yet Cal/OSHA has now deviated from this clear regulatory mandate. As far as we are aware, historically, Cal/OSHA and all the other State Plans have always adhered to the mandates of Section 1904.37.

II. COVID-19 Recordability Criteria

As described below, Cal/OSHA's May 27th FAQs improperly deviate from federal OSHA's recordkeeping requirements in two important respects: (a) the requirement for a confirmed positive COVID-19 test result; and (b) the standard for work-relatedness.

A. Confirmed Case Recordability Criterion

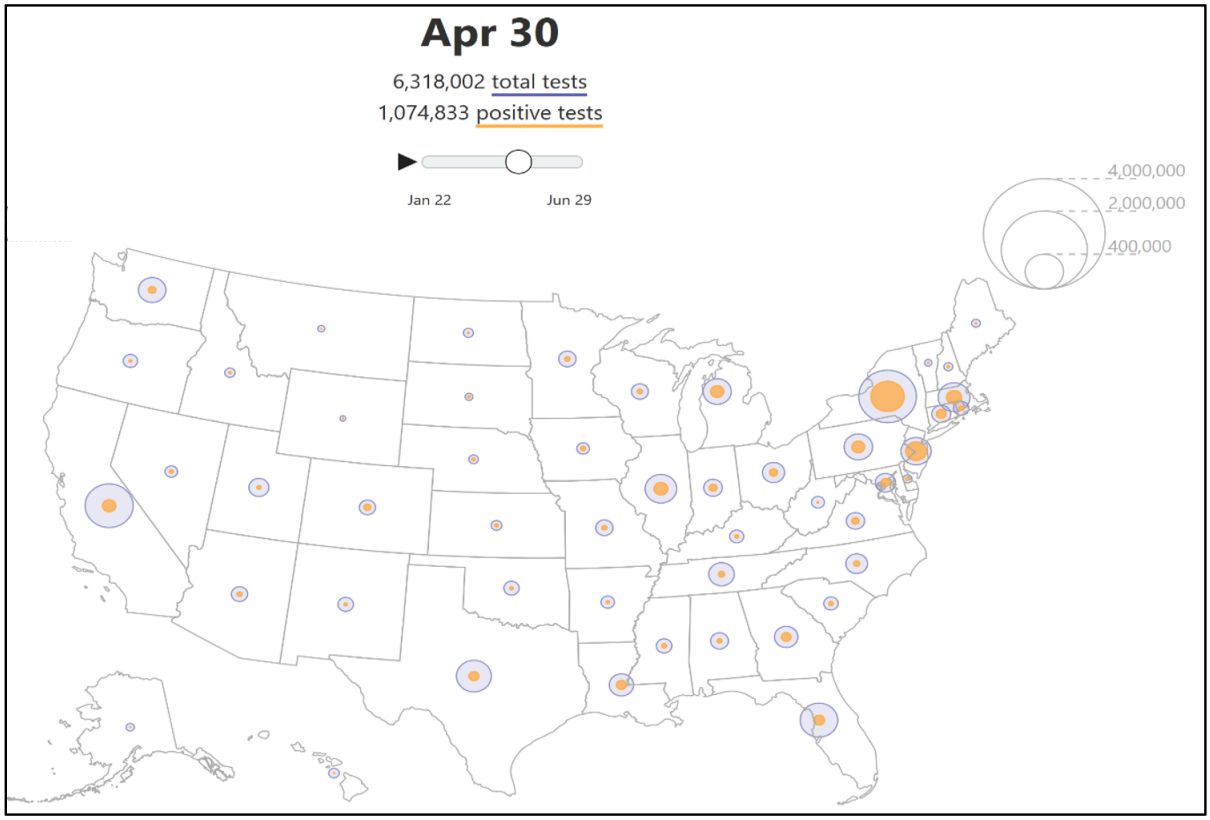
Federal OSHA established three threshold criteria for COVID-19 cases to be recordable:

- **The employee's COVID-19 infection is confirmed by a positive laboratory test of a respiratory specimen**;
- The case involves one or more of the general recording criteria, including days-away-from-work, restricted job duties or transfers; etc. and
- The case is work-related as defined by 29 C.F.R. Section 1904.5.

To distinguish COVID-19 cases from the cold, the flu, or other ailments for recordkeeping purposes, federal OSHA set a precondition for recordability that the COVID-19 infection must be a "confirmed case." It is not enough to self-diagnose or even to have a medical professional opine that an illness likely is coronavirus. Referencing CDC guidance, federal OSHA explains that a "confirmed case of COVID-19 means an individual with at least one respiratory specimen that tested positive for SARS-CoV-2, the virus that causes COVID-19."

Cal/OSHA expressly rejects OSHA's requirement that there be a confirmed positive test result and eliminates that as a criterion for California recordkeeping. Cal/OSHA's FAQs state: "while Cal/OSHA considers a positive test of COVID-19 determinative of recordability, a positive test result is ***not necessary*** to trigger recording requirements." Elimination of this precondition in California recordkeeping guarantees discrepancies between California employers' logs and the logs of employers everywhere else in the country. This inconsistency alone will likely dramatically increase the number of COVID-19 cases recorded on California logs, and will very likely result in the mistaken recording of cases of the cold and flu, which are exempt from recordkeeping.

Cal/OSHA's stated reason for requiring inclusion of suspected cases on California logs is its concern regarding a shortage of COVID-19 testing in California. However, that rationale is flawed for several reasons. First, the entire nation, not just California, faced COVID-19 testing challenges in the early stages of the pandemic. Indeed, based on objective data, it appears California has been and remains far ahead of the curve in testing among its peer states. As of the end of June, California had performed more than 4,000,000 COVID-19 tests, the most of any state in the country, representing 13% of the total tests performed nationwide, and in the top third of states in terms of number of tests per 100,000 population.[3] Even if we focus just on the early days of the pandemic, by the end of April, California had already performed 625,337 COVID-19 tests, second only to New York.



[3] The data referenced here comes from the highly regarded *COVID Tracking Project*, a volunteer organization dedicated to collecting data on a state-by-state level to understand the COVID-19 outbreak in the U.S. *See* https://covidtracking.com/data.

Regardless, even if testing shortages resume or remain in some pockets of California, as with other areas around the country, that does not provide a legitimate basis to deviate from the federally-mandated requirement to establish consistent recordability criteria. Indeed, it would make it all the more important for California to align its recording requirements with federal OSHA's. Otherwise, trend analyses will be artificially skewed, distorting the picture of virus transmission nationally, and showing a disproportionate COVID-19 impact on California employers. Significant concern exists among this Coalition that this artificial picture will create the false impression that California employers are not acting as responsibly to protect their employees as employers in other states. This would be an unfair and unjustified conclusion, but nonetheless would be difficult to combat.

Furthermore, the portion of Cal/OSHA's COVID-19 recordkeeping FAQs related to confirmed cases is unworkably vague and will result in over-recording non-COVID cases due to confusion about whether an illness is actually a COVID-19 case. That is especially true now that CDC has expanded the list of potential COVID-19 symptoms to include very common ailments like headache and diarrhea. It is not clear whether Cal/OSHA requires a presumption that an illness is COVID-19 any time an employee presents with such symptoms, or the other common cold and flu symptoms that overlap with COVID-19. It is also not clear whether Cal/OSHA even requires a diagnosis by a medical professional, or if an employee's self-diagnosis would be sufficient. This will surely be applied differently by different employers, driving the kind of variance in recordability outcomes that federal OSHA was trying to avoid when it promulgated 29 C.F.R. 1904.37(a).

Finally, to the extent Cal/OSHA's expansive criteria is designed to catch suspected cases to ensure adequate contact tracing, again the rationale is flawed. Employers do not rely on OSHA 300 Logs to identify employees for whom contact tracing should be conducted. Cases do not even need to be recorded on a 300 Log for seven days, so reliance on logs for contact tracing would be woefully inadequate. Likewise, the 300 Log captures only work-related cases, and a contact tracing protocol that is limited only to work-related cases would similarly be woefully inadequate, because employers must isolate and remove potentially infected employees regardless of the origin of the illness. Finally, 300 Logs are not a source relied on by state and county health departments as a tool to track COVID-19 cases. Accordingly, revising Cal/OSHA's FAQs to reflect federal OSHA's criteria would have no impact on contact tracing efforts by employers or any agency.

B. <u>The Standard for Work-Relatedness</u>

Federal OSHA directs employers to find work-relatedness for COVID-19 cases only where it is "more likely than not" that the illness was caused by an exposure in the workplace, based on reasonably available evidence, and in the absence of an equally or more likely alternative (non-work) explanation for the illness. Illnesses of uncertain origin are not presumed to be work-related, and indeed, where there may be both work-related as well as non-work-related possible explanations for an employee's illness, federal OSHA makes clear the case is not work-related. This "more likely than not" standard, without a presumption, is the standard that OSHA has always applied to any work-relatedness analysis involving an injury or illness of uncertain origin.

Cal/OSHA, however, has flipped this longstanding standard for work-relatedness on its head, instead establishing a presumption of work-relatedness, which would require logging a COVID-19 case even where there is an equally likely, non-work cause of an individual's illness. Also, it seems that the only situation in which Cal/OSHA even allows consideration of a non-work COVID-19 exposure is when there is no identifiable work-related exposure at all. In all other circumstances, especially in the very common and murky area where there are multiple identifiable sources of exposure within and outside the workplace, Cal/OSHA FAQs demand a conclusion of work-relatedness. For instance, examples of "work-related" exposures that would need to be logged under the FAQs include:

- Working in the same area where people known to have been infected had been; or
- Sharing tools, materials or vehicles with persons known to have been infected.

While these factors certainly should be considered in a work-related analysis, as they are under federal OSHA's guidance, these factors alone would not render a case "work-related" under federal OSHA's criteria, especially where there is a discernable basis to believe a non-work-related exposure was as likely the source of transmission (e.g., the employee's spouse contracted the illness a few days earlier).

The Cal/OSHA guidance leaves no room even to consider the employee's own belief as to where he/she contracted the illness. The members of this Coalition have identified numerous instances where there has been more than one COVID-19 case at a workplace, but where one or more of those employees notified the employer that the employee himself believed he contracted the virus outside the workplace – such as, while attending an event or party, traveling out of state for personal reasons, or having a family member who works in a hospital and was exposed, etc. Under federal OSHA guidance, those cases were properly determined to be not work-related, but because of the new presumption established by Cal/OSHA's guidance, those cases presumably are work-related in California.

In addition, Cal/OSHA's guidance includes no suggestion that the work-related presumption is rebuttable, nor does it provide any guidance on what would be needed to rebut this presumption if it is even rebuttable under any circumstances. Rather, the guidance makes clear that employers must "err[] on the side of recordability." Thus, in situations where an employer identifies any "work-related" factor (e.g., an employee used a tool that also had been used by another employee who had COVID-19), but also a non-work-related factor (e.g., the employee attended a July 4th barbeque with a cousin who had contracted COVID-19), Cal/OSHA's directive is to find work-relatedness and log the case, without consideration of the non-work exposures or even the infection control measures implemented at the workplaces (e.g., requiring the wearing of masks, social distancing measures, or enhanced sanitation, etc.).

As illustrated above, Cal/OSHA's May 27th FAQs directly contradict federal OSHA's "more likely than not" criteria that weighs non-work exposures equally and will result in overreporting and data contamination. The FAQs are inconsistent with the regulation

requiring State Plans to have the same requirements as federal OSHA for determining which injuries and illnesses are recordable.

III. Consequences and Burdens of Cal/OSHA's Diverging Recordability Criteria

The Coalition's concern regarding Cal/OSHA's deviation from federal OSHA recordkeeping criteria is not simply an esoteric one. Compliance with the criteria laid out in Cal/OSHA's FAQs will have real and significant negative consequences for the regulated community. Importantly, it also will hamper the ability of OSHA and State Plan states from accurately tracking COVID-19 transmission and identifying trends.

A. Distortion of an Accurate Record of COVID-19 Cases

Cal/OSHA has cast a broader net for capturing COVID-19 cases on California employers' 300 Logs than will be captured on employers' logs everywhere else in the country, rendering accurate comparative analysis of OSHA 300 Log data essentially impossible. This raises several serious concerns. First, for employers with facilities in both California and other parts of the country, their facility logs will almost inevitably skew to higher caseloads at their California facilities. This will make it appear that risk mitigation measures and safety protocols in place in their California facilities are less effective than measures implemented in other states, even if California facilities' exposure control plans and mitigation measures are equal or even superior to their sister facilities.

Because the federal OSHA and Cal/OSHA recordkeeping standards are different, the data will have lost its meaning. Company safety professionals will have no way of knowing which COVID-19 safety measures are working and which are not working. The data distortion could and likely will hamper critical job hazard analyses and evaluation of risk mitigation protocols and controls, and may improperly drive resource decisions.

Additionally, the same data distortion will occur for OSHA and the State Plans. OSHA relies on 300 Logs to identify injury and illness trends, and to assess existing hazards, but because California Log data will not reflect an "apples to apples" comparison, any trend analysis will be distorted and inaccurate.

B. Undue and Unfair Risks and Burdens on California Employers

Following Cal/OSHA recordkeeping guidance, California employers will inevitably log higher recordable numbers than employers in every other state, *even under scenarios that present precisely the same circumstances,* which will in turn have myriad consequences.

First, although employers have not yet fully realized these consequences, it is eminently reasonable to assume that the high COVID-19 caseload on OSHA logs will negatively impact California companies' contract bidding opportunities, especially in the construction and aerospace/defense industries, where the safety record of potential contractors is carefully

scrutinized. Likewise, and more generally, the risk of reputational harm associated with increased injury and illness recordables and/or DART rates is real and significant.[4]

Second, because DART rates are an element in most workers' compensation insurance rate modifiers, a disproportionate number of recordable illnesses for California employers will result in disproportionately higher workers' compensation insurance rates, not because California employers are experiencing higher instances of work-related illnesses, but just because Cal/OSHA has set a unique standard for recording such cases.

Finally, because Cal/OSHA expressly endorsed federal OSHA's COVID-19 recordkeeping guidance until its May 27th reversal, California employers face significant confusion over which is the proper standard for COVID-19 recordkeeping. It also is unclear which standard applies to COVID-19 cases recorded during the first few months of the pandemic. Retroactive application of Cal/OSHA's contradictory recordability standard would require California employers to revisit the recordability determinations of every potential COVID-19 related illness made between January and May 27th, creating an extraordinary burden that only California employers would have to bear.

An important point to clarify is that Cal/OSHA's realignment of its recordkeeping criteria with federal OSHA's will not interfere with or affect in any way an employee's ability to receive benefits for COVID-19 illnesses under California's workers' compensation program. The work-relatedness standard for federal OSHA 300 Log recording purposes is different than the standard for benefits under California's workers' compensation laws. In fact, by executive order, Governor Newsom ordered that any COVID-19-related illness must be presumed to "arise out of and in the course of employment" for purposes of awarding workers' compensation benefits. That mandate is unaffected by employers' 300 logs.

IV. Conclusion

For all the reasons discussed above, Cal/OSHA's unique COVID-19 recordkeeping standard places California employers between the proverbial rock and a hard place. They can follow federal guidance and risk harsh enforcement[5] for violating Cal/OSHA's unique recordkeeping criteria, or they can follow Cal/OSHA's recordkeeping criteria to avoid enforcement, but be exposed to myriad other negative consequences associated with artificially elevated COVID-19 recordable cases on their 300 Logs. Accordingly, we respectfully request Cal/OSHA rescind the COVID-19 FAQs referenced herein and promptly

---

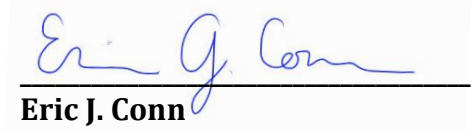
[4] The requirement to annually upload electronic recordkeeping data subjects this data to public availability. While federal OSHA's current policy has been to temporarily withhold this data from public disclosure, federal courts have rejected that policy.

[5] Recordkeeping violations are among the most common citations that Cal/OSHA characterizes as "repeat" violations, which results in steep penalties, upwards of potentially $132,765 per violation. Recordkeeping violations also are among the small set of citations that may be assessed on a "violation-by-violation" basis, with separate fines for each instance of a recordkeeping violation that constitutes "an egregious or flagrant violation."

reissue revised guidance that is fully consistent with federal OSHA's COVID-19 recordkeeping criteria.

We appreciate your interest in this matter and look forward to an opportunity to meet with you at your earliest convenience regarding this matter.

Sincerely,



Eric J. Conn
Andrew J. Sommer
Conn Maciel Carey LLP

Counsel for the Coalition for Uniformity in COVID-19 Recordkeeping

Rob Moutrie
Policy Advocate

California Chamber of Commerce

In conjunction with:

California Retailers Association
Crane Owners Association
FMI (The Food Industry Association)
National Retail Federation
Retail Industry Leaders Association