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Adverse Reactions to COVID-19 Vaccines Are NOT Recordable On Your OSHA 300 Log

By Conn Maciel Carey's COVID-19 Task Force

Our national OSHA Practice at Conn Maciel Carey has been advocating hard to OSHA about COVID-19 related recordkeeping issues. One of those issues has been the recordability of adverse reactions to the COVID-19 vaccine. Specifically, if we want to encourage more workers to get vaccinated, and to encourage more employers to mandate, incentivize, or encourage employees to get vaccinated, OSHA should not require employers to record adverse reactions to the vaccines as days away illnesses on their 300 Logs.

Many people have experienced something of a flu-like reaction to the COVID-19 vaccines, and often have required at least a day away from work the day after the second dose. OSHA had previously indicated that many of these reactions would be recordable on the OSHA 300 Log, especially if the employer required or strongly encouraged the vaccine, or if the circumstances of the job made vaccination something of a *de facto* requirement.



In mid-April, OSHA clarified its position in a couple of FAQs about the recordability of adverse reactions to the vaccine in a couple of FAQs on its COVID-19 page. At that time, OSHA said:

If I require my employees to take the COVID-19 vaccine as a condition of their employment, are adverse reactions to the vaccine recordable?

If you *require* your employees to be vaccinated as a condition of employment (i.e., for work-related reasons), then any adverse reaction to the COVID-19 vaccine is work-related. The adverse reaction is recordable if it is a new case under 29 CFR 1904.6 and meets one or more of the general recording criteria in 29 CFR 1904.7.

I do not require my employees to get the COVID-19 vaccine. However, I do recommend that they receive the vaccine and may provide it to them or make arrangements for them to receive it offsite. If an employee has an adverse reaction to the vaccine, am I required to record it?

No. Although adverse reactions to *recommended* COVID-19 vaccines may be *recordable* under 29 CFR 1904.4(a) if the reaction is: (1) work-related, (2) a new case, and (3) meets one or more of the general recording criteria in 29 CFR 1904.7, OSHA is exercising its enforcement discretion to only require the recording of adverse effects to *required* vaccines at this time. Therefore, you do not need to record adverse effects from COVID-19 vaccines that you *recommend*, but do not require.

Note that for this discretion to apply, the vaccine must be truly voluntary. For example, an employee's choice to accept or reject the vaccine cannot affect their performance rating or professional advancement. An employee who chooses not to receive the vaccine cannot suffer any repercussions from this choice. If employees are not free to choose whether or not to receive the vaccine without fearing adverse action, then the vaccine is not merely "recommended" and employers should consult the above FAQ regarding COVID-19 vaccines that are a condition of employment.

Note also that the exercise of this discretion is intended only to provide clarity to the public regarding OSHA's expectations as to the recording of adverse effects during the health emergency; it does not change any of employers' other responsibilities under OSHA's recordkeeping regulations or any of OSHA's interpretations of those regulations.

Finally, note that this answer applies to a variety of scenarios where employers recommend, but do not require vaccines, including where the employer makes the COVID-19 vaccine available to employees at work, where the employer makes arrangements for employees to receive the vaccine at an offsite location (e.g., pharmacy, hospital, local health department, etc.), and where the employer offer the vaccine as part of a voluntary health and wellness program at my workplace. In other words, the method by which employees might receive a recommended vaccine does not matter for the sake of this question.

After we advocated hard for OSHA to reconsider that policy, in written comments about the ETS, in one of our meetings with OIRA, and in direct advocacy to senior officials at OSHA, the agency updated that policy over the

weekend. It's nice to be heard once in a while. Here is what that same section of FAQs now says:

Vaccine Related

Are adverse reactions to the COVID-19 vaccine recordable on the OSHA recordkeeping log?

DOL and OSHA, as well as other federal agencies, are working diligently to encourage COVID-19 vaccinations. OSHA does not wish to have any appearance of discouraging workers from receiving COVID-19 vaccination, and also does not wish to disincentivize employers' vaccination efforts. As a result, OSHA will not enforce 29 CFR 1904's recording requirements to require any employers to record worker side effects from COVID-19 vaccination through May 2022. We will reevaluate the agency's position at that time to determine the best course of action moving forward.

As we have discussed several times over the last year, it is our position that any change set by federal OSHA in recordkeeping requirements as to what needs to be recorded on the 300 Log applies everywhere. While this is technically an FAQ and an FAQ that talks about OSHA exercising enforcement discretion, we still believe that principle behind 1904.37(b) applies, and requires consistency: OSHA regulations provide 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." The language of the regulation is clear, and its purpose was made clearer when OSHA explained in the preamble that "[t]hese 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."

This is a great start. Now we just need to get OSHA to agree to exempt COVID-19 cases from recordkeeping altogether.

Contact any of the OSHA-specialist attorneys with Conn Maciel Carey's national OSHA Practice if you have any questions.

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