JUNE 2, 2020 | LEGISLATIVE & STANDARDS BOARD UPDATES

Cal/OSHA Establishes a Presumption of Work Relatedness in new COVID-19 Recording and Reporting Guidance

By Conn Maciel Carey's COVID-19 Task Force

As we previously reported, in early April, the Head of Cal/OSHA, Division Chief Doug Parker, provided feedback about Cal/OSHA's COVID-19 Recordkeeping and Reporting expectations. The signal to employers back then was that Cal/OSHA would be following Federal OSHA's guidance on when employers must record COVID-19 cases on their 300 Logs, and that is not very often.

Just last week, however, Cal/OSHA issued a new set of COVID-19 Recordkeeping and Reporting FAQs, indicating that it has changed course from Division Chief Parker's April letter. This move comes only a few days after Fed OSHA reversed course with respect to its own COVID-19 Recordkeeping and Reporting guidance.



State of California
Department of Industrial Relations

Recording and Reporting Requirements for COVID-19 Cases
Frequently Asked Questions

1. **Do employers have to record COVID-19 illnesses on their Log 300?**

Yes, California employers that are required to record work-related fatalities, injuries and illnesses must record a work-related COVID-19 fatality or illness like any other occupational illness. To be recordable, an illness must be work-related and result in one of the following:

- Death.
- Days away from work.
- Restricted work or transfer to another job.
- Medical treatment beyond first aid.
- Loss of consciousness.
- A significant injury or illness diagnosed by a physician or other licensed health care professional.

If a work-related COVID-19 case meets one of these criteria, then covered employers in California must record the case on their 300, 300A and 301 or equivalent forms.

See California Code of Regulations, title 8, Chapter 7, Subchapter 1, Article 2, Employer Records of Occupational Injury or Illness for details on which employers are obligated to report and other requirements.

2. **Does a COVID-19 case have to be confirmed to be recordable?**

Pursuant to recent federal OSHA guidance, a COVID-19 case should generally be confirmed through testing to be recordable. However, due to testing shortages and a variety of other reasons, not all persons determined to have COVID-19 have been tested.

Thus, while Cal/OSHA considers a positive test for COVID-19 determinative of recordability, a positive test result is not necessary to trigger recording requirements. There may be other situations in which an employer must make a recordability determination even though testing did not occur or the results are not available to the employer. In these instances, the case would be still be recordable if it meets any one of the other general recording criteria from Section 14300.7 described above, such as resulting in days away from work. Cal/OSHA recommends erring on the side of recordability.

3. **How does an employer determine if a COVID-19 case is work-related for recordkeeping purposes?**

For recordkeeping purposes, an injury or illness is considered work-related if an event or exposure in the work environment either caused or contributed to the resulting condition, or significantly aggravated a pre-existing injury or illness. An injury or illness is presumed to be work-related if it results from events or exposures occurring in the work environment unless an exception in section 14300.5(b)(2) specifically applies.

A work-related exposure in the work environment would include interaction with people known to be infected with

To be clear, while Fed OSHA's latest COVID-19 Recordkeeping guidance does retreat from some of the early relief OSHA had offered employers, in substance, it merely changes the landscape around the edges — requiring

more employers to analyze work-relatedness for COVID-19 cases. Still fed OSHA only requires recording or reporting COVID-19 cases where it is "more likely than not" that a COVID-19 case resulted from workplace exposure, based on reasonably available evidence, and the absence of any alternative (non-work) explanation for the employee's illness.

Among other stark differences, Cal/OSHA's new guidance flips the burden of establishing work-relatedness on its head. Now, according to Cal/OSHA, a COVID-19 case in California will be presumed to be work-related if *any* workplace exposure is identified, even if the cause of the illness is more likely attributable to a non-workplace exposure.

Confirmed Case

Unlike Fed OSHA's previous and current recordkeeping guidance, Cal/OSHA's FAQs now make clear that Cal/OSHA does NOT require a positive test for COVID-19 to be necessary to trigger recording requirements. Cal/OSHA states:

"There may be other situations in which an employer must make a recordability determination even though testing did not occur or the results are not available to the employer. In these instances, the case would be still be recordable if it meets any one of the other general recording criteria [(death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness, or a significant injury or illness diagnosed by a physician or other licensed health care professional)], such as resulting in days away from work. Cal/OSHA recommends erring on the side of recordability."

Work-Relatedness

More importantly, Cal/OSHA is diverging dramatically from Fed OSHA in terms of how employers are expected to determine whether an employee's COVID-19 infection is work-related. Rather than adopting Fed OSHA's "more likely than not" standard and Fed OSHA's carve-out from work-relatedness for cases where there any identifiable alternative (non-work) explanation for the employee's illness, Cal/OSHA has essentially established a presumption of work-relatedness if there is any identifiable workplace exposure that can be shown.

Cal/OSHA's FAQs identify the following factors as reflecting a work-related exposure:

1. Interactions with people known to be infected with the virus (apparently at any distance and for any duration);
2. Working in the same area where people known to have been carrying the virus had been; or
3. Sharing tools, materials or vehicles with persons known to have been carrying the virus.

If any of that occurs and the employee who experienced that interaction at work later develops the illness, the case is presumptively work-related. Cal/OSHA's guidance does not, however, say whether that presumption is rebuttable, or if it is, how and what standard the rebuttal evidence must meet. Thus, it is not clear how Cal/OSHA expects employers to evaluate circumstance where a workplace exposure can be identified, but a non-work exposure is also identifiable and much more likely to have caused the illness.

For example, an employee wearing a face covering had a thirty-second conversation two-feet away from an

infected co-worker who was also wearing a face covering, but the employee also lives with a spouse who tested positive two days before the employee. The much more likely cause of the illness is the close contact with the spouse, but by Cal/OSHA's standard, the mere possibility of exposure in the workplace makes it presumptively work-related. Per Cal/OSHA's guidance, this case is presumptively work-related.

In such an instance, we advise documenting the conclusions as to work-relatedness with assistance from Conn Maciel Carey's Work-Relatedness Questionnaire, and if the illness is recorded as a result of the presumption, documenting the company's belief that it is not work-related, but is being recorded solely because of the presumption in Cal/OSHA's guidance. If a decision to not record is made, documenting the reasons the company determined that the presumption was rebutted is even more important.

Cal/OSHA further instructs that even if there is NOT a known workplace exposure that would trigger the presumption of work-relatedness, employers must still evaluate the employee's work duties and environment to determine the likelihood that the employee was exposed during the course of their employment. Specifically, Cal/OSHA identifies the following factors that would be relevant for that analysis:

- The type, extent and duration of contact the employee had at the work environment with other people, particularly the general public.
- Physical distancing and other controls that impact the likelihood of work-related exposure.
- Whether the employee had work-related contact with anyone who exhibited signs and symptoms of COVID-19.

Note that Cal/OSHA's FAQ guidance was published May 27, 2020, but unlike Fed OSHA's May 19th guidance, Cal/OSHA's FAQs do not list an effective date. It seems, therefore, that Cal/OSHA does not intend for the FAQs to reflect a change in how employers determine work-relatedness, but rather a clarification of how it should have been determined from the outset of the COVID-19 pandemic. Thus, COVID-19 cases in California from May and earlier may need to be re-evaluated, or evaluated for the first time, using this new standard.

Quarantine as Days Away from Work

Cal/OSHA's guidance also includes a somewhat muddled clarification about counting quarantine days as days away from work for recordkeeping purposes. The Cal/OSHA FAQ document provides:

"Is time an employee spends in quarantine considered 'days away from work' for recording purposes?

No. Unless the employee has a work-related illness that would otherwise require days away from work, time spent in quarantine is not "days away from work" for recording purposes."

One logical reading of that language is that if an employee contracts COVID-19 at work, remains asymptomatic and physically able to work at all times, but quarantines on doctor's orders, that is not a recordable case because those quarantine days do not count as days away. That would be in conflict with Fed OSHA, which has expressed that quarantine days count as days away regardless of the employee's physical ability to work during the quarantine (even if the employee does in fact work from home during the quarantine).

Another logical reading of Cal/OSHA's guidance is that quarantine days do not count only if it was a

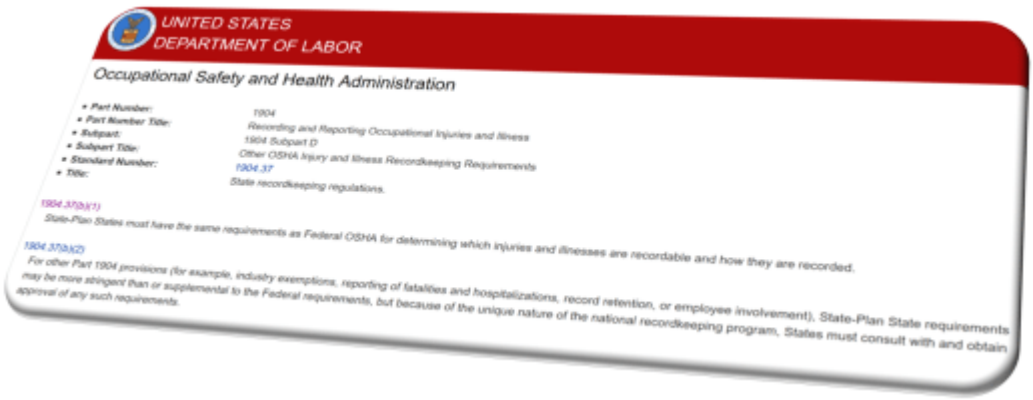
precautionary quarantine (e.g., because of a close contact with a sick co-worker), and it is later confirmed that the employee never actually contracted the illness. Knowing that Cal/OSHA is intending to expand recordable cases, not shrink them, the latter reading is the more likely of the two, but employers would have a defensible position based on the first reading.

Are Cal/OSHA COVID-19 Recording FAQs Lawful?

As a general rule, State OSH Plans are required to be "at least as effective" as fed OSHA, which means, they generally are permitted to mandate that employers meet more stringent requirements than fed OSHA expects. For example, State Plans have authority to ask employers to report more injuries and illnesses (which Cal/OSHA does), and they can set other unique, more stringent regulatory requirements, like fall protection requirements triggered at lower heights, lower PELs for chemical exposures, or more demanding PPE requirements. But OSHA's recordkeeping regulation at 29 C.F.R. 1904.37(b)(1) provides:

State-Plan States must have the same requirements as Federal OSHA for determining which injuries and illnesses are recordable and how they are recorded.

Accordingly, whether an injury or illness is recordable is **one** regulatory requirement about which state plans may not be more restrictive. The idea is that a recordable should be a recordable no matter where you are; so Cal/OSHA may not lawfully require employers to record an injury or illness if that same injury or illness would not be recordable in a fed OSHA state.



An outcome-based analysis of Cal/OSHA's COVID-19 recordkeeping guidance vs. fed OSHA's guidance will surely reveal that there are cases that will have to be recorded in California that would not be recordable in fed OSHA states. Take the example above of the employee with COVID-19 who was briefly exposed to a co-worker who had previously contracted the virus while both were wearing respiratory protection, but the employee also lives with a spouse who contracted the virus a few days earlier. That employee's COVID-19 illness would surely not but recordable in a fed OSH jurisdiction, but would be presumptively recordable in California. That is impermissible.

More COVID-19 cases on your logs can create significant risk of liability. For example, there is no doubt an avalanche of wrongful death and personal injury suits waiting around the corner, and while recording an illness is not an admission of wrong-doing, it is an admission that the illness was spread in your workplace. Plaintiffs' attorneys will try to make hay of that to show that your exposure control efforts were not effective, or to show that infections of their clients (customers, contractors, family members of employees, whose suits would not be

barred by worker's compensation exclusivity) likely were also contracted in your workplace because of inadequate protections in your workplace. And of course, more illnesses having to be recorded also creates more potential for Cal/OSHA citations for failure to record, or failure to record timely or accurately, as discussed at the end of this article.

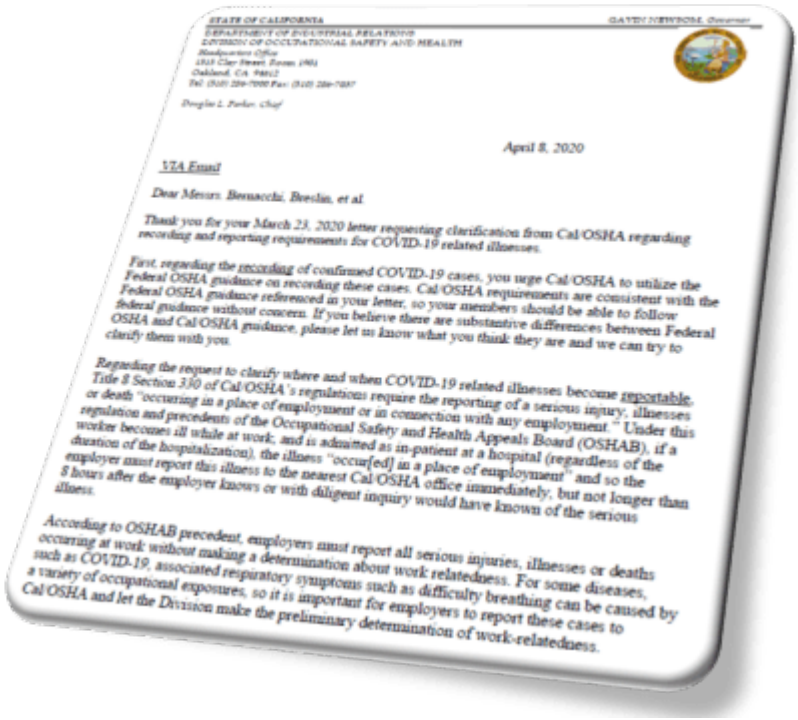
Fed OSHA has a mechanism by which employers – or any individuals for that matter – who find problems with the administration of a state OSH Plan can file a formal complaint with fed OSHA – a "Complaint About State Program Administration" (CASPA). OSHA has a regulation that lays out the CASPA process, which provides:

Any interested person or representative of such person or groups of persons may submit a complaint concerning the operation or administration of any aspect of a State plan. The complaint may be submitted to the Assistant Regional Director for Occupational Safety and Health (hereinafter referred to as the Assistant Regional Director) or his representative in the Region where the State is located.

For purposes of a challenge to Cal/OSHA's recordkeeping program, that would be filed with fed OSHA's Region 9 (San Francisco) Regional Office. Contact us to discuss that possibility in this circumstance.

Reporting COVID-19 Cases in California

On the ***reporting*** side, Cal/OSHA's FAQs are mostly consistent with Division Chief Parker's April 8, 2020 letter. That is, both pieces of guidance explain that reporting obligations under Cal/OSHA regulations are much broader than Fed OSHA's. Employers in California must report to Cal/OSHA any COVID-19 cases that result in an in-patient hospitalization or death of an employee if the illness either occurred ***in connection with work*** (i.e., the illness was caused by an exposure at work), or occurred ***in the place of employment*** (even if it is clearly not work-related).



STATE OF CALIFORNIA — GAVIN NEWSOM, Governor

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Douglas L. Parker, Chief

April 8, 2020

VIA Email

Dear Messrs. Bernacchi, Breslin, et al.

Thank you for your March 23, 2020 letter requesting clarification from Cal/OSHA regarding recording and reporting requirements for COVID-19 related illnesses.

First, regarding the recording of confirmed COVID-19 cases, you urge Cal/OSHA to utilize the Federal OSHA guidance on recording these cases. Cal/OSHA requirements are consistent with the Federal OSHA guidance referenced in your letter, so your members should be able to follow federal guidance without concern. If you believe there are substantive differences between Federal OSHA and Cal/OSHA guidance, please let us know what you think they are and we can try to clarify them with you.

Regarding the request to clarify where and when COVID-19 related illnesses become reportable, Title 8 Section 330 of Cal/OSHA's regulations require the reporting of a serious injury, illnesses or death "occurring in a place of employment or in connection with any employment." Under this regulation and precedents of the Occupational Safety and Health Appeals Board (OSHAB), if a worker becomes ill while at work, and is admitted as in-patient at a hospital (regardless of the duration of the hospitalization), the illness "occur[ed] in a place of employment" and so the employer must report this illness to the nearest Cal/OSHA office immediately, but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the serious illness.

According to OSHAB precedent, employers must report all serious injuries, illnesses or deaths occurring at work without making a determination about work relatedness. For some diseases, such as COVID-19, associated respiratory symptoms such as difficulty breathing can be caused by a variety of occupational exposures, so it is important for employers to report these cases to Cal/OSHA and let the Division make the preliminary determination of work-relatedness.

So, if an employee contracts the illness from a workplace exposure, experiences symptoms of the illness anywhere, and is admitted to the in-patient service of a hospital (regardless of the duration of the

hospitalization), that must be reported to the nearest Cal/OSHA office immediately, but not longer than 8 hours after the employer knows or with diligent inquiry should have known of the serious illness. Just as with recording determinations discussed above, the FAQs about reporting also call for something of a presumption. Specifically, the guidance states:

"Where there is uncertainty about whether an employee contracted COVID-19 at work, the employer should err on the side of reporting the illness to Cal/OSHA."

And regardless of work-relatedness, in California, it is also reportable if a non-work-related COVID-19 case "occur[ed] in a place of employment." But the FAQ document clarifies that a COVID-19 illness occurs "in a place of employment," only if "the onset of symptoms occurred at work." In other words, if an employee contracts the illness away from work, and the symptoms of the illness begin to manifest away from work, but the employee later goes to work anyway, the mere fact that he is present at work and experiencing symptoms of the illness does not trigger the reporting requirement.

Cal/OSHA's FAQs explain the reason for this requirement to report non-work-related illnesses. That is, for some diseases, such as COVID-19, associated respiratory symptoms such as difficulty breathing can be caused by a variety of occupational exposures, so it is important for employers to report cases that occur at work without making a determination of work-relatedness.

Recordkeeping and Reporting Citations and Fines

Penalties for violations characterized as "regulatory," which would include non-willful and non-repeat recordkeeping violations, generally range from $500 to $13,277 for each violation. See 8 CCR section 336(a). Some specific violations trigger higher minimum penalties, for example reporting violations (see below). See 8 CCR section 336(a)(2)-(6). The actual penalty amount may be adjusted based on size of the employer, good faith, and history of previous violations.

Note that there is the potential for penalties to be assessed for *each instance* of a recordkeeping violation that constitutes "an egregious or flagrant violation" of the safety order, resulting in multiple penalties associated with a single OSHA log. The Division recognizes "violation-by-violation" penalties consistent with federal OSHA practice, meaning that civil penalties may be assessed for *each instance* of a recordkeeping violation (i.e., each case that is not recorded, or that is not recorded timely or accurately). See DOSH Policy and Procedures Manual, C-10A. Specifically, the Cal/OSHA policy provides:

"NOTE: For application of the violation-by-violation policy to Willful/Regulatory violations, including Recordkeeping violations, District Managers shall contact the Legal Unit for assistance."

For reporting violations, as opposed to recording violations, there is a minimum penalty of $5,000 for failure to timely report an employee's serious injury or illness, or death of an employee in violation of section 342(a). See 8 CCR section 336(a)(6). Note that if the employer notifies Cal/OSHA of a reportable injury or illness, but that notification is beyond the allowed reporting time, the Appeals Board has held that there may be a reduction in the amount of the $5,000 penalty. The penalty may also be reduced where appropriate based on the employer's

size, good faith and citation history. *See Central Valley Engineering and Asphalt*, 2012 CA OSHA App. Bd. LEXIS 176, *16-17 (2012), finding that the $5,000 gravity based penalty could be modified for factors of size, history and good faith:

"Treating this employer who reported a few days late, the same as those who fail to report at all leads to an unjust and absurd results."

Recordkeeping and reporting violations are also among the most common citations that Cal/OSHA characterizes as "repeat" regulatory violations, which results in much higher per violation penalties. The penalties for repeat regulatory violations escalate according to this formula:

- 1st repeat – proposed penalty multiplied x 2
- 2nd repeat – proposed penalty multiplied x 4
- 3rd repeat and beyond – proposed penalty multiplied x ten.
- The maximum penalty is $132,765.

If any repeat violation is determined to be Repeat-Willful, the proposed penalty is multiplied x 5, with a minimum penalty of $9,483 and maximum of $132,765.

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Reach out to any of the OSHA-specialist **attorneys in Conn Maciel Carey's national OSHA Practice Group** if you have questions about:

1. Whether a specific injury or illness is recordable or reportable to Cal/OSHA;
2. When the report is actually due;
3. How to record the illness or make the report;
4. What information to share with Cal/OSHA in the report; and/or
5. How to manage Cal/OSHA's response to the report.

We would love to be a resource for you, and would be happy to provide some free advice around these thorny recordkeeping and reporting issues.

For additional resources on issues related to COVID-19, please visit Conn Maciel Carey's COVID-19 Resource Page for an extensive index of frequently asked questions with our answers about HR, employment law, and OSHA regulatory related developments and guidance, as well as COVID-19 recordkeeping and reporting flow charts. Likewise, subscribe to our Employer Defense Report blog and OSHA Defense Report blog for regular updates about the Labor and Employment Law or OSHA implications of COVID-19 in the workplace. Conn Maciel Carey's COVID-19 Task Force is monitoring federal, state, and local developments closely and is continuously updating these blogs and the FAQ page with the latest news and resources for employers.

