

MARCH 22, 2021 | LEGISLATIVE & STANDARDS BOARD UPDATES

Six Important Updates About Cal/OSHA and Federal OSHA COVID-19 Recordkeeping

By *Conn Maciel Carey's [COVID-19 Task Force](#)*

It has been a little while since we last shared an update about COVID-19 recordkeeping issues. Since [Fed OSHA issued its COVID-19 recordkeeping guidance in May 2020](#) and [Cal/OSHA issued its controversial COVID-19 Recordkeeping FAQs with unique requirements](#), the agencies have been mostly quiet about COVID-19 recordkeeping. But that does not mean there have not been significant developments in that area or that there are no important developments to monitor closely.

Here are six notable COVID-19 recordkeeping (and general reporting) updates that we wanted to share with you:

1. Congressional Intervention About Cal/OSHA's COVID-19 Recordkeeping FAQs

As we explained last year, [Cal/OSHA's May 27th COVID-19 Recordkeeping FAQs](#) departed from Fed OSHA's COVID-19 recordkeeping requirements in two key ways: (i) rejecting Fed OSHA's recordability precondition of a

positive COVID test, flipping the burden of establishing work-relatedness on the employer's head, setting instead a presumption of work-relatedness if any workplace exposure can be identified, even if the cause of the illness is just as likely to be attributable to a non-work exposure.



Aside from being bad policy that will result in many non-work related illnesses being recorded on California employers' 300 Logs, Cal/OSHA is not legally permitted to deviate from Fed OSHA's recordkeeping requirements.

The latest big development on that front was a helpful letter from the U.S. Department of Labor responding to an inquiry about this issue from a group of California Congressmen, in which DOL confirms that Cal/OSHA should be following the same recordkeeping requirements as Fed OSHA. Despite the clear statements in Cal/OSHA's FAQs that a "confirmed case" is not required for recordkeeping and that work-relatedness should be presumed, the federal Department of Labor explained in its letter to the Congressmen:

"The FAQs reference federal OSHA's guidance and state that 'a COVID-19 case should generally be confirmed through testing to be recordable,' consistent with federal OSHA. We note the suggestion that there may be some instances of recordable cases without testing is limited to rare situations, such as where testing is not available. Cal/OSHA advises that it has not issued any recordkeeping citations without a confirmed COVID-19 case."

"OSHA believes that Cal/OSHA's guidance with respect to work-relatedness is also consistent with OSHA's guidance...." Here, DOL goes even further, essentially suggesting that Cal/OSHA's FAQs should not be given weight: "[G]uidance on Cal/OSHA's website makes clear that the FAQs are not a substitute for the recordkeeping standard. Thus, the recordkeeping standard itself—not Cal/OSHA's FAQs—governs the recordability of these cases." Ultimately, DOL offered that "[t]o the extent Cal/OSHA's FAQs appear to create any significant difference between the state and federal COVID-19 recordkeeping requirements, OSHA will work with Cal/OSHA to consider clarifying changes to its FAQs."

[Here is a link](#) to a copy of the letter from DOL to the California Congressmen.

2. President Biden’s OSHA Passed on an Early Opportunity to Change Fed OSHA’s COVID-19 Recordkeeping Guidance

As much as we have been encouraging Cal/OSHA to realign its COVID-19 recordkeeping requirements with federal OSHA’s less burdensome position, we have been worried that federal OSHA, now under a Biden Administration, would move the national COVID-19 recordkeeping position to align with Cal/OSHA’s more burdensome interpretation. Fed OSHA just had a major opportunity to do precisely that and passed on it.

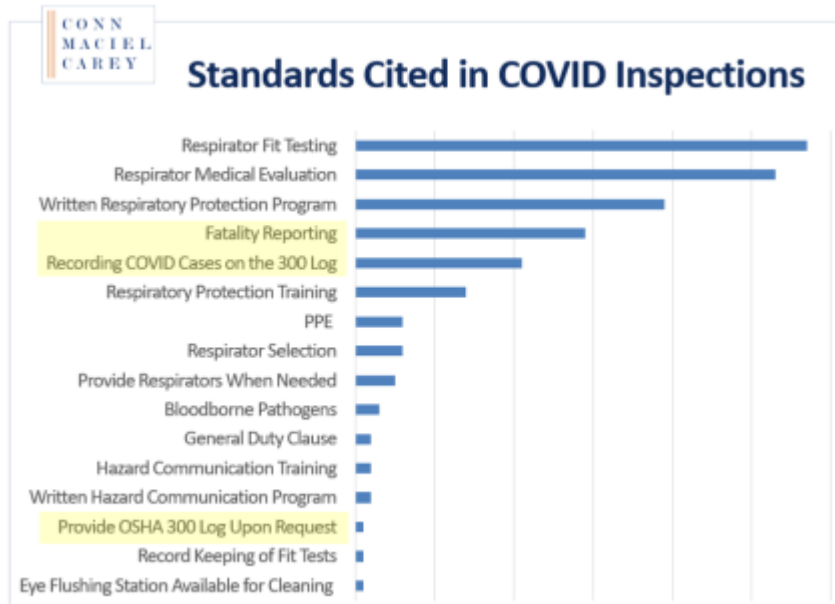


Specifically, OSHA just announced significant updates to its [Interim Enforcement Response Plan](#), which details how OSHA’s field staff should conduct COVID-related inspections. That response plan happens to be the same tool that OSHA has used to detail for the public the agency’s position about COVID-19 recordkeeping. If OSHA was going to offer a less generous position on COVID recordkeeping, it would start by updating this Interim Enforcement Response Plan to change or delete that guidance. OSHA may still do that at some point, perhaps through the COVID-19 emergency rulemaking that is underway right now, but it did not disturb that guidance in the updated response plan last week, which is a good sign.

3. COVID-19 Recordkeeping Enforcement

To date, injury and illness recordkeeping and reporting has been Fed OSHA’s 2nd [most frequently cited category of regulatory requirements in the COVID-19 context](#) (behind respiratory protection requirements related to N95 use in healthcare settings). That may change after OSHA issues a COVID-19 emergency temporary standard,

which we expect soon. In the meantime, it seems the OSHA Area Offices are taking a more aggressive view of work-relatedness than fed OSHA COVID-19 recordkeeping guidance suggests is appropriate. Many of those alleged recordkeeping violations are in active contest before the OSH Review Commission right now.



Relevant to the Cal/OSHA recordkeeping controversy discussed above, we have been trying to monitor Cal/OSHA's COVID-related enforcement throughout the year, and to date, we have not yet seen any Cal/OSHA COVID-related recordkeeping violations for cases that would not also have been recordable in a fed OSHA state. We may have missed some, but it is clear enough that as of now, this has not been an enforcement priority for Cal/OSHA. That could change in the near term, or because of the new five-year statute of limitations Cal/OSHA has for recordkeeping violations, it could be something California employers have to deal with a little ways down the road.

4. Exempting COVID-19 From Recordkeeping

At the beginning of the pandemic, OSHA declined to apply the recordkeeping flu exemption to COVID-19 despite the fact that COVID-19 proliferates in the same way as the cold and flu – it is invisible; it is ubiquitous; and it is not unique to the workplace – which is the reason why the cold and flu have always been exempt from OSHA injury and illness recordkeeping. Regrettably, thus far, OSHA has decided that exemption written into the recordkeeping regulations is very narrow; i.e., it applies only to specific cold and flu diagnoses, and thus, confirmed COVID-19 cases are not exempt from recordkeeping. OSHA has not believed that it could lawfully apply such an exemption by policy even if it wanted to; rather, it would have amend the regulatory text.

Since Federal OSHA is currently engaged in a COVID-19 emergency rulemaking right now, we have been recommending to Fed OSHA that it include a COVID-19 recordkeeping exemption in its ETS (in conjunction with establishing a separate COVID-19 tracking system). In connection with that rulemaking, we have had a couple of opportunities to share our input and recommendations to OSHA directly, including about the burden of COVID-19

recordkeeping. We were one of a few employer groups to participate in a Listening Session with OSHA to share our concerns and recommendations as OSHA was drafting the ETS. Then, despite fed OSHA not publishing a proposed rule for public comment, we nevertheless submitted a comprehensive set of [written comments and recommendations to Fed OSHA and OMB](#) about the potential fed OSHA ETS. As part of our long-running effort to ease the COVID-19 recordkeeping burden on employers in all states, we advocated strongly that fed OSHA should use this emergency rulemaking to exempt COVID-19 from 300 Log recordkeeping, just like the cold and flu. Fingers crossed OSHA sees the logic in that decision.



If that did develop, that would also be very significant in California and other State Plan states. Consistent with the position we have been advancing to OSHA and Cal/OSHA throughout the pandemic, since all State Plans must follow fed OSHA's lead on recordkeeping (in terms of what has to be recorded and how to record it), if fed OSHA exempts a particular illness from recordkeeping, all of the State Plans would also be obligated to exempt it from their recordkeeping requirements.

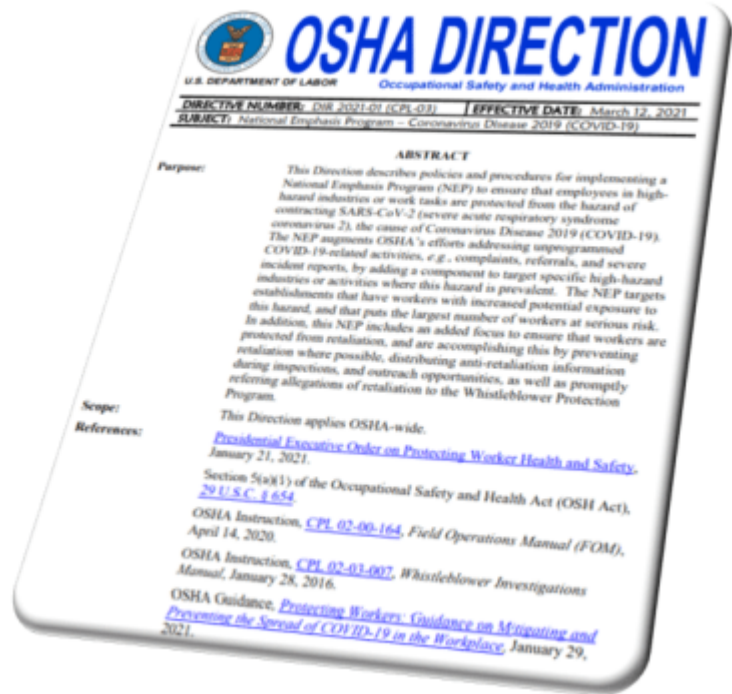
5. COVID-19 Vaccination-Related Recordkeeping Issues

OSHA has fielded a few questions lately about the recordability of bad vaccine reactions in the context of both mandatory and voluntary workplace vaccination programs. The agency has shared some feedback already, but there is still some lack of clarity. What we do know is that OSHA representatives have stated that reactions to the vaccine in the context of an *employer-mandated vaccination program* would be considered work-related, and would be recordable on the 300 Log if the reactions required medical treatment beyond first aid or days away from work.

What we know about recordability in the absence of an employer's explicit vaccine mandate is less clear. On one hand, OSHA's longstanding general rule is that injuries/illnesses that result solely from *voluntary* participation in a medical activity like a flu shot program are **not** work-related. See 29 C.F.R. 1904.5(b)(2)(iii). On the other hand, OSHA has long explained that an employee's vaccination should be considered work-related, even in the absence of an explicit vaccine mandate, if the vaccine is needed for the employee to perform his/her job duties, which OSHA says is the case when "the vaccine is provided to protect the employee from exposure in the work environment." See OSHA Injury and Illness Recordkeeping and Reporting Requirements Q&A Search, FAQ ID: 375 (related to the smallpox vaccine); see also Preamble to the Final Rule on Occupational injury and Illness Recording and Reporting Requirements, 66 FR 5916 (stating that an

employee’s reaction to a vaccine received for travel overseas on business is work-related).

Thus far, OSHA has refused to treat COVID-19 like the flu with respect to recordkeeping obligations. We think OSHA is likely to take a similar approach here to serious reactions to the COVID-19 vaccine, as there are dissimilarities between the COVID-19 vaccine (and employee’s decisions to get it) and vaccines for the flu. OSHA is more likely to determine a COVID-19 vaccine (as compared to a flu vaccine) is necessary to protect employees from exposure in the work environment, particularly at work environments that OSHA views as higher risk. That is especially likely for the industries covered by [OSHA’s new COVID-19 National Emphasis Program](#). Application of that kind of interpretation in low risk exposure workplaces would be a stretch, because it would be difficult for OSHA to show the vaccine is any more necessary for the employee’s job duties than it is for his or her personal life outside the workplace.



Until we get some more clarity from OSHA about this, to the extent it is feasible, we recommend trying to keep track in some form employee vaccine reactions that require medical treatment or days away, especially for vaccinations received during an event coordinated at the workplace.

6. New OSHA Interpretation Letter About Double Reporting Hospitalizations and Fatalities

Finally, although not exclusive to COVID-19, we wanted to share some other OSHA recordkeeping / reporting news – a helpful clarification about “double reporting” to federal OSHA. In response to advocacy by CMC’s OSHA team, OSHA issued a formal letter of interpretation that confirms a position we have been pushing with fed OSHA through a series of contested cases and inspection disputes. Specifically, we have been advocating that pursuant to OSHA’s [hospitalization, amputation, and fatality reporting rule](#), employers are *not required to submit a second report* to OSHA regarding a fatality or other reportable event, if the employer had already reported the

incident to OSHA based on an initial reportable outcome. For example, if an employee's hospitalization is reported to OSHA, and that employee should unfortunately later succumb to the same injury or illness, that more severe outcome is not separately reportable, nor would be a medical-amputation that follows an already-reported hospitalization.



The second report is not required because the initial report to OSHA provides the agency all the notice it needs to begin its own investigation (either through an on-site inspection or the new Rapid Response Investigation protocol). Here is [a link to the new interpretation letter posted on OSHA's website](#). This interpretation limits the number (and nature) of reports employers must make to OSHA.

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