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COVID-19 OSHA Recordkeeping and Reporting: OSHA Reverses Course on Work-Relatedness

By Conn Maciel Carey's COVID-19 Task Force

There are myriad workplace safety and health implications of the COVID-19 pandemic, but one OSHA regulatory obligation about which we have received countless questions the past three months is the requirement to record on an OSHA 300 Log and/or pick up the phone and report to OSHA work-related cases of COVID-19. This article explains the circumstances the OSHA recordkeeping and reporting obligations related to employee COVID-19 cases.

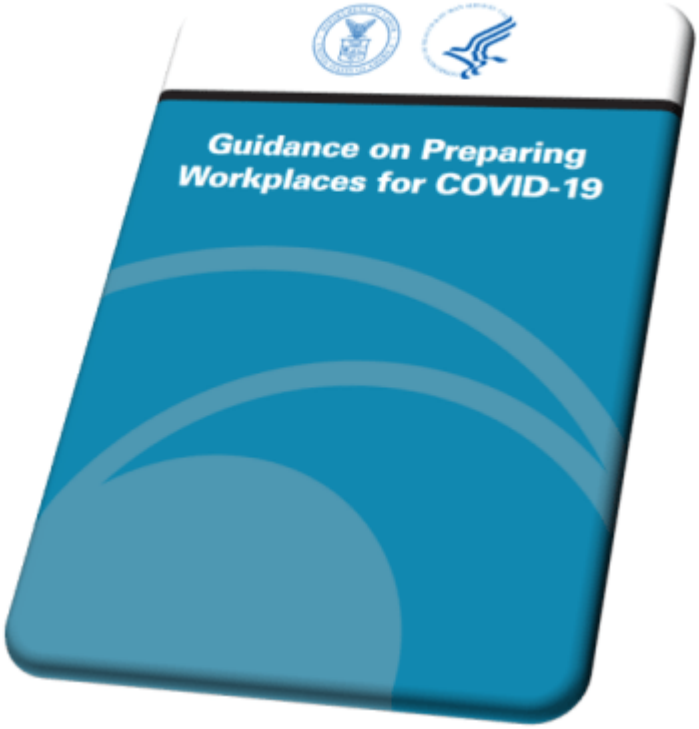
The Cold and Flu Exemption to OSHA Recordkeeping

By regulation, the common cold and flu are exempt from OSHA's recordkeeping and reporting requirements (29 CFR Part 1904.5(b)(2)(viii)):

> ***"An injury or illness occurring in the work environment that falls under one of the following exceptions is not work-related, and therefore is not recordable.... The illness is the common cold or flu."***

The rationale for the exemption is that the spread of the cold and flu is so pervasive and potential exposures are ubiquitous within and outside the workplace, so it can be nearly impossible to identify the specific source of

infection.



Despite great personal sacrifice around the country in the form of mass self-quarantine, the scale of infection of COVID-19 continues to spread like the flu and common cold, with even more dire consequences. Nevertheless, OSHA has repeatedly made clear that COVID-19 is not subject to the cold/flu recordkeeping exemption:

"While 29 CFR 1904.5(b)(2)(viii) exempts recording of the common cold and flu, COVID-19 is a recordable illness when a worker is infected on the job."

OSHA has explained that the cold and flu recordkeeping exemption is not just an OSHA policy or enforcement philosophy. Rather, it is a part of the regulation itself that went through APA notice-and-comment rulemaking. And the scientific reality is, COVID-19 is not the cold or flu. It is a different virus. So without another rulemaking (that history suggests would take longer than it will to eradicate this illness), OSHA cannot just declare this serious illness to be exempt from recordkeeping and reporting requirements.

Indeed, over a series of guidance documents in April and May, OSHA has doubled-down on its decision that employers must spend time determining whether cases of COVID-19 are more likely than not work-related.

Determine Recordability of COVID-19 Cases

Consistent across all of OSHA's COVID-19 guidance has been the basic structure for evaluating whether an employee's COVID-19 case is recordable. Employers will only be responsible for recording a case of COVID-19 if it meets the following criteria:

1. The case is a **confirmed case** of COVID-19;

2. The case involves one or more of the **general recording criteria** in 29 CFR 1904.7 (i.e., medical treatment beyond first aid; days away from work; etc.); and
3. The case **is work-related** as defined in 29 CFR 1904.5.

What is a confirmed case of COVID-19?

The symptoms of COVID-19 are so similar to the cold and flu that in order to distinguish them, for OSHA recordkeeping purposes, the illness must be a confirmed case of COVID-19. It is not enough to self-diagnose or even to have a medical professional opine that an employee's illness is likely coronavirus. Rather, a confirmed case of COVID-19 means an individual with at least one respiratory specimen that tested positive for SARS-CoV-2 virus.

What are the general recording criteria that may make a COVID-19 case recordable?

As to whether the case meets one of the general recording criteria, note that quarantine can constitute days away from work to trigger recording, even if the employee is asymptomatic and would be physically able to work if only he or she was permitted into the workplace. So virtually all confirmed COVID-19 cases will meet at least the days away recording criterion.

How do you determine a COVID-19 infection is work related?

To be recordable, an employee's COVID-19 case must be work-related, and to be work-related the employer must determine that it is more likely than not that an event or exposure in the work environment caused the illness, based on a totality of the circumstances. In the 2001 Preamble to the Final Recording and Reporting Rule, OSHA commented on evaluating contagious illnesses:

> ***[A] problem arises when an employee reports symptoms of a contagious disease that affects the public at large . . . and the workplace is only one possible source of the infection. In these situations, the employer must examine the employee's work duties and environment to determine whether it is more likely than not that one or more events or exposures at work caused or contributed to the condition. If the employer determines that it is unlikely that the precipitating event or exposure occurred in the work environment, the employer would not record the case.***

Thus, under normal circumstances, where it is unclear whether *the exposure* that caused an illness occurred at work or through some other community exposure, then the employer should consider each case on an individual basis and assess the available information about whether the employee's work environment and/or work duties were more likely than not the exposure that caused the illness. For rare illnesses linked to a chemical relatively unique to the workplace, the work-related connection may be obvious. But for COVID-19, while it may be possible to trace a potential exposure to a co-worker or customer in the workplace, with the level of community spread around the world, objectively concluding that exposure was *the exposure* that resulted in the employee's illness is a big stretch. CDC data demonstrates that more than 90% of CDC-reported confirmed COVID-19 cases still have no known origin.

OSHA's April 10th COVID-19 Recordkeeping Guidance

On April 10, 2020, OSHA issued **Enforcement Guidance for Recording Cases of Coronavirus Disease 2019**. That guidance did not outright exempt COVID-19 cases from recordkeeping, like the cold and flu are, but OSHA's intent was to significantly limit recordable cases outside of very high risk exposure workplaces, like hospitals. OSHA essentially established a new standard for evaluating work-relatedness for COVID-19 cases. Here is what it says:


UNITED STATES DEPARTMENT OF LABOR
Occupational Safety and Health Administration

***Until further notice ... OSHA will not enforce 29 CFR § 1904 to require other employers [outside of healthcare, emergency response, and correctional facilities] to make the same work-relatedness determinations, except where . . . [t]here is objective evidence that a COVID-19 case may be work-related. This could include, for example, a number of cases developing among workers who work closely together without an alternative explanation; and . . . [t]he evidence was reasonably available to the employer. For purposes of this memorandum, examples of reasonably available evidence include information given to the employer by employees, as well as information that an employer learns regarding its employees' health and safety in the ordinary course of managing its business* and employees.**

Read literally, it says non-healthcare employers do not need to undertake the work-relatedness analysis for COVID-19 cases at all, unless the work-relatedness analysis that they do, shows evidence of work-relatedness. The logic was so circular that the limitation appeared to consume itself. But understanding its purpose was to limit recordkeeping, here is how we had been interpreting the guidance:

- If you are in the healthcare/emergency response/prison industries, you have to do the traditional, careful, case-by-case work-relatedness analysis of every confirmed case of COVID-19 among your employees; but
- If you are not in those very high risk exposure industries, then you do NOT have to do a work-relatedness analysis at all, UNLESS work-relatedness is staring you in the face; i.e., it is so obvious it is work-related because there is a cluster of cases among people who were working closely together, AND there is no other apparent exposure outside the workplace that could explain the employees' illness.

For having endeavored to relieve most workplaces in the country from the duty to evaluate work-relatedness of, and therefore to record, COVID-19 cases, and to set a high bar to find work-relatedness (i.e., there is no potential

non-work explanation for the infection), OSHA faced a public flogging by worker safety activists, unions, and the media. The Washington Post and The New York Times both penned harsh criticisms of OSHA for being "missing in action" and letting employers off the hook during the pandemic. AFL-CIO President Richard Trumka sent a scathing letter to new Labor Secretary Eugene Scalia attacking OSHA's role during the pandemic:

"Since this crisis began, the Department of Labor and federal government have failed to meet their obligation and duty to protect workers; the government's response has been delinquent, delayed, disorganized, chaotic and totally inadequate."

The public shaming of OSHA has apparently gotten to the agency, which today issued amended COVID-19 Recordkeeping Guidance that scales back some of the relief to employers provided by the April 10th guidance.

OSHA's May 19, 2020 Scaled-Back COVID-19 Recordkeeping Relief

The May 19th memo provides "updated interim guidance" for enforcing the requirements of recording cases of COVID-19. The memo goes into effect on May 26th, when the April 10th memorandum will officially be rescinded.

The May 19th memo maintains the same general structure for recording COVID-19 cases; i.e., to be recordable, it must be a confirmed case (positive test of a respiratory specimen), it must meet one of the general recording criteria, and it must be work-related. What changes with the May 19th memo, is how you determine work-relatedness.

Whereas OSHA's prior COVID-19 recordkeeping guidance relieved most employers of the duty to evaluate work relatedness, now OSHA believes "employers should be taking action to determine whether employee COVID-19 illnesses are work-related and thus recordable," even while still acknowledging the "ubiquity of community

spread." Specifically, unlike the April 10th guidance, which required a case-by-case work-relatedness analysis only for employee COVID-19 cases in healthcare, emergency response, and correctional facilities, **the new guidance requires an individualized work-relatedness analysis for all industries**.

Still recognizing what a challenge it is to identify *the cause* of a COVID-19 infection (between work-related exposures and exposures that happen away from work), OSHA's new enforcement approach will evaluate the "*reasonableness of the employer's investigation into work-relatedness*." While the burden to undertake the assessment has been restored to all employers, OSHA indicates that employers are "not expected to undertake extensive medical inquiries, given employee privacy concerns," and may rely only "on the information reasonably available to the employer at the time it made its work-relatedness determination." It will be sufficient in most cases for employers to:

1. Ask the employee how he believes he contracted the COVID-19 illness
2. Discuss with the employee his work and out-of-work activities that may have led to the COVID-19 illness; and
3. Review the employee's work environment for potential SARS-CoV-2 exposure (which should be informed by any other instances of workers in that environment contracting COVID-19 illness).

"If, after the reasonable and good faith inquiry described above, the employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role with respect to a particular case of COVID-19, the employer does not need to record that COVID-19 illness."

OSHA goes on to identify the types of evidence that may weigh in favor of or against work-relatedness. For instance, OSHA says, COVID-19 illnesses "are likely work-related" if:

- Several cases develop among workers who work closely together *and there is no alternative explanation*;
- The illness is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 *and there is no alternative explanation*; and
- Job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission *and there is no alternative explanation*.

The guidance also indicates that an employee's COVID-19 illness likely is NOT work-related if:

- Only one worker in a general vicinity in the workplace contracts COVID-19;
- Job duties do not include having frequent contact with the general public, regardless of the rate of community spread;
- Outside the workplace, the infected employee associates closely and frequently with a non-coworker (e.g., a family member, significant other, or close friend) who has COVID-19.

So the biggest differences between the April 10th guidance and the May 19th guidance are:

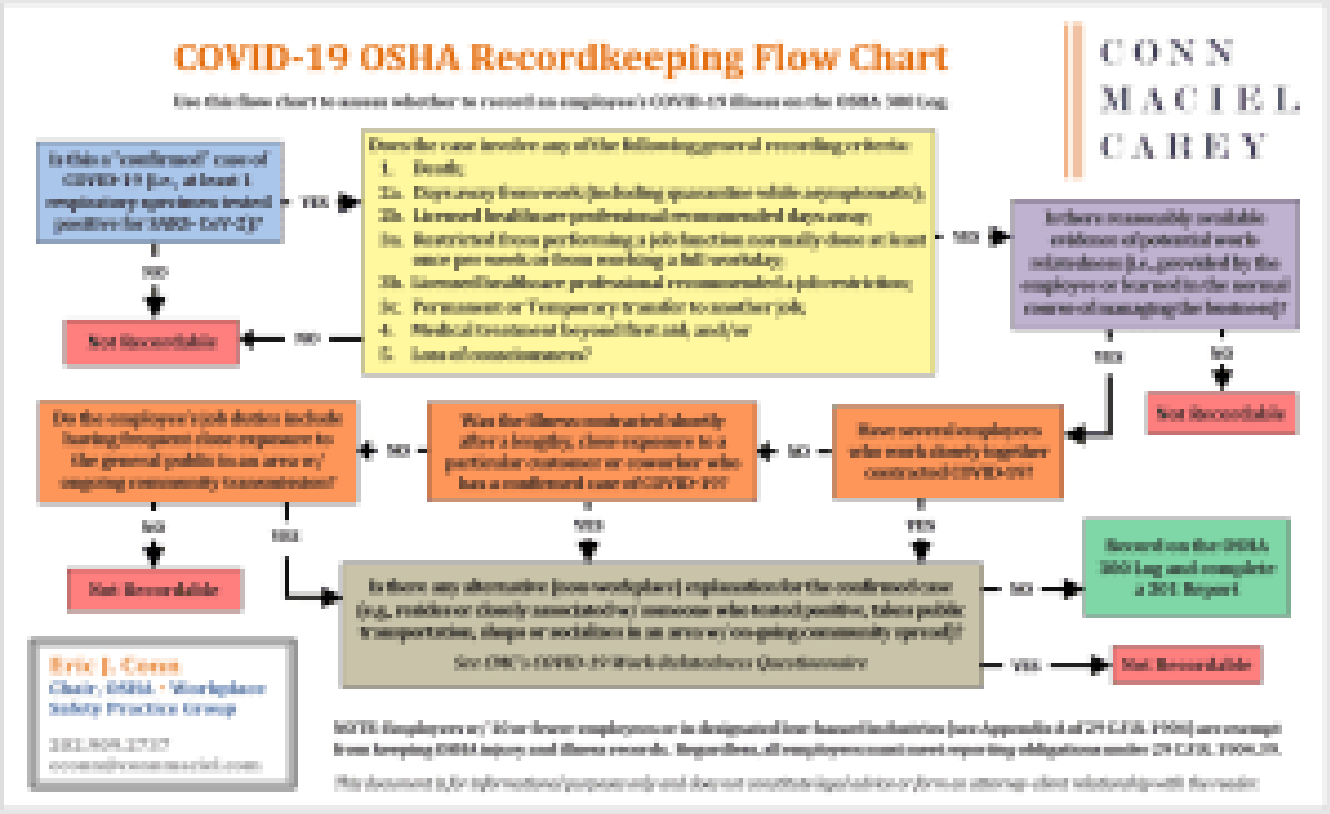
1. There is no exemption from conducting case-by-case work relatedness analyses for medium and low risk exposure workplaces; and
2. The new memo expands the examples of the type of objective evidence of likely work-relatedness from just a

cluster of positive cases, to also include cases where someone contracts the illness after a lengthy exposure at work, or has job duties that involve frequent, close exposure to the general public.

No Alternative Explanation for How the Illness Was Contracted

But one key aspect of OSHA's COVID-19 recordkeeping guidance remains the same. That is, each example of a scenario that OSHA believe is "likely work-related" includes the condition that "*there is no alternative explanation*." While there continues to be widespread community spread, there is essentially always an alternative explanation. Unless the employee lives at the workplace, he or she is surely experiencing potential exposures away from work that could cause the illness. Indeed, for workers who are not sheltering in place, experiences at home and in public are often in environments with less sophisticated exposure control measures in place than their workplaces; e.g., on public transportation, at home, in retail stores, in community gatherings, etc.). So if the employee acknowledges any such interactions away from work, that should still almost always justify a conclusion that an illness is not more likely than not work-related.

Conn Maciel Carey's COVID-19 Task Force has developed a variety of COVID-19 related recordkeeping and reporting tools, including a work-relatedness questionnaire, a COVID-19 Recording Flow Chart, and a Recording "How To" One-Pager. Contact us for access to any of those tools or for help making this tricky recordability determination.



New Recordkeeping Guidance Does Not Apply Retroactively

We have concluded that the new Recordkeeping Guidance does not apply retroactively, for a couple of reasons. First, the May 19th Guidance includes an actual "effective date" and an explicit "expiration" date for the prior, April 10th guidance. That is somewhat unusual for guidance. It is set up more like a rule, so it stands to reason that it does not apply to anything that occurred before the new guidance became effective.

Second, OSHA lists reasons for why it is expecting more employers to undertake a case-by-case work-relatedness assessment for COVID-19 cases, and that is, the changing circumstances of the pandemic; i.e., rates of infections are slowing, more industries are returning to work, and more is understood about how the virus spreads. Those reasons do not apply to cases that occurred before those circumstances changed.

So, we do not believe it is necessary to go back and conduct new work-relatedness determinations for COVID-19 cases that occurred before the May 26, 2020 effective date of OSHA's new COVID-19 Recordkeeping Guidance.

However, OSHA has indicated that work-relatedness determinations may need to be reevaluated if an employer later learns additional/new information pertinent to an employee's COVID-19 illness. Thus, in instances where information arises after May 26, 2020 that informs the potential work-relatedness of COVID-19 cases that had occurred before May 26th, it would be advisable to reevaluate the earlier cases in light of the new evidence.

Under what circumstances should confirmed COVID-19 illness be Reported to OSHA?

Here is an article with a detailed review of OSHA's in-patient hospitalization rule. To determine whether to report to OSHA a COVID-19 illness in particular, as a threshold matter, the same analysis as above must be done to determine whether it is a confirmed case and whether it is work related. Assuming those criteria are met, then we look to 1904.39(a) to determine whether any particular reporting criteria (i.e., in-patient hospitalization or death) are met.

Work related in-patient hospitalizations are reportable 24 hours after the hospitalization and deaths are reportable to OSHA within 8 hours after the death.

However, pursuant to 1904.39(b)(6):

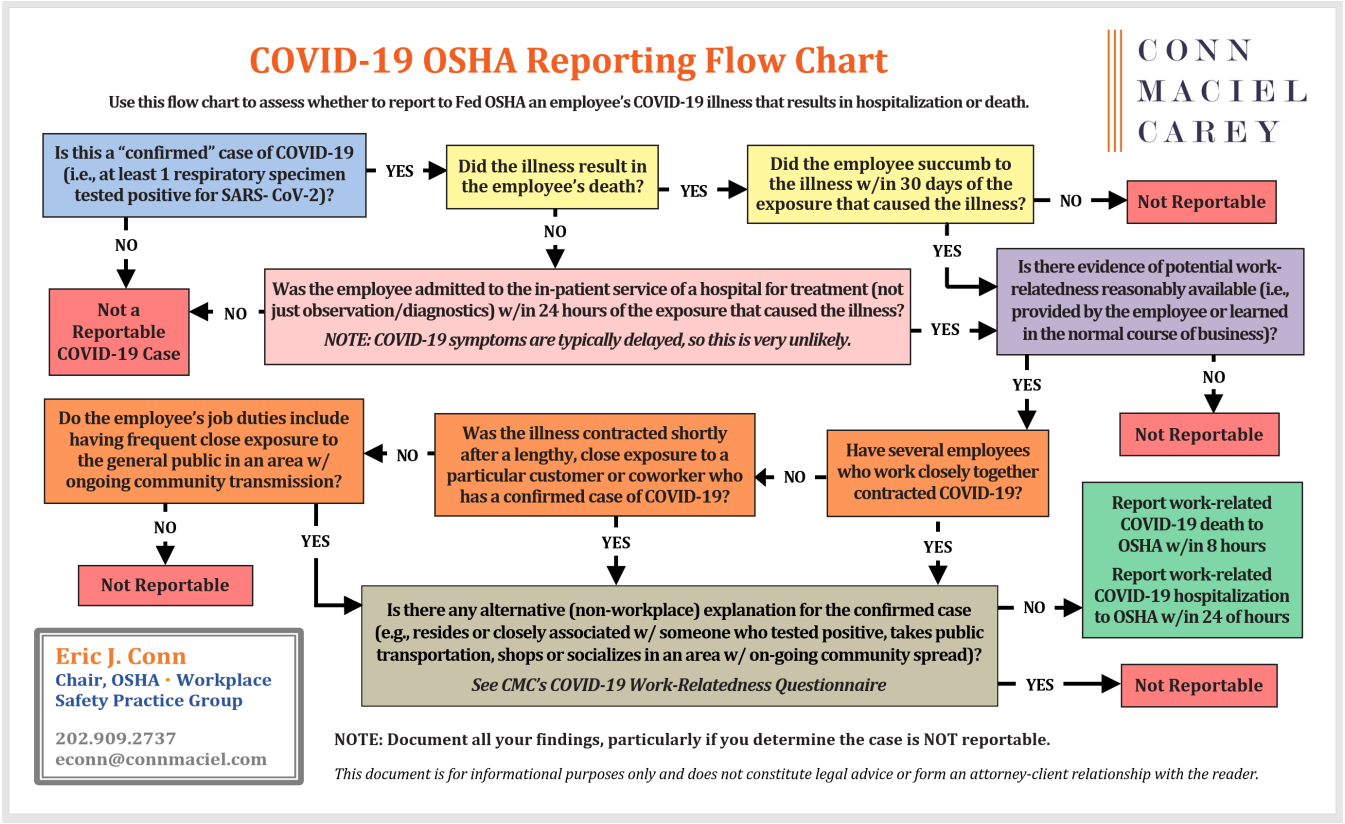
if a *"fatality [or] in-patient hospitalization does not occur during or right after the work-related incident . . . [y]ou must only report a fatality to OSHA if the fatality occurs within thirty (30) days of the work-related incident [and] an in-patient hospitalization . . . if [the admission to the in-patient service of the hospital] occurs within twenty-four (24) hours of the work-related incident."*

When an employer assesses whether the death or in-patient hospitalization resulted from a work-related illness — like contracting COVID-19 from an exposure in the workplace — pursuant to 1904.5(b)(3), you must "evaluate the employee's work duties and environment to decide whether or not one or more events or ***exposures*** in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing condition." In other words, in cases of illnesses due to exposures in the workplace, the triggering event is the time when the employer can best discern the employee was exposed to the contagion or chemical that caused the illness.

Thus, an employee's in-patient hospitalization is only reportable to OSHA if an employer determines: (a) the employee was exposed to the virus while performing work-related duties, (b) when that exposure occurred; and (c) that the employee was admitted to the in-patient service of the hospital within 24 hours of that exposure.

It is highly unlikely that any case of COVID-19 would meet these factors. First, as discussed above, it will be rare outside of the healthcare or nursing care sectors for an employer to determine the exposure that led to the illness more likely than not occurred in the workplace. Second, even in those instances where a conclusion is made that a case is work-related, it is unlikely that any non-fatal COVID-19 case that results in an in-patient hospitalization will be reportable to OSHA because of the length of the latency/incubation period between exposure to the virus and the time symptoms begin to appear, let alone when the illness becomes so significant that it results in an in-patient hospitalization. That will almost always be more than 24 hours. According to the CDC, individuals typically do not begin showing symptoms until 2 to 14 days after the exposure. Thus, in most cases, the exposure and ensuing illness, even if work-related, will at most result in a recordable event, not a reportable one.

For cases where the virus results in the employee's death, the reporting window is 30 days; i.e., if it is determined to be work related, and it is a confirmed diagnosis, it would be reportable if the employee succumbs to the illness within 30 days of the exposure that resulted in the COVID-19 diagnosis. That is a more likely scenario than the in-patient hospitalization, but again, the work-related conclusion (outside of healthcare, nursing care, and clusters in other workplaces) will be very rare.



For more information on this issue, as well as OSHA's reporting rule generally, check out Conn Maciel Carey's **Fatality and Serious Injury Reporting Flow Chart**. Also check out this **link to recordings of several webinars about OSHA's reporting rule** conducted as part of Conn Maciel Carey's annual **OSHA Webinar Series**.

And, of course, feel free to reach out to **Eric J. Conn** at **econn@connmaciel.com** or 202-909-2737, or any of the other 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 OSHA;
2. When the report is actually due;
3. How to record the illness or make the report;
4. What information to share with OSHA in the report; and/or
5. How to manage 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 FAQ Page for an extensive index of frequently asked questions with our answers about HR, employment law, and OSHA regulatory related developments and guidance. 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.

COVID-19 FAQs for Employers