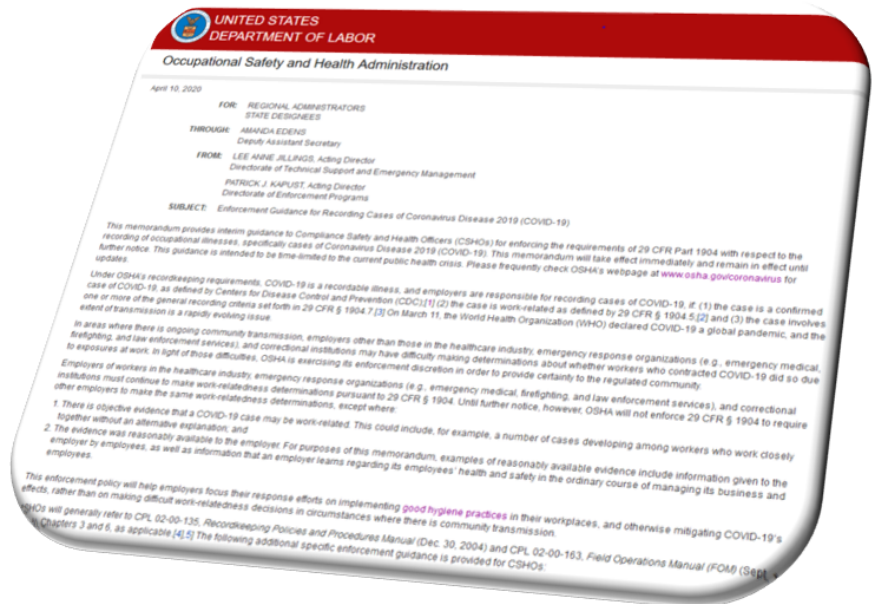


APRIL 23, 2020 | STATE OSH PLANS

COVID-19 Recording and Reporting in the State of Washington

By *Conn Maciel Carey's COVID-19 Task Force*

As previously discussed on the OSHA Defense Report blog, on April 10, 2020, Federal OSHA issued enforcement guidance for recording cases of COVID-19, relaxing recordkeeping enforcement for employers other than those in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting, and law enforcement services), and correctional institutions. Unfortunately, the guidance does not mandate that State Plan States follow suit, and not all states with approve OSH Programs have announced whether they will be following Fed OSHA's guidance.



The state of Washington has not published any guidance on that issue one way or the other. But here is what we have learned from the Washington Department of Labor and Industries (“DLI”) Division of Occupational Safety and Health (“DOSH”).

As a threshold matter, as we know from Fed OSHA recordkeeping, among other requirements, for an injury or illness to be recordable, it must be “work-related.” The language of Washington DLI’s recordkeeping regulation regarding assessing work-relatedness mirrors the Fed OSHA regulation. They both state that an employer:

“must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a preexisting injury or illness.”

Work-relatedness is presumed for injuries and illnesses resulting from events or exposures that occur in the work environment, unless an enumerated exception applies, and the work-relatedness exceptions for Fed OSHA and Washington are also the same.

Importantly, Washington DLI also has similar language to the Fed OSHA regulation regarding how employers should evaluate cases where it is not obvious where the precipitating event or exposure occurred (i.e., whether the exposure that caused the illness occurred at work or away from work). In ordinary circumstances (i.e., in non-pandemic times), both Fed OSHA and Washington DLI instruct that, in such situations, employers must evaluate the employee’s work duties and environment to determine if the event or exposure was work-related and resulted in either a new injury or illness or it significantly aggravated a preexisting condition.

To make that evaluation, Fed OSHA follows a “more likely than not standard.” That is, if it is not obvious whether the precipitating event occurred at work or elsewhere, the employer must evaluate the employee’s work duties and environment and make a determination whether it is “more likely than not” that work events or exposures were a cause of the injury or illness or of a significant aggravation of a pre-existing condition. This is set forth, for example, in Fed OSHA’s [Nov. 19, 2002 Interpretation Letter](#) and [Sep. 12, 2016 Interpretation Letter](#). While making determinations under this standard can be difficult under normal circumstances, it is nearly impossible for COVID-19 cases during this pandemic.

As we mentioned above, unfortunately, unlike Fed OSHA, Washington DLI has not issued any explicit guidance on recordkeeping issues related to COVID-19. However, in recent informal discussions with representatives from DOSH, it appears DOSH is following Fed OSHA’s April 10, 2020, guidance. Thus, in non-healthcare, emergency response, or prison settings, Washington DLI is exercising enforcement discretion and will not require employers to make the same work-relatedness determinations for COVID-19 cases, except where:

1. **There 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
2. **The evidence was reasonably available to the employer.** 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.

As explained by Fed OSHA, this policy is intended to help employers focus their response efforts on implementing good hygiene practices in their workplaces, and otherwise mitigating COVID-19’s effects, rather than on making near impossible work-relatedness decisions in circumstances where there is ongoing community transmission.

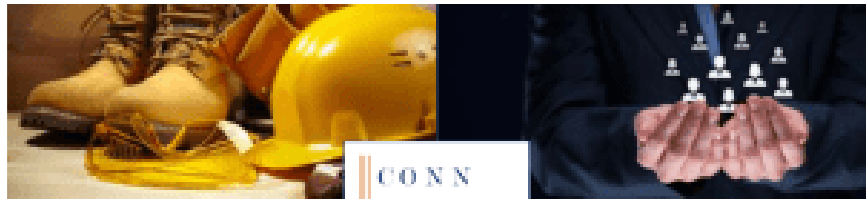
Reporting COVID-19 Hospitalizations in Washington

On the reporting front, the language of Washington DLI’s regulation differs from Fed OSHA’s in one key respect. The WA DLI rule does not speak to the timeframe in which an amputation, in-patient hospitalization, or loss of an

eye must occur for it to be reportable. However, in following up with DOSH this week, it appears the agency generally intended to incorporate the same criteria for reportability as Fed OSHA in its state-specific standard on reporting. Accordingly, a fatality must occur within 30 days of the incident and an in-patient hospitalization, amputation, or loss of an eye must occur within 24 hours of the incident to be reportable. Indeed, it appears that DOSH intends to update its standard to align with the Fed OSHA standard, but has been slow to make that change.

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We will be continuing to monitor OSHA's and State Plans' guidance on how regulations apply to the Coronavirus pandemic, and we will provide additional updates on these evolving issues. In the meantime, plan to join Conn Maciel Carey's COVID-19 Task Force on Thursday, May 7, 2020 at 2 PM Eastern, for a complimentary webinar: [Returning to Work Strategies – Employment and Workplace Safety Implications of COVID-19](#).



**Returning to Work Strategies:
Employment and Workplace Safety
Implications of COVID-19**

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Conn Maciel Carey LLP
Labor & Employment and OSHA Practice Groups

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For additional employer resources on issues related to COVID-19, check out the webinar put on by Conn Maciel Carey's COVID-19 Task Force in March addressing "[How Employers Can Respond to COVID-19](#)," and 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 COVID-19 and other important Labor & Employment and OSHA issues. 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