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Reporting In-Patient Hospitalizations to OSHA: Common Misunderstandings and Mistakes

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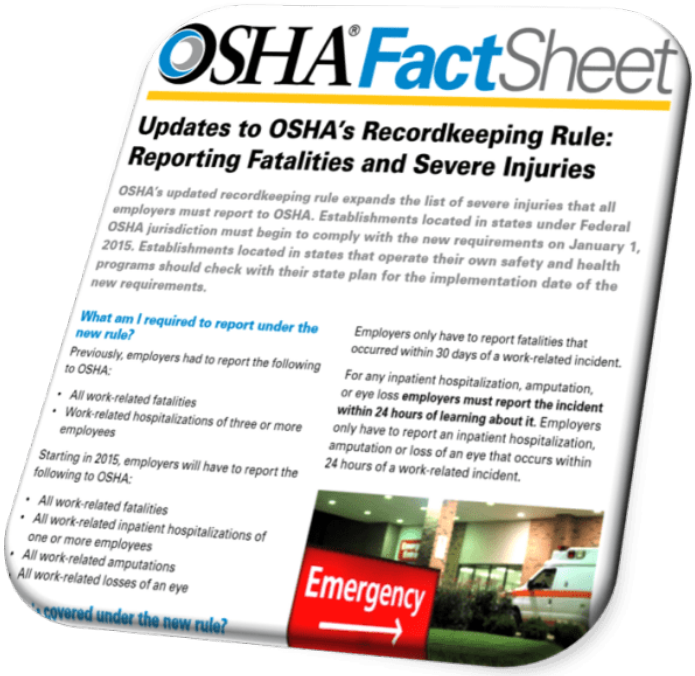
The regulatory requirement at 29 C.F.R. 1904.39, OSHA's Fatality and Serious Injury Reporting Rule, which requires employers to report to OSHA certain in-patient hospitalizations, may seem straightforward, but there are several nuances employers routinely miss that affect the determination whether a hospitalization is actually reportable to OSHA.

Although failing to timely report a reportable hospitalization can be cited, and could set up an employer for costly Repeat violations, over-reporting has its own significant consequences. Reporting hospitalizations very often triggers an on-site enforcement inspection, and OSHA issues a citation approximately 75% of the time it conducts an inspection (with an even higher percentage for incident-related inspections). Moreover, at least 85% of OSHA citations are characterized as Serious, Repeat or Willful, and OSHA's civil penalty authority has skyrocketed by 80% in the past two years. Accordingly, it is critical that employers understand the intricacies of what makes an employee's visit to the hospital a reportable event, and conversely, what does not, so as to avoid unnecessary and costly reports to OSHA.


OSHA® FactSheet

Updates to OSHA's Recordkeeping Rule: Reporting Fatalities and Severe Injuries

OSHA's updated recordkeeping rule expands the list of severe injuries that all employers must report to OSHA. Establishments located in states under Federal OSHA jurisdiction must begin to comply with the new requirements on January 1, 2015. Establishments located in states that operate their own safety and health programs should check with their state plan for the implementation date of the new requirements.

What am I required to report under the new rule?

Previously, employers had to report the following to OSHA:

- All work-related fatalities
- Work-related hospitalizations of three or more employees

Starting in 2015, employers will have to report the following to OSHA:

- All work-related fatalities
- All work-related inpatient hospitalizations of one or more employees
- All work-related amputations
- All work-related losses of an eye

Employers only have to report fatalities that occurred within 30 days of a work-related incident.

For any inpatient hospitalization, amputation, or eye loss **employers must report the incident within 24 hours of learning about it.** Employers only have to report an inpatient hospitalization, amputation or loss of an eye that occurs within 24 hours of a work-related incident.

Emergency

As we outlined in a prior **article discussing OSHA's updated Fatality and Serious Injury Reporting Rule**, under the current reporting requirements, employers must:

> ***"within 24 hours after the in-patient hospitalization of one or more employees [that occurs within 24 hours of the work-related incident] . . . report the in-patient hospitalization . . . to OSHA."***

This is a significant change from the prior reporting rule, which required a report to OSHA only if three or more employees were hospitalized overnight. It was extraordinarily rare that a single workplace incident resulted in the overnight hospitalization of three or more workers, and so the instances of reporting under that rule were infrequent. The new rule, however, requires a report to OSHA for the hospitalization of a single employee, which has opened the door to thousands more incidents that must be evaluated for possible reporting.

Although the current regulation has increased the number of employee hospitalizations that are being reported to OSHA, many of those incidents reported to OSHA did not actually meet the criteria for reporting, based on a very particular definition of hospitalization and a limited time period for when the hospitalization must occur. In other words, many incidents are being reported to OSHA (effectively inviting OSHA to conduct a site enforcement inspection) that should not have been reported at all.

What Is an "In-Patient Hospitalization"?

Under the old requirement to report the hospitalization of three or more workers, the operative analysis was whether the employees stayed overnight at the hospital. The new regulation lowers the employee count from three or more to just a single employee, but more importantly, redefines the term hospitalization from an overnight stay to the "in-patient hospitalization . . . for care or treatment." Let's take that in parts.

First, as defined by the regulation, an in-patient hospitalization occurs only upon:

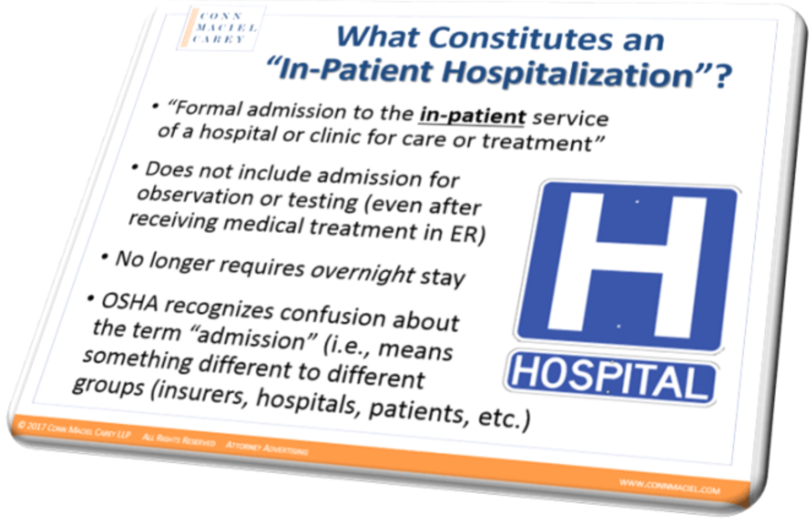
> ***"formal admission into the in-patient service of the hospital or clinic for care or treatment."***

Based on the plain language of the regulation and guidance issued by OSHA about what it means, there are two limiting elements that must be present for a visit to the hospital to be an "in-patient hospitalization":

- Formal admission to the in-patient service of a medical facility; and
- Delivery of medical care or treatment *after* formal admission.

Therefore, to meet the definition of an in-patient hospitalization, the employee must move beyond the emergency room and emergency status at the hospital to a formal admission to the in-patient service. On top of

that, medical care or treatment must be provided after the formal admission to the in-patient service. For instance, if an employee loses consciousness at work and is admitted to the in-patient service of the hospital for an MRI to diagnose what caused the loss of consciousness and for observation for additional symptoms, but no medical treatment is provided, that hospitalization is not reportable. Importantly, in the context of evaluating an in-patient hospitalization, the language of the standard does not limit "care or treatment" to "medical treatment beyond first aid," as it does for recording injuries on the 300 Log, and OSHA clarified in **FAQs for the reporting requirements** that an in-patient hospitalization "involving any treatment," even if just first aid, must be reported to OSHA.



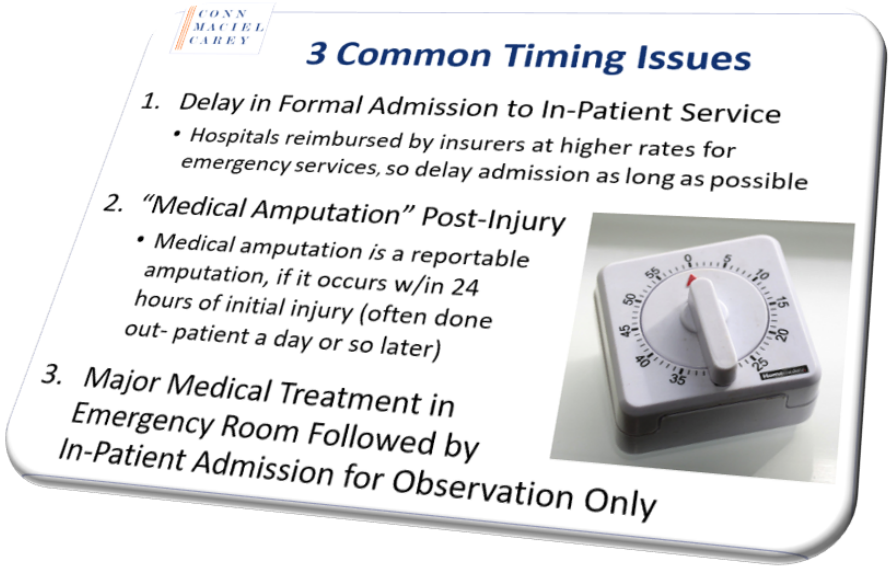
Does Timing and the Sequence of Events Matter?

The timing and timeline of an in-patient hospitalization is critical in determining whether a visit to the hospital is reportable to OSHA. First, medical treatment or care given prior to formal admission into in-patient services does not constitute a reportable hospitalization under 29 C.F.R. 1910.39(a)(2). Not only must an employee be admitted to the in-patient service for an injury to be reportable, the hospitalization is only reportable to OSHA if medical treatment is provided *after* the admission. Major medical care provided to an injured worker only in the emergency setting is not reportable. For example, if an employee breaks his leg and is taken to the emergency room (*i.e.*, not the in-patient service of the hospital) where he receives emergency surgery to set the leg and prescription drugs for pain before being released, this incident is not reportable because there was no admission to the in-patient service. This is also true where an employee receives substantial medical care in the emergency service *prior to* being formally admitted in-patient, if the subsequent admission involves only observation. In the same broken leg scenario as before, if rather than being released from the emergency service, that employee is admitted to the in-patient service but only for observation for potential infection from the surgery, that incident is also not reportable to OSHA because the employee did not receive medical care beyond observation *after* being admitted in-patient.

Second, the reporting rule limits employers' duty to report in-patient hospitalizations to those hospitalizations that occur within 24 hours of the work-related incident. More specifically, for a hospitalization to be reportable to OSHA, an injured employee must move beyond the emergency service, to a formal admission to the in-patient service, and then receive medical treatment while in the in-patient service all within 24 hours of the incident. Surprisingly, that has turned out to be a very limiting criterion.

Without getting too cynical, let's just say that our healthcare system in the U.S., or more specifically, our health insurance payment/reimbursement system, creates unusual incentives. Medical providers are reimbursed by insurers at a higher rate for the same medical service, if that service is delivered in the emergency context, as

opposed to in the in-patient service. Accordingly, hospitals tend to keep patients in emergency status as long as they are permitted under the insurance scheme. Time from the site of an injury and wait times at emergency rooms can also be surprisingly long. Accordingly, it is shockingly common for the formal admission to the in-patient service to occur more than 24 hours after the incident that caused the injury. In those circumstances, the injury is not reportable to OSHA regardless of the scope of medical treatment provided to the injured employee after admission to the in-patient service.



Likewise, instances where medical treatment is deferred for a day or two after an incident (e.g., surgery delayed until swelling reduces) is not reportable provided no other medical treatment was provided in the in-patient setting during the delay.

When Do the Various Reporting Time Clocks Start Ticking?

Similar to reporting fatalities or **amputations**, an in-patient hospitalization must be reported to OSHA within 24 hours. A key question (and a particularly tricky issue in the context of hospitalizations), is what triggers that 24-hour reporting window. The 24-hour timeclock to report to OSHA begins when the employer, or any agent of the employer (i.e., any supervisory employee), obtains knowledge that a reportable event has occurred. The regulation recognizes that an employer may not always have immediate knowledge that an injury meets the reporting criteria, especially hospitalizations. Knowledge of a fatality or amputation is usually self-evident at the workplace when the incident occurs. However, because of the nuances discussed above about whether a hospitalization is reportable, and the fact that key circumstances for determining whether a hospitalization is reportable occur outside the workplace, the precise moment in time when an injury becomes a reportable hospitalization and when an employer attains actionable knowledge of that fact, are often not immediately available after an incident has occurred.

Obviously if an injury and hospitalization occur without the employer being notified, the employer's reporting obligation would not kick-in until it is notified or otherwise becomes aware after reasonable inquiry/investigation by the employer. For instance, if two employees are working in a shipping area, one cuts open his hand trying to open a box, and, without notifying management, his co-worker drives him to the hospital where he is admitted for treatment, the 24-hour reporting clock does not start at the moment of the incident. Rather, the employer would have 24 hours to report the injury to OSHA from the time the employer is either notified or independently

becomes aware of both the injury and the resulting in-patient admission for treatment. Similarly, even if the employer knows the employee was taken to the hospital, but does not learn about the formal admission for several hours (or days), either because the admission itself is delayed, or because the employer cannot obtain information from the hospital or the employee, the start of the 24-hour reporting clock does not begin right away. As above, the 24-hour timeframe in which the hospitalization must be reported would not start until the employer learns the hospitalization meets the reporting criteria.

Note, however, employers may not bury their heads in the sand. Reasonable inquiry is required, and employers will need to demonstrate what steps that have taken to learn the circumstances of the hospitalization, whether it be efforts to contact the employee or the hospital.

One final point about timing, it is usually easier to determine whether a qualifying hospitalization has occurred within 24 hours of a work-related *injury*, than it is for a work-related illness. When the impetus for a hospitalization is an illness, determining whether the hospitalization occurred within 24 hours of the incident can be challenging. In that case, the triggering event is the time when the employer can best discern the employee was exposed to the chemical, contagion, bacteria or other work-related condition that caused the illness. For example, on October 1st, Employee 1 worked in close proximity with Employee 2 to develop a training presentation. On October 2nd, Employee 1 calls out of work with a staph infection. On October 4th, Employee 2 is admitted into the in-patient service at a hospital and receives medical care for a staph infection. Employee 2's staph infection is likely work-related because she worked in close proximity to Employee 1, and that workplace exposure more likely than not contributed to his in-patient hospitalization. However, the employer can reasonably conclude that the triggering exposure that resulted in Employee 2's hospitalization occurred on October 1st, while he worked with Employee 1. Therefore, the hospitalization is not reportable because the admission to the hospital occurred outside the 24-hour window from the work-related incident.

Addressing Multiple Bases for Injury Reporting

There is no official interpretation in the Preamble or in any subsequent guidance from OSHA about whether an employer must separately report an injury that escalates into an amputation or fatality if the underlying incident was already reported as an in-patient hospitalization. However, a contact in OSHA's national office who is responsible for the recordkeeping program, has communicated to us that there is no duty to make a subsequent report for an already-reported hospitalization. So if an employer later learns that an in-patient hospitalization had escalated into an amputation or fatality *within* 24-hours of the work-related incident, and the employer had already reported the incident based on the in-patient hospitalization, a second report need not be made to OSHA. Of course, if both outcomes are known before the initial report to OSHA, both the in-patient hospitalization and the amputation can be reported at the same time.

Is the Underlying Injury Work Related?

Another factor in determining whether and when a hospitalization becomes reportable to OSHA, is determining whether the underlying injury is work-related. Under OSHA's reporting rule, which is just a sub-section of OSHA's broader Injury and Illness Recordkeeping regulation, only work-related fatalities, amputations and in-patient hospitalizations are reportable. If the employer determines that an injury that results in a hospitalization is not work-related, it is not reportable. Likewise, if it takes some time to determine, based on reasonable inquiry

and investigation, that an injury resulting in a hospitalization is work related, the reporting clock only begins to tick when the employer learns the information necessary to make that determination.

For example, if an employee has a seizure at work and hits her head on a desk causing a laceration, and the laceration is treated after admission into in-patient service, the hospitalization is not reportable to OSHA if the employer determines that the seizure was caused by a non-work-related condition, such as epilepsy. Conversely, if the employer learns after three days of investigation, including industrial hygiene testing and consulting with the employee's treating physician, that something in the work environment contributed in any way to her seizure, the hospitalization would be a reportable work-related hospitalization. However, the 24-hour window to report the incident to OSHA would not start to run until the employer learns the injury is work-related.

* * * * * *

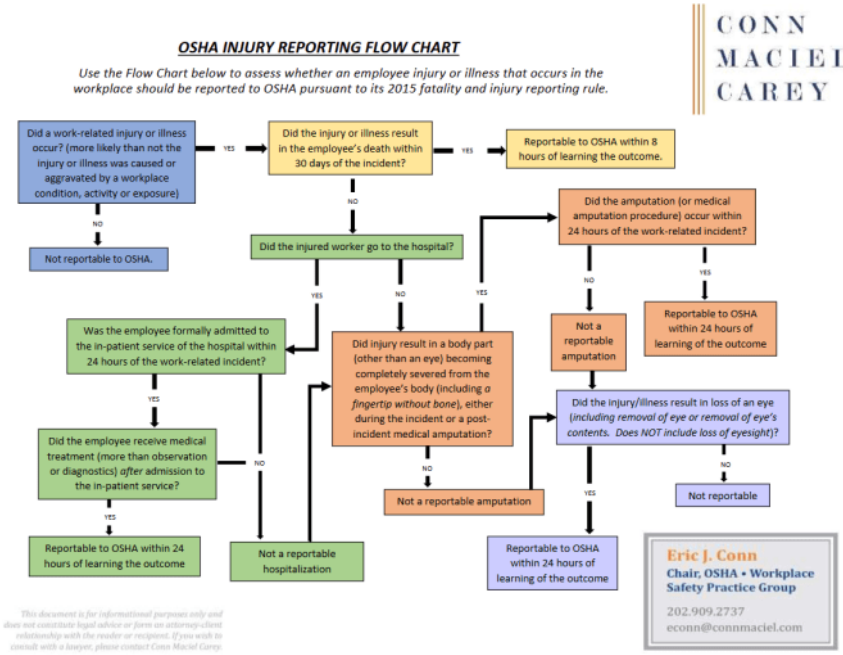
Determining whether an in-patient hospitalization should be reported to OSHA, and by when, is not always clear, and the consequences of getting it wrong, either way, are serious. When an employee experiences an injury or illness that results in a visit to the hospital, an employer must determine, through reasonable inquiry and investigation, whether:

- The employee was admitted to the in-patient service of the medical facility;
- The employee received medical treatment beyond observation and diagnosis at the medical facility;
- The medical treatment was provided *after* admission to the in-patient service;
- The admission to the in-patient service and subsequent medical treatment occurred within 24 hours of the incident that caused the injury; and
- The injury was work-related.

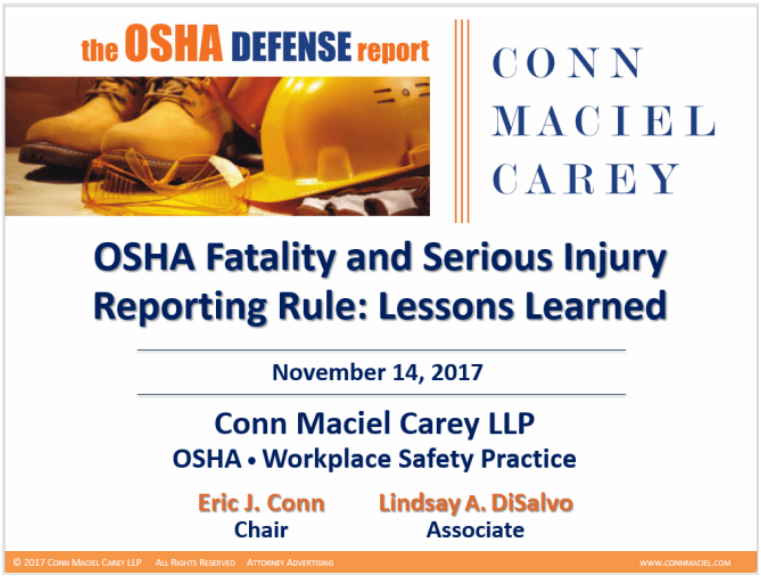
Only if the answer to all of those questions is yes, must OSHA be notified of the hospitalization, and that notification must be made within 24 hours of learning of the relevant information to draw that conclusion.

Accordingly, it is important to educate management representatives, particularly those charged with the responsibility to make reports to OSHA, about the nuances of OSHA's reporting rule, and to consult with OSHA defense counsel before picking up the phone to call OSHA.

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, be sure 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 incident or injury is reportable to OSHA;
2. When the report is actually due;
3. How to 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 this thorny reporting issue.