



## OSHA Refines Stance on COVID-19 Recordkeeping and Enforcement

On May 19, OSHA issued two enforcement memos regarding COVID-19. The first of these memos revised OSHA's requirements for employers as they determine whether individual cases of COVID-19 are work-related. The second enforcement memorandum OSHA issued on May 19 revised OSHA's policy for handling COVID-19-related complaints, referrals, and severe illness reports. These two memos are summarized below.

### Recordkeeping and Reporting

As has been [OSHA's position for months](#), cases of COVID-19 are subject to OSHA's recordkeeping and reporting requirements if they are work-related. OSHA's [new memorandum](#) will supersede (on May 26, 2020) OSHA's previous April 10 memorandum on the subject of work-relatedness. The April 10 memorandum essentially provided most employers latitude to assume that cases of COVID-19 were not work-related, absent evidence to the contrary. (For greater discussion of this April 10 policy, see our previous article, [here](#).) Now, the May 19 memorandum revises OSHA's position, requiring employers to investigate COVID-19 cases more heavily before concluding whether they are work-related.

The primary thrust of OSHA's revised position on work-relatedness is that OSHA enforcement officers should consider three primary factors when evaluating whether an employer's determination of work-relatedness was reasonable:

- The reasonableness of the employer's investigation into work-relatedness;
- The evidence available to the employer; and
- The evidence that a COVID-19 illness was contracted at work.

OSHA elaborates on these three factors in the May 19 memo. Employee privacy rights are a potential trap for unwary employers when inquiring about employee exposure outside of the workplace. Such discussions could implicate a variety of employment laws, including state-specific laws.

OSHA justifies its revised position on work-relatedness by stating that the nature of COVID-19 and the ubiquity of community spread frequently make it difficult to accurately determine whether a COVID-19 illness is work-related, especially when employees have experienced potential exposure both in and out of the workplace. OSHA might also have been motivated by some organizations calling for OSHA to take a more aggressive response to COVID-19.

### **Complaints, Referrals, and Illness Reports**

The second memo issued on May 19 related to complaints, referrals, and severe illness reports. Specifically, in geographic areas where community spread of COVID-19 has significantly decreased, OSHA will return to its normal pre-COVID-19 methods for prioritizing reported events for inspections. OSHA will continue to prioritize cases of COVID-19 to some degree, but these efforts will increasingly be conducted by phone or other remote methods. In geographic areas experiencing either sustained elevated community transmission or a resurgence in community transmission, OSHA will continue to heavily prioritize COVID-19, including conducting on-site inspections, especially in high-risk workplaces. For more detail, the memorandum itself is available [here](#).

### **Final Takeaways**

As with all other aspects of the COVID-19 pandemic response, OSHA's enforcement approaches continue to evolve. Please reach out to your Spencer Fane attorney if you have questions on how OSHA's recent enforcement policies affect your business or organization.

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