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OSHA issues new FAQs on reporting coronavirus cases

The Occupational Safety and Health Administration has issued new **Frequently Asked Questions** addressing when employers governed by the federal agency must report work-related cases of COVID-19. The most significant new information concerns the circumstances under which an employer must report to OSHA when an employee is hospitalized as a result of contracting COVID-19 at work.

Under § 1904.39(b)(6), employers are required to report an inpatient hospitalization only if the hospital admission “occurs within twenty-four (24) hours of the work-related incident.” Although the reference to a “work-related incident” seemingly refers to an event or accident, this is the only regulation that describes the specific circumstances under which an admission to a hospital must be reported. Therefore, before the new FAQ, employers understood that hospitalization for an illness, like COVID-19, would have to occur within 24 hours of the last exposure at work to whatever caused or contributed to the illness, which presumably would be the last day the employee reported to work.

With the new FAQ, OSHA has effectively disregarded its existing recordkeeping regulation and has created a new requirement. Under federal administrative procedures law, however, OSHA cannot create or change rules unless it first advises the regulated public of a proposed new rule and allows the public to weigh in on the proposal. As noted, OSHA has not done this, but has instead simply announced a new substantive requirement setting out when COVID-19-related hospitalizations must be reported.

Under the new FAQ, an employer must report COVID-19-related hospitalizations when the employer has knowledge that 1) the employee has been hospitalized 2) as a result of COVID-19. Thus, contrary to the existing recordkeeping regulation on reporting, which requires a case to be reported only if the hospitalization occurs within 24 hours of a work-related incident, the new FAQ requires employers to report COVID-19-related hospitalizations to OSHA no matter how many days passed since the employee was last exposed to coronavirus at work.

For example, in a typical scenario, an employee reports symptoms that may be related to COVID-19 and is directed to stay out of work. Days later the employer learns that the employee has been hospitalized, apparently due to worsening symptoms. The employer does not have actual knowledge whether the employee has tested positive for COVID-19 and may never receive actual notification of that status because of the privacy rule of the Health Insurance Portability and Accountability Act or other privacy protections. Under the new FAQ, when the employer learns that the employee has been admitted into a



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hospital as a result of COVID-19 and has presumably tested positive, the employer must report this case to OSHA within 24 hours, regardless of when the employee was last exposed to the virus at work. OSHA further notes that if an employee is hospitalized with what is apparently work-related COVID-19, but the case is not confirmed until after the hospitalization, the employer would have to report the case to OSHA within 24 hours of when the employer learned that the case of COVID-19 had been confirmed. OSHA says that a confirmed case means that “at least one sample tested positive for SARS-CoV-2.”

The FAQ does not afford as much clarity as the Agency may think, because, as noted, it is not clear that employers would receive any formal confirmation of a positive test.

For those of you who wish to stay out of trouble and avoid a citation for untimely reporting, it is prudent to report to OSHA within 24 hours of when you learn of a COVID-19-related admission to a hospital. But if you inadvertently miss this new deadline, **we advise against conceding that there has been a violation of your obligation to report to OSHA when there has been a hospitalization. If that hospitalization occurred more than 24 hours after the “work-related incident,” then we believe that as a matter of law the rule in § 1904.39(b)(6) still controls and does not require reporting.**

Need help with reopening?
Check out our **Coronavirus Return to Work FAQs** for the latest guidance. And more general information is available on our **Coronavirus Resource Center** page.

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