

## OSHA Publishes New FAQs on Reporting Hospitalizations and Fatalities Due to COVID-19

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On July 15, 2020, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) published a [new interpretation](#) of the hospitalization reporting requirement of [29 C.F.R. § 1904.39\(b\)\(6\)](#), one that states that employers "must report the hospitalization within 24 hours of knowing both that the employee has been hospitalized and that the reason for hospitalization was COVID-19."

The new interpretation came in a new series of [frequently asked questions \(FAQs\)](#) and answers related to an employer's obligation to report work-related cases of COVID-19 that lead to employee fatalities and in-patient hospitalizations under 29 C.F.R. § 1904.39. It appears OSHA added the new reporting FAQs to its existing "[COVID-19 Frequently Asked Questions](#)" without much by way of a formal announcement from the agency.

The subject of the new FAQ at issue is whether and when an employer is required to report to OSHA in-patient hospitalizations for work-related cases of COVID-19. Section 1904.39(b)(6) states that employers are required to report a work-related hospitalization only if it occurs within 24 hours of the work-related "incident." Specifically, § 1906.39(b)(6) states:

*What if the ... in-patient hospitalization ... does not occur during or right after the work-related incident? ... For an in-patient hospitalization, ... you must only report the event to OSHA if it occurs within twenty-four (24) hours of the work-related incident. ...*

Inasmuch as it is extremely difficult, if not impossible, for an employer to know when an employee was exposed to the coronavirus—a difficulty exacerbated by the usual delay in symptom onset—employers have been unsure of whether and how the 24-hour interval would apply to an in-patient hospitalization for COVID-19. Specifically, what is the work-related "incident" that triggers the 24 hours for reporting a work-related COVID-19 hospitalization to OSHA? Is it the employee's exposure to COVID-19 in the workplace, such that employers have to report the hospitalization only if it occurs within 24 hours of exposure to COVID-19? Or is the "incident" the employee's positive diagnosis for COVID-19, regardless of when the employee was exposed in the workplace? OSHA appears to have adopted the latter view.

The problem for employers is that that position appears to depart substantially from the language of the reporting regulation that it purports to interpret. The language of the regulation indicates that the “incident” can have been only the employee’s work-related exposure to the virus. Section 1904.39 includes several references to injuries and illnesses that occur “as a *result* of work-related incidents.” (Emphasis added.) After all, employees are hospitalized “as a result” of an illness—not a diagnosis.

However, OSHA’s reporting FAQ adopts the latter approach—that is, that the reporting requirement is triggered by employer knowledge of a positive test result. Perhaps most significantly, the new FAQ also simply omits the 24-hour time limitation set forth in § 1904.39(b)(6). That makes work-related COVID-19 hospitalizations reportable regardless of when the employee was exposed in the workplace.

It is important to note that OSHA’s FAQs are merely guidance and do not create additional legal obligations for employers. Indeed, it is unclear whether the FAQs even represent “enforcement guidance” that will be used to assist OSHA compliance officers during workplace inspections. However, the FAQs are the most affirmative statement of policy from OSHA on reporting work-related employee hospitalizations due to COVID-19.

That said, OSHA’s approach set forth in the FAQs is susceptible to challenge if used in an enforcement action. OSHA cannot displace existing regulations—such as § 1904.36(b)(6)—without formal notice-and-comment rulemaking.

One final point: Although employers with 10 or fewer employees and business establishments in [certain low-risk industries](#) are partially exempt from the obligation to keep a log of work-related injuries and illnesses, all employers are subject to OSHA’s requirement to report employee fatalities and in-patient hospitalizations.

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