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AMERICAN SOCIETY OF
SAFETY PROFESSIONALS

Return to Work Strategies Cal/OSHA Implications of COVID-19

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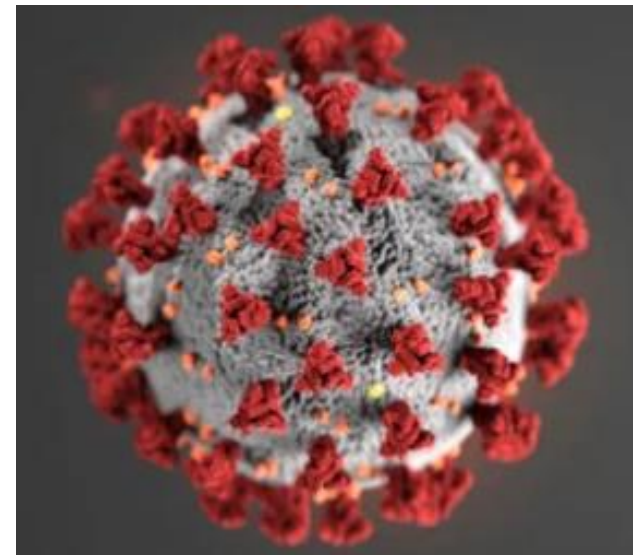
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ERIC J. CONN is a founding partner at **CONN MACIEL CAREY** and the Chair of the Firm's national OSHA • Workplace Safety Practice Group:

- Practiced for a decade w/ the former first General Counsel of OSHRC
- Focuses on all aspects of occupational safety & health law
- Represents employers in inspections, investigations and enforcement actions involving OSHA, CSB, MSHA, & EPA
- Manages investigations of catastrophic industrial, construction, and manufacturing workplace accidents, explosions, and chemical releases
- Handles all aspects of OSHA litigation, from citation contests to criminal prosecutions, and negotiating settlements to minimize impact of OSHA enforcement on civil actions and operations
- Co-Chair of Conn Maciel Carey's COVID-19 Task Force

AGENDA

- ✓ Cal/OSHA Implications of COVID-19 in the Workplace
 - Aerosol Transmissible Diseases Rule
 - Interim Guidelines on Protecting Workers from COVID-19 and Work Site
 - Temperature/Symptom Screening
 - Requiring Face Coverings
 - COVID-19 Illness Recording and Reporting Guidance





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CAL/OSHA Implications of COVID-19

Relevant Cal/OSHA Standards

**Aerosol
Transmissible
Diseases**

5199

**Injury & Illness
Prevention
Program**

3203

**Personal
Protective
Equipment**

3380

**Control of Harmful
Exposures**

5141

**Reporting &
Recording**

342 and 14300

CAL/OSHA Guidance on COVID-19



State of California

Department of Industrial Relations

Cal/OSHA Interim General Guidelines on Protecting Workers from COVID-19

May 14, 2020

Background

Cal/OSHA's regulations require protection for workers exposed to airborne infectious diseases such as the 2019 novel coronavirus disease (COVID-19). This interim guidance does not impose new legal obligations. It provides employers and workers with information for preventing exposure to the coronavirus (SARS-CoV-2), the virus that causes COVID-19. Employers and employees should review their own health and safety procedures as well as the recommendations and standards detailed below to ensure workers are protected.

Employers Covered by the ATD Standard

Cal/OSHA requires employers covered by the Aerosol Transmissible Diseases (ATD) Standard (title 8, [section 5199](#)) to protect employees from airborne infectious diseases such as COVID-19 aerosols. The ATD Standard applies to:

1. Hospitals, skilled nursing facilities, clinics, medical offices, outpatient medical facilities, health care facilities, hospices, medical outreach services, medical transport and other facilities that provide health care services.
2. Certain laboratories, public health services and police services that are reasonably expected to handle or produce an aerosol transmissible disease.
3. Correctional facilities, homeless shelters, and drug treatment programs.
4. Coroner's offices, mortuaries, funeral homes, and other facilities that perform autopsies and handle human cadavers.
5. Any other locations when Cal/OSHA informs employers in writing that they must implement the ATD Standard.

When covered employers effectively implement the ATD Standard, they also reduce exposure to COVID-19 in the workplace who may not have patient contact, and the community as a whole. Review section 5199 and any current interim compliance guidance on the Cal/OSHA website for further information.

Additional Cal/OSHA Regulations for Employers Not Covered by the ATD Standard

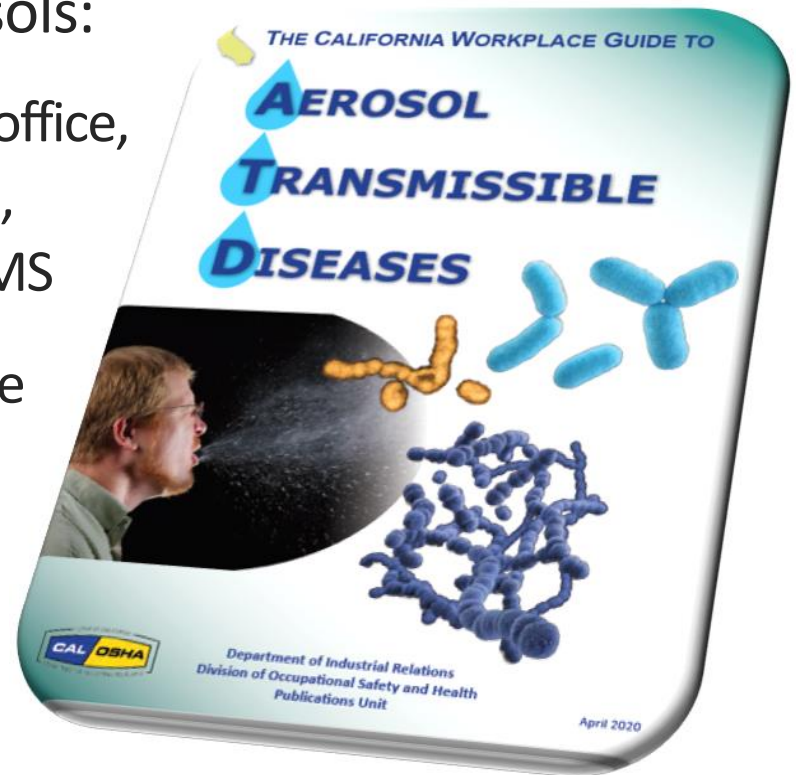
Although the scope of the ATD Standard is limited to certain employers, there are other Cal/OSHA regulations that apply to all employers. COVID-19 precautions that may be required by these standards are applicable to most workplaces in California, particularly those with significant public interaction such as retail establishments and service industries since COVID-19 is widespread in the community.

Injury and Illness Prevention Program (IIPP)

California employers are required to establish and implement an IIPP (title 8 [section 3203](#)) to protect employees from workplace hazards, including infectious diseases. Employers are required to determine if COVID-19 infection is a hazard in their workplace. If it is a workplace hazard, then employers must implement infection control measures, including applicable and relevant recommendations from the Centers for Disease Control and Prevention (CDC), [Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 \(COVID-19\)](#), and [Coronavirus Disease 2019 \(COVID-19\): How to Protect Yourself & Others](#). For most California workplaces, adopting changes to their IIPP is mandatory since COVID-19 is widespread in the community.

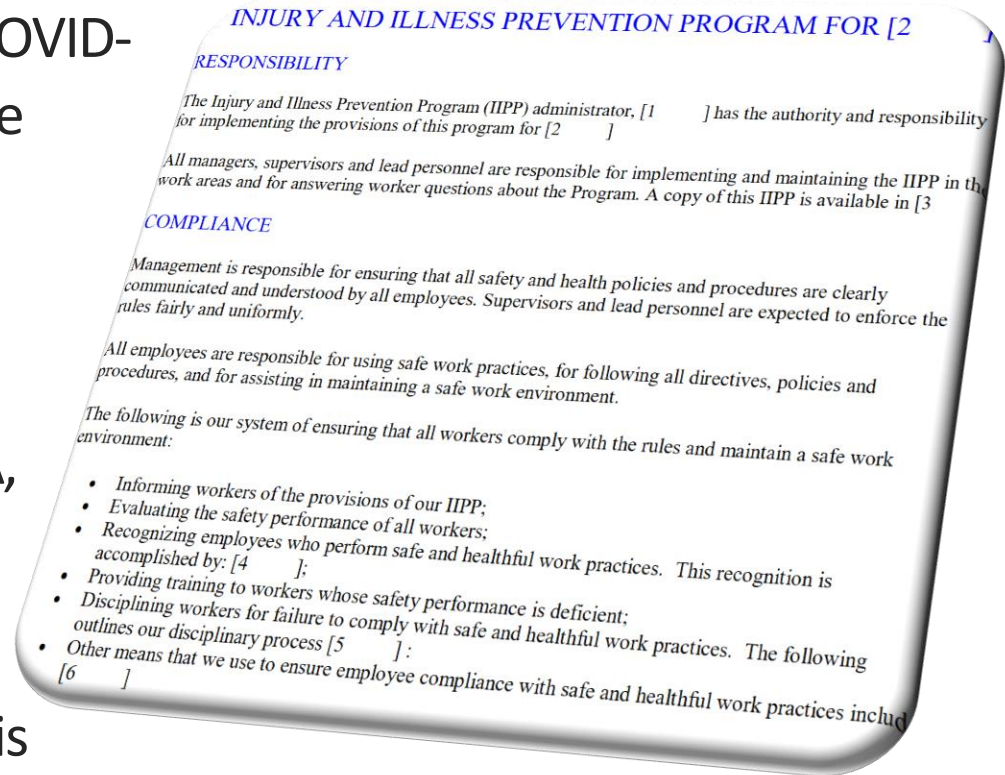
Aerosol Transmissible Diseases Rule

- Cal/OSHA's ATD Rule requires the following employers to protect employees from airborne infectious diseases (such as COVID-19) and pathogens transmitted by aerosols:
 - Hospital, nursing facility, clinic, medical office, home healthcare, long-term healthcare, hospice, medical outreach, and EMT/EMS
 - Laboratories, public health and police services that have reasonably anticipated exposure to ATDs
 - Corrections facilities, homeless shelters and drug treatment programs
 - Other locations Cal/OSHA informs in writing must comply w/ the Rule



Employers Not Covered by the ATD Rule

- “CA employers are required to establish & implement an IIPP to protect employees from workplace hazards, including infectious disease.”
- Employers must determine if COVID-19 is a hazard in their workplace
- If so, must implement infection control measures, including applicable recommendations from CDC, OSHA, and Cal/OSHA, and must train employees
- “For most Calif. workplaces, adopting changes to their IIPP is mandatory, since COVID-19 is widespread in the community.”



Worksite-Specific COVID 19 Prevention Plan

- Establish a written, worksite-specific COVID-19 prevention plan at every facility, perform a comprehensive risk assessment of all work areas, and designate a person at each facility to implement the plan
- Identify contact information for the local health department for communicating info about COVID-19 outbreaks among employees
- Train and communicate w/ employees/employee reps on the plan
- Regularly evaluate the workplace for compliance with the plan and document and correct deficiencies identified
- Investigate any COVID-19 illness and determine if any work-related factors could have contributed to risk of infection.
- Identify close contacts (w/in 6' for 15 min. +) of an infected employee and isolate COVID-19 positive employee(s) and close contacts

Protective Measures to Consider

- Implement COVID-19 Exposure/Infection Control Plan
- Engineering controls (e.g., high-efficiency air filters, increase ventilation rates, install physical barriers, etc.)
- Admin. controls (e.g., require sick workers to stay home, virtual meetings, implement telework if feasible, job rotations/staggered shifts, requiring face coverings, etc.)
- Safe work practices (procedures to reduce duration, frequency, or intensity of exposures; e.g., requiring regular hand washing)
- PPE (conduct temporary PPE Hazard Assessment (e.g., face shields, respiratory protection, gloves, gowns, etc.)



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New Procedures Impacting Employers

Health Screening Procedures

- If employers are planning to do any diagnostic testing on workers, they must follow CDC guidance and regulatory requirements including:
 - Testing must be job related and consistent w/ business necessity
 - Employer must ensure tests are accurate and reliable
 - Employers should still require that employees observe infection control practices
 - Employers who are testing and recording must keep the records for one year, maintain confidentiality and comply w/ Calif. Consumer Privacy Act (possibly required to be kept for 30+ years pursuant to Cal/OSHA's Employee Medical Record rule)



Health Screening Procedures

- Employers can require employees to participate in testing even if they do not exhibit symptoms
 - Note: This is permissible under the “Direct Threat Exemption” of the ADA
- A negative test does not mean an employee will not be infected later, so employers should keep following the guidance of medical and public health authorities
- Consider having employees self-monitor and/or fill out questionnaires



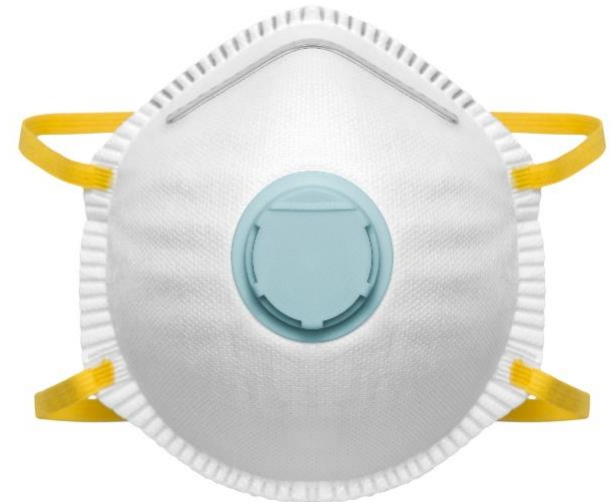
Health Screening Procedures

- Employers must:
 - Conduct testing in a non-discriminatory manner
 - Maintain the confidentiality of test results
 - Determine whether time related to testing is compensable under federal and state wage and hour laws
 - Have protocols in place for employees who refuse testing
 - Have consent / acknowledgement forms
 - Establish protocols for notifying employees of results
 - Determine when and under what conditions employees who test positive can return to work



Requiring Employees to Wear Masks

- Employers may require use of face coverings in the workplace:
 - A face covering is a cloth, bandana, or other type of materials that covers an employee's mouth and nose.
 - The CDC lists five criteria for “cloth face coverings:”
 1. Fit snugly but comfortably against the side of the face
 2. Be secured with ties or ear loops
 3. Include multiple layers of fabric
 4. Allow for breathing w/out restriction
 5. Be able to be laundered and machine dried without damage or change to shape



Requiring Employees to Wear Masks

- **What if an employer has distributed face coverings, but an employee fails to bring their face covering to work?**
 - Because face coverings are considered protective equipment, the employee should not be permitted to work on-site until s/he is able to obtain a face covering
- **What if employees want to use their own face coverings?**
 - Must make sure the coverings meet the CDC's requirements and that they clean them correctly
 - Employers should provide employees a reimbursement or subsidy for material and cleaning costs
 - Must be work appropriate and cannot feature offensive images or content

Requiring Employees to Wear Masks

- Employers should provide training to employees at the time that face coverings are distributed or implemented
- If an employee declines to wear a face covering for medical reasons, employers should engage in the interactive process with such employees as required by the ADA
- An employee who cannot breathe through a face covering should not be required to wear one, but may need to be temporarily removed from customer-facing responsibilities, provided with leave, or accommodated in some other fashion



Requiring Employees to Wear Masks

- Face coverings should not interfere with an employee's ability to perform the job
 - Employers should assess this issue during the rollout process, identify cases where face coverings may inhibit job performance, and develop workarounds that do not compromise safety or performance
- Employees who decline to wear face coverings without a medical or otherwise protected objection should not be permitted to work and may be disciplined for not following work requirements





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Cal/OSHA COVID-19 Recordkeeping and Reporting

Cal/OSHA Recordkeeping FAQs

- Does a COVID-19 case have to be **confirmed** to be recordable?
 - No. Unlike Fed OSHA's guidance, Cal/OSHA's FAQs now make clear that Cal/OSHA does NOT require a positive test for COVID-19 to trigger recording requirements
- Is time employee spends in **quarantine** considered *days away from work*?
 - Unless employee has a work-related illness that would otherwise require days away from work, time spent in quarantine is NOT *days away from work* for recording
 - This likely means quarantine days do not count, if it was precautionary only (i.e., quarantine b/c of a close contact, but it is later confirmed the employee did not contract the illness)

Cal/OSHA Form 300 (Rev. 7/2007) Appendix A
Log of Work-Related Injuries and Illnesses

Attention: This form contains information relating to employee health and must be used in a manner that protects the confidentiality of employees to the extent possible while the information is being used for occupational safety and health purposes.
See CCR Title 8 14300.29(b)(6)-(10)

You must record information about every work-related death and about every work-related injury or illness that involves loss of consciousness, restricted work activity or job transfer, days away from work, or medical treatment beyond first aid. You must also record significant work-related injuries and illnesses that are diagnosed by a physician or licensed health care professional. You must also record work-related injuries and illnesses that meet any of the specific recording criteria listed in CCR Title 8 Section 14300.12. Feel free to use two lines for a single case if you need to. You must complete an Injury and Illness Incident Report (Cal/OSHA Form 301) or equivalent form for each injury or illness recorded on this form. If you're not sure whether a case is recordable, visit your local Cal/OSHA office for help.

Year 20 _____

Department of Industrial Relations
Division of Occupational Safety and Health

Identify the person

(A) Case no.	(B) Employee's name	(C) Job title (e.g., Helper)	(D) Date of injury or onset of illness	(E) Where the event occurred (e.g., Loading dock north end)	(F) Describe injury or illness, parts of body affected, and object/substance that directly injured or made person ill (e.g., Second degree burns on right forearm from complex saw)
			monday		
			monday		
			monday		

Classify the case

Using these four categories, check ONLY the most serious result for each case:

Death	Days away from work	Restricted work or restriction (I)	Other recordable injury or illness (J)
(G)	(H)	(I)	(J)
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Enter the number of days the injured or ill worker was:

Away from work (K)	On job transfer or restriction (L)
(K)	(L)
days	days
days	days
days	days

Check the "injury" column or choose one type of illness:

(1)	(2)	(3)	(4)	(5)	(6)
(1)	(2)	(3)	(4)	(5)	(6)
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Cal/OSHA's New Guidance on COVID-19 Work-Relatedness

- Contrary to Fed OSHA's "more likely than not" standard and carve-out for identifiable alternative (non-work) explanations, Cal/OSHA has established a (possibly rebuttable?) **presumption** of work-relatedness if there is any identifiable workplace exposure that can be shown
- The following factors reflect a work-related exposure:
 - Interactions w/ people known to be infected with the virus
 - Working in the same area where people known to have been infected had been
 - Sharing tools, materials or vehicles w/ persons known to have been infected
- Unclear how Cal/OSHA expects employers to evaluate circumstances w/ an identifiable workplace exposure AND also an identifiable non-work exposure that is much more likely to have caused the illness

Cal/OSHA on Work-Relatedness

- Even w/ NO identifiable workplace exposure to trigger the presumption, employers must still evaluate the employee's **work duties** and **environment** to determine whether the illness is work-related (perhaps under a more-likely-than-not standard?)
- Cal/OSHA IDs the following factors as relevant for that analysis:
 - The type, extent, and duration of contact the employee had in the work environment w/ other people, particularly the general public
 - Social distancing and other controls that impact the likelihood of exposure
 - Whether the employee had work-related contact w/ anyone who exhibited signs and symptoms of COVID-19
- Any doubts about whether an injury/illness or fatality is related to a workplace must be resolved in favor of a report to the Division

Legality of Cal/OSHA's FAQs

- State OSH Plans are required to be “at least as effective” as fed OSHA, but generally may mandate employers meet more stringent requirements (e.g., *report* more injuries/illnesses)
- However, this does not apply to injury and illness *recordkeeping*
 - OSHA's regs at 1904.37(b)(1) provide: *State-Plans must have the same requirements as Fed OSHA for determining which injuries and illnesses are recordable and how they are recorded*
 - Uniformity in recordkeeping is mandated by fed OSHA, so state plans may not establish broader recordkeeping requirements (i.e., a recordable should be a recordable no matter where you are)
- Outcome-based analysis of Cal/OSHA guidance vs. fed OSHA guidance reveals cases that will be recordable in Calif. but not in fed OSHA states
- Fed OSHA has a mechanism to address problems w/ administration of a State Plan – a Complaint About State Program Administration (CASPA)

Cal/OSHA COVID-19 Reporting

- “Every employer shall report immediately...to the nearest Dist. Office [] any serious injury or illness, or death, of an employee **occurring in a place of employment or in connection with any employment.**”
- “In connection with any employment”
 - Contracted in connection w/ work, regardless where symptoms onset
- “Occurring in a place of employment”
 - Serious illness or fatality that occurs at work are reportable, ***even if it is not work related***
 - Cal/OSHA FAQs make clear a non-work related COVID-19 illness occurs “in a place of employment” only if “the onset of symptoms occurred at work”



Conn Maciel Carey COVID-19 Task Force Resources

COVID-19 TASK FORCE

As employers around the country grapple with the employment law and workplace safety implications of the 2019 Novel Coronavirus, "COVID-19," Conn Maciel Carey has formed a multi-disciplinary legal and regulatory task force comprised of our dedicated Workplace Safety, Labor and Employment Law, and Litigation attorneys to help our clients across all industries manage the multitude of pandemic-related issues employers are facing and prepare for potential litigation that is around the corner. We have produced a comprehensive database of resources to guide employers through this uncharted territory and the unique workplace challenges presented by the presence of a new health hazard in our nation's workplaces.

Members of CMC's COVID-19 Task Force

Eric J. Conn OSHA Chair	Kara M. Maciel Labor and Employment Chair	Bryan A. Carey Partner	Nicholas W. Scala MSHA Chair
Kate M. McMahon OSHA Partner	Jordan B. Schwartz Labor and Employment Partner	Andrew J. Sommer Cal/OSHA and Employment Partner	Aaron R. Gelb OSHA and Employment Partner
Amanda Strainis-Walker OSHA Partner	Mark M. Trapp Labor and Employment Partner	Lindsay A. DiSalvo Associate	Megan S. Shaked Associate



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COVID-19 FAQs for Employers

As the COVID-19 Pandemic continues to evolve, we have created an extensive index of frequently asked questions about HR, employment, and MSHA/OSHA related regulatory developments and guidance from federal agencies and the CDC. Conn Maciel Carey's COVID-19 Task Force will be updating our list of FAQs frequently, but please reach out to us for the most up to date information.

- Employee Layoffs & Reduced Working Schedules
- The CARES Act
- Vacation, Paid Time Off & Sick Leave
- OSHA Recordkeeping and Reporting of COVID-19 Cases
- Temperature Checks for Employees
- Personal Protective Equipment
- Preventing Exposure in the Workplace
- Annual Physical Requirements
- Space Restrictions in Retail
- On-Site Inspection Activities
- Employer-Employee Confidentiality
- Emergency Infectious Disease Rule / NEP
- Offer Letters & Flexible Start Dates
- Employer Liability



COVID-19 FAQs for Employers

COVID-19 OSHA Recordkeeping and Reporting Resource Guide

CMC's COVID-19 Task Force has prepared a series of resources to assist employers in assessing whether a COVID-19 diagnosis for one of its employees is reportable to OSHA and/or recordable on the company's OSHA 300 Log, and if so, "how to" record it on the log. The toolkit includes a COVID-19 OSHA Reporting Flow Chart, a COVID-19 OSHA Recording Flow Chart, a one-pager on "How to record" COVID-19 cases on the log, and a detailed "Work-Relatedness Questionnaire." For more information about the OSHA reporting and reporting implications of COVID-19, [read this detailed article](#).



the **OSHA** DEFENSE report



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... **2020 OSHA WEBINAR** series ...

OSHA's 2019 in Review and 2020 Forecast
Thursday, January 23rd

OSHA Settlement Tips and Strategies
Tuesday, February 25th

Strategies for Responding to Whistleblower Complaints
Wednesday, March 25th

Annual Cal/OSHA Update
Thursday, April 16th

E-Recordkeeping and Injury Reporting Update
Wednesday, May 20th

OSHA's PPE Standards - Top 5 Risks and Mistakes
Tuesday, June 16th

What You Need to Know About OSHA's General Duty Clause
Thursday, July 23rd

Employee Discipline - OSHA and Labor & Employment Issues
Wednesday, August 19th

Privileged Audits and Investigations and OSHA's Self-Audit Policy
Tuesday, September 22nd

Impact of the Election on OSHA
Thursday, October 22nd

Updates about OSHA's PSM Standard and EPA's RMP Rule
Tuesday, November 17th

Impact of America's Aging Workforce on OSHA and Employment Law
Wednesday, December 16th

Check out our OSHA Blog:

the **OSHA DEFENSE** report



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QUESTIONS?

