

## New OSHA Memo Helps Clarify Recordkeeping Compliance

By Heather MacDougall, Kaiser Chowdhry and Megan Lipsky (June 6, 2024, 6:01 PM EDT)

Musculoskeletal disorders are the most common workplace injury. Employers frequently utilize active release techniques, or ART, or develop suggested exercises as options for workers to alleviate discomfort, and these are often key techniques for preventing and treating work-related musculoskeletal disorders.[1]

On May 2, the Occupational Safety and Health Administration issued a memorandum to provide enforcement guidance to compliance safety and health officers on whether musculoskeletal disorders are recordable under OSHA's injury and illness recordkeeping regulation, when first aid, ART, or exercises and stretching are recommended.

Based on this new guidance, it appears that OSHA may target ART and stretching programs during its inspections to assess compliance with the recordkeeping regulation.

### Background

Employers are required to keep injury and illness records pursuant to OSHA's recordkeeping regulation that document when an employee's injury or illness results in loss of consciousness or medical treatment beyond first aid, death, restricted work or transfer to another job, or days away from work. It is important to remember that each criterion operates independently of the others.

For example, if an employee's work-related injury is treated via first aid, but results in a work restriction, the injury would be recordable, even though the only treatment provided is first aid.

Another example the guidance provides is that if first aid is administered using ice for 15 minutes every hour, resting every hour or elevating a body part, the case is recordable as restricted work, with one caveat: Employers do not have to record restricted work activity if it was imposed only for the day on which the injury occurred.

The starting point in evaluating recordability is determining whether the case meets the regulation's definition of "injury or illness," which is an "abnormal condition or disorder." [3]

An abnormal condition need not include objective signs, such as results from laboratory tests or medical evaluations, to be considered an injury or illness. Subjective signs, such as an employee statement that



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they feel pain, can be sufficient to determine that an abnormal condition exists.

Distinguishing between recommended stretching for soreness or discomfort — not recordable — or recommended stretching for an abnormal condition or disorder can be challenging.

In fact, over the years, OSHA has issued conflicting letters of interpretation on the issue. OSHA's May 2 memorandum appears to be intended to set forth the current administration's position on what is considered medical treatment beyond first aid for recordkeeping purposes. OSHA's recent memorandum should guide employers in the development and administration of their ART and stretching exercise programs.

### **First Aid**

OSHA's recordkeeping regulation provides a comprehensive list of first aid, such as using nonprescription medication at nonprescription strength, hot or cold therapy, massage and drinking fluids.

If an injured or ill employee is given any of the treatments listed, this treatment is not recordable, even — as OSHA's May 2 guidance confirms — when such treatment is provided over a long period of time or involves multiple applications.

However, while OSHA states that it is not the number of times that first aid is provided that makes a case recordable, the guidance states that first aid generally does not involve multiple encounters with the same patient presenting the same concerns.

The new guidance encourages compliance safety and health officers to scrutinize the care being provided to employees to ensure that the employer is not using repeated applications of first aid to avoid prescribing medical treatment beyond first aid, which would be recordable.

If a compliance safety and health officer notices that first aid treatments are being repeatedly applied to the same worker who is presenting to the first aid provider with the same concerns, the officer is directed to investigate further using questions provided at the end of the guidance.

These include "determine whether the same name and body part appears on the first aid log more than once in a four-week period" and "determine if the log reports that employees were referred to outside care."

If the compliance safety and health officer believes further medical treatment is needed, but the employer repeatedly applies first aid only, the officer may issue a citation under the medical services and first aid standard for failure to determine whether further treatment is needed or make such consultation available to the employee.[4]

### **ART**

In 2006, OSHA issued a letter of interpretation concluding that ART is massage and therefore first aid for purposes of OSHA recordkeeping. ART was also discussed in a 2019 letter of interpretation, which reiterated that ART is first aid, while soft-tissue massage is not and therefore recordable.

OSHA's May 2 guidance empowers compliance safety and health officers to ask the employee or the

ART-certified practitioner about the course of treatment to ensure that no other form of therapy is being provided, since other forms of treatment — such as chiropractic manipulation, physical therapy or soft tissue massage — provided to the employee would be recordable.

### **Exercise and Stretching**

Exercise and stretching are not included on the comprehensive list of first aid treatments in Title 29 Section 1904.7(b)(5)(ii) of the Code of Federal Regulations, which has resulted in conflicting opinions from OSHA as to whether their omission means that they are not first aid.

Compare this 2014 letter of interpretation, which stated that a stretching recommendation upon a report of discomfort was first aid and not recordable where the employee was encouraged to continue with an already existing program of stretching, with a 2011 letter of interpretation that stated recommending exercise to an employee who exhibits any signs or symptoms of a work-related injury involves medical treatment and is recordable.

Where exercise or stretching is prescribed to treat a work-related injury or illness, e.g., written instructions on sets, reps and resistance, the exercise or stretching program constitutes medical treatment and the case is recordable — even if the employee exercises or stretches at home.

While exercise and stretching that are generally part of safe work practices commonly recommended for any employee are not recordable as medical treatment, if stretching exercises were modified or changed to specifically address an employee's injury or illness, the case is likely recordable.

If an employee has an injury or illness that is not work related — e.g., the employee is experiencing muscle pain solely from home improvement work — the administration of exercise and stretching does not make the case recordable.

For exercise or stretching to be recordable, there must first be a work-related injury or illness to the employee. What is not contained in the new guidance is when the threshold is crossed to a sign or symptom of a work-related injury such that using stretching is beyond first aid and results in recordability of the case.

### **Key Takeaways**

Because this guidance empowers compliance safety and health officers to issue citations under the medical services and first aid standard, employers should consistently monitor employees' first aid and requests for medical care to ensure that employees are receiving appropriate treatment.[5] Failure to determine whether further treatment is needed could result in a citation.

Exercise and stretching that are generally part of safe work practices can continue to be recommended for anyone engaged in certain tasks or working with certain equipment.

However, based on the recent guidance, employer's recommendations regarding stretching should be tied to purely precautionary measures that a worker can take.

In addition, employers should also monitor the frequency of stretching intended as first aid so that the stretching is not viewed as an indication that further necessary medical care is not being provided to an

injured or ill employee, i.e., first aid treatment is not repeatedly applied to the same worker with the same concerns.

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[1] ART is a patented movement-based massage technique that targets soft tissues such as muscles, tendons, ligaments, fascia, and nerves and is practiced by licensed healthcare professionals (usually a physical therapist or a chiropractor). OSHA considers ART to be first aid regardless of the professional status of the person providing the treatment.

[2] 29 CFR § 1904 (Recordkeeping Regulation).

[3] See 29 CFR § 1904.46(3); See also OSHA's January 25, 2010, letter of interpretation (LOI).

[4] 29 CFR § 1910.151(a).

[5] 29 CFR § 1910.151(a).