OSHA UPDATES ITS GUIDANCE FOR RECORDING COVID-19 ILLNESSES ON EMPLOYERS' OSHA 300 LOGS AND SELF-REPORTING OBLIGATIONS FOR WORK-RELATED FATALITIES AND IN-PATIENT HOSPITALIZATIONS

Hodgson Russ OSHA Alert
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The Occupational Safety and Health Administration (OSHA) issued an Enforcement Memorandum on May 19, 2020 that updates its prior interim enforcement guidance on the recording obligations of employers for COVID-19 cases on their OSHA 300 logs. The new guidance is effective May 26th and supplants the previously issued guidance from April 10. It will remain in effect until OSHA gives further notice.

OSHA has not changed its stance that COVID-19 is a recordable illness. Nor has it altered the three general criteria it previously identified for recording:

1. **The case is a confirmed case of COVID-19, as defined by the Centers for Disease Control and Prevention**.
   The OSHA enforcement guidance memorandum states that a "confirmed case" for this purpose "means an individual with at least one respiratory specimen that tested positive for SARS-CoV-2, the virus that causes COVID-19."

2. **The case is work-related as defined by 29 C.F.R. § 1904.5.**
   As relevant in this context, section 1904.5(b)(2) states that illnesses such as the common cold and flu are not considered work-related, but "contagious diseases such as tuberculosis, brucellosis, hepatitis A, or plague are considered work-related if the employee is infected at work." Thus, there is a regulatory significance to employees presenting with COVID-19 illnesses.

3. **The case involves one or more of the general recording criteria set forth in 29 C.F.R. § 1904.7.**
   In short, section 1904.7(a) requires recording where the illness results in an employee death, days away from work, restricted work or transfer to another job,

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medical treatment beyond first aid, loss of consciousness, or if it involves a significant injury or illness diagnosed by a physician or other licensed health care professional.

The prior April 10th guidance limited recordability of COVID-19 cases for most employers to situations where there was objective evidence that a COVID-19 case was work-related and the evidence was reasonably available to the employer. The new enforcement guidance recognizes the difficulties employers have had in making a "work-relatedness" determination under such standards, particularly when potential exposures exist both in and out of the workplace. OSHA is now emphasizing that the illness is better understood, and employers are taking steps to curtail the spread of the virus as they work to safely reopen their businesses. Accordingly, OSHA expects employers to take greater investigative action going forward to determine whether COVID-19 illnesses are work-related and recordable.

Under the new guidance, employers are charged with the obligation to make "a reasonable determination of work-relatedness." Because this is enforcement guidance, the memorandum does not directly state exactly how the employer should fulfill that obligation. Instead, it couches the employer's responsibility by way of stating what factors a Compliance Health and Safety Officer (CSHO) will consider when evaluating whether the employer has made a reasonable decision. The practical effect is to give employers a bare minimum outline, but that does not mean employers are precluded from doing more. The memorandum outlines the following three major criteria the CSHO should consider when evaluating compliance:

1. **The reasonableness of the employer's investigation into work-relatedness.**
   OSHA notes that employers are not expected to undertake extensive medical inquiries due to privacy concerns. But where the employer learns of an employee's COVID-19 illness, it will in most cases be sufficiently reasonable inquiry if the employer: (a) asks the employee how he/she believes the COVID-19 illness was contracted; (b), discusses (while still respecting employee privacy) with the employee his/her in-work and out-of-work activities that may have led to the COVID-19 illness; and (c) reviews the work environment for potential exposure, with such review being informed by other instances of workers in that environment contracting COVID-19 illness.

2. **The evidence available to the employer.**
   This factor is evaluated based on what information was reasonably available at the time the employer made its work-relatedness decision. However, the guidance also says that if an employer later learns more information related to an employee's COVID-19 illness, the CSHO should also take that information into account in assessing whether the employer's decision was reasonable. Unfortunately, this may cut both ways for an employer. It would seem somewhat difficult for a CSHO to assess what information was available if the employer does not conduct an appropriate investigation or maintain a record of it.

3. **The evidence that a COVID-19 illness was contracted at work.**
   OSHA notes that while there is no ready formula for application, a CSHO should take into account all reasonably

available evidence to determine whether the employer has met its obligation. And certain types of evidence will weigh in favor of or against work-relatedness. The guidance gives the following examples:

- COVID-19 illnesses are *likely work-related* when several cases develop among workers who work closely together and there is no alternative explanation.
- An employee's COVID-19 illness is *likely work-related* if it is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19, and there is no alternative explanation.
- An employee's COVID-19 illness is *likely work-related* if his job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.
- An employee's COVID-19 illness is *likely not work-related* if she is the only worker to contract COVID-19 in her vicinity and her job duties do not include having frequent contact with the general public; regardless of the rate of community spread.
- An employee's COVID-19 illness is likely not work-related if he, outside the workplace, closely and frequently associates with someone (e.g., a family member, significant other, or close friend) who (1) has COVID-19; (2) is not a coworker; and (3) exposes the employee during the period in which the individual is likely infectious.

The enforcement guidance further states that CSHO's should give due weight to any evidence of causation pertaining to the employee illness at issue, as may be provided by medical providers, public health authorities, or the employee.

Based on the employer's reasonable and good faith inquiry into work-relatedness, the guidance appears to impose a "more likely than not" standard for recordability. Thus, if "the employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role with respect to a particular case of COVID-19, the employer does not need to record that COVID-19 illness."

Where an employer determines that a case is work-related, it should be coded on the OSHA 300 log as a "respiratory illness." Employers should bear in mind that an employee may request that his/her name not appear on the log for privacy reasons. Employers must honor such requests in accordance with 29 C.F.R. 1904.29(b)(7)(vi).

Another important consideration in this context is whether the employer must self-report. If a work-related COVID-19 illness case results in a fatality, an in-patient hospitalization, amputation, or loss of an eye, an employer will have an obligation to self-report to OSHA under 29 C.F.R. § 1904.39. Complying with this self-reporting obligation may present challenges for employers given that the predicate for such reporting under the regulation is a "work-related incident." As a result, conducting a proper work-relatedness investigation and determination will likely have a dual significance for many employers. Employers with less than 10 employees and certain employees in low hazard industries are not required to maintain OSHA 300 logs, but they are still required to self-report applicable cases under Section 1904.39, which necessitates making a work-relatedness determination.

Please contact Jason Markel (716.848.1395), Glen Doherty (518.433.2433), or Charlie Kaplan (646.218.7513) if you have questions about OSHA recording and reporting obligations, need assistance with making a work-relatedness determination, or have other OSHA-related concerns.

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

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