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OSHA Guidance Requires Certain Employers to Record "Work-Related" COVID-19 Cases

The Occupational Safety and Health Administration (OSHA) recently issued new guidance on employers' obligation to document COVID-19 cases in the workplace for OSHA recordkeeping purposes. Specifically, employers who are required to keep OSHA 300 logs are now required to record cases of COVID-19 (which OSHA considers a respiratory illness) on such logs if the employer determines that the employee's COVID-19 illness is work-related.

The new guidance went into effect on May 26, 2020 and is an abrupt departure from OSHA's previous guidance.

When to Record

Under the new guidance, a case of COVID-19 must be recorded by the employer if:

- >> An employee has a confirmed case of COVID-19, as defined by the Centers for Disease Control and Prevention (CDC);
- >> The case is work-related (i.e., an event or exposure in the work environment caused or contributed to the illness); and
- >> The case meets one or more of the recording criteria set forth under general OSHA standards (i.e., the case results in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness or significant injury or illness diagnosed by a physician or other licensed healthcare professional).

The Bottom Line

Recent OSHA guidance now requires employers in certain industries to document COVID-19 cases in the workplace that are considered to be "work-related." To determine this, employers must engage in a three-step analysis that requires close attention to other instances of COVID-19 at work and areas of increased risk of transmission in the workplace.

Employers should ensure that they have appropriate policies and procedures in place — which should be compliant with all OSHA and other relevant guidance — to facilitate the recording and reporting of any COVID-19 cases, as well as the documentation of any work-relatedness determination.

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"Work-Related" Cases

The guidance acknowledges that it may be difficult for employers to determine whether a COVID-19 illness is work-related and states that OSHA will "exercise enforcement discretion" in evaluating whether an employer has made a reasonable determination of work-relatedness, taking into account the following factors:

>> The reasonableness of the employer's investigation into work-relatedness
The guidance clarifies that employers should not undertake extensive medical inquiries. It is sufficient in most cases for the employer, when it learns of an employee's COVID-19 illness:

1. To ask the employee how he or she believes the illness was contracted;
2. Discuss with the employee his or her work or non-work activities that may have led to such illness; and
3. Review the employee's work environment for potential COVID-19 exposure (including any other instances of workers in that environment contracting COVID-19);

>> The evidence available to the employer
OSHA will look at the information that was reasonably available to the employer at the time of the work-relatedness determination and any additional information it learned of later on.

>> The evidence that a COVID-19 illness was contracted at work
There are several factors that point to a finding of work-relatedness (*e.g.*, when coworkers who work closely together develop COVID-19 or the employee falls ill after lengthy, close exposure to a customer/coworker who has a confirmed case of COVID-19, and there is no alternative explanation). There are also several factors that weigh against work-relatedness (*e.g.*, the employee is the only worker in her vicinity to contract COVID-19 and his or her job duties do not involve frequent contact with the general public, or the employee frequently associates with someone outside of the workplace who has COVID-19, is not a coworker and is in contact with the employee during the period when the individual is likely infectious).

Reasonable and Good Faith Inquiries

OSHA will also consider any other evidence of causation provided by medical providers, public health authorities or the employee. Notably, the guidance states that if after a "reasonable and good faith inquiry" an employer cannot conclude that exposure in the workplace caused a particular COVID-19 case, the employer does not need to record that case on the OSHA 300 log.

To show that they engaged in a "reasonable and good faith inquiry," employers should maintain

records reflecting their analysis and the information relied upon in making their determination of work-relatedness.

Privacy Concerns

The guidance further notes that if a COVID-19 case is recorded on the OSHA 300 log, the affected employee has the right to request that his or her name not be entered on the log for privacy reasons. Under such circumstances, the employer must comply with the employee's request and enter the phrase "privacy case" instead. The employer must also maintain a separate, confidential list of privacy concern cases with case numbers and employee names to be provided to the government if requested.

Partially Exempt Employers

Under existing OSHA regulations, employers with ten or fewer employees and certain employers in low-hazard industries — including advertising and financial services — are not required to maintain OSHA 300 logs. These "partially exempt" employers are still required to report to OSHA any workplace incident that results in death or in-patient hospitalization within a certain time frame. Unfortunately, employers may see a surge in in-patient hospitalizations as more states and cities reopen and employees return to the office.

Regardless of whether a COVID-19 case is determined to be work-related or not, employers are advised to closely examine and track any COVID-19 cases occurring among their employees in order to reduce the spread of the virus and to respond appropriately to protect workers. OSHA recently released its updated interim enforcement response plan, which states that OSHA will be resuming its usual investigation procedures — which include unannounced on-site inspections — in areas where community spread of COVID-19 has decreased, and that it will continue to prioritize COVID-19 cases. Employers should ensure that they have COVID-19 protocols in place that are up-to-date and consistent with the latest OSHA, CDC and state and local guidance.

For More Information

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