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Revised Short-Term Guidance on OSHA Recordability of COVID-19

Effective May 26, 2020, the Occupational Health and Safety Administration (OSHA) rescinded its previous memorandum with respect to the recording of occupational illnesses, specifically cases of COVID-19. Previous guidance required employers of workers in the health care industry, emergency response organizations (e.g., emergency medical, firefighting and law enforcement services) and correctional institutions continue to make work-relatedness determinations pursuant to 29 CFR § 1904, while suspending these work-relatedness determinations for other employers, except where there is objective evidence reasonably available to the employer that a COVID-19 case may be work-related.

This new memorandum outlined below remains in effect until further notice, with the intent for this guidance to be time-limited to the current COVID-19 public health crisis.

Under OSHA's recordkeeping requirements, COVID-19 is a recordable illness, and thus all employers are responsible for recording cases of COVID-19, if:

1. The case is a confirmed case of COVID-19, as defined by the Centers for Disease Control and Prevention (CDC);
2. The case is work-related as defined by 29 CFR § 1904.5; and
3. The case involves one or more of the general recording criteria set forth in 29 CFR § 1904.7.

Note: employers with 10 or fewer employees and certain employers in low-hazard industries have no recording obligations. They need only report work-related COVID-19 illnesses that result in a fatality or an employee's in-patient hospitalization, amputation or loss of an eye.

Because of the difficulty with determining work-relatedness, OSHA is exercising enforcement discretion to assess employers' efforts in making work-related determinations. In determining whether an employer has complied with this obligation and made a reasonable determination of work-relatedness, OSHA's Compliance Safety and Health Officers (CSHOs) will consider:

The reasonableness of the employer's investigation into work-relatedness

Employers, especially small employers, are not expected to undertake extensive medical inquiries, given employee privacy concerns and most employers' lack of expertise in this area. It is sufficient in most circumstances for the employer, when it learns of an employee's COVID-19 illness, (1) to ask the employee how he believes he contracted the COVID-19 illness; (2) while respecting employee privacy, discuss with the employee his work and out-of-work activities that may have led to the COVID-19 illness; and (3) review the employee's work environment for potential exposure — including any other instances of workers in that environment contracting COVID-19 illness.

The evidence available to the employer

The evidence that a COVID-19 illness was work-related should be considered based on the information reasonably available to the employer at the time it made its work-relatedness determination. If the employer later learns more information related to an employee's COVID-19 illness, then that information should be taken into account as well in determining whether an employer made a reasonable work-relatedness determination.

The evidence that a COVID-19 illness was contracted at work

Evidence suggesting COVID-19 illnesses are likely work-related includes:

- Several cases that develop among workers who work closely together and there is no alternative explanation.
- Onset shortly after lengthy, close exposure to a particular customer or co-worker who has a confirmed case of COVID-19 and there is no alternative explanation.
- Job duties involve 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.
- Outside of the workplace, she closely and frequently associates with a family member, significant other or close friend who (1) has COVID-19; (2) is not a co-worker; and (3) exposes the employee during the period in which the individual is likely infectious.

If, after the reasonable and good faith inquiry described above, 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.

COVID-19 is a respiratory illness and should be coded as such on the OSHA Form 300. Because this is an illness, if an employee voluntarily requests that his or her name not be entered on the log, the employer must comply as specified under 29 CFR § 1904.29(b)(7)(vi).

If you wish to further discuss these updates or have any questions, please contact Swift Currie attorneys:

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