OSHA Updates Its COVID-19 Recordkeeping Guidance, Giving Employers Helpful Guardrails

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COVID-19 has reached virtually the entire country, and both employers and employees in a broad range of industries have experienced outbreaks. At the same time, the government and private sector continue to take steps to slow the virus’s spread and protect employees while adapting to the new business environment. In recognition of the unique challenges posed by COVID-19, the Occupational Safety and Health Administration (OSHA) is applying updated guidance in an effort to provide additional clarity to employers and workers.

On May 26, 2020, OSHA issued updated guidance concerning employers’ recordkeeping responsibilities with respect to employee COVID-19 cases. Under OSHA’s general recordkeeping requirements, employers would be responsible for recording cases of COVID-19 if: (1) the case is confirmed as a case of COVID-19; (2) exposure in the work environment caused or contributed to the illness; and (3) the infection results in death or significant injury, time off work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness. However, in recognition that it remains difficult to determine whether a COVID-19 illness is work-related, OSHA is exercising its enforcement discretion to articulate and enforce specific recordkeeping requirements for such illnesses.
In determining whether an employer has complied with its obligations to make a reasonable determination of work-relatedness, OSHA will consider the reasonableness of the employer’s investigation, the evidence available to the employer, and the evidence that COVID-19 was contracted at work. Per the May 26 enforcement memorandum, it is sufficient for an employer, once it learns of an employee’s COVID-19 illness, to: “1) ask how the employee believes he/she contracted the illness; 2) while respecting employee privacy, discuss the employee’s work and out-of-work activities that may have led to the illness; and 3) review the employee’s work environment for” potential exposure. The evidence considered should be the information reasonably available to the employer — if the employer later learns more information, that information should be factored into the determination as well. There is no formula to determine work-relatedness, but OSHA has specifically identified certain evidence with respect to determining whether a case is/is not work-related:

- OSHA advises that “COVID-19 illnesses are likely work-related when several cases develop among workers who work closely together and there is no alternative explanation.”

- OSHA also notes that “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 (or other person) who has a confirmed case of COVID-19 and there is no alternative explanation.”

- Further, OSHA writes that an employee's COVID-19 illness is likely work-related if his/her “job duties include having frequent, close exposure to the general public in [an area] with ongoing community transmission and there is no alternative explanation.”

- OSHA indicates that an employee's COVID-19 illness is likely not work-related if she/he “is the only worker to contract COVID-19 in [the employee’s job] vicinity and [the] job duties do not include having frequent contact with the general public, regardless of the rate of community spread.”

- In addition, OSHA states that an employee's COVID-19 illness is likely not work-related if the employee, “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.”

OSHA has noted that its inspectors “should give due weight to any evidence of causation, pertaining to the employee illness, at issue provided by medical providers, public health authorities, or the employee” herself/himself.

If, after a reasonable and good-faith inquiry, 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, then the employer need not record that illness. For cases that are deemed to be work-related, employers should take note, however, that because COVID-19 is an illness, if an employee voluntarily requests that his or her name not be recorded, the employer must comply.
OSHA’s guidance is intended to be time-limited to the current COVID-19 public health crisis, and employers should continue frequently checking OSHA’s webpage for updates. Finally, OSHA notes that “it is important as a matter of worker health and safety, as well as public health, for an employer to examine COVID-19 cases among workers and respond appropriately to protect workers, regardless of whether a case is ultimately determined to be work-related.”

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