OSHA RAISES THE BAR FOR INVESTIGATING THE WORK-RELATEDNESS OF COVID-19 CASES

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On May 19, OSHA once again revised its guidance to employers concerning enforcement of the recordkeeping requirements found in 29 CFR §1904, as they pertain to the recording of COVID-19 cases.

From the start of the COVID-19 outbreak in the United States, OSHA has stated that COVID-19 is a recordable illness and must be recorded on an employer's 300 log, if the following three criteria are met:

1. The employee has a confirmed case of COVID-19, as defined by the CDC (meaning that the employee has had at least one respiratory specimen that tested positive for SARS-CoV-2).

2. The case is work-related as defined by 29 CFR §1904.5; and

3. The illness results in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness, or the illness is a significant injury or illness diagnosed by a physician or other licensed health care professional.

While the first and third criteria are relatively easy to verify, determining the work-relatedness of COVID-19 is particularly difficult for employers when there is known community spread of the virus. In previous guidance, OSHA recognized this difficulty and stated that it would not require employers to determine the work-relatedness of a COVID-19 case (and would not enforce 29 CFR §1904) unless[1]:

1. There was objective evidence that a case of COVID-19 may be workrelated (for example, a number of cases developing among workers who work closely together without an alternative explanation); and

2. This objective evidence was reasonably available to the employer (including information given to the employer by employees, as well as information an employer learned regarding its employees' health and safety *in the ordinary course of managing its business and employees*).

In practice, this meant that an employer was not required to undertake an extensive inquiry into the potential work-relatedness of an employee's COVID-19. Unless the causal link between

[1] This "hands off" policy did not apply to employers of workers in the healthcare industry, emergency response, or correctional institutions. Employers in those industries were required to continue making work-relatedness determinations on a case-by case basis.

COVID-19 and the workplace became known to the employer through the normal course of operating the business, the employer was not expected to record the case.

However, OSHA has announced that it will now enforce 29 CFR §1904 with respect to employers across all industries,[2] and has issued new guidance that raises the bar for employers investigating the work-relatedness of COVID-19 cases.

Effective May 26, 2020, employers must make a "reasonable determination" as to the work-relatedness of employee COVID-19 cases. Now, employers must take affirmative steps to question employees with confirmed cases of COVID-19, rather than simply relying upon information that the employer could learn through the regular course of managing the business. To make a "reasonable determination," employers should "(1) [A]sk the employee how he believes he contracted the COVID-19 illness; (2) while respecting the employee's 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 SARS-CoV-2 exposure," keeping in mind any other workers in the same environment who have contracted COVID-19. OSHA cautions that employers, and particularly smaller employers, "should not be expected to undertake extensive medical inquiries, given employee privacy concerns and most employers' lack of expertise in this area." Thus, employee privacy concerns and an employer's lack of medical expertise will necessarily limit the extent of the information an employer can obtain when making a "reasonable determination" as to work-relatedness.

In addition to questioning employees, OSHA will continue to look at information that was reasonably available to the employer at the time the work-relatedness determination was made. But, OSHA announced that it will also look at information that the employer learned *later* (after the work-relatedness determination was made) to assess whether the employer's determination was reasonable. This Monday-morning quarterbacking by OSHA places a burden on employers to revisit the "work-relatedness" determination of COVID-19 cases that were not recorded, if subsequent information suggests that the case should have been recorded.

OSHA outlined the types of evidence that would weigh in favor of a COVID-19 case being work related. According to OSHA, cases are "likely work related" when there is no alternative explanation other than workplace exposure, and either: (1) several cases develop among workers who work closely together; (2) the virus is contracted shortly after a lengthy and close exposure to a customer or coworker who has the virus; or (3) the employee's job duties involve frequent and close exposure to the general public in a locality with ongoing community transmission. OSHA stated that it would also "[G]ive due weight to any evidence of causation, pertaining to the employee illness, (*sic*) at issue provided by medical providers, public health authorities or the employee herself."

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[2] As always, employers with 10 or fewer employees are not subject to the injury/illness recording requirements in 29 CFR §1904 and need only report cases of COVID-19 that result in death, hospitalization, amputation or loss of an eye.

On the other hand, OSHA acknowledges that an employee's COVID-19 illness is likely not work-related if the employee is the only worker in his work area to contract the virus; his job duties do not include frequent contact with the general public; or if the employee, outside of work, closely associates with someone who has COVID-19.

Last, OSHA clarified that employers must evaluate the work-relatedness of each case using a "more likely than not" standard. OSHA stated, "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 the particular case of COVID-19, the illness is not recordable." In other words, a mere possibility that the exposure occurred in the workplace does not make a case recordable.

It remains to be seen whether this new guidance ends up being a distinction without a difference, since many employers are already investigating employee COVID-19 cases to protect their other employees and comply with various state government directives. But, in the event OSHA pays a visit, employers should be prepared to prove they have made a "reasonable determination" as to the work-relatedness of employee COVID-19 cases. When an employer questions an employee with a known case of COVID-19, the questions and responses should be documented by the employer, dated, and stored in a location where the employee's private health information will be protected. If an employer decides that a particular case is not work-related, it should document any and all reasons supporting that determination.

In addition, employers who typically rely upon their workers' compensation insurance carriers to investigate worker claims should not strictly rely on the insurance company's investigation to determine the work-relatedness of the virus. To comply with OSHA's directive, employers should undertake an independent investigation (which may have to be more extensive than their workers' compensation insurance carrier's investigation) of each claim and arrive at their own conclusions about the work-relatedness of COVID-19 cases. If the employer is in one of the few states that prohibit private workers' compensation insurance, the bulk of the investigation will fall on the employer's shoulders. OSHA has made it clear that it is the responsibility of the *employer* to determine work-relatedness, and therefore an employer may need to defend itself by demonstrating it acted reasonably in making its determination.