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All in a Day's Work: The Employer's Legal Guide

OSHA requires all employers to investigate whether COVID-19 infections are "work-related"

By George W. Ingham & Zachary Siegel on May 20, 2020

On May 19, 2020, the Occupational Safety and Health Administration (OSHA) issued **Revised Enforcement Guidance** (Guidance) requiring employers to investigate whether employee COVID-19 infections are "work-related" for the purpose of determining whether a record must be made of such infections. This Guidance, which is effective on May 26, 2020, backtracks from OSHA's prior April 10 guidance which had previously relaxed recordkeeping obligations on all non-healthcare, emergency response, or correctional institution employers for COVID-19 illnesses.

As background, OSHA requires employers to make a record of a COVID-19 infection if: (1) the case is a **confirmed case** of COVID-19; (2) the case is **work-related** as defined by 29 CFR § 1904.5 (an injury or illness is work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness); and (3) the case involves **one or more of the general recording criteria** set forth in 29 CFR § 1904.7 (an injury or illness is recordable if it results in: death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness or if it is otherwise diagnosed by a medical professional as a significant injury or illness). Certain circumstances, such as work-related fatalities, must not only be recorded, but **reported** to OSHA.

In light of the difficulty of determining whether workers contracted COVID-19 due to exposures at work, in an **April 10, 2020 memorandum**, OSHA exercised its "enforcement

discretion" to **not require work-relatedness determinations to be made by non-healthcare/emergency response/correctional institution employers unless** (a) there is **objective evidence** a COVID-19 case may be work related (e.g., a number of cases developing among workers who work closely together without an alternative explanation; and (b) the evidence was **reasonably available** to the employer.

OSHA now requires all employers (except employers who have less than 10 employees or employers who are otherwise **partially exempt** from OSHA's recordkeeping obligations) to make work-relatedness determinations. The Guidance specifically requires an employer to make a "good faith and reasonable inquiry" into 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. If it is, then the exposure should be deemed "work-related" and is potentially recordable. In determining the adequacy of the employer's inquiry, OSHA will consider the following:

- The reasonableness of the employer's investigation into work-relatedness. Employers are not "expected to undertake extensive medical inquiries," but should "(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 SARS-CoV-2 exposure," including reviewing co-worker COVID-19 infections.
- The evidence available to the employer. In determining the reasonableness of an investigation, OSHA will focus on "the information reasonably available to the employer at the time it made its work-relatedness determination" but will also consider later information learned by the employer. Thus, an employer may wish to revisit work-relatedness determinations based on new information learned.
- The evidence that a COVID-19 illness was contracted at work. OSHA has explained that work-relatedness is more likely where:
    - Several cases develop among workers who work closely together and there is no alternative explanation.
    - A COVID-19 infection 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 job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative

explanation.

- By contrast, work-relatedness is less likely where:
    - An employee 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, 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 will 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.

Employers should ensure they are prepared to conduct this inquiry into COVID-19 infections in the workplace. For more information regarding this development or other issues relating to COVID-19, please contact one of the authors of this article or the Hogan Lovells lawyer with whom you work.

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