OSHA'S Disappointing Reversal on Recording COVID-19 Infections as Workplace Injuries

Effective May 26, 2020, employers will be required to record COVID-19 infections as workplace injuries if:

1. An employee has 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 Section 1904.5; and
3. The case involves one or more of the general recording criteria set forth in 29 CFR Section 1904.7.

OSHA's revised enforcement guidance issued to its Compliance Safety and Health Officers is a 180 degree turnabout from the guidance issued on April 10.

OSHA justifies its policy reversal based on three sets of facts: incidence, adaptation, and the return of the workforce. Whether OSHA's rationale for changing its position is compelling is besides the point. Employers must comply with OSHA's new directive.

The new OSHA directive reminds employers that recording a COVID-19 illness does not, of itself, mean that an employer has violated any OSHA standard.

Moreover, existing regulations exempt employers with 10 or fewer employees and certain employers in low hazard industries from reporting obligations all together. COVID-19 illnesses that result in a fatality, in-patient hospitalization, amputation, or loss of an eye still have to be reported even by smaller employers.

One bright spot for employers is that OSHA recognizes how devilishly difficult it is to determine the source of anyone's COVID-19 infection. Therefore, OSHA will look to the "reasonableness" of an employer's investigation. It is sufficient in most circumstances for an employer, when it learns of an employee's COVID-19 illness, to:

- Ask the employee how he/she believes they contracted the COVID-19 illness.
- While respecting employee privacy, discuss with the employee their work and out-of-work activities that may have led to the COVID-19 illness; and
- Review the employee's work environment for potential SARS-CoV-2 exposure.

The review under the third bullet point is to be informed by any other instances of workers in that environment contracting COVID-19 illness. When conducting this review, OSHA provided many examples of evidence

that would tend to prove that an infection was work-related. For example:

- COVID-19 illnesses are likely work-related when several cases develop among workers who work closely together and there is no alternative explanation.
- 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 who has a confirmed case of COVID-19 and there is no alternative explanation.
- An employee's COVID-19 illness is likely work-related if his job duties include having 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.
- An employee's COVID-19 illness is likely not work-related if he, 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.

If an employer conducts a good faith investigation and winds up "on the fence," with no determination as to whether the infection was or was not contracted at work, then the employer does not need to record that COVID-19 illness.

Employer Takeaways

OSHA's abrupt reversal is disappointing. Many employers are not equipped to conduct investigations about the origins of an infectious disease while simultaneously attending to all their other legal obligations. With that said, the best source of information about a COVID-19 infection is the infected employee. Employers should ask every employee who is infected, "How do you think you caught this?" Most employees will answer honestly and candidly. If the employee is too sick to answer questions, employers should talk with spouses and family members.

Finally, documentation of the investigation is critical. Employers must document the "who, what, where, when, why and how" of their investigations in writing. OSHA will likely defer to an employer's conclusion even if it is a "close call," but employers must prove that they engaged in a good-faith investigation leading them to that conclusion.

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