

COVID-19 and OSHA reporting requirements



Miriam L. Rosen | Friday, June 12, 2020

Employers with employees returning to the workplace have a long list of new requirements to deal with. Now employers can add to that list the Occupational Safety and Health Administration's (OSHA) requirement relate to evaluating and reporting when a COVID-19 case is a work-related incident. In a Memorandum effective May 26, 2020, OSHA clarified earlier guidance about when employers should take action to determine whether COVID-19 cases affecting employees are work-related and therefore, recordable.

For purposes of recordkeeping requirements, OSHA states that COVID-19 is a recordable illness and employers are responsible for recording COVID-19 cases, if:

1. The case is a confirmed case of COVID-19, as defined by the CDC.
2. The case is work-related; which means under 29 CFR §1904.5 that 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.**
3. The case involves one or more of the general recording criteria set forth in 29 CFR § 1904.7.

In the Memorandum, OSHA acknowledges that the nature of the disease may make it difficult for employers to determine whether a COVID-19 illness is work-related, especially when an employee has had potential exposure both in and out of the workplace.

As a result of these considerations, OSHA advised that it will exercise discretion in its enforcement of the reporting requirement. In particular, because of the difficulty in determining work-relatedness, OSHA will consider the following factors in assessing the effectiveness of employers' efforts to making work-related

determinations.

- **The reasonableness of the employer's investigation into work-relatedness.** OSHA does not expect employers, especially small employers, to undertake extensive medical inquiries, in light of employee privacy concerns and most employers' lack of expertise in this area. OSHA notes that in most circumstances it is sufficient for the employer, to ask a COVID-19 positive employee:
 - How the employee believes the COVID-19 illness was contracted;
 - While respecting employee privacy, discuss with the employee work and out-of-work activities that may have led to the COVID-19 illness; and
 - Review of the employee's work environment for potential exposure. This review should be informed by any other instances of workers in that environment contracting COVID-19 illness.
- **The evidence available to the employer.** Employers should consider information *reasonably* available to it at the time its work-relatedness determination – such as an outbreak in the workplace or no other known incidences.
- **The evidence that a COVID-19 illness was contracted at work.** OSHA has also advised its compliance officers to take into account all reasonably available evidence to determine whether an employer has complied with its recording obligation. Because these factors cannot be reduced to a ready formula, certain types of evidence may weigh in favor of or against work-relatedness. For instance:
 - COVID-19 illnesses are **likely work-related** when:
 - Job duties include having frequent, close exposure to the general public in an area with ongoing community transmission and no alternative explanation exists.
 - It is contracted shortly after lengthy, close exposure to a customer or coworker who has a confirmed case of

COVID-19 and there is no alternative explanation.

- Several cases develop among workers who work closely together and no alternative explanation exists.
- A COVID-19 illness is likely **not work-related** if:
 - The employee is the only worker to contract COVID-19 in the vicinity and the job duties do not include having frequent contact with the general public.
 - Outside the workplace the employee closely and frequently associated 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.

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After a reasonable and good faith inquiry, if the employer concludes that a COVID-19 case is more likely than not work-related, it should be recorded as a respiratory illness on the OSHA Form 300. If the employer cannot make such a determination, there is no recording obligation. Notably, recording of a COVID-19 incident as work-related does not, in and of itself, indicate that the employer has violated any OSHA standard. Whether work related or not, OSHA advises employers that it is important for workers' health and safety to take appropriate steps to protect employees.

With heightened concerns about workplace safety, employers should anticipate an uptick in OSHA complaints as employees return to work. To be prepared to respond to such complaints, it will be important for employers to establish compliance with the reporting requirements by conducting the inquiries noted above and documenting efforts to determine whether an employee COVID-19 case is work-related.

As the impact of the COVID-19 crisis unfolds in return to work concerns, the McDonald Hopkins Employment Law Team will continue to keep employers updated on new developments.



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