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Insights

OSHA's Revised Enforcement Guidance When a Work-Relatedness Determination is Required

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By: Elizabeth M. Roberson and Kate Trinkle

The Department of Labor (DOL) is continuously updating its guidance for handling COVID-19. One of the most recent updates came from the DOL's Occupational Safety and Health Administration (OSHA), which recently revised its enforcement policies for COVID-19.**1** We detailed the former guidance in a previous article, **Workplace Safety and COVID-19: OSHA's Interim Enforcement Guidance and What It Means for Employers**. The guidance mentioned there will be rescinded as of May 26, 2020. However, not all of the enforcement guidance has changed.

I. What still applies from the prior OSHA guidance?

Recordkeeping Requirements

OSHA classified COVID-19 as a recordable disease. Employers must report COVID-19 cases if:

1.the case is a confirmed case of COVID-19, as defined by the Centers for Disease Control and Prevent (CDC);

2. the case is work-related; and

3.the case involves one or more of the general recording criteria set forth in the Occupational Safety and Health Act of 1970 (OSH Act).

This recording criteria will be met if the injury or illness results in death, days away from work, restricted work or transfer to another job, loss of consciousness, or a significant injury or illness diagnosed by a physician or other licensed health care professional.

Although testing for COVID-19 may not be available and/or results from such a test may not be immediate, once an employer learns of a reportable event**2**, it must report it within either (1) 8 hours for a fatality, or (2) 24 hours for an in-patient hospitalization, an amputation, or loss of an eye. And if a fatality occurs within 30 days after the work-related incident, an employer must report the fatality to OSHA within 8 hours of being made aware of it.

Preventing Exposures from Hazards in the Workplace

As employers transition to bringing their workforce back to work or moving from a work from home setting to the office setting again, OSHA emphasizes that one of the most important OSHA requirements will be front and center: employers must prevent exposure to hazards in the workplace. OSHA issued guidance on numerous industry specific standards that should be followed, but in addition, all industries should enforce the following OSHA and CDC standards:

- encourage employees to frequently wash their hands with soap and water for at least 20 seconds
- have alcohol-based hand sanitizer available for employees to use in many areas of your workplace
- tell employees to avoid touching their eyes, nose, or mouth with unwashed hands
- encourage employees to maintain a 6-foot distance from others; and
- place OSHA related signage in your workplace to help remind employees of these requirements.

In addition to these prevention steps, employers should consider whether their state requires a safety plan, has specific OSHA guidance, or specific industry guidance.

II. What's new under the revised enforcement guidance?

Recordkeeping Requirements

With the new enforcement guidance, OSHA will enforce the recordkeeping requirements for all employers. It is important to remember that recording a COVID-19 illness, without doing more, may not satisfy an employer's OSHA obligations. For certain employers, like those with 10 or fewer employees or those within certain low risk industries, the recording requirement does not apply unless a COVID-19 illness results in a fatality or an employee's in-patient hospitalization, amputation, or loss of an eye.

Work-Relatedness Determination

While all employers are now required to make a work-relatedness determination, regardless of industry risk, OSHA is exercising its enforcement discretion to determine whether employers have met OSHA obligations and made a reasonable work-relatedness determination. Specifically, OSHA will consider the following:

1. The reasonableness of the employer's investigation into work-relatedness.
2. The evidence available to the employer.
3. The evidence that a COVID-19 illness was contracted at work.

1. Reasonableness of Investigation.

An investigation into work-relatedness after learning of an employee's COVID-19 illness will generally be sufficient, and reasonable, if the employer

a. asks the employee how s/he believes s/he contracted COVID-19;

b. engages in a discussion with the employee about the employee's activities at work and outside of work, while respecting the employee's privacy; and

c. assesses the employee's work environment for potential COVID-19 exposure, taking into account any other instances of workers in the same environment contracting COVID-19.

2. Evidence Available.

OSHA will look to the evidence reasonably available to the employer at the time it makes its work-relatedness determination. If additional information becomes available to the employer at a later time, OSHA will also take that information into account.

3. Evidence COVID-19 was Contracted at Work.

OSHA will take into account all evidence when determining whether the employer has complied with its recording obligations. However, some types of evidence may weigh in favor of or against work-

relatedness. For example:

- If several cases of COVID-19 develop among employees working in close contact with one another, the COVID-19 illness is likely work-related unless there is an alternative explanation.
- If an employee contracts COVID-19 shortly after a lengthy, close exposure to an individual, coworker or customer, confirmed as having COVID-19, the exposure is likely work-related unless there is an alternative explanation.
- If the employee has frequent, close exposure to members of the public in a locality with ongoing community transmission as part of the employee's job, the COVID-19 illness is likely work-related unless there is an alternative explanation.
- Conversely, an employee's COVID-19 illness is not likely work-related if the employee is the only one to contract the illness in the employee's work area and the employee does not frequently have contact with members of the general public.
- Similarly, an employee's COVID-19 illness is likely not work-related if the employee, outside of the workplace, closely and frequently associates with someone 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 that relates to the employee's illness, including that provided by medical providers, public health authorities, or the employee.

If the employer makes a good faith and reasonable inquiry into the work-relatedness of the employee's COVID-19 illness and "the employer cannot determine whether it is more likely than not that the exposure in the workplace played a causal role … the employer does not need to record that COVID-19 illness." OSHA emphasizes that "[i]n all events, 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."

III. Moving Forward

If you have any questions about OSHA's enforcement guidance or you have an employee who contracts COVID-19, please contact **Elizabeth M. Roberson**, or any other member of the Krieg DeVault LLP **Employment Law team**. We are here to assist you with making a work-relatedness determination and solutions for protecting your employees.

Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.

[1] https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19.

[2] Id.