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OSHA Issues Guidance Limiting Recordkeeping Requirements of COVID-19 Cases for Certain Employers

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On April 10, 2020, the Department of Labor's Occupational Safety and Health Administration ("OSHA") issued guidance clarifying certain employers' recording requirements regarding cases of COVID-19. Under the new guidance, most employers are now exempt from the requirement to record COVID-19 cases of employees for OSHA recordkeeping purposes, absent objective evidence that a case is work-related. Employers that are in the healthcare industry, emergency response organizations, and correctional institutions, however, must continue to record work-related COVID-19 cases. The guidance will take effect immediately and will remain in effect until further notice, pending the conclusion of the COVID-19 public health crisis.

Employers Exempt from COVID-19 Recording Requirement

OSHA's regulations require employers to record (and in some cases involving hospitalization or death, to report to OSHA) certain work-related injuries and illnesses on their OSHA Form 300 log. As we previously reported, OSHA considers COVID-19 to be a recordable illness.

OSHA's most-recent guidance states that, until the agency notifies employers otherwise, all employers – except emergency response organizations, correctional institutions or those in the healthcare industry – will not be required to record cases of COVID-19 unless:

1. There is objective evidence that a COVID-19 case may be work-related; and
2. The evidence was reasonably available to the employer.

In terms of defining "objective evidence", the guidance states that such evidence would exist if, for example, a number of cases developed among employees who work closely together, with no alternative explanation. The guidance also explains that objective evidence of a work-related COVID-19 transmission will be deemed to be "reasonably available" if, for example, employees provided information to the employer or the employer learns information regarding its employees' health and safety during the ordinary course of managing its business.

Healthcare, Emergency Response, and Correctional Employers Must Continue to Record COVID-19 Cases

The guidance also reiterates that healthcare-industry employers, emergency response organizations (such as emergency medical, firefighting, and law enforcement services), and correctional institutions must continue to record cases of COVID-19 on the OSHA Form 300 log if:

1. The case is a confirmed case of COVID-19 as defined by the Centers for Disease Control and Prevention ("CDC");
2. The case is work-related; and
3. The case involves one or more of the general recording criteria set forth in 29 C.F.R. § 1904.7.

Under OSHA's regulations, an injury or illness is presumed to be 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." However, injuries or illnesses that fall under certain exceptions (as set forth in the governing regulations) are not work-related and not required to be recorded, including, for example, where the injury or illness involves signs or symptoms that surface at work but result from a non-work-related event or exposure occurring outside the work environment. An injury or illness meets the general recording criteria under 29 C.F.R. § 1904.7 if it results in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness.

Takeaways

This is welcome guidance from OSHA, as it will ease some of the uncertainty around OSHA recordkeeping obligations that comes with often unclear assessment of whether an employee with COVID-19 contracted the virus at work. Still, earlier guidance and enforcement directives, as posted on OSHA's coronavirus webpage, remain in effect. Most notably, employers must continue to satisfy the requirement under the OSHA General Duty Clause to provide "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." Employers in certain high-risk industries should also be aware of OSHA's Personal Protective Equipment (PPE) general standards, which require gloves, eye, and face protection under hazardous conditions, as well as more recent guidance relevant to healthcare workers.

Finally, on April 13, 2020, OSHA announced an interim enforcement response plan that prioritized workplace inspections in response to employers' mandatory reports of fatalities, in-patient hospitalizations, and imminent danger exposures. Therefore, employers should be proactively reviewing their policies and protocols to ensure compliance with OSHA's requirements.

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