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CLIENT SERVICES
Labor & Employment
COVID-19 Insights

05/21/2020

OSHA Issues Revised Guidance Regarding Recordkeeping Relative to COVID-19

On May 19, 2020, the Department of Labor issued revised interim enforcement guidance by the Occupational Safety and Health Administration (OSHA) concerning OSHA's recordkeeping requirement related to recording cases of COVID-19. Under previous interim enforcement guidance published on April 10, OSHA had temporarily exempted most employers from determining whether a recorded case was "work-related," defined as an event or exposure in the work environment either causing or contributing to the resulting condition, or significantly aggravating a pre-existing injury or illness. (A broader discussion of OSHA's previous guidance can be found here). Pursuant to the May 19 revised guidance, however, OSHA has effectively removed this temporary exemption, meaning that all employers who are otherwise required to keep OSHA injury and illness logs must now determine when COVID-19 cases are "work-related" and report such cases to the agency accordingly.

To determine whether it is more likely than not that exposure in the workplace played a causal role with respect to a case of COVID-19, employers are required to conduct a reasonable and good faith investigation based upon the evidence available at that time. Although employers are not expected to undertake extensive medical inquiries, the guidance directs employers to take the following steps upon learning of an employee's COVID-19 diagnosis: (1) ask the employee how (s)he

believes (s)he contracted the COVID-19 illness; (2) while respecting employee privacy, discuss with the employee his/her 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 exposure.

OSHA offers that cases of COVID-19 are likely work-related under the following circumstances, unless an alternative explanation exists:

- Several cases develop among workers who work closely together; or

- COVID-19 was contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19; or

- The 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.

In these OSHA-provided examples, an employee's COVID-19 diagnosis is deemed to not be work-related where:

- The employee is the only one to contract COVID-19 in her "vicinity," and his/her job duties do not include having frequent contact with the general public regardless of the rate of community spread. (The term "vicinity" is not defined.)

- Outside the workplace, the employee 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.

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The guidance is clear that if, after a reasonable and good faith investigation an employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role with respect to a case of COVID-19, the employer does not need to record that illness. Moreover, and consistent with existing OSHA regulations, employers with 10 or fewer employees are only required to report a work-related COVID-19 illness if such illness results in a fatality or an employee's in-patient hospitalization, amputation, or loss of an eye.

The agency reasoned that a revision of its previous guidance on this topic was necessary given the growing understanding of the manner of transmission of COVID-19 coupled with states' ongoing efforts to reopen economies and return employees to the physical workplace. This revised guidance will go into effect, and OSHA's previous memorandum will be simultaneously rescinded as of May 26, 2020.

If you have any questions regarding OSHA's guidance or other labor and employment issues, please contact Corey Biller or your Neal Gerber Eisenberg attorney.

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