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COVID-19 UPDATE

NEW OSHA GUIDELINES



**Occupational Safety
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Employers Take Note

On May 28, 2020, Occupational Safety and Health Administration (OSHA) officials informed members of Congress that the agency issued its first coronavirus-related citation within the last two weeks. In response to criticism, OSHA officials stated their preference for looser, industry-specific guidance instead of hard-and-fast rules, which OSHA contends will allow the agency to adapt to the latest science and accounts for differences in business sectors. But OSHA says this will not come at the expense of enforcement.

To that end, OSHA recently issued two enforcement memos regarding COVID-19 in the workplace. The first memo updates employers on the appropriate standard for recording COVID-19 illnesses resulting from workplace exposure. *Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19)*. The second memo provides guidance for employees when reporting COVID-19 illness or injury and guidance for compliance safety and health officers (CSHOs) for investigating workplaces during the emergency. *Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)*. The updated protocols went into effect on May 26, 2020, and are effective as the current public health crisis continues to develop.

I. Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019

COVID-19 has been declared a recordable illness and is subject to OSHA's recording standards if:

1. The illness is a confirmed case of COVID-19, meaning the employee tests positive for SARS-CoV-2, the virus which causes COVID-19.
2. The case is work-related, meaning the employee contracted the virus through exposure in the workplace.
3. The case results in the employee's death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness, or involves significant illness or injury diagnosed by a physician or licensed healthcare professional.

The guidelines recognize the difficulty in determining whether an illness is work-related and require employers to make a good-faith inquiry into the whether the illness is work-related. CSHOs are given discretion to investigate the employer's inquiry and are instructed to consider the factors below, in addition to any evidence of causation provided by a medical provider, the public health authorities, or the employee's own statement.

A. When should the employer record the illness?

Employers should record COVID-19 cases as work-related illness only after the employer conducts a reasonable and good-faith inquiry and determines that the employee's exposure more than likely occurred in the workplace.

B. What is the scope of the inquiry an employer should make into whether the illness is work-related?

Employers must conduct a reasonable inquiry into whether the illness is work-related. In most instances, a reasonable inquiry will entail:

1. Asking the employee how they believe they contracted COVID-19.
2. While respecting the employee's privacy, discussing their work and out-of-work activities that may have



led to contracting COVID-19.

3. Reviewing the employee's work environment for potential SARS-CoV-2 exposure, considering any other instances of workers in the same environment contracting COVID-19.

C. What kind of information or evidence should employers consider during their investigation?

Employers should consider all the information reasonably available at the time they make any decision regarding work-relatedness. Any information which an employer learns after making a determination will be considered by OSHA when evaluating whether the determination was a result of a reasonable and good-faith inquiry.

D. How should employers evaluate evidence related to work-relatedness?

The guidelines state that there is no strict formula to follow, but the following rules should be considered in the employer's determination. COVID-19 illnesses are likely work-related if:

1. Several cases develop among workers who work closely together and there is no alternative explanation
2. The sick 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.

COVID-19 illnesses are likely not work-related if:

1. The employee is the only worker to contract COVID-19 in their vicinity and their job duties do not include having frequent contact with the general public, regardless of the rate of community spread.
2. The employee, outside the workplace, closely and frequently associates with someone (e.g., a family member, significant other, or close friend) who has COVID-19, is not a coworker, and exposes the employee during the period in which the individual is likely infectious.

E. What should employers do if an employee tests positive for COVID-19, but determines the illness was not work-related?

Regardless of whether the employee's illness is work-related, employers should respond appropriately to protect other employees to limit their exposure to the virus. Please see our update from April 3, 2020, for tips on how to appropriately respond when an employee contracts COVID-19 out of the workplace. (<https://rllaw.com/2020/04/03/labor-and-employment-issues-amid-covid-19-what-employers-need-to-know/>)

II. Updated Interim Enforcement Response Plan for Coronavirus Disease 2019

The second OSHA memorandum outlines the reporting deadlines for employers and establishes new guidelines for CSHOs to follow when investigating any workplace injury or illness during the COVID-19 pandemic.

A. Reporting Timelines

Employers must report:

1. Work-related fatalities to OSHA within eight (8) hours.
2. Work-related in-patient hospitalizations, amputations, or losses of an eye within twenty-four (24) hours
3. Fatalities that occur within thirty (30) days of a work-related incident.



4. In-patient hospitalizations, amputations, or losses of an eye that occur within twenty-four (24) hours of a work-related incident.

B. OSHA's and CSHOs' Priorities

In geographic areas where community spread of COVID-19 has significantly decreased, CSHOs will return to the inspection planning policy that OSHA relied on prior to the start of the COVID-19 health crisis. OSHA will continue to prioritize COVID-19 cases, and CSHOs are instructed to utilize non-formal phone/fax investigations or rapid-response investigations when such investigations have historically been conducted in such a manner. When site inspections are necessary, CSHOs will utilize appropriate precautions and wear PPE (personal protective equipment).

In geographic areas experiencing either sustained elevated community spread or a resurgence in community spread, OSHA will prioritize investigations into high-risk workplaces, such as hospitals or healthcare providers treating COVID-19 patients, or workplaces with high numbers of complaints or known COVID-19 cases.

III. Conclusion

OSHA will continue to issue updates to its guidelines with additional instructions for employers, who should follow and implement OSHA's revised standards as they continue to develop. If you have any questions or concerns regarding the issues addressed in this article, Riess LeMieux is available to assist.

