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OSHA Reverses Course and Reinstates Employers' Obligation to Determine Whether COVID-19 Cases Are Work-Related

Departing from its previous guidance, on May 19, the Occupational Safety and Health Administration (OSHA) issued new guidance regarding employers' obligation to record COVID-19 cases on their OSHA 300 Logs.

The new guidance, effective May 26, reinstates covered employers' obligation to make work-relatedness determinations on confirmed cases of COVID-19 among employees. Under OSHA's prior enforcement guidance, employers outside the healthcare/emergency responder industries were excused from making such determinations unless there was objective evidence reasonably available to them that the case was work related. Citing a slowdown in the spread of the virus in certain areas of the country, which has prompted states to ease restrictions and allow workers to return to the workplace, OSHA's position is that all covered employers should be taking action to determine whether an employee's COVID-19 illness is work-related.

A COVID-19 case is subject to recording requirements if it meets the following criteria:

1. The employee has a confirmed case of COVID-19 (at least one respiratory specimen that tested positive for SARS-CoV-2).
2. The employee was exposed to COVID-19 in the work environment.
3. The case is recordable under general OSHA standards (i.e., results in any of the following: death, days away from work, restricted work, transfer to another job, medical treatment beyond first aid or loss of consciousness).

Recognizing it may still be difficult for employers to make work-relatedness determinations, OSHA's guidance states that it will exercise enforcement discretion when assessing whether employers have complied with this obligation and made a "reasonable determination" of work-relatedness based on the following considerations:

1. *The reasonableness of the investigation into work-relatedness*. Due to privacy concerns, employers need not make extensive medical inquiries, but should ask employees who test positive for COVID-19 how they believe they contracted the virus. This includes discussing with employees the activities outside of work that may have led to exposure, which can include but need not be limited to whether other members of their household have tested positive or they have otherwise been in close contact with someone who has tested positive or exhibited COVID-19 symptoms. It also includes reviewing the work environment for potential exposure (including knowledge of other employees at the worksite who have tested positive).
2. *Evidence available to the employer.* OSHA will consider the information that was available to the employer at the time it made the decision about work relatedness and any additional information the employer later learned.
3. *Evidence that COVID-19 was contracted at work*:
    - Several cases develop among workers who work closely and there is no alternative explanation.
    - Illness occurs shortly after "lengthy, close" exposure to a customer/co-worker and there is no alternative explanation.
    - Job duties include close frequent contact with the public in a community with significant cases and there is no alternative explanation.
4. *Evidence that COVID-19 was **not** contracted at work*:

- Only one worker contracts COVID-19, and his/her job duties do not involve contact with the public (regardless of the prevalence of community spread).
- The worker 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.

OSHA also will consider other evidence of causation based on medical advice, public health authorities and/or anecdotal information the employee provides. Unlike many other workplace illnesses and injuries, it is difficult to pinpoint exactly when and where the employee contracted the virus. Therefore, if, after a reasonable and good faith inquiry, the employer cannot determine the exposure was work related, it does not need to record the COVID-19 case on its OSHA 300 Log. To demonstrate their good faith, employers should document their investigation and the information relied on in making their determinations of work relatedness.

OSHA also clarified that COVID-19 cases should be coded as a respiratory illness. In addition, employers may treat COVID-19 cases as privacy cases and withhold an employee's name on their OSHA 300 Logs, provided they comply with the other requirements set forth in 29 CFR § 1904.29(b)(7)(vi), which among other things requires employers to keep a separate list identifying such employees.

Pursuant to existing regulations, employers with 10 or fewer employees and certain employers in low-hazard industries have no requirement to maintain OSHA 300 Logs. OSHA's guidance notes, however, that such employers still must *report* fatalities within eight hours and in-patient hospitalizations within 24 hours.

When employers report in-patient hospitalizations and fatalities to OSHA, it will trigger either an on-site inspection or rapid response investigation, both of which typically include information requests requiring employers to produce their OSHA forms 300, 300A and 301. Accordingly, employers must keep such records up to date.

Employers should also timely notify their workers' compensation carrier if they make a determination that an employee's COVID-19 diagnosis is work related in order to be able to use their workers' compensation insurance to cover claims by affected employees (or their estate) for medical expenses, lost wages, and/or benefits for death or any permanent partial or total disability.

On May 19, OSHA also released its updated interim response plan, which states that, effective May 26, it will continue to prioritize COVID-19 cases and will resume its pre-COVID-19 investigation procedures, including on-site inspections, in geographic areas where community spread of COVID-19 has decreased. The resumption of on-site inspections means employers must be prepared to produce certain information to OSHA inspectors, including any written COVID-19 safety policies and OSHA 300, 300A and 301 forms, on short notice. It is imperative that employers be prepared for such inspections at all times since they are unannounced. As such, regardless of whether there have yet been any COVID-19 cases attributable to a particular workplace, employers should maintain COVID-19 protocols that are up to date and compliant with current guidance.

Employers are now faced with the challenging task of investigating the origins of infection of workers who test positive for COVID-19 and making judgment calls based on all the information available to them about whether the case is work related and thus subject to OSHA's recording and/or reporting requirements. Given OSHA's prioritization of COVID-19-related cases, employers' determinations as to whether such cases are work related are almost certain to face heightened scrutiny. As such, employers should consult with counsel when making such determinations.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

Authors



Daniel L. Schwartz
Partner

Stamford, CT | (203) 977-7536

New York, NY | (212) 297-5800

dlschwartz@daypitney.com



Elizabeth C. Barton
Of Counsel

Hartford, CT | (860) 275-0371

ecbarton@daypitney.com



Francine Esposito
Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com



Heather Weine Brochin
Partner

Parsippany, NJ | (973) 966-8199

New York, NY | (212)-297-5800

hbrochin@daypitney.com



James M. Leva
Partner

Parsippany, NJ | (973) 966-8416

Stamford, CT | (973) 966-8416

jleva@daypitney.com



Rachel A. Gonzalez
Partner

Parsippany, NJ | (973) 966-8201

New York, NY | (212) 297-5800

rgonzalez@daypitney.com