Recording of COVID-19 Work-Related Illness Under the Occupational Safety and Health Administration's (OSHA) Recordkeeping Requirements
May 29, 2020
Version 2.0[1]

Recordkeeping Requirements for OSHA 300 Logs

The voluntary industry guidance on this website ("Industry Guidance") is based on recommendations received from a variety of sources, including federal agencies, state health authorities, and industry advisors. As recommended practices continue to evolve, guidance on these issues also may have been issued by federal agencies such as the Centers for Disease Control (CDC), the U.S. Department of Labor, state and local authorities, and others subsequent to the formulation of this Industry Guidance. For this reason, in addition to considering this Industry Guidance, readers are encouraged to review any and all updated guidance from either industry or governmental authorities, as well as any guidance that may be issued in the future, as it is expected that recommended practices will continue to evolve. Readers should also check this website for any updated versions of this Industry Guidance.

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Readers are also encouraged to exercise their best judgment in considering whether, due to their particular individual circumstances, it would be reasonable to implement additional measures to further reduce the risks related to COVID-19. Readers are further encouraged to consider any and all additional authoritative resources and advice.

Background

As with H1N1 and other uncommon communicable diseases, OSHA considers COVID-19 to be an "illness" under its recordkeeping regulation (29 C.F.R. Part 1904) and, thus, potentially recordable on an employer's OSHA 300 Log. Under OSHA's recordkeeping regulation, when an employee contracts an illness the employer must consider if it is "work-related." An illness is 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.

Work-relatedness is presumed for illnesses that result from events or exposures in the work environment, unless certain exceptions apply. One of those exceptions is that the illness involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs *outside* of the work environment. Thus, if an employee develops COVID-19 *solely* from an exposure outside of the work environment, it would *not* be work-related, and thus not recordable.

As Related to COVID-19

With the community transmission of COVID-19 in many parts of the country and the presence of asymptomatic infected persons, it may be challenging for employers to determine if an employee's confirmed COVID-19 diagnosis is work-related. In response to this concern, on May 19, OSHA issued updated interim enforcement guidance on when an employer should record a

[1] Version 1 was applicable between April 10 – May 25, 2020. Version 2 went into effect on or after May 26, 2020. Please carefully review "Establishing "Work-Related" COVID-19 Illness" which has been re-written in accordance with OSHA's new interim guidance.

confirmed COVID-19 diagnosis for purposes of OSHA's recordkeeping requirements. The new guidance goes into effect May 26 and will remain so until further notice.

In the guidance, OSHA states that only confirmed cases of COVID-19, as defined by the Centers for Disease Control and Prevention (CDC), should be recorded. OSHA also reiterates that only work-related cases should be analyzed and these cases must still meet the severity criteria of the rule (i.e., cases involving one or more of the following: death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness, or a significant injury or illness diagnosed by a physician or other licensed health care professional).

Some companies have implemented precautionary measures to screen employees for symptoms of illness. Directing an employee to go home or seek medical advice because the employee is displaying potential symptoms of illness does not trigger the OSHA recording requirement. OSHA's recordkeeping requirements require a confirmed positive COVID-19 test per the CDC guidelines.

Establishing "Work-Related" COVID-19 Illness

In the aforementioned enforcement guidance, OSHA acknowledges potential challenges certain employers, such as food manufacturing facilities, distribution centers, wholesale and retail outlets, may experience when determining whether an employee was exposed to COVID-19 at the workplace or outside of the workplace. For those reasons, OSHA stated it will exercise enforcement discretion to assess the employers' efforts in making work-relatedness determinations. OSHA states that Compliance Safety and Health Officers (CSHO) should consider the following considerations when determining if the employer complied with its obligation to make a reasonable determination of work-relatedness:

1. The reasonableness of the employer's investigation into work-relatedness. OSHA states it is sufficient in most circumstances for the employer, when it learns of an employee's COVID-19 illness:
    a) to ask the employee how he/she believes he/she contracted the COVID-19 illness;
    b) 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
    c) review the employee's work environment for potential SARS-CoV-2 exposure. This review should be informed by any other instances of workers in that environment contracting COVID-19 illness.

2. The evidence available to the employer. The evidence that a COVID-19 illness was work-related should be considered based on the information *reasonably* available to the employer at the time it made its work-relatedness determination. If the employer later learns more information related to an employee's COVID-19 illness, then that information should be taken into account as well in determining whether an employer made a reasonable work-relatedness determination.

3. The evidence that a COVID-19 illness was contracted at work. When the CSHOs are considering if the employer met their obligation, they should take into account all reasonably available evidence, in the manner described above. This cannot be reduced to a ready formula, *but certain types of evidence may weigh in favor of or against work-relatedness*. For instance:

    a) COVID-19 illnesses are **likely work-related** when several cases (clusters) develop among workers who work closely together and there is no alternative explanation.
    b) An employee's COVID-19 illness is **likely work-related** if it is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation.
    c) An employee's COVID-19 illness is **likely work-related** if his/her job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.
    d) An employee's COVID-19 illness is **likely not work-related** if he/she is the only worker to contract COVID-19 in his/her vicinity and his/her job duties do not include having frequent contact with the general public, regardless of the rate of community spread.
    e) An employee's COVID-19 illness is **likely not work-related** if he/she, outside the workplace, 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.
    f) CSHOs should give due weight to any evidence of causation, pertaining to the employee illness, at issue provided by medical providers, public health authorities, or the employee herself.

Lastly, OSHA states that if after reasonable and good faith inquiry based on the description above, the employer still cannot determine if it was more likely than not the exposure in the workplace played a causal role with respect to a particular case of COVID-19, the employer does not need to record that COVID-19 illness. Determining whether an employee's positive COVID-19 illness is work-related and recordable under OSHA's recordkeeping requirements is an exercise best made in conjunction with counsel.

Companies may find some of the ideas below useful in planning how a company evaluates the likelihood of a workplace exposure, but this information is not legal advice and not intended to replace actual consultation with counsel.

- *Preventative Measures*. The CDC and trade associations have provided guidance and best practices to help food manufacturing facilities, distribution centers, wholesale and retail outlets, minimize the spread of COVID-19 in the workplace.(links) These risk-based prevention strategies include physical or social distancing; enhanced sanitation and disinfecting measures; personal protective equipment (PPE), face covering protocols; reconfigurations of break areas, entry processes, line speeds/configurations, etc; and employee and visitor screening protocols. The extent to which a company has

implemented these practices throughout a facility and individual duty stations may be useful in weighing the overall risk of COVID-19 transmission between employees.

- *Information Gathering*. For those companies implementing company policies for temperature checks and employee health screenings, or other communication mechanisms, information provided by employees may provide the employer with information of other potential sources for an employee's illness. Companies should be sure to keep any personal employee medical information received confidential, to the extent required by state of federal law.

Any review of a company's recordkeeping decision would have the benefit of hindsight, thus contemporaneous documentation is always recommended to memorialize company decisions. A clear company policy and decision-tree establishing what questions are asked of employees may also aide in providing consistent documentation of what information was available to the employer. Also, if a company is provided with additional probative information regarding the situation or employee at a later time, that information should be adequately documented, retained and recordkeeping modified as needed.

Finally, for employees with job duties that enable them to telework from home, a work-related illness must be directly related to performance of company work rather than to the general home environment or setting[2]. Absent physical contact with other employees in the home environment for the performance of company work, a positive COVID-19 diagnosis would not be work-related for employees working solely from home.

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[2] https://www.osha.gov/laws-regs/regulations/standardnumber/1904/1904.5