OSHA Now Requires All Employers to Conduct Work-Relatedness Determinations for All COVID-19 Cases and Record All Work-Related COVID-19 Cases

Related Practices

COVID-19 Task Force

By Peabody & Arnold on May 29, 2020

As discussed in our April 28, 2020 OSHA Update: Recording Cases of COVID-19, the Occupational Safety and Health Administration (OSHA) advised in guidance issued April 10, 2020, that it was relaxing its enforcement policy regarding confirmed, work-related cases of COVID-19 for employers outside of the healthcare industry, emergency response organizations, and correctional institutions.

On May 19, 2020, however, OSHA provided updated interim guidance rescinding its April 10, 2020 guidance effective May 26, 2020. The updated interim guidance, which is described in greater detail below, will remain in effect until further notice.

This post provides only a summary of the information from OSHA's updated guidance on recordkeeping and is not a substitute for legal advice.

Recording Obligations for Work-Related Cases of COVID-19

According to OSHA's updated interim guidance, COVID-19 is a recordable illness and employers with 10 or more employees must record a case of COVID-19 if:

- It is a confirmed case of COVID-19, as defined by the Centers for Disease Control and Prevention (CDC);[1]
- The case is "work-related," which is defined as an event or exposure in the work environment that either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness; and
- The case involves one or more of the general recording criteria under the OSH Act, such as resulting in days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness, or death.[2]

OSHA's Updated Enforcement Policy

In its April 10, 2020 guidance, OSHA acknowledged that it would be difficult for many employers outside of certain industries to conduct inquiries into the work-relatedness of a confirmed case of COVID-19. For that reason, OSHA decided to relax its enforcement policy for most employers, but only temporarily. In its updated interim guidance, however, OSHA announced that it is enforcing the recordkeeping requirements for cases of COVID-19 equally for all employers due to the nationwide efforts to slow the spread of and protect against COVID-19 as states begin reopening their economies.

Specifically, OSHA recognizes that there have been confirmed cases of COVID-19 in nearly all parts of the

United States; outbreaks have been identified among workers in industries other than healthcare, emergency response, or correctional institutions; and transmission and prevention of infection have become better understood to allow employers to slow the spread of the virus, protect employees, and adapt to new ways of doing business. Accordingly, all employers, irrespective of industry, with more than 10 employees will be held to the same standard for recording work-related cases of COVID-19.

Guidance for the Work-Relatedness Determination of Cases of COVID-19

Although all employers are now held to the same recording requirements, OSHA acknowledges that it remains difficult to determine whether a COVID-19 illness is work-related, especially when employees have experienced potential exposure both in and out of the workplace. Therefore, OSHA is exercising its enforcement discretion to assess employers' effort in making work-related determinations. When determining whether an employer has complied with the requirement to determine whether a COVID-19 case is work-related, OSHA will make the following considerations:

- *The reasonableness of the employer's investigation into work-relatedness*
  - Employers, especially small employers, should not be expected to undertake extensive medical inquiries, given employee privacy concerns and most employers' lack of expertise in this area. It is, therefore, sufficient for the employer, when they learn of an employee's COVID-19 illness:
    - To ask the employee how she believes she contracted the COVID-19 illness;
    - While respecting employee privacy, discuss with the employee her work and out-of-work activities that may have led to the COVID-19 illness; and
    - Review the employee's work environment for potential SARS-CoV-2 exposure, particularly if there have been other instances of workers in that environment contracting COVID-19.
  - *The evidence available to the employer*
    - Employers must make the work-relatedness determination based on the evidence that is available to them at the time of recording. 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 assessing whether an employer made a reasonable work-relatedness determination.
  - *The evidence that a COVID-19 illness was contracted at work*
    - All reasonably available evidence should be considered when evaluating whether the employer complied with its recording obligation. Although this cannot be reduced to a specific formula, certain types of evidence may weigh in favor or against work-relatedness. For example:
      - COVID-19 illnesses are likely work-related when several cases develop among workers who work closely together and there is no alternative explanation;
      - A COVID-19 illness is likely work-related if 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; and
      - A COVID-19 illness is likely not work-related if the employee is the only worker to contract

COVID-19 in her vicinity and her job duties do not include having frequent contact with the general public, regardless of the rate of community spread.

If an employer makes a reasonable and good faith inquiry into whether a case of COVID-19 is work-related, as described above, but cannot determine whether it is more likely than not that exposure in the workplace played a causal role with respect to a particular case of COVID-19, then the employer is not required to record that COVID-19 illness. In any event, all covered employers must examine COVID-19 cases among workers and respond appropriately to protect their workforce, regardless of whether a case of COVID-19 is work-related.

Record Retention Requirements

As states begin to allow employers to reopen their workplaces, many employers may want, or in some states may be required, to conduct medical screenings, such as temperature checks, COVID-19 testing, or other types of medical inquiries, of their employees entering the workplace. Employers must be aware of their record retention obligations under the OSH Act regulations.[3] Specifically, the regulations require employers to retain employee exposure records and medical records for 30 years.

The record retention obligation applies to employers who are maintaining records of biological monitoring and medical examination results, including the results of temperature checks and COVID-19 testing, as well as responses to questions relating to symptoms of COVID-19. Accordingly, if an employer is maintaining a record for the results of these types of precautionary screenings, the records must be retained for 30 years. However, the record retention obligation does not apply when an employer does not maintain a record of the information. For example, if an employer requires an employee to verbally confirm they do not have a fever before entering the workplace and the employer does not create a written record of this response, then there is no record that must be maintained. Thus, employers should consider their ability to comply with OSHA's record retention obligations when determining whether it is necessary and/or how to implement these types of medical screenings in the workplace.

Further Information

We will continue to monitor updates and publications from OSHA on requirements for employers and issues related to workplace health and safety. Employers are encouraged to consult with a member of Peabody & Arnold's COVID-19 Task Force for further information about the COVID-19 pandemic and its impact on employment laws.

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[1] A "confirmed case" of COVID-19 refers to individuals who have at least one respiratory specimen that tested positive for SARS-CoV-2, which is the name of the virus that causes COVID-19. For more information about confirmed cases, please visit the CDC's website.

[2] An employer must also consider a case recordable if it involves a significant injury or illness diagnosed by a physician or other licensed health care professional, even if it does not meet one of the aforementioned criteria. *See* 29 C.F.R. § 1904.7.

[3] The employer obligation to retain employee exposure and medical records is set forth at 29 C.F.R. §

1910.1020.

