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OSHA Update: Recording Cases of COVID-19

The Occupational Health and Safety Administration (OSHA) requires covered employers to record certain workplace injuries and illnesses on their OSHA Form 300 injury logs. Last month, OSHA published information on its website stating that “COVID-19 can be a recordable illness if a worker is infected as a result of performing their work-related duties.” Businesses that have continued operations during the COVID-19 pandemic have been left wondering whether and how this recordkeeping requirement applies when employees test positive for COVID-19. Determining whether a case of COVID-19 is “work-related” may be especially difficult in those areas with community spread, where an employee could be exposed to the virus both inside and outside the workplace.

In response to numerous questions raised by employers, OSHA released an [Enforcement Memorandum](#) on April 10, 2020, explaining its recordkeeping requirements for COVID-19 cases and providing additional guidance for employers deciding whether and how to record employee cases of COVID-19 on their injury logs.

Determining Whether COVID-19 is “Work-Related”

Generally, employers are only responsible for recording cases of COVID-19 if (1) the case is confirmed, as defined by the Centers for Disease Control and Prevention (CDC); (2) the case is work-related, as defined by [29 C.F.R. § 1904.5](#); and (3) the case involves one or more of the general recording criteria set forth in [29 C.F.R. § 1904.7](#) (e.g., medical treatment beyond first aid, days away from work, etc.).

An injury or illness is considered “work-related” under 29 CFR § 1904.5, if an event or exposure in the work environment caused or contributed to the condition or significantly aggravated a preexisting injury or illness. Work-relatedness is often presumed for injuries and illnesses resulting from events or exposures occurring

at work. Ultimately, however, the burden falls on the employer in each instance of an employee injury or illness to determine whether that injury or illness is “work-related.” This may be impossible to do for COVID-19, a disease caused by a very contagious coronavirus that employees can be exposed to both in and out of the workplace.

OSHA’s Enforcement Memorandum now clarifies that for most employers that are required to maintain injury logs, OSHA will not enforce the work-relatedness requirement, except in the following circumstances:

- There is objective evidence that a COVID-19 case may be work-related. This could include, for example, several cases developing among workers who work closely together without an alternative explanation; and
- The evidence was reasonably available to the employer. For example, information given to the employer by employees, as well as information that an employer learns regarding its employees’ health and safety in the ordinary course of managing its business and employees.

With this guidance, OSHA hopes employers can concentrate on preventing and mitigating the spread of COVID-19 in the workplace, rather than making difficult work-relatedness determinations.

Recordkeeping for Health Care Employers, First Responders and Correctional Facilities Remains the Same

Importantly, the Enforcement Memorandum provides that this clarified work-relatedness requirement for recordkeeping decisions does not apply to employers in the health care industry, to emergency response organizations (e.g., emergency medical, firefighting and law enforcement services) or to correctional institutions. Employers in these industries must continue to apply the traditional work-relatedness analysis and presumptions contained in 29 C.F.R. § 1904.5 for employees who contract COVID-19, without considering the additional work-relatedness

requirements described above.

How to Record COVID-19 Cases and Ensure Employee Privacy

Finally, for cases of COVID-19 that do meet the work-relatedness requirements and must be included on an employer's OSHA Form 300 injury log, the Enforcement Memorandum explains that COVID-19 should be coded as a respiratory illness on the log. In addition, under OSHA's recordkeeping regulations, certain specific types of illnesses and injuries (e.g., tuberculosis, HIV infections) must be treated as "privacy concern cases," and in those cases, employers may not include the employee's name on Form 300. OSHA's Enforcement Memorandum makes clear that OSHA has not expanded the scope of privacy concern cases to include COVID-19. Therefore, OSHA would generally require employers to list the names of employees who have recordable cases of COVID-19 on Form 300.

The Enforcement Memorandum advises, however, that if an employee asks that his or her name not be included on Form 300, then the employer is permitted to treat the case as a privacy concern case and write "Privacy Case" on the line where the employee's name would normally be recorded. Based on this guidance, employers should consider asking employees who have recordable cases of COVID-19 whether they want their names included on the employer's Form 300. Employers who treat recordable COVID-19 cases as privacy concern cases per employees' requests should be aware that there are additional requirements and paperwork that must be created and maintained for privacy concern cases, which are set forth in [29 C.F.R. § 1904.29](#).

For additional guidance on workplace safety, questions about this article, or questions about your OSHA requirements that may apply to your specific industry and location, please contact [Jay Schoeny](#), [Kyle Johnson](#), [Steve Tolbert](#), or any of the attorneys in Frost Brown Todd's [Employee Safety & OSHA](#) Group Practice.

*To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a **Coronavirus Response Team**. Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.*

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