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Benefits**Employment Question of the Day: April 14, 2020****Legal Update**

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By Kristy L. Albrecht and Beverley L. Adams

Question

Under what circumstances do I need to include a COVID-19 case as a recordable event for purposes of OSHA's record-keeping requirements?

Answer

On Friday, April 10, 2020, the Occupational Safety and Health Administration (OSHA) issued interim enforcement guidance to its compliance officers regarding the recording of COVID-19 cases. This guidance is helpful to employers that are required to file an OSHA Form 300, also referred to as the OSHA Log of Work Related Injuries and Illnesses.

In its guidance, OSHA instructs that COVID-19 is indeed a recordable illness. Therefore, employers must record cases of COVID-19 if:

1. The case is a confirmed case of COVID -19, as defined by the CDC. The CDC currently defines a confirmed case as one where a respiratory specimen tests positive for the virus;
2. The illness is work-related; and
3. The case involves one or more of the following general recording criteria for a recordable illness or injury: death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness, or a diagnosis by a physician or other licensed health care professional.

In geographic areas where we have ongoing community transmission of the COVID-19 virus, the difficult determination in the recordable-illness analysis concerns the second requirement — that a COVID-19 case must be work-related. This is particularly true when we know many people with the virus are asymptomatic, and individuals may contract the virus in and out of the workplace.

OSHA's interim guidance is helpful on that issue. As an initial matter, OSHA instructs that employers of workers in the healthcare industry, emergency response organizations (emergency medical, firefighting and law enforcement services), or correctional institutions must continue to make work-related determinations pursuant to 29 CFR §1904.5.

However, until further notice, OSHA will not enforce 29 CFR § 1904 to require other employers to make the same work-relatedness determinations, **unless**:

1. "There is objective evidence that a COVID-19 case may be work-related." Such evidence would include, for example, that a number of employees working closely together became infected, without an alternative explanation; **and**
2. "The evidence was reasonably available to the employer." The evidence is reasonably available if the employer learns of it in the ordinary course of managing its employees or if someone provides the information to the employer.

If these "other employers" have objective evidence that a COVID-19 case may be work-related, the employers should conduct the 29 CFR § 1904.5 analysis. If a recordable illness is found, employers should record and code the COVID-19 case as a respiratory illness. As a matter of privacy, if the employee voluntarily requests that his or her name not be entered on the log, the employer must comply with that request.

OSHA reminds all employers in its guidance that they are responsible for providing safe and healthful workplaces for their employees. OSHA encourages employers to focus on mitigating the effects of the COVID-19 virus with good hygiene practices.

Finally, please keep in mind that 28 states, including Minnesota and Iowa, have OSHA-approved State Plans, under which state agencies operate occupational safety and health programs. State Plans are required to have standards and enforcement programs that are at least as effective as OSHA's, but they may also have different or more stringent requirements. We recommend referring to your State Plan in addition to any federal OSHA enforcement guidance when considering OSHA compliance issues.

Takeaway

OSHA has eased the requirements for many employers as to the recordable illness requirement for COVID-19 cases, but some cases will still be recordable. Employers should comply with the recordable illness standards recently provided by OSHA, as well as federal and state-law standards to maintain a safe work environment.

Please contact your Fredrikson & Byron attorney if you need help regarding the OSHA recordable-illness or safety standards for the workplace. We are happy to assist as you navigate these issues.

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