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## Question of the Day: OSHA Reporting

**Legal Update**

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**Question**

**An employee has tested positive for COVID-19. Do I need to record this on an OSHA log?**

**Answer**

It depends, largely on whether the employee's illness is work-related.

**Shift in Guidance**

Under new OSHA guidance, which took effect on May 26, employers are now required to track COVID-19 cases if:

1. A case of COVID-19 is confirmed per CDC guidelines (i.e., the individual has tested positive for the virus);
2. The case is work-related, as defined by 29 CFR § 1904.5, meaning the work environment either caused or contributed to the COVID-19 case or significantly aggravated a pre-existing injury or illness; **and**
3. The case involves one or more of the general recording criteria set forth in 29 CFR § 1904.7 (e.g., the case involves a death, days away from work or medical treatment).

This is a shift from OSHA's prior guidance on the issue, under which most employers were not required to make a work-relatedness determination unless there was objective evidence that a case may be work-related.

Now, employers are required to undertake a reasonable, good faith investigation to determine whether an employee contracted the illness at work or if it is otherwise work-related.

## Making a Work-Relatedness Determination

Per the guidance, employers should follow the following steps in determining whether a COVID-19 case is work-related:

**1. Conduct a reasonable investigation.** When an employer learns of an employee's COVID-19 illness, it should, at a minimum:

- Ask the employee how he or she believes he or she contracted the COVID-19 illness;
- Discuss with the employee his or her work and out-of-work activities that may have led to the COVID-19 illness (while appropriately respecting employee privacy);
- Review the employee's work environment for potential COVID-19/SARS/COV2 exposure. This review should be informed by any other instances of workers in that environment contracting COVID-19.

**2. Consider all reasonably available evidence.**

- This includes both information available at the time the determination is made, as well as any relevant information learned after the fact.
- Employers should give due weight to any evidence of causation provided by medical providers, public health authorities or the employee his or herself.

**3. Weigh the available evidence.** Once the employer has all available evidence, it should weigh the evidence to make a determination on whether the case is work-related. In doing so, employers should consider the following factors identified by OSHA:

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**4. Make a determination and record the illness, if necessary.** If, after the employer conducts the inquiry described above, it determines that it is more likely than not that the exposure in the workplace played a causal role in that COVID-19 case, the employer should record the case on its OSHA 300 log. If, on the other hand, the employer cannot determine that it is more likely than not that workplace exposure played a causal role, the employer does not have to record that COVID-19 case.

## Other Considerations

OSHA's recordkeeping requirements apply to employers in most industries who have 11 or more employees. Employers in industries that are exempt can be found here. Note, however, that states may impose different or additional recordkeeping obligations, so employers should be aware of any state-specific guidance.

Finally, in conducting the work-relatedness investigation, employers should be cognizant of employees' privacy. Employers should conduct the above investigation in private and keep confidential any employee health information. Any and all written records of the investigation should be kept in a separate, confidential file in the employee's file. Any reporting of the individual's illness—whether on the OSHA 300 logs or otherwise—should be kept anonymous and not reveal confidential or identifying information about the individual.

### Takeaway

Most employers will now be required to conduct a reasonable, good faith investigation into the origin of an employee's case of COVID-19 to determine if the case is work-related (and therefore reportable).

If you have questions about your OSHA reporting obligations or need assistance with an OSHA issue, please reach out to a member of Fredrikson & Byron's OSHA team.

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