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Insights

TO RECORD OR NOT TO RECORD, THAT IS THE QUESTION: QUESTIONS AND ANSWERS REGARDING U.S. FEDERAL OSHA RECORDKEEPING AND REPORTING REQUIREMENTS DURING THE COVID-19 CRISIS

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SUMMARY

The federal Occupational Safety and Health Act and its implementing regulations require employers to record certain work-related injuries and illnesses. Due to the prevalence of community transmission of COVID-19, deciding whether an employee's COVID-19 illness is work-related, and therefore recordable, is more challenging than ever for employers. In addition to the federal Occupational Safety and Health Administration's (OSHA) existing recordkeeping requirements found at 29 Part 1904, OSHA released an interim enforcement policy on April 10, 2020 (Enforcement Guidance for Recording Cases of COVID-19) (April 10 OSHA Guidance) clarifying that OSHA will exercise its enforcement discretion to interpret the recordkeeping requirements to mean that most employers (other than those in the healthcare, emergency response, and correctional institution industries) are **only** required to make a decision about whether an employee's COVID-19 illness is work-related if there is objective evidence of such work-relatedness that is reasonably available to the employer. The following questions and answers aim to provide employers with guidance regarding OSHA's recordkeeping and reporting regulations and guidelines amidst the rapidly evolving COVID-19 crisis.

QUESTION: If an employee informs you that they are experiencing flu-like symptoms and complains that they have become ill from a workplace exposure to the COVID-19 virus, are you, as the employer, required by OSHA to record the illness on your OSHA 300 Log?

ANSWER: No. According to federal OSHA regulations and guidance, an employee merely reporting symptoms of the COVID-19 virus to their employer, without testing or confirmation, is insufficient to trigger a recording obligation. Thus, an employee's suspected and unconfirmed COVID-19 illness, even if that employee is seriously ill with severe cold or flu like symptoms, does not need to be included on the employer's OSHA 300 Log. This is consistent with OSHA regulations that expressly

state that the common cold or flu are not recordable as illnesses on the OSHA 300 Log, even if they result from an exposure in the work environment. OSHA has drawn a line between an employee exhibiting symptoms and an employee receiving a positive test result. A case is only "confirmed" if it meets that definition as stated by the Centers for Disease Control and Prevention (CDC). OSHA's recent guidance has clarified that a confirmed COVID-19 illness is recordable if an employee is infected while working. (29 C.F.R. § 1904.5(b)(2)(viii)). In doing so, OSHA has categorized the COVID-19 virus with contagious diseases such as tuberculosis or hepatitis A, which are considered work-related if the employee contracts the disease in the workplace. (29 C.F.R. § 1904.5(b)(2)(viii)).

QUESTION: If an employee reports to you, as their employer, that they have tested positive for the COVID-19 virus, are you required by federal OSHA regulations to record that illness on your OSHA 300 Log?

ANSWER: Possibly. Under the April 10 OSHA Guidance, until further notice, OSHA will not enforce its recordkeeping requirements to require employers (**except for those in the healthcare, emergency response, and correctional institution industries**) to make work-relatedness determinations of employees' COVID-19 illnesses, except in limited circumstance where:

(1) There is objective evidence that a COVID-19 case may be work-related. Such "objective evidence" could include, for example, a number of cases developing among workers who work closely together without an alternative explanation; and

(2) The objective evidence was reasonably available to the employer. Examples of reasonably available evidence include 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.

If these circumstances are present, then the employer must decide whether the employee's illness is work-related. If an employer determines that the employee's illness is work-related, then the employer is required to comply with 29 C.F.R. Part 1904 and record the illness on its OSHA 300 Log, provided that the case involves one or more of OSHA's general recording criteria. (29 C.F.R. § 1904.7.) Those criteria include the employee spending days away from work or seeking medical treatment beyond first aid.

OSHA's stated purpose of this two-step test is to help employers focus their response efforts on implementing proper hygiene practices in their workplaces, and otherwise mitigating COVID-19's effects, rather than on making difficult work-relatedness and reporting decisions.

QUESTION: If an employee in the healthcare, emergency response, or correctional institution industries reports to you, as their employer, that they tested positive for the COVID-19 virus, are you required by federal OSHA regulations to record that illness on your OSHA 300 Log?

ANSWER: Possibly. In order for an employee's COVID-19 illness to be recordable, that illness must meet three requirements:

First, the employee's illness must be a confirmed case, i.e., the employee must have tested positive, per CDC guidelines, for the COVID-19 virus.

Second, the employee's COVID-19 illness must be work-related. (29 C.F.R. § 1904.5.) Under federal OSHA standards, a COVID-19 illness is work-related if an event or exposure in the work environment either caused or contributed to the employee becoming infected with the COVID-19 virus. An employer will need to make this determination on an individual, case by case basis. Relevant factors could include whether the employee was exposed to one or more people who have been diagnosed with the COVID-19 virus; the nature, duration and frequency of any potential exposure; and the amount of time between potential exposure and diagnosis. One of the challenges in evaluating whether an illness is work-related is that, as medical experts have indicated, the COVID-19 virus is highly communicable, even from asymptomatic people, and it may be difficult to determine whether an employee's COVID-19 illness came from an exposure inside or outside of their workplace.

Under the April 10 OSHA Guidance, OSHA has stated that if there are a number of positive cases among a group of employees who work in the same area, reporting on the OSHA 300 Log would likely be required, particularly for those who tested positive after the initial case and who have no other known exposures. On the other hand, OSHA has indicated that a lone COVID-19 case where the employee reports that a family member has COVID-19 likely would not need to be reported. Lastly, for an employee's COVID-19 illness to be recorded on the employer's OSHA 300 Log, the case must involve one or more of OSHA's general recording criteria. (29 C.F.R. § 1904.7.)

QUESTION: What do you, as the employer, do if you do not know whether your employee was exposed to the COVID-19 virus inside or outside of the workplace?

ANSWER: Investigate. The April 10 OSHA Guidance is intended to reduce the burden on most employers to evaluate whether each confirmed case of COVID-19 is work-related. However, because OSHA's guidance states that an employer must still consider "objective evidence," it may be difficult for an employer to fully rely on this guidance as justification to simply do nothing and not attempt to ascertain whether an illness is work-related. Of course, in order to evaluate objective evidence, some investigation and consideration of whether the illness is work-related is arguably required. Thus, if an employee has tested positive for the COVID-19 virus per CDC guidelines, the conservative approach for an employer is to investigate and identify available objective evidence regarding the nature of the employee's exposure to COVID-19. OSHA strongly encourages employers to investigate all incidents, including illnesses. (See OSHA Safety and Health Topics: Incident Investigation.) Such investigations may include determining whether the employee has come into contact with any other employees in the workplace, and whether those other employees have either exhibited flu-like symptoms or tested positive for the COVID-19 virus. An investigation into an employee's suspected

COVID-19 illness may also lead towards questions regarding whether the employee was recently exposed to anyone outside of the workplace who has tested positive for the COVID-19 virus. With any such inquiry, or even if an employee were to voluntarily share such information, an employer should be mindful not to document any medical information of its employees' friends or family.

Of course, during these investigations employers should follow any applicable precautionary measures, as recommended by the CDC and OSHA, in order to protect all employees and prevent any further spread of the COVID-19 virus. Such measures may include the use of personal protective equipment (PPE) or social distancing practices so that the investigation limits other employees' potential exposure to the illness. These measures will be highly dependent on the particular industry and workplace at issue. The employer's focus should be on finding objectively available information regarding the nature of the employee's activities in the workplace and potential sources of the illness, rather than assigning fault or blame. Likewise, an employer's investigation should adhere to OSHA's fact-finding directions (See OSHA's Incident Investigations: A Guide for Employers), including whether the COVID-19 illness was work-related based on potential exposure in the work environment or whether any other employees have tested positive for the COVID-19 virus.

Please note that you must take into account federal and state confidentiality laws and guidance when interviewing employees during such investigations. For instance, according to guidance from the U.S. Equal Employment Opportunity Commission (EEOC), "[d]uring a pandemic, [Americans with Disabilities Act (ADA)]-covered employers may ask employees [who call in sick] if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA." (See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.) Additionally, the same EEOC guidance states that an employer "may store all medical information related to COVID-19 in existing medical files," including the "employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms." Therefore, you can likely ask employees questions regarding any symptoms they have experienced consistent with COVID-19 as part of your investigation, as long as you treat the information collected as confidential medical information. Employers should document these COVID-19-related investigations, as well as any resulting determinations, and maintain those documents in a designated confidential location that is separate, and in addition to, their OSHA documentation. That confidential location can be separate COVID-19 related medical files, or employees' existing medical files, if such files already exist.

If an employer concludes that an employee with a confirmed case of the COVID-19 virus was exposed to the virus in the workplace, and, if as noted above, that employee has also met OSHA's general recording criteria, such as having spent days away from work or having sought medical

treatment beyond first aid, that employee's COVID-19 illness will need to be recorded on its OSHA 300 Log. (29 C.F.R. § 1904.7.)

QUESTION: Do you, as the employer, have to record an employee who becomes ill from a confirmed case of the COVID-19 virus, if that employee has been working from home?

ANSWER: Possibly. As a result of the many shelter-in-place orders that have been implemented across the United States amidst the COVID-19 crisis, there has been a significant increase in employees working from home. These work-from-home arrangements present a potential challenge to the determination of whether an employee's exposure to the COVID-19 virus occurred in the work environment. OSHA has determined that an illness that occurs while an employee is working from home is "considered work-related if the injury or illness occurs while the employee is performing work for pay or compensation in the home, and the injury or illness is directly related to the performance of work rather than to the general home environment or setting." (29 C.F.R. § 1904.5(7).) Under this standard, in most instances, particularly where businesses have instructed their employees to follow shelter in place orders, it seems more unlikely than not that an employee working from home will have contracted the COVID-19 virus from actions that are directly related to their work, as opposed to their general home environment. Such work-related exposure would be more likely to occur where the employee's work obligations require the employee to travel, or otherwise come into contact with other individuals who may be carrying the COVID-19 virus, outside of the home. In any event, if an employee is working from home and contracts COVID-19, an employer should still follow the April 10 OSHA Guidance.

QUESTION: If you, as the employer, determine that your employee's illness due to COVID-19 is recordable on your OSHA 300 Log, what obligations do you have under OSHA regulations to protect the privacy of your employees' information on your OSHA 300 Log?

ANSWER: Before the COVID-19 crisis, OSHA established privacy protections with respect to employers' OSHA 300 Logs. Notably, OSHA's list of illnesses that are considered to be privacy concerns is limited to illnesses: to an intimate body party or the reproductive system; resulting from sexual assault; mental illness; HIV infection, hepatitis, or tuberculosis; or needlestick injuries. (29 C.F.R. § 1904.29(b)(7).) OSHA makes clear that there are no other illnesses outside of those listed that automatically afford an employee such privacy protections. Moreover, this OSHA regulation has not yet been updated with respect to the COVID-19 virus.

However, OSHA does permit an illness to be deemed a privacy concern when the ill employee voluntarily requests that their name not be entered on the OSHA 300 Log. If the ill employee makes such a request, you may enter the phrase "privacy case" on the OSHA 300 Log rather than including the employee's name. Doing so "will protect the privacy of the … ill employee when another employee, a former employee, or an authorized employee representative is provided access to the

OSHA 300 Log ….” (29 C.F.R. § 1904.29(b)(6).) In doing so, an employer must keep a separate and confidential list of the employees’ names omitted from these privacy concern cases so that the employer may provide such information to OSHA, or other government regulators, as required. In addition, if you are reasonably concerned that the employee may still be identified on your OSHA 300 Log based on the remaining information aside from the employee’s name, “you may use discretion in describing the … illness on” the OSHA 300 Log, by entering “enough information to identify the cause of the incident and the general severity of the … illness,” while omitting any other private details. (29 C.F.R. § 1904.29(9).)

QUESTION: After determining that an employee has a recordable illness resulting from COVID-19, what obligation do you, as the employer, have to notify other employees who may have been exposed?

ANSWER: OSHA has not issued any specific regulations or guidelines regarding whether an employer must inform its employees after the employer learns that those employees may have been exposed to an employee with a confirmed COVID-19 case in the workplace. OSHA could potentially allege that such a requirement exists under an employer’s Section 5(a) general duty clause obligations which mandate that an employer is to provide their employees with “employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm ….” (29 U.S.C. § 654.) In order to take such a position, OSHA would likely argue that COVID-19 is now a recognized hazard in an employer’s workplace that is causing or likely to cause death or serious physical harm to employees. The greater the number of confirmed cases in a workplace, the greater the risk that OSHA would view the employer as having a “general duty” to act. In sharing information with employees about a confirmed case, the employer should maintain as much privacy as possible with respect to the employee who is found to have a recordable COVID-19 illness, including by omitting that employee’s name. However, it is possible that coworkers being notified of their potential exposure may be able to figure out the identity of the ill employee based on the surrounding factors.

QUESTION: Under what circumstances must you, as the employer, affirmatively report an employee’s COVID-19 illness to OSHA?

ANSWER: The obligation to report an employee illness involving COVID-19 is governed by OSHA’s fatality, injury and illness reporting requirements which require a regulated employer to report an in-patient hospitalization to OSHA if that employee’s exposure to the COVID-19 virus was found to be “work-related” per OSHA guidelines and the employee is hospitalized within 24 hours after that exposure. (29 C.F.R. § 1904.39.)

It seems unlikely that COVID-19 illnesses will be reportable to OSHA under such standards given that hospitalization due to the COVID-19 virus typically occurs well beyond 24 hours following exposure. The current OSHA guidelines with respect to reporting are instead geared toward work-

related incidents resulting in relatively immediate injuries or illnesses rather than diseases such as the COVID-19 virus which are more likely to have longer incubation periods.

If an employee dies as a result of a work-related exposure to the COVID-19 virus, that employee's death must be reported to OSHA if the death occurs within 30 days of that employee's exposure. (29 C.F.R. § 1904.39.) While it is possible for an employee to die from a COVID-19 exposure within thirty days of exposure, as discussed above, establishing whether this reporting requirement applies faces the same challenge of determining when that employee was exposed to the COVID-19 virus and whether the exposure is work-related.

Notably, all employers under federal OSHA jurisdiction, regardless of whether they are within the healthcare industry, emergency response organizations, correctional institutions, or general industry, are obligated to report to OSHA if an employee's work-related illness results in hospitalization or death within the enumerated time frames.

QUESTION: If I report a COVID-19 illness to OSHA, am I, as the employer, more likely to be inspected by OSHA?

ANSWER: Possibly. Whether or not OSHA will perform an inspection will be a case-by-case determination. OSHA evaluates each reported injury, illness or fatality under an established investigation and enforcement approach through which the agency will decide whether to perform an on-site or formal inspection, or to send the employer its Rapid Response Investigation letter. Practically, OSHA has limited resources and it is likely to focus its on-site inspection resources on the most significant cases.

QUESTION: What other OSHA resources and guidelines should all businesses and employers consider amid the COVID-19 crisis?

ANSWER: Employers should consult other relevant federal OSHA standards as related to COVID-19, including personal protective equipment (PPE) standards (29 C.F.R. § 1910); respiratory protection standards (29 C.F.R. § 1910.134); the general duty clause (29 U.S.C. § 654.(a)(1)); sanitation standards (29 C.F.R. § 1910.141); hazard communication standards (29 C.F.R. § 1910.1200); and standards relating to access to employee exposure and medical records (29 C.F.R. § 1910.1020).

CONCLUSION

OSHA continues to review and consider how its regulations should be applied to employers during the rapidly changing circumstances as our society adapts to the COVID-19 pandemic. We will continue to monitor and provide insight regarding any developments in OSHA guidelines, as well as other federal and state government regulations, throughout the COVID-19 crisis and update you accordingly. We also invite you to review BCLP's other COVID-19 resources, many of which are aimed directly at answering additional questions and concerns for businesses and employers operating during the COVID-19 crisis. If you have any questions related the above OSHA guidelines

or any other concerns for your business' operations during the COVID-19 crisis, please contact any of the authors listed here or your BCLP relationship attorney.

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