

# Updated Guidance from OSHA Changes COVID-19 Recording Requirements and Inspection Plans

As employers move forward with their plans for reopening, they should be aware of recently issued guidance from the Occupational Safety and Health Administration (OSHA) regarding confirmed cases of COVID-19 as a recordable and/or reportable illness. Although OSHA initially provided certain exemptions for employers regarding COVID-19, it has rescinded that previously released COVID-19 illness recording guidance—as well as its prior enforcement plan regarding inspections—and issued revised guidance effective May 26, 2020. Below are the important changes from the revised guidance.

## Revised COVID-19 Illness Recording Guidance

OSHA has rescinded its prior guidance in which it limited certain employers' obligation to determine whether confirmed cases of COVID-19 were work-related and thus recordable and/or reportable. The newly issued guidance requires *all* employers to record any COVID-19 case where:

- There is a confirmed case of COVID-19 (*i.e.*, a positive test for SARS-CoV-2);
- The case is work-related; and
- The employee sought medical treatment beyond first aid, the case resulted in lost work days or restricted duty or caused loss of consciousness or death.

OSHA acknowledges that “it remains difficult to determine whether a COVID-19 illness is work-related, especially when an employee has experienced potential exposure both in and out of the workplace.” As such, OSHA has indicated that it will exercise enforcement discretion in assessing whether an employer has complied with its obligation in making this determination. Accordingly, OSHA has instructed its Compliance Safety and Health Officers (CSHOs) to consider whether the employer was *reasonable* in investigating the work-relatedness of the illness and evaluating the evidence available to the employer in making such determination, including evidence that the employee contracted COVID-19 at work.

OSHA does not expect employers to conduct an extensive medical inquiry. However, employers should take the following steps to assess whether a confirmed case of COVID-19 is work-related:

- Ask the employee how s/he believes s/he contracted COVID-19;

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- While respecting the employee's privacy, discuss the activities in which s/he participated both in and outside of work that may have led to exposure to the coronavirus; and
- Review the employee's work environment for potential coronavirus exposure, including whether there are other workers within the same environment who have contracted COVID-19.

In addition to asking these questions, employers should consider evidence that OSHA has identified that could weigh in favor or against finding that the COVID-19 case was work-related. OSHA provides the following examples of this type of evidence:

- COVID-19 illnesses are likely work-related when several cases develop among workers who work closely together and there is no alternative explanation.
- An employee's COVID-19 illness is likely work-related if it is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation.
- An employee's COVID-19 illness is likely work-related if his or her job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.
- An employee's COVID-19 illness is likely not work-related if s/he is the only worker to contract COVID-19 in his or her vicinity and his or her job duties do not include having frequent contact with the general public, regardless of the rate of community spread.
- An employee's COVID-19 illness is likely not work-related if s/he, outside the workplace, closely and frequently associates with someone (e.g., a family member, significant other or close friend) who (1) has COVID-19; (2) is not a coworker; and (3) exposes the employee during the period in which the individual is likely infectious.
- Any evidence of causation, pertaining to the employee illness, at issue provided by medical providers, public health authorities or the employee him or herself.

If the employer ultimately cannot determine, based on a reasonable and good faith investigation as set forth above, whether it is *more likely than not* that a causal link exists between an employee's workplace exposure to the coronavirus and his or her contracting COVID-19, the employer need not record that case of COVID-19. Employers should document their investigation into whether cases of COVID-19 are work-related.

If an employer does record a case of COVID-19 on its OSHA 300 Log, it should be

coded as a respiratory illness. Moreover, an employee may request that their name not be entered on the OSHA 300 Log and the employer then must not publish that name.

## **Revised Enforcement Guidance**

In addition to modifying its COVID-19 illness recording guidance, OSHA has rescinded its April 13, 2020, [Interim Enforcement Plan for COVID-19](#) and replaced it with an Updated Interim Enforcement Response Plan. This new guidance was issued in light of the fact that non-essential businesses are beginning to open and the spread of coronavirus is, therefore, no longer a concern for only certain high-risk industries.

In areas in which the spread of the virus has decreased, OSHA will perform inspection and investigation procedures according to its pre-pandemic policies, though it will continue to prioritize COVID-19 cases and conduct investigations remotely. It is important that employers actively engage in the phone, fax or letter investigation processes, as an inadequate response by the employer may result in an on-site inspection.

In those areas in which community transmission is still prevalent or has made a resurgence, OSHA will exercise discretion, but continue to prioritize fatalities and imminent danger exposures for inspection, particularly in high-risk workplaces such as hospitals. In the event there are insufficient resources to perform an on-site inspection, OSHA will initiate such inspections remotely, anticipating that the on-site portion will be completed if and when additional resources become available.

## **Best Practices**

In light of OSHA's new guidance and the fact that many businesses are beginning to reopen and bring employees back to the workplace, employers should have in place a plan for mitigating coronavirus-related hazards and ensuring this transition runs smoothly. Employers should, at a minimum:

- Have a written pandemic plan as recommended by the Centers for Disease Control and Prevention.
- Confirm that personal protective equipment (PPE) protocols and training are up to date if your PPE hazard assessment requires that employees use PPE.
- Maintain documentation of efforts made to obtain and provide appropriate and adequate PPE supplies to employees.
- Have training records up to date, including training related to preventing



exposure to the coronavirus.

There are a number of other employment-related questions that businesses should consider as they make their plans for reopening. Reinhart attorneys recently [hosted a webinar with a comprehensive overview](#) regarding these matters.

If you have questions related to OSHA's revised guidance and inspection procedures, please contact Brittany Lopez Naleid, [Troy E. Giles](#) or your Reinhart attorney.

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