

Occupational Safety and Health Obligations to Record and Report COVID-19 Cases

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Employers face unprecedented challenges in addressing the spread of the novel coronavirus (COVID-19). Among the items on their ever-expanding list is that federal and state occupational safety and health regulations require employers to record instances of work-related injuries and illnesses and to report to the U.S. Occupational Safety and Health Administration (OSHA) or applicable state agency all work-related fatalities and in-patient hospitalizations, among other events. Although the common cold and seasonal flu are excepted from recordkeeping requirements, COVID-19 is not. As a result, with the exception of certain small employers and those in specifically designated industries, employers should identify instances of COVID-19 infection among employees, determine whether the infection was work-related and then maintain required records of such illnesses. In addition, employers must timely report to OSHA or an applicable state agency any work-related COVID-19 death or hospitalization.

General Recordkeeping and Reporting Requirements

OSHA recordkeeping rules require that an employer keep records of all work-related fatalities, injuries and illnesses that meet certain recording criteria.¹ A workplace injury or illness is recordable if it results in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid or loss of consciousness. Significant work-related injuries or illnesses diagnosed by a physician or other licensed health care professional also are recordable even if they do not involve death, days away from work or the other general recordkeeping criteria.² Although small businesses with fewer than 10 employees, and businesses in low-hazard industries like retail, insurance, financial services, real estate, law, bars and restaurants and certain others, are exempt from this recordkeeping requirement,³ even these employers that are otherwise relieved of recordkeeping requirements must report work-related fatalities to OSHA or an applicable state agency within eight hours and inpatient hospitalizations within 24 hours.

OSHA has confirmed that it considers work-related exposure to COVID-19 to be a recordable (and reportable) illness. Discharging this obligation may prove particularly difficult if the outbreak continues to expand. Employers also should be aware that

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OSHA's recordkeeping requirements are "no fault," meaning that employers must record work-related illnesses even if the employer had no control over the exposure.⁴

Determining Work-Relatedness

In general, an illness is considered work-related "if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness."⁵ OSHA defines the work environment as "the establishment and other locations where one or more employees are working or are present as a condition of their employment."⁶ This can include the employer's premises or other settings, like conferences, client sites or other locations where an employee is present as a condition of his or her job responsibilities.

OSHA regulations provide that "contagious diseases . . . are considered work-related if the employee is infected at work."⁷ Where it is not clear whether the exposure occurred in the work environment, "the employer must examine the employee's work duties and environment to determine whether it is more likely than not that one or more events or exposures at work caused or contributed to the condition."⁸

Determining whether an employee has a work-related COVID-19 infection presents two distinct challenges. First, in the absence of more widespread and readily available testing, it might be impossible to know whether the employee is suffering from COVID-19 or a nonreportable cold or flu. An employer has an obligation to make a reasonable inquiry, but employee privacy or other restrictions may prevent the employer from knowing for sure.

Second, determining work-relatedness in the context of a viral illness can be particularly difficult, especially if the COVID-19 outbreak becomes more widespread. Whether a work-related exposure caused or contributed to an employee becoming infected with COVID-19 may be impossible for an employer to determine in the absence of clear medical or scientific evidence on the source of transmission. This determination arguably is somewhat easier in some high-risk workplaces, like hospitals, nursing homes or other settings where health care workers are in close and regular contact with persons infected by COVID-19. In those situations, and until there is more evidence of community-based spread of the illness, employers may have enough information to conclude that there was a work-related cause. Conversely, it might be possible for an employer to reasonably conclude that an employee's COVID-19 diagnosis is not work-related if the employee developed COVID-19 soon after personal travel to an affected region or caring for a relative with COVID-19.

Figuring out whether an employee sustained exposure at work in lower-risk workplaces, especially those with low public traffic, may be less apparent. For example, an employer would not be required to report a COVID-19 employee illness if the employee exhibited symptoms at work, but there was no evidence of exposure there.⁹ Similarly, even where one employee is exposed to an infected person in the workplace and is then diagnosed with COVID-19, it may not be possible for an employer to know with any reasonable certainty that the second employee became sick because of exposure in the workplace or exposure to some other COVID-19-infected individual.

Recording and Reporting – Suggestions for How to Proceed

OSHA recordkeeping and reporting are obviously secondary priorities to ensuring employee safety. In that regard, employers should take all appropriate measures to safeguard employees against exposure. Sick employees or those with suspected exposure to COVID-19 should not come to work and should follow the guidance of medical professionals and other public health officials:

CDC: <https://www.cdc.gov/coronavirus/2019-ncov/downloads/workplace-school-and-home-guidance.pdf>

World Health Organization: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

Johns Hopkins Medicine: <https://www.hopkinsmedicine.org/coronavirus>

OSHA has just published “[Guidance on Preparing Workplaces for COVID-19](#),” that is a useful resource for any business.

To comply with their recording and reporting obligations, employers should consider the following steps:

1. If an employee is sick with COVID-19 **symptoms**, the employer should ask the employee to stay away from the workplace and obtain appropriate medical care. The employer also should attempt to determine if the employee has been infected with the virus, mainly so the employer can determine what measures may be appropriate to protect other employees, but also to confirm whether it has a recording obligation. The employer should ask the employee if he or she has been tested, and if not, request that such a test occur and that the results be reported back. In our prior [Employer FAQs](#), we address a range of questions employers may have in addressing workplace issues involving COVID-19.
2. If COVID-19 is confirmed, the employer should take reasonable steps to attempt to determine whether the employee’s exposure was work-related, considering factors like an individual’s business-related travel, conference attendance or other information that might indicate a work-related source of exposure. There will obviously be limits to what an employer can accomplish with such inquiry. If an employer cannot establish a work-related source of the exposure, an employer would not have a recording (or reporting) obligation.
3. If an employee is hospitalized or dies from work-related exposure to COVID-19, the employer must report that event to OSHA or an applicable state agency within eight hours in the event of death or 24 hours for a hospitalization.

¹ 29 C.F.R. § 1904.4(a).

² Id. § 1904.7(a).

³ See id. § 1904.2(a)(1) & Appendix A, <https://www.osha.gov/laws-regs/regulations/standardnumber/1904/1904SubpartBAppA>.

⁴ See 29 C.F.R. § 1904.0 (“Recording or reporting a work-related injury, illness, or fatality does not mean that the employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for workers’ compensation or other benefits.”).

⁵ Id. § 1904.5(a).

⁶ Id. § 1904.5(b)(1).

⁷ Id. § 1904.5(b)(2)(viii).

⁸ See id. § 1904.5(b)(3); see also Occupational Injury and Illness Recording and Reporting Requirements, 66 Fed. Reg. 5916, 5958-59 (Jan. 19, 2001) (to be codified at 29 C.F.R. pt. 1904) (illustrating that an employer could determine a case of staph infection was work-related if other employees also had staph infection).

⁹ 29 C.F.R. § 1904.5(b)(2)(i)-(iii).

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