

An Update on OSHA Guidance For Reporting COVID-19 Cases

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OSHA published revised guidance on May 19 with respect to how employers determine whether they should report cases of COVID-19 on the OSHA 300 accident and illness logs. Remember, this must be a confirmed case, not just an employee who reported symptoms and did not appear for work. Only cases with positive test results need to be reported.

OSHA now requires individualized assessments of each case. Employers are held to a good faith standard in making the determination as to whether someone contracted COVID-19 at work. In the guidance, OSHA provided the following guidance for determining whether the employer has complied with its recording obligations:

- ***The reasonableness of the employer's investigation into work-relatedness.*** Employers, especially small employers, should not be expected to undertake extensive medical inquiries, given employee privacy concerns and most employers' lack of expertise in this area. It is sufficient in most circumstances for the employer, when it learns of an employee's COVID-19 illness, **(1) to ask the employee how [the employee] believes [he/she] contracted the COVID-19 illness; (2) while respecting employee privacy, discuss with the employee [his/her] work and out-of-work activities that may have led to the COVID-19 illness; and (3) review the employee's work environment for potential SARS-CoV-2 exposure. The review in (3) should be informed by any other instances of workers in that environment contracting COVID-19 illness.**

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- ***The evidence available to the employer.*** The evidence that a COVID-19 illness was work-related should be considered based on the information reasonably available to the employer at the time it made its work-relatedness determination. If the employer later learns more information related to an employee's COVID-19 illness, then that information should be taken into account as well in determining whether an employer made a reasonable work-relatedness determination.
- ***The evidence that a COVID-19 illness was contracted at work.*** Employers should take into account all reasonably available evidence to determine whether an employer has complied with its recording obligation. This cannot be reduced to a ready formula, but certain types of evidence may weigh in favor of or against work-relatedness. For instance:
 - 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/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 [he/she] is the only worker to contract COVID-19 in [his/her] vicinity and [his/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 [he/she], 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.
 - Employers should give due weight to any evidence of causation, pertaining to the employee illness, at issue provided by medical providers, public health authorities, or the employee him/herself.

Given this guidance, employers should consider developing standard questionnaires and investigative procedures for COVID-19 cases. The investigatory documents should include an opportunity for the employee to state the employee's belief as to the origin of the illness, any risk factors encountered inside and outside of the workplace, a review of compliance with employer safety protocols, and the extent of contact and exposure to others in the workplace, including the number of cases in general and in common areas. By taking these steps, employers can reduce the risk of a dispute in the event that OSHA undertakes

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an audit of whether the employer complied with its recording obligations.

If the employer can reasonably conclude that the transmission did not occur at work, then there is no need to report the COVID-19 case on the OSHA 300 log.