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Revised USDOL Guidance for Recording COVID-19 Cases in the Workplace

The recent guidance concerning OSHA's record-keeping requirements will go into effect on May 26, 2020. Under the requirements, COVID-19 is a recordable illness, which means employers are duty-bound to record cases of COVID-19, if:

- [1] There is a confirmed case of COVID-19 (meaning an individual with at least one respiratory specimen that tested positive for SARS-CoV-2, the virus that causes COVID-19);
- [2] The case is work-related (work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, subject to specific exceptions); or
- [3] The case involves one or more of the general recording criteria (meaning, if it results in **any** of the following: death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness; **or** if it involves a significant injury or illness diagnosed by a health care professional).

With shelter-at-home restrictions being lifted, employers are implementing processes to protect employees and adapt to new and changing best practices. While many states and counties have successfully slowed the spread of the virus, employers still have a lot of work ahead of them to protect employees, including determining whether employee COVID-19 illnesses are work-related and thus recordable. Given the evidence that the virus may be spread by the asymptomatic, presymptomatic and very mildly symptomatic, it can be difficult to determine whether a COVID-19 illness is work-related, especially considering most individuals will be at least potentially exposed both in and out of the workplace (e.g., at the grocery store, entering the workplace, etc.)

Simply recording a COVID-19 illness does not mean that the employer has violated any OSHA standard; this is a record-keeping requirement. Furthermore, employers with 10 or fewer employees and certain employers in low hazard industries have no recording obligations. These employers need only report work-related COVID-19 illnesses that result in a fatality or an employee's in-patient hospitalization, amputation, or loss of an eye. [See 29 CFR §§ 1904.1(a)(1) and 1904.2 for a complete list of low hazard industries].

Recognizing this recording mandate may be difficult, OSHA is exercising enforcement discretion to assess an employer's efforts in making work-related determinations. When evaluating whether

an employer has complied and made a reasonable determination of work-relatedness, the following considerations will be considered:

- [1] The reasonableness of the employer's investigation into work-relatedness (e.g., after learning of an employee's COVID-19 illness, asking the employee how they believe they contracted the illness; discussing with the employee their work and out-of-work activities that may have caused the illness; and reviewing the employee's work environment for potential exposure, considering any other instances by coworkers).
- [2] The presence of evidence reasonably available to the employer that a COVID-19 illness was contracted at work. For example, COVID-19 illnesses are likely work-related: when several cases develop among coworkers and there is no alternative explanation; if it is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case and there is no alternative explanation; if an employee's job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.

On the other hand, the illness *is likely not* work-related if the employee is the only worker in the vicinity to contract the virus and their job duties do not include having frequent contact with the general public; if they, outside the workplace, closely and frequently associate with someone who has the virus.

- [3] OSHA will take into consideration any evidence of causation, pertaining to the employee illness, provided by medical providers, public health authorities, or the employee.

If the employer cannot determine whether it is likely that exposure in the workplace played a causal role with a particular employee, the employer need not record the illness. *Note:* COVID-19 should be coded as a respiratory illness, and if an employee voluntarily requests that their name not be entered on the record log, the employer must comply as specified under 29 CFR § 1904.29(b)(7)(vi).

Employers should be aware that some states have adopted specific rules regarding the causation of Covid-19 illnesses. For example, California Governor Gavin Newsom's Executive Order N-62-20 creates a rebuttable presumption that employees who test positive for COVID-19 are *presumed* to have become infected while working for purposes of collecting workers' compensation benefits [see also Alaska, Illinois, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Mexico, New York, Ohio, Pennsylvania, North Dakota, Utah, Vermont, and Washington]. In California, this rebuttable presumption applies so long as the illness occurs between March 19 and July 5, 2020, and the following four requirements are met:

- [1] The employee tests positive/is diagnosed with COVID-19 within 14 days after performing work at their place of employment at the employer's direction;
- [2] The work was performed on or after March 19, 2020;

- [3] The place of employment was not the employee's home/residence; and
- [4] If the employee was diagnosed with COVID-19 (as opposed to testing positive), the diagnosis was "done by a physician who holds a physician and surgeon license with the California Medical Board, and the diagnosis is confirmed with further testing within 30 days of the diagnosis." Unless the employer successfully disputes the presumption by offering other evidence, "the Workers' Compensation Appeals Board is bound to find in accordance with it."

If you have any further questions about the rapidly changing work environment, contact your Stokes Wagner representative.

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