

# HRW CLIENT ALERT

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## OSHA Issues Revised Enforcement Guidance Clarifying When An Employer May Need to Record COVID-19 Case As Occupational Illness

On May 19, 2020, the Occupational Safety and Health Administration (“OSHA”) issued [Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 \(COVID-19\)](#) (“revised guidance”).

**As a reminder, OSHA applies to ALL private sector employers.** Under OSHA, most private sector employers with 11 or more employees have recording requirements and, as explained below, will need to comply with the revised guidance when receiving reports of COVID-19 cases in the workplace.

**The revised guidance is scheduled to take effect on Tuesday, May 26, 2020,** and is intended to be time-limited to the current COVID-19 crisis.

### What the Revised Enforcement Guidance for Recording Cases of COVID-19 Says

The revised guidance addresses the circumstances under which an employer is obligated to record an employee’s positive test for COVID-19 as work-related, and the discretion that will be exercised by OSHA Compliance Safety and Health Officers (“CSHO”) when enforcing recording requirements.

Under OSHA’s recordkeeping requirements contained in 29 CFR Part 1904, COVID-19 is a recordable illness, and thus employers are responsible for recording cases of COVID-19 in the workplace, if:

- 1) The case is a confirmed case of COVID-19,** which the Centers for Disease Control and Prevention (“CDC”) define as one in which an individual has at least one respiratory specimen test positive for the virus that causes COVID-19;
- 2) The case is work-related,** which is defined by 29 CFR § 1904.5 as an event or exposure in the work environment that either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness; and
- 3) The case involves one or more of the general recording criteria** set forth in 29 CFR § 1904.7, including an injury or illness that results in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness, or that involves a significant injury or illness diagnosed by a physician or other licensed health care professional.

Recognizing the difficulty with determining work-relatedness of COVID-19 cases, OSHA is exercising enforcement discretion to assess employers’ compliance with their record-keeping obligations with respect to COVID-19 cases, and advising CSHOs to apply the following considerations in determining employer compliance with recording obligations:

- **Reasonableness of employer’s investigation into work-relatedness:** The revised guidance provides that it is sufficient in most circumstances for an employer, when it learns of an employee’s COVID-19

illness, (1) to ask the employee how the employee believes they contracted the COVID-19 illness; (2) while respecting employee privacy, discuss with the employee their 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 exposure.

- **Evidence available to the employer:** When assessing whether an employer should have designated a COVID-19 illness as work-related, the CSHO is advised to consider the information reasonably available to the employer at the time of the employer's determination. If the employer later learns more information related to the employee's COVID-19 illness, then that information could also be taken into account by the CSHO in determining whether the employer made a reasonable work-relatedness determination.
- **Evidence that COVID-19 was contracted at work:** The revised guidance identifies evidence that may weigh in favor of or against a work-relatedness determination:
  - 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 their 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 they are the only worker to contract COVID-19 in their vicinity and their 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 they, outside of the workplace, closely and frequently associates with someone 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.
  - CSHO may also 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 themselves.

If, after the reasonable and good faith inquiry described above, the employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role with respect to a particular case of COVID-19, the employer does not need to record that COVID-19 illness.

## **What Does This Mean for Employers?**

**Investigate:** Employers with OSHA recordkeeping obligations must endeavor to investigate whether a reported positive COVID-19 test of one of its employees is work-related, as described above. All investigations should be documented.

**Evaluate:** Employers should consider the findings of the investigation, evaluating the information available to the employer at the time the employer is weighing whether the COVID-19 case is work-related.

**Determine Whether to Record:** Employers must then make a determination whether an employee's positive COVID-19 test is work-related and must be recorded.

Failure to comply with OSHA's recordkeeping requirements can result in fines and citations.

## **General Health and Safety Considerations**

The COVID-19 pandemic has raised many questions and concerns in workplaces across the U.S. As employers navigate through this challenging time, in addition to following CDC and OSHA regulations and guidelines, it is important for employers in all sectors of the economy to remember to communicate clearly with employees. Any employee concern related to safety and health should be promptly addressed with employees consistent with the above guidelines, regulations, and existing employer policies.

Finally, as employers develop and refine written control plans to comply with mandatory safety standards for operation in the COVID-19 reopening period, this is also a good opportunity for employers to reinforce the

importance of the health and safety committee in each workplace, since the health and safety committee serves as a very effective vehicle for communicating information and responding to employee suggestions and concerns.

If you have any questions about compliance with the revised guidance, workplace safety, or COVID-19 and the workplace, please reach out to any member of HRW's COVID-19 Team:

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