OSHA Updates Rules, Requires Most Employers to Determine Whether COVID-19 Cases Are Work-Related

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The Occupational Safety and Health Administration ("OSHA") has changed its policy for employer recording of COVID-19 cases among its workforce. OSHA's new policy rescinds prior guidance announced in April 2020 (discussed here), which relieved most employers of the need to determine whether COVID-19 cases among their employees are work-related. Now, OSHA will enforce recordkeeping requirements, and an employer with more than 10 employees must undertake a reasonable investigation to determine whether cases of COVID-19 among its workforce are work-related, and if so, record those cases using the OSHA-prescribed log and Incident Report form or an equivalent form. A summary of the recordable incidents on the OSHA log must then be reported on an annual basis.

OSHA's new policy requires employers to record cases of COVID-19, if: (1) the case is a "confirmed" case, as defined by the Center for Disease Control (CDC); (2) the case is "work-related"; and (3) the case meets at least one of the general recording criteria established by regulation. Under existing regulation, an illness or injury is recordable if it results in death, days away from work, restricted work or transfer, medical treatment or loss of consciousness. Given that COVID-19 case would at the very least result in days away from work, it is a recordable illness.

OSHA has recognized the difficulty in determining work-relatedness for COVID-19. In exercising its enforcement discretion, OSHA will assess an employer's *efforts* in making work-related determinations. To do so, it will consider the following:

- *The reasonableness of the employer's investigation into work-relatedness.* In most circumstances, it is sufficient to (1) inquire how the employee believes they contracted COVID-19; (2) discuss the employee's work and non-work related activities that may have resulted in the illness; and (3) review the employee's work environment for potential exposure to coronavirus, taking into consideration other instances of COVID-19 in the environment.
- *The evidence available to the employer*. The employer should consider any evidence that a case of COVID-19 is work-related that is available at the time it is making its work-relatedness determination. If the employer learns additional information after its determination, it should consider that new information to assess whether its initial work-relatedness determination was reasonable.
- *Reasonably available evidence that a COVID-19 illness was contracted at work*. While there is no set formula for evidence that should be considered in determining work-relatedness, certain types of evidence may weigh in favor or against work-relatedness. For example, multiple cases among workers in close proximity, frequent and close exposure to the general public, and symptoms occurring shortly after exposure to a customer or coworker with COVID-19, all weigh in favor of work-relatedness. On the other hand, an isolated case in a worker with limited exposure to the public or an isolated case in someone who was in close contact with a COVID-19 patient outside the workplace, is unlikely to be work-related.

If, after a reasonable and good-faith inquiry, an employer cannot determine whether it is more likely than not that exposure in the workplace resulted in the case of COVID-19, it need not record the illness.

In light of OSHA's new policy, employers with greater than 10 employees should consider developing protocols and procedures for making work-relatedness determinations. In doing so, employers should consider the guidance from OSHA and take into account concerns about employee privacy.

Foley Hoag has formed a firm-wide, multi-disciplinary task force dedicated to client matters related to the novel coronavirus

(COVID-19). For guidance on COVID-19 business reopening issues, visit our Resource Portal or contact your Foley Hoag attorney.

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