Environmental and Workplace Health & Safety

Employers are Back in the Workplace: So is OSHA!

By: Gabrielle Sigel

On May 19, 2020, in recognition of many more businesses opening their workplaces in response to governors modifying stay-at-home orders and the President's urging businesses to reopen across the country, OSHA revised two of its prior COVID-19 enforcement policies; thereby informing employers that OSHA would no longer grant enforcement discretion regarding the recording of work-related COVID-19 exposure cases and that OSHA intended to conduct more onsite inspections of alleged workplace violations and complaints, particularly those focusing on COVID-19 issues.

OSHA began its announced changes in enforcement policies by stating that, "The government and the private sector have taken rapid and evolving measures to slow the virus's spread, protect employees, and adapt to new ways of doing business." The two revised policies are to "ensure employers are taking action to protect their employees" as workplaces reopen. Both new policies go into effect on May 26, 2020.

OSHA's first policy change is to its own enforcement procedures. OSHA plans to increase in-person inspections of "all types of workplaces." OSHA stated that it can conduct more onsite inspections because the risk to OSHA inspectors is lower and the PPE that OSHA inspectors would need is "more widely available." Thus, OSHA will rescind its April 13, 2020, Interim Enforcement Response Plan for COVID-19, which stated OSHA's temporary policy of suspending most onsite inspections in favor of written and telephonic communications with employers. Under the May 26, 2020 Updated Interim Enforcement Response Plan, OSHA intends to return to its pre-pandemic approach for determining whether to respond to employee complaints by (a) in-person investigation; (b) non-formal telephonic investigations; and/or (c) requests that employers respond in writing to a complaint, such as through a Rapid Response Investigation in response to a reported fatality or work-related in-patient hospitalization. However, in all cases, OSHA intends to "continue to prioritize COVID-19 cases."

OSHA's updated policy also provides that in geographic areas with sustained or resurgent cases of community transmission, OSHA's Area Directors have the discretion to prioritize onsite inspections for cases of fatalities and imminent danger exposures, particularly in "high-risk workplaces, such as hospitals and other healthcare providers treating patients with COVID-19 [and] workplaces with high numbers of complaints or known COVID-19 cases."

OSHA's second announced enforcement policy change concerns OSHA's recordkeeping regulations, which obligates employers in many businesses with 10 or more employees to record certain cases of employee illness as a recordable case on OSHA-required logs of work-related injuries and illnesses. The recordkeeping regulation provides that if the employee has a confirmed case of COVID-19, which is "work-related" as defined in OSHA regulation, 29 CFR § 1904.5, and for which the employee received medical treatment beyond first aid or days away from work (the latter almost always being the case), the employee's illness is recordable.

The challenge to employers in the case of a community-wide communicable disease is knowing whether the employee's illness is "work-related." In OSHA's April 10, 2020 enforcement discretion policy issued on this topic, OSHA recognized that for all workplaces except those with a high-risk of exposure to COVID-19-positive people (*e.g.,* COVID-19 hospital wards and prisons), employers *did not* have to take

action to determine whether an employee's illness was due to a work-related exposure and thus recordable. In the new OSHA policy, effective May 26, 2020, all employers, regardless of COVID-19 exposure risk levels, must determine whether an employee's illness is work-related.

However, OSHA recognizes that, "[g]iven the nature of the disease and ubiquity of community spread, … in many instances it remains difficult to determine whether a COVID-19 illness is work-related, especially when an employee has experienced potential exposure both in and out of the workplace." Thus, if the employer conducts a "reasonable and good faith inquiry" and the employer "***cannot determine*** whether it is ***more likely than not*** that exposure in the workplace played a ***causal role***…, ***the employer does not need to record that COVID-19 illness***." (Emphasis added.)

OSHA will consider whether an employer has made a "reasonable determination of work-relatedness" by evaluating:

- The reasonableness of the employer's investigation into work-relatedness. OSHA states that employers should "not be expected to undertake extensive medical inquiries, given employee privacy concerns and most employers' lack of expertise in this area." Instead, in response to known employee illness, the employer should "(1) ask the employee how he believes he contracted the COVID-19 illness; (2) while respecting employee privacy, discuss with the employee his 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," including other cases in that environment.

- The evidence available to the employer. "Available" evidence can be information both available at the time of the investigation and learned later by the employer.

- The evidence that a COVID-19 illness was contracted at work. OSHA will evaluate "all reasonably available evidence… to determine whether an employer has complied with its recording obligation." Such evidence can include clusters of cases in the work environment or whether the employee had "frequent, close exposure to the general public in a locality with ongoing community transmission," and in either case there is "no alternative explanation." On the other hand, a case is "likely not work-related," if the employee had "close" and "frequent" exposure to someone outside the workplace who was infectious during the relevant time period.

Especially because OSHA can do its own *post hoc* determination of the reasonableness of the employee's decision, employers should document their investigation of each case of an employee COVID-19 illness.

OSHA ends its revised policy by cautioning employers that, regardless of whether an employee's illness is recordable, "as a matter of health and safety" [subtext: subject to potential OSHA enforcement], the employer should respond to protect other workers when it learns that one employee has become ill. OSHA does not describe, however, what those next steps should be.

Please feel free to contact the author with questions or for further information. For regular updates about the impact of COVID-19 in the workplace and on business generally, please visit Jenner & Block's Corporate Environmental Lawyer blog and Jenner & Block's COVID-19 Resource Center.

Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

For additional information and materials, please visit our COVID-19 / Coronavirus Resource Center.

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