

Benesch COVID-19 Resource Center: OSHA Updates Interim Guidance Regarding COVID-19 Illness Recording Requirements

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On May 19, 2020, the Occupational Safety and Health Administration (“OSHA”) issued an “updated interim guidance” memorandum to Compliance Safety and Health Officers (“CSHOs”) for enforcing the requirements under the Occupational Safety and Health Act, 29 CFR Part 1904, with respect to the recording of COVID-19 cases in the workplace. This new guidance goes into effect on May 26, 2020 and will replace OSHA’s April 10, 2020 interim guidance memorandum.

Under OSHA’s latest guidance memorandum, COVID-19 will be deemed a “recordable illness” if:

1. The case is a confirmed case of COVID-19 as defined by the Centers for Disease Control and Prevention;
2. The case is work-related, as defined by 29 CFR § 1904.5; and
3. The case involves one or more of the general recording criteria set forth in 29 CFR § 1904.7.

OSHA’s latest guidance explicitly recognizes the obvious difficulty in determining “whether a COVID-19 illness is work-related, especially when an employee has experienced potential exposure both in and out of the workplace.” In light of this obvious difficulty, OSHA advises CSHOs to apply the following considerations when determining whether an employer has complied with its record-keeping obligations under Part 1904:

1. **The reasonableness of the employer’s investigation into work-relatedness.** Here, employers should ask employees who test positive for COVID-19 how the employee believes he or she contracted the virus; discuss with the employee, while respecting his or her privacy, how work and out-of-work activities may have led to the positive test result; and review the employee’s work environment for potential COVID-19 exposure. When reviewing the employee’s work environment, the employer should consider whether other employees working in the same or similar environment contracted COVID-19.
2. **The evidence available to the employer.** OSHA’s updated guidance recognizes that employers “don’t know what they don’t know,” and that any decision regarding whether an employer properly recorded an employee’s COVID-19 illness should be based on the information reasonably available to the employer at the time it made its work-relatedness determination. The updated guidance, however, makes clear that if an employer who initially determines that a

COVID-19 illness is not work-related subsequently learns additional information that may bear on the work-relatedness question, that information can be used by CSHOs in determining whether the employer complied with Part 1904.

3. **The evidence that a COVID-19 illness was contracted at work.** Again, OSHA recognizes the difficulty in determining whether a COVID-19 illness is “work-related” by specifically acknowledging that an employer’s compliance under Part 1904 “cannot be reduced to a ready formula.” Nevertheless, OSHA’s latest guidance advises CSHOs to consider the following when determining whether a COVID-19 illness is work-related:
- a. Were there several cases of COVID-19 illnesses among employees who work closely together and is there no alternative explanation;
 - b. Was the employee’s COVID-19 illness contracted shortly after lengthy, close exposure to a customer or coworker who has a confirmed case of COVID-19 and is there no alternative explanation;
 - c. Did the employee’s job duties include frequent, close exposure to the general public in a locality with ongoing community transmission and is there no alternative explanation;

Conversely, the updated guidance advises CSHOs that a COVID-19 illness is likely *not work-related* if (1) the employee is the only worker to contract COVID-19 in his or her vicinity and the employee’s job duties do not require frequent contact with the general public; or (2) the employee frequently associates with an individual who has COVID-19, who is not a co-worker, and who exposed the employee to COVID-19 during the period in which the individual is likely infectious.

Finally, OSHA advises its CSHOs to consider evidence provided by medical providers, public health authorities, or the employee him or herself when determining whether an employer has complied with its Part 1904 record-keeping obligations.

Given OSHA’s latest guidance, employers should take care to conduct reasonable, good faith inquiries when determining whether a COVID-19 illness is work-related and, therefore, recordable under Part 1904. These good faith inquiries necessarily should incorporate, if possible, a discussion with the infected employee, including a discussion on how and when the employee believes he or she contracted the illness and any medical evidence which might support that the illness was contracted in the workplace. In addition, employers should review whether any of its other employees tested positive for COVID-19 and, if so, whether those employees worked with the newly infected employee. Finally, given this updated guidance, we strongly recommend that employers timely document their inquiries and the reasons they made their determinations.

For more information please contact a member of Benesch's [Labor & Employment Practice Group](#).

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Please note that this information is current as of the date of this Client Alert, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by the CDC and local officials.

