HANCOCK DANIEL
The Health Law Solution

OSHA'S COVID-19 REPORTING REQUIREMENTS AND INTERIM ENFORCEMENT PLAN

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For most employers, it is unfortunately likely that one or more of their employees will get the novel coronavirus (COVID-19). Employers, therefore, need to understand how to comply with the Occupational Safety and Health Administration's (OSHA) requirements to maintain records; timely report certain work-related injuries and illnesses pursuant to 29 C.F.R. § 1904, including fatalities, in-patient hospitalizations, amputations, and loss of an eye; and apply these requirements to any COVID-19 cases that occur in their workforce.

OSHA'S MARCH 10, 2020, GUIDANCE

OSHA first provided specific guidance on recording workplace exposures to COVID-19 on OSHA 300 logs and OSHA Form 301 in early March. Although certain illnesses such as a cold or seasonal flu are not reportable, OSHA confirmed that COVID-19 is a recordable illness when an employee is infected as a result of performing their job and all of the following are true: 1) the employee has a laboratory confirmed case of COVID-19; 2) the case is work-related, 29 C.F.R. 1904.5; and 3) the case is "recordable" under 29 C.F.R. 1904.7, meaning it results in a fatality, days away from work, restricted duty, in-patient hospitalization for one or more employees, loss of consciousness, or medical treatment beyond first aid. Not all employees who contract COVID-19 will know either they have the virus, require "medical treatment," or satisfy any of the other recordable criteria. Such instances need not be recorded.

Cases of COVID-19 also present especially challenging determinations regarding work-relatedness, as our current knowledge of this virus and testing capabilities often will not allow an employer to determine whether exposure to the virus occurred inside or outside of the work environment. Using the best information available, however, employers were initially directed to analyze the diagnosed employee's work environment, the job performed, the risk of transmission between employees at work, the presence of community transmission in their locality, and other known cases in the workplace to determine whether the "work-related" criteria is met.[1] COVID-19 cases are work related and should be recorded when an employer determines that exposure in the workplace caused or contributed to the illness or significantly aggravated a pre-existing injury or illness (as further explained in the April 2020 Guidance discussed below).

[1] Illness sustained while working at home must be "directly related to the performance of work rather than to the general home environment or setting" to be work-related.

The timing requirements for recording and reporting work-related injuries or illness have not changed. Employers may "cap" the reported total days away from work at 180 days. Any work-related fatality that occurs within thirty (30) days of a work-related incident must be reported to OSHA within eight (8) hours of the employer finding out about it, as required by 29 C.F.R. § 1904.29. Employers must report inpatient hospitalizations, amputations, or eye loss within twenty-four (24) hours of learning of them, if the event occurs within twenty-four (24) hours of work-related incident. Reports may be submitted to OSHA by telephone to the nearest OSHA area office during normal business hours, by telephone to the OSHA hotline at 1-800-321-6742, or electronically at https://www.osha.gov/report.html. Given the lengthy progression of the COVID-19 symptoms in some patients, these time limited reporting requirements and challenging causation questions may result in only a percentage of the actual COVID-19 workplace related cases being recorded or reported to OSHA.

OSHA'S APRIL 10, 2020, ENFORCEMENT GUIDANCE MODIFIES SOME COVID-19 REPORTING REQUIREMENTS

A few weeks after its March guidance, OSHA issued additional helpful enforcement guidance limiting the resources most employers must utilize to investigate and record COVID-19 cases, with the exception of healthcare, emergency response (emergency medical, firefighting, and law enforcement), and correctional institution employers. See https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19. Specifically, the April 2020 enforcement memorandum provides that in areas where there is ongoing community transmission all employers, *other than the three industries excepted*, are not required to determine whether COVID-19 cases are work-related or to record or report such cases to OSHA. OSHA's enforcement discretion is being exercised based upon both the practical difficulty of determining where an employee may have picked up the novel coronavirus and the limited resources many employers have available to research potential work exposures currently. There are two situations, however, where the requirement to make work-relatedness determinations remains for all employers:

1. There is objective evidence that a COVID-19 case may be work-related. This could include a number of cases among workers who work closely together without an alternative explanation; and
2. The evidence of work-relatedness is reasonably available to the employer. For purposes of OSHA's enforcement memorandum, reasonably available evidence includes information given to the employer by employees, as well as information that the employer learns regarding its employees' health and safety in the ordinary course of business.

Recording and reporting requirements also apply to all employers when confirmed COVID cases meet the three part test (including the modified work relatedness test) outlined above. Note that healthcare industry, emergency response, and correctional institution employers must continue to make work-relatedness determinations for all employees with COVID-19 and must record and report all cases that meet the established criteria.

OSHA'S APRIL 13, 2020, INTERIM ENFORCEMENT RESPONSE PLAN FOR CORONAVIRUS DISEASE

Many employers that are attempting in good faith to ensure safe and healthy conditions for employees and the public while operating their businesses are facing one or more COVID-19 related OSHA complaints. OSHA's interim enforcement guidance, https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-

coronavirus-disease-2019-covid-19, provides a helpful overview of how complaints will be handled, modified inspection procedures, enforcement discretion that may be exercised, healthcare employer specific guidance, citations, sample letters that may be sent to employers, and additional references for employers.

OSHA will investigate all complaints, referrals and employer-reported hospitalizations and fatalities to identify potentially hazardous occupational exposures and to require that employers take prompt action to mitigate hazards. The guidance notes that many complaints received to date have described a lack of personal protective equipment (PPE), such as respirators, gloves, and gowns, as well as a lack of training on applicable standards and possible COVID-19 illnesses in the workplace. In most places, OSHA will process complaints using non-formal complaint and referral procedures. Not surprisingly, OSHA will weigh carefully whether an on-site inspection is necessary and will maximize use of electronic means of communication to conduct investigations and inspections. Fatalities and imminent danger exposures related to COVID-19 are being prioritized for inspections, with particular attention given to healthcare organizations and first responders. For example, if OSHA receives a formal complaint of alleged unprotected worker exposures to COVID-19 while performing aerosol-generating procedures without adequate PPE, this may warrant an on-site inspection. All other formal complaints will not normally result in inspectors requesting on-site access.

Facilities should anticipate that OSHA will request some of all of the following documentation: a written pandemic plan or emergency preparedness plan, the facility's procedures for hazard assessment and protocols for PPE use with suspected or confirmed COVID-19 patients, laboratory procedures for handling specimens, medical records relating to worker exposure incidents, any worker hospitalizations relating to COVID-19, and any precautionary removals/isolation due to COVID-19, respirator policies, employee training records, documented efforts to obtain and provide adequate PPE, procedures for the use of airborne infection isolation rooms/areas, procedures for transferring patients to other facilities in situations where appropriate isolation rooms/areas are inoperable or unavailable, the numbers and placements (room assignments) for confirmed and suspected COVID-19 patients at the time of inspection, and any pattern of placements for confirmed and suspected COVID-19 patients in the preceding 30 days. While every situation is different, the most likely applicable OSHA standards are:

- 29 CFR § 1904, Recording and Reporting Occupational Injuries and Illness.
- 29 CFR § 1910.132, General Requirements - Personal Protective Equipment.
- 29 CFR § 1910.133, Eye and Face protection.
- 29 CFR § 1910.134, Respiratory Protection.
- 29 CFR § 1910.141, Sanitation.
- 29 CFR § 1910.145, Specification for Accident Prevention Signs and Tags.
- 29 CFR § 1910.1020, Access to Employee Exposure and Medical Records.
- Section 5(a)(1), General Duty Clause of the OSH Act.

In the course of its investigation, OSHA will determine whether healthcare employers with practitioners who are performing surgical procedures on patients either infected or potentially infected with COVID-19, or are performing procedures expected to generate aerosols, or procedures where respiratory secretions are likely to be poorly controlled (e.g., cardiopulmonary resuscitation, intubation, extubation, bronchoscopy, nebulizer therapy, sputum induction) are requiring that these practitioners: 1) use respirators within the manufacturer's recommended shelf life, if available, before using respirators that are beyond the manufacturer's recommended shelf life; 2) use respiratory protection equipment not certified by NIOSH approval holders only when a facemask

or improvised nose/mouth cover is the only feasibly alternative; and 3) are not using expired respiratory protection equipment if respirators are available that are within the manufacturer's recommended shelf life. At the same time, the enforcement guidance acknowledges that it is reasonable for healthcare employers to reserve some NIOSH or foreign certified N95 FFRs for use by healthcare workers expected to perform procedures on potentially infected COVID-19 patients and employers simply should be able to provide a reasonable rationale for their decision to stockpile this equipment. It recommends following CDC guidance for situations where crisis standards of care may need to be considered or utilized.

In both the interim enforcement response plan and OSHA's April 16, 2020, Enforcement Memorandum, an employer's good faith efforts during the coronavirus pandemic will be important. Employers with limited equipment available should document their good faith effort to obtain other appropriate, alternative equipment, their monitoring of supplies, the provision of interim measures such as surgical masks and eye protection, and other efforts to comply to the extent possible with applicable standards. The absence of good faith compliance efforts may result in OSHA issuing citations for alleged serious violations. We recommend careful review of the interim enforcement response plan if your organization receives an OSHA complaint.

Hancock Daniel's Labor & Employment team is prepared to assist with any issues or questions related to the coronavirus and the Families First Coronavirus Response Act. Our COVID-19 Task Force will advise and assist employers on all concerns arising from the pandemic.

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