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Reporting Work-Related COVID-19 Diagnoses to OSHA

Gray Reed Legal Alert

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Employers are generally not responsible for reporting employees' positive COVID-19 diagnoses to the U.S. Department of Health and Human Services or the Texas Department of State Health. However, employers may overlook the ordinary reporting requirements for workplace illnesses that must be made to the Occupational Health and Safety Administration (OSHA), including reporting COVID-19 diagnoses. With that in mind, OSHA recently released revised enforcement guidance that provides employers with substantive direction concerning the recording of COVID-19 cases.

Under OSHA's recordkeeping requirements, covered employers[1] must record on their OSHA 300 log any confirmed COVID-19 diagnosis that is both: (1) work-related; **and** (2) involves OSHA general recording criteria. A condition is "work-related" if "an event or exposure in the work environment either caused or contributed to the resulting condition." An illness involves OSHA general recording criteria if, among other things, it results in days away from work or medical treatment beyond first aid.

Any COVID-19 case will necessarily involve OSHA general recording criteria, since a confirmed case will, at a minimum, require days away from work. However, determining whether the illness is "work-related" is a more difficult task. Recognizing this difficulty for employers, OSHA's revised guidance provides that it will exercise substantial discretion in enforcing the reporting requirement. In general, an employer is only responsible for reporting a confirmed COVID-19 case if: (1) there is objective evidence that the diagnosis may be work-related (e.g., cluster of cases among workers in close proximity without an alternative explanation; illness is contracted shortly after lengthy close contact with coworker/customer with confirmed diagnosis); and (2) the evidence was reasonably available to the employer (e.g., reports from employees).

OSHA's revised guidance also provides that employers should make a reasonable investigation into work-relatedness. According to the guidance, it is sufficient in most circumstances to: (1) ask the diagnosed employee how they believe they contracted COVID-19; (2) discuss with the employee any work or out-of-work activities that may have led to exposure; and (3) review the employee's work environment for potential exposure (i.e., identify whether others in that work environment have contracted COVID-19). If, after the inquiry described above, an employer cannot determine whether it is more likely than not that the employee's illness is work-related, the employer does not need to record that COVID-19 diagnosis.

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In sum, OSHA's reporting requirements are mandatory, and they may be easily overlooked as employers deal with other pressing aspects of managing their workplaces during this pandemic. OSHA's revised guidance makes clear that the recording requirements are not onerous and that OSHA will exercise significant discretion in enforcing those requirements where employers have made a reasonable effort to comply.

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[1] *A "covered employer" is any employer with ten or more employees that is not in an exempt industry classification. The list of industries exempt from OSHA's recordkeeping requirements can be accessed by clicking here.*

ABOUT THE AUTHORS

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Jake Lewis focuses his practice on resolving a broad range of employment litigation matters, including defense of employers under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Fair Labor Standards Act, the Family Medical Leave Act and state anti-discrimination laws. He has significant experience handling Department of Labor audits and related litigation involving misclassification of employees and payment of overtime and minimum wage. Jake also prosecutes and defends unfair competition disputes from preliminary injunctive relief through trial, typically involving non-compete agreements, non-disclosure agreements and misappropriation of trade secrets.

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Vernon Howerton helps businesses avoid and resolve commercial disputes through negotiation, alternative dispute resolution and litigation, with an emphasis on construction and government contract law. He has more than 25 years of experience helping construction owners, contractors, subcontractors and suppliers enforce and defend their rights in disputes arising from public and private heavy civil, industrial, telecom and commercial project contracts. Vernon also presents and defends various bid protests related to federal, state and local government contracts and defends OSHA citations for workplace safety violations.