OSHA Guidance

On May 26, 2020, the Occupational Safety and Health Administration's ("OSHA") most recent guidance to its Regional Administrators and State Plan Designees took effect. In this guidance—more formally known as the Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019—OSHA updated employers regarding its expectations for required workplace investigations and recordkeeping following an employee's positive test for COVID-19. This new guidance presents a reversal of course by OSHA and places more strenuous obligations on some employers than previously thought.

As an initial matter, this guidance does not apply to employers that are exempt from OSHA's recordkeeping requirements. Specifically, employers with ten or fewer employees at all times during the previous calendar year and employers that operate in a low-hazard industry are not subject to these requirements.

Prior Guidance

The Occupational Safety and Health Act (the "OSH Act") requires employers to record and maintain records of occupational injuries and illnesses. This, by definition, applies only to injuries and illnesses that are "work-related." As the COVID-19 pandemic was in its early phases, employers questioned how the OSH Act would apply to an employee who contracted the virus. OSHA calmed these nerves with initial guidance in early April. In this guidance, OSHA declared it would not require employers to determine if COVID-19 was work-related and would not enforce its recording requirements absent objective evidence that was reasonably available to the employer that a COVID-19 case was work-related. In other words, OSHA told employers that there was no need to worry unless there was some compelling, apparent evidence that one of its employees contracted COVID-19 at work. This significantly reduced employers' obligations to conduct investigations into the source of employees' positive COVID-19 tests.

New Requirements

Now, over a month later, OSHA has tightened its lax requirements and informed employers that it expects more of them in the event of a COVID-positive employee. Under these revised OSHA recordkeeping requirements, an employee's contracting COVID-19 is a recordable illness—and thus an employer is responsible for recording a case of COVID-19—if the case: (i) is a confirmed case of COVID-19; (ii) is "work-related"; and (iii) involves one or more of the general recording criteria set forth in OSHA regulations (for example, if it results in days away from work or medical treatment beyond first aid).

Employers are now tasked with making a good-faith effort to determine whether an employee's contraction of COVID-19 was "work-related." An illness is "work-related" if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Recognizing the difficulty of this work-relatedness determination, OSHA "is exercising enforcement discretion to assess employers' efforts on making work-related determinations." OSHA has listed the following considerations for its inspectors to assess when making these enforcement determinations:

- **The reasonableness of the employer's investigation into work-relatedness.** Although OSHA understands that employers (especially smaller ones) are not expected to undertake extensive medical evaluations of their employees, it does expect some effort from employers to investigate work-relatedness. In general, when an employer learns of an employee's COVID-19 diagnosis, it is sufficient to: (i) ask the employee where he/she believes he/she contracted the virus; (ii) review with the employee his/her out-of-work activities that could have led to the infection; and (iii) review the employee's work environment for potential exposure.

- **The evidence available to the employer.** OSHA will not hold unknown information against employers. Therefore, after a reasonable investigation, if the employer determines an employee's contracting COVID-19 was not work-related—even though existing but unknown information would lead the employer to believe otherwise—such information will not count against the employer. However, by the same token, if an employer subsequently learns information that leads it to believe an employee's COVID-19 illness was work-related, the employer remains under an obligation to act and record accordingly.

- **The evidence that COVID-19 was contracted at work.** Although difficult to know whether COVID-19 was contracted at work, OSHA details some factors for employers to explore and consider when making their work-relatedness determination:

    - COVID-19 is more likely work-related when several cases pop up contemporaneously among workers who work closely together without alternative explanation.

    - An employee's illness is more likely work-related if it is contracted shortly following exposure to a colleague, customer, or vendor who tested positive for COVID-19.

    - An employee's illness is also more likely work-related if his or her job involves frequent exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation for the illness.

    - At the same time, an employee's COVID-19 diagnosis is less likely to be work-related if the employee is the only worker to contract COVID-19 in his or her vicinity and his or her job does not require having frequent contact with the general public, regardless of the rate of community spread.

    - An employee's COVID-19 illness is likely not work-related if he or she, outside the workplace, closely and frequently associates with someone who: (i) has COVID-19; (ii) is not a coworker; and (iii) exposes the employee during the period in which the individual is likely infectious.

Practical Implications

This updated guidance means that employers must treat OSHA recordkeeping in the COVID era as more than a mere formality. To the extent possible, employers should take efforts to investigate all instances of COVID-19 cases from their employees. Employers should be proactive in developing their processes and procedures for investigating positive COVID tests before they ever occur. Moreover, this guidance serves as a reminder for employers to take affirmative measures to provide a clean and safe work environment for all employees. While this certainly means ensuring a sanitary workplace, it also includes developing return-to-work guidelines and protocols that promote social distancing and healthy habits. Such measures can help to reduce (if not eliminate) the number of recordable illnesses in the future. The Centers for Disease Control continues to offer helpful resources to assist employers on this front.

As always, please reach out to your contacts in the Firm's Labor & Employment Practice if you have any questions or comments about your OSHA recordkeeping obligations in light of this new guidance or about any other return-to-work considerations.

Maynard Cooper's COVID-19 Coronavirus Task Force is closely monitoring all updates to pending legislation and regulations related to the Coronavirus pandemic. We are dedicated to providing client-focused services, and it is the goal of the Task Force to continue this level of service to each and every client as they face challenges about planning for and responding to the threats posed by the virus. If you have any questions, please reach out to your relationship partner or any of the lawyers serving on the Task Force.