

## LABOR AND EMPLOYMENT

# ALERT

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## Determining Whether Covid-19 Illnesses Are Work-Related

By *Brian M. Wallen and Michael J. Wietrzychowski*

The Occupational Safety and Health Administration (“OSHA”) has issued revised guidance regarding how employers can determine whether a Covid-19 case is work-related and, thus, recordable.<sup>1</sup> The new guidance addresses workplace exposure issues expected to occur as shelter-in-place orders are being eased across the country and employees return to work. OSHA published the guidance on May 19, 2020 and it was effective May 26, 2020. The new OSHA policies update the guidance originally issued on April 10, 2020, which required certain frontline employers to determine whether known cases of Covid-19 among their workforces were recordable work-related illnesses.

Given the large fines that can result from OSHA recordkeeping violations, employers should be familiar with the updated guidance.

### GENERAL RECORDING OBLIGATIONS AND PRIOR COVID-19 GUIDANCE

OSHA requires most employers to maintain a log detailing employees’ work-related illnesses and injuries – more commonly referred to as an OSHA 300 log.<sup>2</sup> Assuming an employer is covered, all work-related illnesses except common colds and the flu

must be recorded on the log and maintained for five years.<sup>3</sup> The above obligations notwithstanding, all employers must record OSHA work-related illnesses that result in a fatality or in-patient hospitalization and report them to OSHA.<sup>4</sup> Deaths must be reported to OSHA within 8 hours, and in-patient hospitalizations must be reported to OSHA within 12 hours.

OSHA’s prior guidance, issued on April 10, 2020, mainly addressed the recording obligations of front-line employers whose employees contracted work-related Covid-19 illness. Non-frontline employers were specifically excused from being required to determine whether an employee’s Covid-19 illness was a recordable work-related illness subject to one exception. Non-frontline employers were required to determine whether an employee’s Covid-19 illness was work-related if there was objective evidence that the case in question was work-related and the evidence of work-relatedness was easily available.

### REVISED OSHA GUIDANCE REGARDING RECORDABLE COVID-19 ILLNESSES

On May 19, 2020, OSHA published updated guidance, which went into effect on May 26, 2020. This guidance unequivocally states that Covid-19 illnesses are potentially recordable illnesses for nearly all covered employers.<sup>5</sup> Covered employers will be responsible for

<sup>1</sup> Revised OSHA Enforcement Guidance for Recording Cases of Covid-19 - <https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>.

<sup>2</sup> Employers with fewer than 10 employees, self-employed individuals, as well as employers in certain industries may be partially exempt from reporting work-related illnesses. See 29 CFR § 1904.1-2.

<sup>3</sup> In contrast, only some workplace injuries need to be recorded on the OSHA 300 Log. See 29 CFR § 1904.7.

<sup>4</sup> Although not relevant to this article, nearly all employers must additionally report incidents of amputations or loss of an eye. See 29 CFR § 1904.7.

<sup>5</sup> See 29 CFR 1904.39.

recording Covid-19 cases on OSHA 300 Logs if the case: (1) is a confirmed case of Covid-19 as defined by the Centers for Disease Control (“CDC”); (2) is work-related as defined by OSHA’s regulations; and (3) involves one or more of the general reporting criteria outlined in OSHA’s regulations. Nearly all employers, even those exempted from maintaining OSHA 300 Logs, will continue to be required to record and report to OSHA work-related Covid-19 illnesses that result in a fatality or an employee’s in-patient hospitalization.<sup>6</sup>

#### *CONFIRMED COVID-19 ILLNESS*

Under OSHA’s updated guidance, in order for an employee’s Covid-19 illness to be recordable, an employee must have a “confirmed” Covid-19 illness as defined by the CDC. A CDC-defined confirmed Covid-19 illness is one that is substantiated by laboratory testing.<sup>7</sup> Accordingly, employers can cease this analysis when an employee has all the symptoms of Covid-19 but is otherwise unable to obtain a test to confirm. Once the employee has a confirmed Covid-19 illness, employers then must engage in the more complicated analysis of whether a Covid-19 illness is work-related. It should be noted that employees who have a “presumptive positive” test likely do not meet the definition of “confirmed,” although employers are permitted to do the subsequent analysis for “presumptive” positive tests and may even record the illness as work-related.

#### *WORK-RELATED*

With respect to work-relatedness, this is typically defined with reference to OSHA’s regulations. OSHA’s revised guidance recognizes that many employers will find it difficult to isolate the cause of an employee’s Covid-19 illness to the worksite. Therefore, employers should undertake a reasonable and good faith inquiry into whether an individual’s Covid-19 illness was

<sup>6</sup> Although less likely, all employers also have to record and report Covid-19 illnesses that result in amputations or loss of an eye.

<sup>7</sup> A confirmatory lab case requires detection of severe acute respiratory syndrome coronavirus 2 ribonucleic acid (SARS-CoV-2 RNA) in a clinical specimen using a molecular amplification detection test. See CDC Case Definitions - <https://www.cdc.gov/nndss/conditions/coronavirus-disease-2019-covid-19/case-definition/2020/>.

contracted in the workplace. To do this, the staff member charged with workplace safety should speak with employees who test positive for Covid-19 to understand where the employee believes the Covid-19 case occurred, including any out-of-work activities that could have led to the Covid-19 illness.<sup>8</sup>

Similarly, personnel responsible for workplace safety should review whether there was a potential Covid-19 exposure in the workplace. Ultimately, an employer must review all available evidence in making a determination that a Covid-19 illness is work-related.

Factors that weigh in favor of finding that a Covid-19 illness was contracted at work are:

- Several cases of Covid-19 developing in the workplace with no alternative reasonable explanation;
- Covid-19 illness subsequent to close and prolonged exposure to a particular customer or coworker who has a confirmed case of Covid-19 without an alternative explanation for the illness;
- The employee’s job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission without an alternative explanation.

On the other hand, a Covid-19 illness is likely not work-related if:

- The employee is the only worker to contract Covid-19 in the work location and job duties do not include frequent contact with the general public, regardless of the rate of community spread;
- An employee closely and frequently associates with someone (e.g., a family member, significant other, or close friend) outside of work who (1) has Covid-19, (2) is not a coworker, and (3) exposes the employee to Covid-19

<sup>8</sup> Employers should be mindful of protecting employees’ privacy during these inquiries. Should an employer learn of a recordable Covid-19 illness, employees may voluntarily request that an employer remove the employee’s name from the OSHA 300 Log. See 29 CFR § 1904.29(b)(7)(vi).

during the period in which the individual is likely infectious.

If, after the inquiry described above, the employer determines it is more likely than not that exposure in the workplace played a causal role in a particular Covid-19 illness, then the employer must record a Covid-19 illness as a work-related respiratory illness on its OSHA 300 Log.

#### GENERAL REPORTING CRITERIA

Assuming the case is a CDC-confirmed case of Covid-19 and the Covid-19 illness is more likely than not work-related, covered employers will almost always meet OSHA's general reporting criteria. An employer generally must record work-related illnesses on its OSHA 300 Log in two scenarios:

- Those that result in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness; and
- Those that involve a significant injury or illness diagnosed by a physician or other licensed health care professional, even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness.

A confirmed Covid-19 illness via lab testing likely meets the general reporting criteria, at this time. Looking ahead, given the expedited research on treatments and vaccines, it is possible that Covid-19 could eventually be treated like the common cold, which is caused by other coronaviruses.

#### TAKEAWAYS AND BEST PRACTICES

OSHA's revised guidance represents another step towards the "new normal." Just like everything else involving Covid-19, this guidance could be subject to change if there is a significant new outbreak on a regional or national basis. OSHA could also revise its guidance to focus more on symptoms-based case evaluation as opposed to testing, if supply shortages akin to those that have already occurred in several places become prevalent.

Regardless of the "what ifs," OSHA's May 19, 2020 revised guidance is clear. When a covered employer

learns of a confirmed positive Covid-19 illness among its employees, the employer should undertake a good-faith and reasonable analysis of whether the Covid-19 illness is more likely than not work-related as outlined above, and, if so, the employer should record the illness on its OSHA 300 Log. For those illnesses that an employer ultimately decides not to record, the employer may still want to memorialize the decision-making process in case this decision is later questioned by OSHA and the employer needs to demonstrate its justification to avoid penalties. ♦

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*For more information about Schnader's Labor and Employment Practices Group or to speak with a member of the firm, please contact:*

*Michael J. Wietrzychowski*  
Co-Chair, Labor and Employment Practices Group  
856-482-5723  
[mwietrzychowski@schnader.com](mailto:mwietrzychowski@schnader.com)

*Jo Bennett*  
Co-Chair, Labor and Employment Practices Group  
215-751-2134  
[jbennett@schnader.com](mailto:jbennett@schnader.com)

*Brian M. Wallen*  
Associate  
215-751-2031  
[bwallen@schnader.com](mailto:bwallen@schnader.com)

*www.schnader.com*

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