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OSHA Increases On-Site Inspections, Expands Employee Illness Recordkeeping Requirements in Response to Businesses Reopening

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As various states continue to reopen their economies, the U.S. Department of Labor's Occupational Health & Safety Administration (OSHA) has announced plans to increase on-site inspections in response to the ongoing COVID-19 pandemic. In addition, OSHA has expanded its employee illness recordkeeping requirements to all employers.

On May 20, 2020, OSHA published its Updated Interim Enforcement Plan for COVID-19, which will go into effect on May 26, 2020. The Plan provides instructions and guidance to OSHA Area Offices and Compliance Safety and Health Officers (CSHOs) for handling complaints, referrals, and severe illness reports related to COVID-19.

- In areas where the community spread of COVID-19 has decreased, OSHA will return to its pre-pandemic inspection planning policy but continue prioritizing COVID-19 cases.
- In areas where community transmission of COVID-19 is experiencing sustained elevation or resurgence, OSHA will continue prioritizing COVID-19 fatalities and imminent danger exposures for inspection.
- High-risk workplaces, such as hospitals and other healthcare facilities, will receive priority attention for onsite inspection, as will workplaces with high numbers of complaints or confirmed COVID-19 cases.

As part of an employer's responsibility to maintain a healthy and safe workplace, OSHA requires employers to "examine COVID-19 cases among workers and respond appropriately to protect workers, regardless of whether a case is ultimately determined to be work-related."

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Consequently, in tandem with OSHA's plan to increase inspections in connection with reported cases of COVID-19, it has also expanded its existing recordkeeping requirements to all employers. These requirements call for an employer to record a case of work-related illness if the case:

- Is confirmed as a COVID-19 illness;
- Is work-related as defined by 29 CFR 1904.5 and
- Involves one or more of the general recording criteria in 29 1904.7, such as medical treatment beyond first aid or days away from work.

To slow the spread of the virus as businesses reopen, employers are now required to record cases of work-related COVID-19 under OSHA's existing recording policies. This is to be distinguished from an employer's responsibility to report COVID-19 illnesses in the workplace that result in a fatality or an inpatient hospitalization, amputation, or loss of an eye. Following this update, both OSHA's recording and reporting requirements in connection with the pandemic will now apply to employers with 10 or fewer employees.

OSHA will utilize a "reasonable and good faith" standard to assess whether employers are in compliance with OSHA's recording requirements. If after a reasonable and good faith inquiry an employer is unable to determine whether a case of COVID-19 is work-related, the illness need not be recorded as a workplace illness.

CSHOs will consider three broad factors when assessing an employer's reasonable and good faith efforts to rule out cases of COVID-19 as work-related:

- **The reasonableness of the employer's investigation into work-relatedness.** While employers are not expected to undertake extensive medical inquiries, once an employer learns an employee has contracted COVID-19 it should (1) ask the employee how s/he contracted the illness; (2) inquire into the employee's work and out-of-work activities without violating the employee's personal privacy; and (3) examine the employee's work environment for potential viral exposure.
- **The evidence available to the employer.** Employers must consider any information available to the employer at the time when considering whether the illness is work-related.
- **The evidence that a COVID-19 illness was contracted at work.** Employers must make reasonable determinations based upon the information available. Although OSHA recognizes that there is no ready formula for making such determinations, it has identified certain key variables, including multiple other incidences of employee/customer infections at the workplace with no alternative explanations, whether the employee resides with someone confirmed to have COVID-19, and the employee's level of exposure to the public in high community transmission areas.

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