Bodman PLC | COVID-19 Response Team Website **May 2020**

CDC Revises Enforcement Guidance for Employers Recording Cases of Coronavirus

On May 19, 2020, the CDC updated its interim guidance to Compliance Safety and Health Officers (CSHOs) for enforcing the requirements of 29 CFR Part 1904 with respect to the recording of occupational illnesses, specifically cases of COVID-19.

Under OSHA's recordkeeping requirements, COVID-19 is a recordable illness, and thus employers are responsible for recording cases of COVID-19 as defined by the Centers for Disease Control and Prevention (CDC). With employees returning to the workforce, Employers must take action to determine whether employee COVID-19 illnesses are work-related or due to exposure outside the workplace.

OSHA is exercising its enforcement discretion in order to provide certainty to employers and workers. OSHA will enforce the recordkeeping requirements of 29 CFR Part 1904 for employee COVID-19 illnesses for all employers according to the guidelines below:

In determining whether an employer has complied with this obligation and made a **reasonable determination** of work-relatedness, CSHOs should apply the following considerations:

- *The reasonableness of the employer's investigation into work-relatedness*. Employers, especially small employers, should not be expected to undertake extensive medical inquiries, given employee privacy concerns and most employers' lack of expertise in this area. It is sufficient in most circumstances for the employer, when it learns of an employee's COVID-19 illness, (1) to ask the employee how he believes he contracted the COVID-19 illness; (2) while respecting employee privacy, discuss with the employee his work and out-of-work activities that may have led to the COVID-19 illness; and (3) review the employee's work environment for potential SARS-CoV-2 exposure. The review in (3) should be informed by any other instances of workers in that environment contracting COVID-19 illness.
- *The evidence available to the employer.* The evidence that a COVID-19 illness was work-related should be considered based on the information reasonably available to the employer at the time it made its work-relatedness determination. If the employer later learns more information related to an employee's COVID-19 illness, then that information should be taken into account as well in determining whether an employer made a reasonable work-relatedness determination.

- *The evidence that a COVID-19 illness was contracted at work.* CSHOs should take into account all reasonably available evidence, in the manner described above, to determine whether an employer has complied with its recording obligation. This cannot be reduced to a ready formula, but certain types of evidence may weigh in favor of or against work-relatedness. For instance:
    - COVID-19 illnesses are likely work-related when several cases develop among workers who work closely together and there is no alternative explanation.
    - An employee's COVID-19 illness is likely work-related if it is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation.
    - An employee's COVID-19 illness is likely work-related if his job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.
    - An employee's COVID-19 illness is likely not work-related if she is the only worker to contract COVID-19 in her vicinity and her job duties do not include 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, outside the workplace, closely and frequently associates with someone (e.g., a family member, significant other, or close friend) who (1) has COVID-19; (2) is not a coworker, and (3) exposes the employee during the period in which the individual is likely infectious.
    - CSHOs should give due weight to any evidence of causation, pertaining to the employee illness at issue, provided by medical providers, public health authorities, or the employee herself.

If, after the **reasonable and good faith inquiry** described above, the employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role with respect to a particular case of COVID-19, the employer does not need to record that COVID-19 illness.

CSHOs will generally refer to CPL 02-00-135, *Recordkeeping Policies and Procedures Manual* (Dec. 30, 2004),[6] and CPL 02-00-163, *Field Operations Manual* (Sept. 13, 2019),[7] Chapters 3 and 6, as applicable. The following additional specific enforcement guidance is provided for CSHOs:

- COVID-19 is a respiratory illness and should be coded as such on the OSHA Form 300. Because this is an illness, if an employee voluntarily requests that his or her name not be entered on the log, the employer must comply as specified under 29 CFR § 1904.29(b)(7)(vi).

If you have any questions regarding this policy, please contact Elizabeth Grossman, Director of the Office of Statistical Analysis, at (202) 693-2225.

[6] www.osha.gov/enforcement/directives/cpl-02-00-135.
[7] www.osha.gov/enforcement/directives/cpl-02-00-163.

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ATTORNEYS & COUNSELORS

For more information, please contact any Bodman Workplace Law Attorney. Bodman has created a COVD-19 Task Force which has prepared a multitude of topical client resources in order to assist our clients stay apprised of relevant developments and meet the legal and business tribulations that the coronavirus outbreak has created. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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