Client Update
05/29/2020

FRASER STRYKER®
Attorneys at law, since 1898

Do I Need to Record COVID-19 Illnesses on OSHA Forms??

Under OSHA's recordkeeping regulations, certain employers are required to prepare and maintain records of serious occupational injuries and illnesses using the OSHA 300 Log. This information is important for employers, workers and OSHA in evaluating the safety of a workplace, understanding industry hazards, and implementing worker protections to reduce and eliminate hazards. However, there are two classes of employers that are partially exempt from routinely keeping injury and illness records.

- Employers with ten (10) or fewer employees at all times during the previous calendar year.
- Establishments in certain low-hazard industries. Those partially-exempt industries are listed at https://www.osha.gov/recordkeeping/ppt1/RK1exempttable.html.

Partially-exempt employers need only report "work-related" COVID-19 illnesses that result in a fatality or an employee's in-patient hospitalization. In-patient COVID-19 hospitalizations must be reported to OSHA within 24 hours, and work-related COVID-19 fatalities must be reported to OSHA within 8 hours.

As you may recall, OSHA previously suspended its recordkeeping requirements for COVID-19 cases on April 10, 2020, acknowledging the difficulty for employers to determine whether an employee's exposure to COVID-19 was work-related and, thus, recordable. **That suspension has been lifted.** Effective May 26, 2020, all employers subject to OSHA's recordkeeping requirements must resume their obligation to record work-related exposures to COVID-19. OSHA claims that it will exercise discretion to assess employers' efforts in making work-related determinations. In doing so, OSHA will consider the following:

- The reasonableness of the employer's investigation into work-relatedness. OSHA does not expect employers to undertake extensive medical inquiries. In most cases, OSHA will consider it sufficient if employers do the following when they learn an Employee has COVID-19:
    - Ask the Employee how he/she believes he/she contracted COVID-19;
    - Discuss the Employee's job and personal activities that may have led to his/her contraction of COVID-19 (taking into account all due privacy concerns); and
    - Review the work environment for possible exposure, taking into account any other instances of workers contracting the virus in the same environment.

- The evidence available to the employer. OSHA will consider which evidence the employer had reasonably available to it at the time it made the determination of whether contracting the virus was work-related. If at a later time, the employer had access to more information related to the employee's illness, OSHA will also consider that information to determine whether the employer made a reasonable "work-related" determination.
- The evidence that a COVID-19 illness was contracted at work. OSHA has instructed its inspectors (CO's) to account for all reasonably available evidence (as described above) to determine whether an employer has complied with its recording obligations. Certain types of evidence may weigh in favor of or against "work-relatedness." OSHA provided the following example of exposures that are likely "work-related":
    - Several cases develop among workers who work closely together and no alternative explanation exists.
    - Employee contracts COVID-19 shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and no alternative explanation exists.
    - The Employee's job duties include frequent, close exposure to the public in a locality with ongoing community transmission challenges and no alternative explanation exists.
- OSHA also offered the following examples of COVID-19 exposures that are not likely to be "work-related":
    - The Employee is the only worker to contract COVID-19 in his/her work-related vicinity and his/her job duties do not include frequent contact with the public, regardless of the rate of community spread.
    - Outside of work, the Employee closely and frequently associates with someone who has COVID-19, is not a coworker and exposed the employee during the period when the individual was likely infectious.

According to OSHA, employers who undertake the investigative steps above but who "cannot determine whether it is more likely than not" the Employee contracted COVID-19 due to a workplace exposure need not record the incident. If it is more likely than not that the employee contracted COVID-19 at work, employers should code COVID-19 as a "respiratory illness," classify the case (i.e., death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness or a significant injury or illness diagnosed by a physician or other licensed health care professional), and complete the other information sought. Because this is an illness, if the

Employee voluntarily requests that his or her name not be entered on the log, the employer must comply with his/her request.

Contact Us

Reach out to Fraser Stryker's Labor and Employment Law attorneys for more information:

Patrick J. Barrett
pbarrett@fraserstryker.com
(402) 978-5245

Kathryn A. Dittrick
kdittrick@fraserstryker.com
(402) 978-5242

Sarah L. (Sally) McGill
smcgill@fraserstryker.com
(402) 978-5277

Rhianna A. Kittrell
rkittrell@fraserstryker.com
(402) 978-5295