Foster Garvey

OSHA Imposes New Requirements on Employers to Investigate Potential Transmission of COVID-19 in the Workplace

Legal Alert
May 20, 2020

Contact

Steven R. Peltin

Related Services

Labor, Employment & Immigration

As more workplaces reopen, employers are being hit with a new responsibility: investigating how their sick employees may have contracted COVID-19. Starting next Tuesday, May 26, employers must comply with new guidance issued yesterday from the federal Occupational Safety and Health Administration (OSHA), requiring them to inquire into how their employees got sick. If there is a likely workplace connection, the employer must record COVID-19 as an "occupational illness."

Background

The Occupational Safety and Health Act requires complex conditions on employers in an effort to protect employees from workplace injury or illness. Although OSHA inspectors can visit the workplace to investigate accidents or other incidents, the agency often relies on employee reports and employer records to determine whether penalties should be assessed against employers.

In prior guidance on April 10, the agency announced that health care employers, emergency response organizations and correctional institutions must determine whether employees with COVID-19 contracted the virus on the job, but only if there was "objective evidence" that a COVID-19 case may be work-related available to the employer. That enforcement discretion, OSHA announced, would help employers focus on implementing good hygiene practices and mitigating the pandemic's effects, "rather than making difficult work-relatedness decisions in circumstances where there is community transmission."

The agency followed up with an April 16 enforcement memo, promising to consider employers' "good-faith" efforts to comply with OSHA standards, given the many difficulties due to the ongoing health emergency.

May 19 Guidance

Now, with more workplaces reopening, OSHA has imposed on all but the smallest employers in every industry the obligation to investigate how COVID-19 positive employees may have contracted the virus. This mandate comes even as the agency acknowledges that given the nature of the disease and ubiquity of community spread, it is difficult to determine whether the virus is work-related.

Employers still must make a reasonable investigation. They do not have to undertake extensive medical inquiries, but should:

- Ask the employee how he or she believes the virus was contracted;
- Discuss with the employee their work and outside activities that may have led to the illness; and
- Check the work environment for exposure risks (noting if other workers got sick).

All the while, employers must respect employees' privacy and ensure the confidentiality of any medical and health information provided.

The employer must consider all information reasonably available at the time – and if the employer learns more later, that information must also be taken into account. Evidence weighing in favor of determining that an illness is work-related includes:

- Several cases developing among employees who work closely together;
- If the illness is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case; or
- If the employee's job duties require frequent, close exposure to the public where there is ongoing community transmission.

On the other hand, an illness is likely *not* work-related if:

- The employee is the only one who contracts COVID-19 in work area, and the employee's job duties do not include frequent public contact; or

- The employee lives or closely and frequently spends time with a family member, significant other, friend or other associate who has COVID-19, is not a coworker, and likely exposed the employee to COVID-19.

Employers also are supposed to consider information about the cause of the employee's illness provided by medical providers, public health authorities or the employee. If the employer determines that it is "more likely than not" that workplace exposure caused or contributed to the employee's COVID-19, the employer must record the illness as work-related.

Impact of the May 19 Guidance

Employers should note that the mere recording of COVID-19 cases does not mean that the employer has violated the law, but the May 19 guidance will have serious impacts in some workplaces.

First, the guidance requires potentially invasive and distracting investigations at a time when the employer is trying to get the workplace back to productivity. Some employers will not have the expertise with the investigation process, requiring outside assistance. Thankfully, very small employers (those with 10 or fewer employees) are required to investigate and report only work-related COVID-19 cases that result in hospitalization or fatality.

Second, in conducting the inquiry, the employer must be careful not to violate the employee's privacy, or make impermissible inquiries into disabilities. The employer must maintain the confidentiality of any medical information collected, and store medical documents separate from the personnel file. The Equal Employment Opportunity Commission has published guidance to help employers comply with anti-discrimination and medical privacy laws during the pandemic.

Further, the report and information gathered by the employer may be fodder for later litigation. Almost 800 lawsuits stemming from the coronavirus pandemic had already been filed nationwide by early May, with employment and labor claims "on the upswing" according to news reports. Employees who claim to have been harmed by COVID-19 in the workplace may find evidence of alleged negligence or may attack the investigation process as a cover-up of supposed misconduct. Any negative action by the employer after an employee's illness or complaint could also lead to a retaliation claim. Large employers could face class action lawsuits.

Foster Garvey's Labor, Employment & Immigration attorneys are available to assist employers in navigating these complex requirements.