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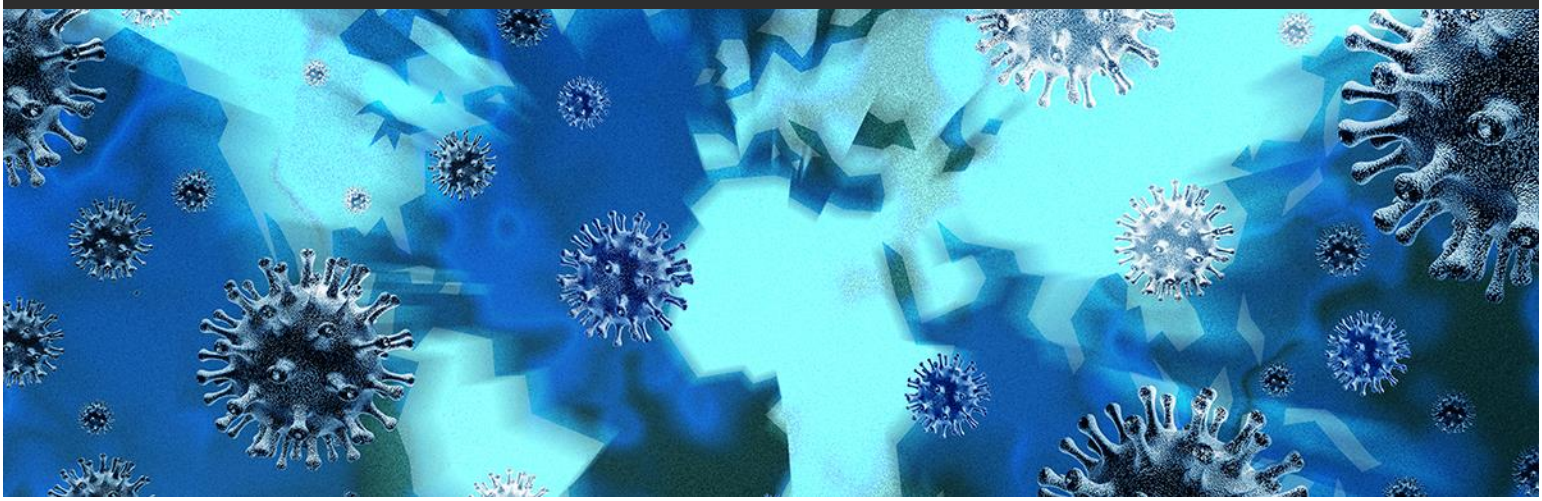
Alert | Health Emergency Preparedness Task Force: Coronavirus Disease 2019



April 14, 2020

Is an Employee's COVID-19 Case Work-Related and Recordable? OSHA Provides Employers Clarity Through Enforcement Guidance

Since the beginning of the Coronavirus Disease 2019 (COVID-19) pandemic, employers have wrestled with whether they are required to record employee COVID-19 cases on their Occupational Safety and Health Act (the Act) Injury and Illness logs, called Forms 300, 300A, and 301. Initially, the Occupational Safety and Health Administration (OSHA) explained that a COVID-19 case is a recordable illness if (1) an employee is positive or presumptively positive for COVID-19; (2) the case is work-related; and (3) the case results in medical treatment beyond first aid or days away from work. OSHA's position seemed straightforward until COVID-19 cases became prevalent, creating uncertainty for some employers as to whether employee COVID-19 cases were work-related under the Act's regulations. If a case is work-related, the Act requires employers to record it on their Injury and Illness logs; if it is not work-related, then the employer is not obligated to record it.

On April 10, 2020, OSHA issued an enforcement guidance memorandum for recording cases of COVID-19 (Memorandum). The purpose of the Memorandum is to clarify for employers when COVID-19 cases are work-related and thus reportable on an employer's Injury and Illness log. Pursuant to the Memorandum, and until further notice, for purposes of employers' recordkeeping obligations, OSHA will **not** enforce the requirement that employers make work-relatedness determinations regarding employees who contract COVID-19, except where:

1. There is objective evidence that a COVID-19 case may be work-related. Such objective evidence could be a number of cases developing among workers who work closely together without an alternative explanation; and

2. The evidence was reasonably available to the employer. The Memorandum explains that reasonable available evidence includes information given to the employer by employees or information that the employer learns regarding employee health and safety during the ordinary course of managing its business and employees.

Note: The Memorandum does not apply to employers in the health care industry, emergency response organizations, or correctional institutions. Employers in these industries must continue to make work-relatedness determinations pursuant to the Act's recordkeeping requirements for purposes of deciding whether it must record an employee's COVID-19 case on its Injury and Illness log.

According to the Memorandum, OSHA's guidance will allow employers to focus their response efforts on implementing "good hygiene practices" and mitigating COVID-19's effects, rather than on "making difficult work-relatedness decisions in circumstances where there is community transmission." The Memorandum remains in effect until further notice.

The Memorandum provides clarity to employers in determining whether an employee contracted COVID-19 at work, while performing their work duties, or through other means. Employers, especially those considered "essential businesses" under governors' Executive Orders and those with large facilities or worksites, should be mindful of the exceptions in the Memorandum.

Employers who over-record instances of employee work-related COVID-19 illnesses may find themselves in OSHA's Site-Specific Targeting Program, which may lead to an OSHA inspection down the road. Likewise, employers who under-record instances of work-related COVID-19 illnesses could be exposed to multiple serious or willful citations for each COVID-19 illness that was not recorded. Employers should consult with experienced counsel on reporting.

For more information and updates on the developing COVID-19 situation, visit GT's Health Emergency Preparedness Task Force: Coronavirus Disease 2019.

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