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## OSHA UPDATES ITS REPORTING AND RECORDKEEPING RULES FOR COVID-19

Last month, **OSHA published guidance** concluding that work-related, confirmed cases of COVID-19 are recordable illnesses. Now, however, recognizing the difficulty of tracing COVID-19 exposure to the workplace, **OSHA has updated its guidance** to relieve many employers of the duty to record these cases. Subject to some exceptions, OSHA is exercising enforcement discretion and declining to enforce the illness recordkeeping standard with respect to COVID-19 cases.

OSHA's prior guidance explained that employers are only responsible for recording COVID-19 cases that:

1. Are confirmed cases of COVID-19; **and**
2. Are work-related, as defined under 29 CFR § 1904.5; **and**
3. Involve one or more of the general recording criteria set forth in 29 CFR § 1904.7 (e.g., medical treatment beyond first-aid, days away from work).

OSHA's most recent guidance relates to the second requirement. Under the previous guidance, employers were expected to assess an employee's work duties and environment to determine whether it was more likely than not that the employee was exposed to COVID-19 while on the job. The agency has now modified this requirement for many employers, recognizing that "transmission is a rapidly evolving issue" and that many might "have difficulty

making determinations about whether workers who contracted COVID-19 did so due to exposures at work."

Under the modified guidance, work-relatedness determinations are only required in two contexts. First, OSHA has not altered the illness recording requirements for employers in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting, and law enforcement services), and correctional institutions. Second, all employers must record COVID-19 cases that otherwise meet the reporting requirements if (1) there is "objective evidence" that a COVID-19 case may be work-related (e.g., 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 (e.g., information given to the employer by employees; information learned in the ordinary course of managing its business and employees). In these situations, an employer must still make a work-relatedness determination, which may require an investigation. Further, while silent on the duty to report serious injuries and illnesses, it logically follows that, OSHA's enforcement discretion will likewise apply to illness reporting obligations.

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That is, because only work-related illnesses that meet the serious reporting criteria (e.g., inpatient hospitalization) are required to be reported, it would be reasonable to expect OSHA to require COVID-19 reporting if the case satisfies one of the exceptions in the updated guidance.

We understand from OSHA Headquarters staff that additional guidance on employer recording and reporting obligations is forthcoming, in a "Frequently Asked Questions" format. We will continue to monitor OSHA guidance relating to recording and reporting COVID-19 cases. Should you have questions regarding the information contained in this alert, or for guidance on workplace safety and environmental requirements that affect your business, please contact **Mike Miller**.

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Visit Wiggin and Dana's COVID-19 Resource Center **here** for additional publications and helpful links on multi-disciplinary topics that are relevant during the current COVID-19 global pandemic.