

September 16, 2021

## COVID-19 Infection May Be an OSHA Recordable Work-Related Illness

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The COVID-19 pandemic will likely to be a concern and challenge for employers for longer than anyone had hoped or anticipated. As businesses adjust to what seems to be a “new normal” it is worth a reminder that COVID-19 infection can be a recordable illness on an employer’s Occupational Safety & Health Administration (“OSHA”) 300 Injury and Illness Log.

OSHA’s recording criteria under 29 CFR 1904.7 includes cases when the employee spends days away from work due to a work-related illness. Even if the employee’s infection does not result in severe symptoms, public health directives requiring employees to shelter at home and away from the workplace if they test positive for COVID-19 may cause the “days away from work” criteria to be satisfied more frequently than most illnesses.

Many states are authorized to regulate occupational safety and health with their own state agencies, such as Cal/OSHA for workplaces located in California. Those state programs must be at least as effective as federal OSHA and will contain similar, if not identical, provisions to those at 29 CFR 1904.7 (*see* 8 CCR 14300 et seq. for the Cal/OSHA injury and illness recordkeeping rules).<sup>1</sup> However, federal OSHA has provided guidance on recording COVID-19 cases whereas the states generally have not, so this client alert focuses on that guidance.

Early in the COVID-19 pandemic, OSHA announced that the “common cold and flu” exception to recording illnesses at 29 CFR 1904.5(b)(2)(viii) would not apply to COVID-19 infections, indicating that they could be recordable. Since then, OSHA has issued guidance clarifying that COVID-19 cases can be recordable illnesses if the case is work-related, but OSHA has not provided much clarity since then on how to make that determination. OSHA’s enforcement guidance for inspectors regarding COVID-19 issues noted that OSHA had been exercising discretion for the recording of COVID-19 cases in certain circumstances, recognizing that employers were struggling with a new and unprecedented situation. However, it also noted that as COVID-19 transmission and infection have become better understood, “employers should have an increased ability to determine whether an employee’s COVID-19 illness is likely work-related, e.g., if the employee, while on the job, has frequent, close contact with the general public in a locality with ongoing community transmission and there is no alternative explanation.”

While this is hardly a bright line, employers should look at available information to assess if an employee’s COVID-19 infection is likely due to exposure in the workplace and therefore recordable. For example, if the workplace requires close contact with infected people, or if there has been an outbreak of COVID-19 cases at the workplace,

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<sup>1</sup> Cal/OSHA has issued emergency regulations on COVID-19 safety overall, but those regulations did not explain when a COVID-19 case should be recorded on an employer’s Cal/OSHA 300 log.

the employee's infection is likely work-related unless the employer determines there is some other explanation, such as the employee living with someone who is infected. If the infected employee had close contact with another infected employee prior to their infection, that should be evaluated on a case-by-case basis, looking at factors such as the time between the close contact and the positive case.

OSHA also requires employers to report any worker fatality within 8 hours or hospitalization with 24 hours. Unfortunately, COVID-19 has resulted in a significant number of fatalities and hospitalizations. Again, the challenge is in determining if an employee's death or hospitalization due to COVID-19 is work-related, but the same factors discussed above would apply. Whether for recordkeeping on the OSHA 300 log or immediate reporting of deaths or hospitalizations, having documentation of the determination of whether the infection was work-related will be valuable during an inspection.

Buchalter has experienced attorneys who have assisted employers on environmental, health and safety matters, including responses to issues raised by COVID-19. If you have questions or need assistance, please contact one of the attorneys listed below.



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