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BULLETIN

To: Membership of Allied Building Metal Industries, Inc.

From: Steven N. Davi

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Re: COVID-19 Update: OSHA Updated Reporting Guidance

As we detailed in our Bulletin dated January 26, 2020, the United States Department of Labor's Occupational Safety and Health Administration ("OSHA" or the "agency") requires covered employers with ten or more employees[1] to maintain a log of every workplace injury or illness requiring medical treatment beyond first aid or causing a worker to miss at least one day of work.

In subsequent Bulletins, particularly on March 12 and April 15, we reported on OSHA's efforts to address COVID-19 in the workplace, including with respect to the recording of occupational illnesses related to COVID-19. In this regard, we advised that on April 10, OSHA issued interim guidance clarifying the extent of covered employers' obligations to record cases of COVID-19.

We now write to advise that on May 19, OSHA issued a memorandum updating its April 10 interim guidance regarding employers' obligations to record cases of COVID-19 in the workplace. This updated interim guidance, the key provisions of which are summarized below, is scheduled to go into effect tomorrow, May 26, 2020.

Employer COVID-19 Reporting Obligation

OSHA's previous April 10 interim guidance largely exempted most employers from the requirement to record COVID-19 cases of employees for OSHA recordkeeping purposes, absent objective evidence that a case was work-related.

Under the updated guidance effective tomorrow, covered employers subject to OSHA recordkeeping requirements will now have to determine whether employees' COVID-19 cases are work-related and, if so, record such cases on the employer's OSHA Form 300 log.

Specifically, the updated guidance makes clear that COVID-19 is a recordable illness under OSHA's recordkeeping requirements, and thus, that covered employers are responsible for recording cases of COVID-19, if:

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[1] Pursuant to existing regulations, employers with 10 or fewer employees and certain employers in low hazard industries have no recording obligations; they need only report work-related COVID-19 illnesses that result in a fatality or an employee's in-patient hospitalization, amputation, or loss of an eye. *See* 29 CFR §§ 1904.1(a)(1), 1904.2.

1. The case is a confirmed case of COVID-19 as defined by the Centers for Disease Control and Prevention ("CDC");

2. The case is work-related pursuant to 29 C.F.R. § 1904.5; and

3. The case involves one or more of the general recording criteria set forth in 29 C.F.R. § 1904.7.

Determining Nexus: COVID-19 and the Workplace

With regard to the work-relatedness prong, OSHA acknowledges in its updated interim guidance that given the nature of the disease, it will be difficult in many instances to determine a nexus between a COVID-19 illness and the workplace, especially when an employee has experienced potential exposure both in and out of the workplace. As a result, OSHA is "exercising enforcement discretion to assess employers' efforts in making work-related determinations." In this regard, the agency will consider three factors in assessing whether an employer has complied with its reporting obligation in the context of COVID-19.

First, the agency will consider the reasonableness of the employer's investigation into work-relatedness. In this regard, employers, especially small employers, will not be expected to undertake extensive medical inquiries, given employee privacy concerns and most employers' lack of expertise in this area. Rather, it will be sufficient in most circumstances for the employer, when it learns of an employee's COVID-19 illness,

a. to ask the employee how he believes he contracted the COVID-19 illness;

b. while respecting employee privacy, to discuss with the employee his work and out-of-work activities that may have led to the COVID-19 illness; and

c. to review the employee's work environment for potential SARS-CoV-2 exposure. Such review should be informed by any other instances of workers in that environment contracting COVID-19 illness.

Second, the agency will consider the evidence available to the employer. Such evidence will be considered *based on the information reasonably available to the employer at the time* it made its work-relatedness determination; provided, however, that If the employer later learns more information related to an employee's COVID-19 illness, then the agency will take that information into account as well.

Third, the agency will consider the reasonably available evidence that a COVID-19 illness was contracted at work. In this regard, in expressly acknowledging that an employer's recording obligation as it relates to COVID-19 "cannot be reduced to a ready formula," the agency provides examples of the types of evidence that may weigh in favor of, or against, work-relatedness.

Evidence tending to indicate a COVID-19 illness is work-related may include,

- when several cases develop among workers who work closely together and there is no alternative explanation;

- where an employee's COVID-19 illness is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation;

- where an employee's job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.

Conversely, evidence tending to indicate a COVID-19 illness is not work-related may include,

- where an employee is the only worker to contract COVID-19 in her vicinity and her job duties do not include having frequent contact with the general public, regardless of the rate of community spread;

- if the employee, outside the workplace, closely and frequently associates with someone (*e.g.*, a family member, significant other, or close friend) who (i) has COVID-19, (ii) is not a coworker, and (iii) exposes the employee during the period in which the individual is likely infectious.

If the employer conducts the reasonable and good-faith inquiry set forth above and still cannot determine whether it is more likely than not that an employee's COVID-19 illness was work-related, the employer need not record that COVID-19 illness.

Going Forward

The updated guidance provides a clear insight into how the agency will assess reporting compliance relating to COVID-19. In addition, OSHA's revised interim enforcement response plan also makes clear the agency intends to continue to prioritize workplace inspections related to COVID-19 cases. Accordingly, employers should take note that going forward they will be subject to OSHA's recordkeeping obligations with regard to COVID-19 cases.

We will continue to monitor and report on all material and relevant developments concerning these matters as they arise.