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OSHA, Industrial Commission of Arizona Issue Guidance on Recording COVID-19 Cases and Potential Workers' Compensation Liability

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As employers shift gears from COVID-19-related closures and workforce reductions to reopening and returning employees to work, the focus of attention increasingly is centered on worker health and safety issues. Two recently issued guidance documents affecting Arizona employers—one from the federal Occupational Safety and Health Administration (OSHA) and the other from the Industrial Commission of Arizona (ICA)—emphasize the importance of appropriately recording and responding to *work-related* cases of COVID-19 illness.

OSHA Guidance

On May 19, 2020, OSHA issued its Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19). This guidance provides insight into how OSHA expects employers to evaluate whether an employee's COVID-19 illness is work-related, and therefore must be recorded on the employer's OSHA 300 log. While most Arizona employers are not *directly* subject to federal OSHA regulation, the Arizona Division of Occupational Safety and Health (ADOSH) enforces federal OSHA standards, including 29 C.F.R. § 1904, which generally requires that employers with more than 10 employees maintain injury and illness records (OSHA 300 log).

Recognizing "the difficulty with determining work-relatedness," the OSHA guidance identified the following factors that OSHA/ADOSH will consider when evaluating whether an employer properly determined whether an employee's COVID-19 illness should be recorded.

"*The reasonableness of the employer's investigation into work-relatedness.*"

According to the OSHA guidance, "it is sufficient in most circumstances for the employer, when it learns of an employee's COVID-19 illness, (1) to ask the employee how he believes he contracted the COVID-19 illness; (2) while respecting employee privacy, discuss with the employee his work and out-of-work activities that may have led to the COVID-19 illness; and (3) review the employee's work environment for potential SARS-CoV-2 [the virus that causes COVID-19] exposure."

"*The evidence available to the employer.*"

The decision to record or not to record a case of COVID-19 illness should be based on "the information reasonably available to the employer at the time it made its work-relatedness determination."

"*The evidence that a COVID-19 illness was contracted at work.*"

The OSHA guidance notes that "certain types of evidence may weigh in favor of or against work-relatedness." For example:

- "COVID-19 illnesses are likely work-related when several cases develop among workers who work closely together and there is no alternative explanation."
- "An employee's COVID-19 illness is likely work-related if it 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."
- "An employee's COVID-19 illness is likely work-related if his job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation."
- "An employee's COVID-19 illness is likely not work-related if she 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."
- "An employee's COVID-19 illness is likely not work-related if he, outside the workplace, closely and frequently associates with someone (e.g., a family member, significant other, or close friend) who (1) has COVID-19, (2) is not a coworker, and (3) exposes the employee during the period in which the individual is likely infectious." (Whether coworker transmission, without more, should be a recordable event is a controversial subject that OSHA has been asked to reconsider.)
- "CSHOs [compliance safety and health officers] should give due weight to any evidence of causation, pertaining to the employee illness, at issue provided by medical providers, public health authorities, or the employee."

The guidance concludes that "[i]f, after the reasonable and good faith inquiry described above, the employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role with respect to a particular case of COVID-19, *the employer does not need to record that COVID-19 illness.*" [Emphasis added.]

Arizona Workers' Compensation Guidance

In addition to these OSHA reporting requirements, work-related COVID-19 illnesses may result in workers' compensation liability, given that a work-related exposure might meet the definition of a compensable workplace injury.

The ICA recently issued an advisory, Substantive Policy Statement: COVID-19 Workers' Compensation Claims, designed to educate workers' compensation carriers and self-insured employers on best practices for processing workers' compensation claims alleging a work-related

COVID-19 illness. Arizona employers may want to familiarize themselves with this policy statement, as employers generally coordinate with their workers' compensation claims adjusters when processing a claim of uncertain origin, such as a COVID-19 illness.

The policy statement warns employers and their insurance carriers that COVID-19 illness claims *cannot* be "categorically" denied and that Arizona law *requires* all denials to be "well-grounded in fact" and "warranted by existing law." The upshot of these admonitions is to avoid "bad faith" denials of claims. In addition to the policy statement, the ICA has reached out to carriers and practitioners with further recommendations on how COVID-19 claims (like other contagious disease claims) should be processed. The ICA *recommends* considering the following factors when evaluating such claims:

- "The nature of the employment and the risk of contracting COVID-19."
- "Whether an identifiable exposure occurred at work."
- "Whether any identifiable exposure occurred outside of work."
- "The timing between an identifiable exposure and the development of COVID-19 symptoms."
- "The reliability of medical or other evidence that the work-related exposure caused the disease."

Key Takeaways

- The OSHA guidance clarifies that the duty to record is founded on an employee's COVID-19 *illness*, not merely testing positive or being potentially exposed to others who actually or may have tested positive for SARS-CoV-2.
- If an employer decides in good faith not to record a COVID-19 illness in the OSHA 300 log, the employer may want to internally note why the illness was not logged (e.g., insufficient information to determine whether it is more likely than not that exposure in the workplace played a causal role).
- Employers should also consider exercising reasonable care when gathering and storing COVID-19 information, particularly with respect to protecting employee privacy. This includes sequestering such health information from other personnel files (e.g., by using the same collection and storage protocol applied to other medical information obtained for Americans with Disabilities Act purposes).
- If an employee does not report that his or her COVID-19 illness may be work-related but the employer's own investigation (in accordance with the OSHA guidance) reveals a probable work-related exposure, the employer should consider recording the illness in its OSHA 300 log and notifying its workers' compensation carrier of a *potential*

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