

 MDM&C Update

[Click Here to Learn More About MDM&C >](#)

June 3, 2020

***CONFUSED? SO IS OSHA***

***EMPLOYERS NOW REQUIRED TO INVESTIGATE WHETHER AN EMPLOYEE'S COVID-19 IS WORK-RELATED OR NOT***

Effective on Tuesday, May 26, OSHA rescinded a memorandum issued last month regarding the reporting of employees who have contracted COVID-19. Last month, only healthcare providers had to report employees with COVID-19. Now *all employers will be required to report* if (1) the employee's illness is a confirmed case of COVID-19, as defined by the Centers for Disease Control; (2) "the case is work related;" and (3) it meets OSHA recording criteria.

The OSHA regulations require an employer to consider an injury or illness a reportable event if it results in death, days away from work, restricted work or transfer to another job, medical treatment beyond first-aid, or loss of consciousness. The illness or injury must also be reported if a physician or a healthcare professional diagnoses the illness or injury as "significant," even if it does not result in death, loss of days of work, restricted work, medical treatment beyond first aid or loss of consciousness.

In what must surely be considered an understatement, OSHA acknowledges "the difficulty in determining work-relatedness" of the source of an employee's COVID-19. The difficulty of determining whether an employee contracted COVID-19 at work is particularly acute in the Northeast, where the virus is widespread. Nevertheless, employers are required to investigate whether the employee's COVID-19 is work related.

In its advisory, OSHA recognizes that "employers, especially small employers, should not be expected to undertake extensive medical inquiries, given employee privacy concerns and most employers' lack of expertise in this area." According to OSHA, it is "sufficient" for an employer to ask an employee who has contracted COVID-19 how the employee believes the employee contracted the illness and to discuss with the employee the employee's out of work activities that may have led to the employee contracting the virus. The discussion of the employee's out of work activities must be done "while respecting the employee's privacy."

In addition, the employer is obligated to review the employee's work environment for potential COVID-19 exposure.

OSHA advises that the evidence shows that COVID-19 was contracted at work if:

- Several cases of COVID-19 develop among workers who work closely together and there is no alternative explanation;
- an employee contracts COVID-19 shortly after a lengthy, close exposure to a particular customer or co-worker who has a confirmed case of COVID-19;

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

OSHA also advises that the evidence shows that COVID-19 was *not* contracted at work if:

- the employee is the only employee to contract COVID-19 in the employee's vicinity and the employee's job duties do not include frequent contact with the general public;  
- the employee outside the workplace (1) closely and frequently associated with someone (family, friend) who has COVID-19; (2) who is not a co-worker; and (3) exposed the employee when the individual is likely infectious.

OSHA cautions employers to "give due weight" to any evidence of causation provided by "medical providers, public health authorities, or the employee."

If after a "reasonable and good faith inquiry . . . the employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role with response to a particular case of COVID-19, the employer does not need to record the COVID-19 illness."

Thus the OSHA Memorandum requires employers to make "a reasonable and good faith inquiry" into the source of employees' COVID-19 and report it if the workplace played a "causal role" in the employee contracting the virus.

If you have any questions about this or any other employment issue, please feel free to contact **Bernard E. Jacques** at [bjacques@mdmc-law.com](mailto:bjacques@mdmc-law.com).

## *Offices*

---

NEW JERSEY | NEW YORK | COLORADO | PENNSYLVANIA  
CONNECTICUT | MASSACHUSETTS | DELAWARE | RHODE ISLAND | FLORIDA

The information provided in this Newsletter should not be relied upon as legal advice or a legal opinion on any specific set of facts or circumstances. The contents are intended for general information purposes only and you are urged to consult an attorney concerning your own situation and any specific legal questions you may have. This Newsletter may be considered Advertising under the court rules of certain states.

© COPYRIGHT 2020 McELROY, DEUTSCH, MULVANEY & CARPENTER, LLP. ALL RIGHTS RESERVED.

---

**Unsubscribe**