OSHA Revises Coronavirus Reporting Requirement after AGC Intervention; Reporting Required in Limited Circumstance where there is Evidence Employee Contracted the Virus at Place of Work

On Tuesday, March 10, 2020, the Occupational Safety and Health Administration (OSHA) provided guidance requiring the recording and reporting of workplace exposures to COVID-19. That guidance did not take into account: the logistical nightmare employers would face to determine where someone contracted the virus—workplace or elsewhere—just as with a non-recordable occurrence of a worker contracting the common cold or influenza at the workplace; the impact this very broad policy could have on workers' compensation plans; and the impact on contractors' safety ratings for insurance and owner requirements.

On Thursday, March 12, 2020, AGC of America CEO Stephen Sandherr spoke one-on-one with U.S. Secretary of Labor Eugene Scalia on this issue noting AGC's deep concerns with and opposition to such broad guidance. Shortly after that call, on Friday March 13, 2020, OSHA issued new guidance. That guidance limits when COVID-19 can be a recordable illness to medically confirmed cases of COVID-19 that fall within a narrowed field of incidents that employers could then presume occurred on the jobsite. It is critical that employers conduct an assessment of the employee's work duties and environment prior to making a decision to record the case, or not, just as you would with any other type of incident. OSHA makes it clear in their guidance, and their existing recordkeeping regulation, that if there is no evidence that the employee contracted the virus in the workplace, it is not a recordable illness.

Below is a summary of that guidance along with additional information to consider as it relates to OSHA's requirements for recording and reporting of workplace injuries and illnesses.

Recordkeeping: Recording and Reporting Cases of COVID-19

Recording Confirmed Cases of COVID-19 on Your OSHA Log

OSHA recordkeeping requirements at 29 CFR Part 1904 mandate covered employers record certain work-related injuries and illnesses on their OSHA 300 log.

COVID-19 can be a recordable illness if a worker is infected as a result of performing their work-related duties. However, employers are only responsible for recording cases of COVID-19 if all of the following are met:

1. The case is a confirmed case of COVID-19 (see CDC information on persons under investigation and presumptive positive and laboratory-confirmed cases of COVID-19);
2. The case is work-related, as defined by 29 CFR 1904.5; and
3. The case involves 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).

Section 1904.5(a) provides that an injury or illness must be considered work-related if an event or exposure in the work environment either caused or contributed to the injury or illness. Work-relatedness is ***presumed*** for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in Section 1904.5(b)(2) specifically applies. A case is ***presumed*** work-related if, and only if, an event or exposure in the work environment is a discernible cause of the injury or illness or of a significant aggravation to a pre-existing condition. If an employee's condition

arose outside of the work environment and there was no discernable event or exposure that led to the condition, the presumption of work-relationship does not apply.

The following are questions from the OSHA Recording and Reporting Occupational Injuries and Illness Regulation that may also be helpful:

Are there situations where an injury or illness occurs in the work environment and is not considered work-related? Yes, an injury or illness occurring in the work environment that falls under one of the following exceptions is not work-related, and therefore is not recordable.

1904.5(b)(2)	**You are not required to record injuries and illnesses if . . .**
(i)	At the time of the injury or illness, the employee was present in the work environment as a member of the general public rather than as an employee.
(ii)	The injury or illness involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment.
(iii)	The injury or illness results solely from voluntary participation in a wellness program or in a medical, fitness, or recreational activity such as blood donation, physical examination, flu shot, exercise class, racquetball, or baseball.
(iv)	The injury or illness is solely the result of an employee eating, drinking, or preparing food or drink for personal consumption (whether bought on the employer's premises or brought in). For example, if the employee is injured by choking on a sandwich while in the employer's establishment, the case would not be considered work-related. **Note:** If the employee is made ill by ingesting food contaminated by workplace contaminants (such as lead), or gets food poisoning from food supplied by the employer, the case would be considered work-related.
(v)	The injury or illness is solely the result of an employee doing personal tasks (unrelated to their employment) at the establishment outside of the employee's assigned working hours.
(vi)	The injury or illness is solely the result of personal grooming, self-medication for a non-work-related condition, or is intentionally self-inflicted.
(vii)	The injury or illness is caused by a motor vehicle accident and occurs on a company parking lot or company access road while the employee is commuting to or from work.

(viii)	The illness is the common cold or flu (Note: contagious diseases such as tuberculosis, brucellosis, hepatitis A, or plague are considered work-related if the employee is infected at work).
(ix)	The illness is a mental illness. Mental illness will not be considered work-related unless the employee voluntarily provides the employer with an opinion from a physician or other licensed health care professional with appropriate training and experience (psychiatrist, psychologist, psychiatric nurse practitioner, etc.) stating that the employee has a mental illness that is work-related.

How do I handle a case if it is not obvious whether the precipitating event or exposure occurred in the work environment or occurred away from work? In these situations, you must evaluate the employee's work duties and environment to decide whether or not one or more events or exposures in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing condition.

How do I decide whether an injury or illness is work-related if the employee is on travel status at the time the injury or illness occurs? Injuries and illnesses that occur while an employee is on travel status are work-related if, at the time of the injury or illness, the employee was engaged in work activities "in the interest of the employer." Examples of such activities include travel to and from customer contacts, conducting job tasks, and entertaining or being entertained to transact, discuss, or promote business (work-related entertainment includes only entertainment activities being engaged in at the direction of the employer).

What is a "significant" diagnosed injury or illness that is recordable under the general criteria even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness? Work-related cases involving cancer, chronic irreversible disease, a fractured or cracked bone, or a punctured eardrum must always be recorded under the general criteria at the time of diagnosis by a physician or other licensed health care professional.

What is the definition of medical treatment? "Medical treatment" means the management and care of a patient to combat disease or disorder. For the purposes of Part 1904, medical treatment does not include:

- 1904.7(b)(5)(i)(A)
  Visits to a physician or other licensed health care professional solely for observation or counseling;

- 1904.7(b)(5)(i)(B)
  The conduct of diagnostic procedures, such as x-rays and blood tests, including the administration of prescription medications used solely for diagnostic purposes (e.g., eye drops to dilate pupils); or

- 1904.7(b)(5)(i)(C)
  "First aid" as defined in paragraph (b)(5)(ii). [**NOTE**: the definitions provided by OSHA for first aid are not applicable to the treatment of COVID-19.]

Reporting Hospitalizations or Fatalities related to Confirmed Cases of COVID-19 to OSHA

OSHA requires employers to report any worker fatality within eight (8) hours and any amputation, loss of an eye, or hospitalization of a worker within twenty-four (24) hours. If an employee has a confirmed case of COVID-19 that is considered work-related, an employer would need to report the case to OSHA if it results in a fatality or in-patient hospitalization of one or more employees.

What if the fatality, in-patient hospitalization, amputation, or loss of an eye does not occur during or right after the work-related incident?

If a fatality occurs within 30 days of the work-related incident, or if an in-patient hospitalization, amputation, or loss of an eye occurs within 24 hours of the work-related incident, then you must report the event to OSHA.

For more information visit OSHA's Injury and Illness Recordkeeping and Reporting Requirements page.