CLIENT ALERT: OSHA Changes Course, Dramatically Expands Obligation of Employers to Report Employee COVID-19 Infections

In an enforcement guidance memorandum issued on May 19, 2020 the United States Occupational Safety and Health Administration ("OSHA") greatly expanded the categories of employers who must record instances in which employees are diagnosed with COVID-19. A copy of the memorandum, which becomes effective on May 26, 2020, can be found here.

Under the terms of the Occupational Safety and Health Act of 1972, many employers are required to keep workplace logs in which employee work-related injuries and illnesses are recorded. In guidance issued on April 10, 2020, OSHA had announced that only employers in industries such as health care, emergency response, and corrections were required to record employee COVID-19 diagnoses, while most other employers were not subject to such a requirement.

The May 19 memorandum changed this guidance dramatically. Under the new guidance, *all employers required to keep OSHA logs* must record in the log instances in which:

1. an employee is diagnosed with COVID-19, as defined by the Centers for Disease Control and Prevention ("CDC"). The CDC defines a confirmed case of COVID-19 as "an individual with at least one respiratory specimen that tested positive for SARS-CoV-2, the virus that causes COVID-19.";
2. the case involves one or more of the general recording criteria set forth in the OSHA regulations. An injury or illness meets the general recording criteria if it results in any of the following: death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness, or a significant injury or illness diagnosed by a physician or other licensed health care professional; and
3. the exposure was work-related. The relevant OSHA regulations provide that an employer must consider a case to be work related "if an event or exposure in the work environment . . . either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness."

Acknowledging that the determination of whether an employee's COVID diagnosis was work-related is not a simple one, as a matter of "enforcement discretion", OSHA will look at the following factors:

- *The reasonableness of the employer's investigation into work-relatedness.* In most circumstances, investigations will be sufficient when upon learning of an employee's COVID-19 illness the employer (1) asks the employee how they believe they contracted the illness; (2) while respecting employee privacy, discusses with the employee their work and out-of-work activities that may have led to the illness; and (3) reviews the employee's work environment for potential SARS-CoV-2 exposure.
- *The evidence available to the employer.* Evidence that a COVID-19 illness was work-related is limited to information reasonably available to the employer at the time it made its work-relatedness determination, but if the employer later learns additional information, it will also be taken into account in determining whether the employer made a reasonable work-relatedness determination.
- *The evidence that a COVID-19 illness was contracted at work*. While the guidance recognizes such evidence cannot be reduced to a ready formula, certain types of evidence may weigh in favor of work-relatedness including: (1) when several cases develop among employees who work closely together; (2) if the illness is contracted shortly after lengthy, close exposure to another employee or customer who has a confirmed case of COVID-19 and there is no

alternative explanation; and (3) if the employee's job duties involve frequent exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation. Contrarily, certain evidence may weigh *against* work-relatedness, including (1) if the employee is the only worker to contract COVID-19 in their vicinity and their job duties do not include having frequent contact with the general public; and (2) if the employee, outside the workplace, closely and frequently associated with someone who has COVID-19, who is not a coworker, and who exposed the employee during the period in which that person was likely infectious.

Notably, the enforcement guidance did not change prior regulations concerning the recording of workplace injuries/illnesses. Employers with fewer than ten employees, or those in certain specified low hazard industries, are not required to log injuries/illnesses; those employers need only report work-related COVID-19 cases that result in a fatality or an employee's in-patient hospitalization, amputation, or loss of an eye. These last two criteria are, of course, not likely in a COVID-19 situation.

The foregoing is an overview of the OSHA guidance as of the date of this publication. Employers should be mindful that these issues remain fluid and should ensure that decisions are made based on the most up-to-date information available. Employers with questions about OSHA, reporting requirements, or enforcement actions should consult with their MBJ attorney.

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