BUSINESS INSURANCE.

OSHA asks employers to investigate COVID-19 claims

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Employers are once again being asked to investigate positive cases of COVID-19 in the workplace and potentially record those cases for the U.S. Occupational Safety and Health Administration.

The federal agency changed course on May 19 when it issued guidance that essentially asks employers to investigate the potential genesis of any cases of COVID-19 among their employees, leading to questions and confusion among employers trying to get their workplaces back up and running, experts say.

“It’s a shifting landscape out there,” said Eric Conn, Washington-based founding partner of Conn Maciel Carey LLP. “(Guidance) has changed already pretty dramatically from the start of the pandemic.”

This is the third time since the onset of the pandemic that OSHA has issued guidance: In March it sent a memo reminding employers that COVID-19 diagnoses are recordable events; in April it backtracked.

As more businesses get up and running again, employers “want a roadmap” on how to handle workers who come to them with positive COVID-19 tests, said Robert O’Hara, New York-based member of law firm Epstein Becker & Green P.C.

“It’s difficult for employers to find the right thing to do,” he said.

Under the revised enforcement policy, which took effect Tuesday, employers must “make reasonable efforts” to investigate confirmed cases of coronavirus in the workplace to determine if they were more likely than not work-related.

The guidance asks employers to question workers about how they believe they contracted the virus and what types of activities they were engaged in both in and out of work that could have led to virus exposure. It also asks employers to look for other workers who could have potentially been exposed to coronavirus in the workplace.

Only COVID-19 claims that were determined to have come from the workplace and required hospitalization or days away from work need to be recorded, according to the guidance.

This is a stark change from the agency’s April 10 memo, which said COVID-19 recordability would only apply to frontline workers — specifically health care workers, first responders and correctional institution employees — except in cases where objective evidence pointed to workplace acquisition with no alternative explanation.

The latest guidance essentially asks employers “to conduct mini-investigations into a positive test of COVID,” said Michael DeLarco, office managing partner in the New York office of Hogan Lovells International LLP. “With prior guidance, employers didn’t really have to do a deep dive.”

Determining whether a worker contracted coronavirus in the workplace as opposed to elsewhere is similar to investigating food-poisoning claims, said Carolyn Richmond, New York-based chair of the hospitality practice at Fox Rothschild LLP.

"It's very hard to trace what someone ate … or prove that it wasn't something you ate earlier," she said. Similarly, it will be difficult for employees to show that that they picked up the virus in the workplace and not from someone they passed on the street, Ms. Richmond said.

"That doesn't mean that this isn't going to be a field day for lawyers," she said. "I think we're going to see an immense amount of litigation in multiple areas."

Determining the genesis of the virus will be a "confounding factor" for employers, said Jim Thornton, president of safety consulting firm Alpha Industries LLC in Hampton, Virginia.

The OSHA guidance does provide some examples to aid employers. For example, if multiple people in a particular business unit test positive for COVID-19, the assumption is that these coronavirus cases are work-related, Mr. O'Hara said. In places with communitywide spread — where the employee could have picked it up on the subway, on the street or in a local big-box store — it is less likely to be work-related, he said.

Employers need to speak to workers who test positive about whether they came into contact with someone with COVID-19 outside of work, conduct their own contact tracing to identify other employees who may have been exposed and document all of that information, Mr. DeLarco said.

During their investigations, employers need to consider workers' privacy and refrain from disclosing the names of those who have tested positive for the virus to others in the workplace, and should document all aspects of the investigation, Mr. DeLarco said.

Just because a virus may be recordable does not mean it's compensable, Mr. O'Hara said.

"Occupational illnesses are very difficult to capture and correlate unless there is a direct correlation with some carcinogenic substance," he said.

For larger employers without paid sick leave, there is more concern about employees with confirmed COVID-19 arguing that they caught the virus in the workplace and seeking workers compensation, Mr. DeLarco said.

Pushing COVID-19 claims into the workers comp system may help prevent a potential "deluge of suits" seeking recompense for hospital bills and deaths, Mr. O'Hara said.

California Gov. Gavin Newsom issued an executive order providing a rebuttable presumption that positive COVID-19 cases were acquired in the workplace and compensable under workers comp in 16 industries deemed "essential" in the state. Illinois lawmakers in both houses on Friday passed bills creating a rebuttable presumption to make COVID-19 acquired by essential workers compensable.

"There is a lot of potential for activity out there," Mr. O'Hara said. "Comp is a way to take care of a lot of that."

More insurance and workers compensation news on the coronavirus crisis here.