

# HUSCH BLACKWELL

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Hon. Loren Sweatt  
Principal Deputy Assistant Secretary of Labor  
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Occupational Safety and Health Administration  
200 Constitution Ave NW  
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**VIA EMAIL**

March 18, 2020

Dear Deputy Assistant Secretary Sweatt:

We write to seek OSHA's clarification on an important question affecting American employers, including many of our clients, as they grapple with spreading cases of COVID-19. As attorneys focused on issues involving labor and employment and workplace safety and health, we have fielded many client inquiries about how COVID-19 implicates OSHA recordkeeping requirements. There is significant confusion about whether an employee testing positive for the virus constitutes a recordable illness under OSHA recordkeeping regulations.

We know OSHA is working to do everything possible to partner with employers and employees in combating the spread of the virus. Toward that end, OSHA could assist greatly by clarifying that in light of the global pandemic recognized by the Centers for Disease Control (CDC) and the national state of emergency declared by President Trump, cases of COVID-19 are presumptively not work-related and thus not recordable.

Current regulations and guidance require having information about where and how someone contracted a contagious disease in order to charge an illness as recordable. As OSHA's COVID-19 web site reminds us, under 29 C.F.R. § 1904.4(a), an illness is only recordable if it is work-related. It is work-related "if an event or exposure in the work environment either caused or contributed" to it. Contagious diseases "are considered work-related if the employee is infected at work." *Id.* § 1904.5(b)(2)(viii).

On the other hand, even if symptoms surface at work, an illness is not recordable if it "result[s] solely from a non-work-related event or exposure that occurs outside the work environment." *Id.* § 1904.5(b)(2)(ii). When in doubt, where the source of exposure is not obvious, OSHA says that employers "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.” *Id.* § 1904.5(b)(3). In the past, OSHA has agreed that this means “the employer must make a determination whether it is more likely than not that work events or exposures were a cause.”<sup>1</sup>

Of course, the challenge with determining the source of infection with COVID-19 is that the virus is all around us. The CDC has now confirmed that community transmission is occurring in the United States. It is unlike anything we have seen in over 100 years. It is not only a global pandemic; it has also been declared a national emergency, as well as a state of emergency in states and cities around the country. The CDC expects that “most of the U.S. population will be exposed to this virus.”<sup>2</sup> Indeed, the CDC’s worst-case scenario reportedly estimated that between 160 million and 214 million people could be infected, and as many as 200,000 to 1.7 million people could die” from COVID-19.<sup>3</sup> Simply put, this goes far beyond a workplace issue.

With the virus spreading nationally, it is impossible to determine the source – even the likely source – of each person’s infection. Many who are infected likely remain unidentified because testing is still extremely limited. Many who have symptoms are still waiting for, or have been denied access to, tests. Even more complicated, the incubation period can last up to 14 days, so someone can contract and transmit the virus even before showing symptoms. Many who carry the virus do not show symptoms.

The result is that if an employee tests positive – no one, including the infected employee – can really know where and how she was infected. In some cases, a co-worker with flu-like symptoms might be a suspected source of exposure. But, that co-worker might also just have the seasonal flu or strep throat (unless the co-worker also tests positive for COVID-19). The employer would merely be speculating about workplace transmission. At the same time, the infected employee’s friends, family, or social encounters in bars or restaurants could have been the real source of illness even if those contacts were entirely asymptomatic. The CDC’s own data underscore this difficulty: 92% of CDC-reported cases still have no known origin.<sup>4</sup>

These are unprecedented times calling for commensurate responses. Employers are struggling to responsibly manage all the unavoidable challenges created by this crisis: workplace hygiene, worried employees, high absenteeism, shuttered stores, collapsing demand, delayed raw materials, lost production, and incalculable lost business. Many are even uncertain how far they can inquire into employee social interactions under state and federal privacy laws.

In this environment, employers should not also have to worry about how to apply the recordkeeping rules under these extraordinary circumstances. In some cases, recording illnesses with speculative relation to the workplace will even cause additional economic harm because for many companies, especially contractors, recorded injury rates affect their ability to obtain or retain business.

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<sup>1</sup> See <https://www.osha.gov/laws-regulations/national-association-of-manufacturers-11162001>.

<sup>2</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html#risk-assessment>.

<sup>3</sup> See <https://www.nytimes.com/2020/03/13/us/coronavirus-deaths-estimate.html>.

<sup>4</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (data as of March 18, 2020 showing 7,038 cases with 6,493 remaining under investigation).

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By making this clarification, OSHA would not in any way compromise its mission or the purposes of the recordkeeping rule. Even in the rare case where workplace exposure clearly occurred, that does not tell OSHA or the public anything useful about health and safety at that workplace. A person can get this virus anywhere. In addition, having thousands of employers record thousands of cases of COVID-19 based on mere speculation will not serve any valuable purpose. In fact, employers assuming that exposures occurred at work – for lack of any convincing proof either way – could create confusing data for the future, when those studying this pandemic inevitably will accept those reported workplace exposures as the definitive source of illness (when, in fact, these cases would simply reflect employers over-reporting for lack of information).

We urge you to announce that, from an OSHA enforcement perspective, COVID-19 infections are presumptively not work-related and not recordable. This guidance would be consistent with prior OSHA guidance that employers must determine whether work exposure more likely than not caused the illness. As the virus spreads everywhere, that simply cannot be known by an employer. Stating so specifically in the context of this pandemic would give great relief and clarity to employers at a critical time.

We appreciate your consideration and all of your work to promote worker safety and health, especially in these complicated days. We would be glad to discuss this request further with you and welcome your earliest response.

Sincerely,



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