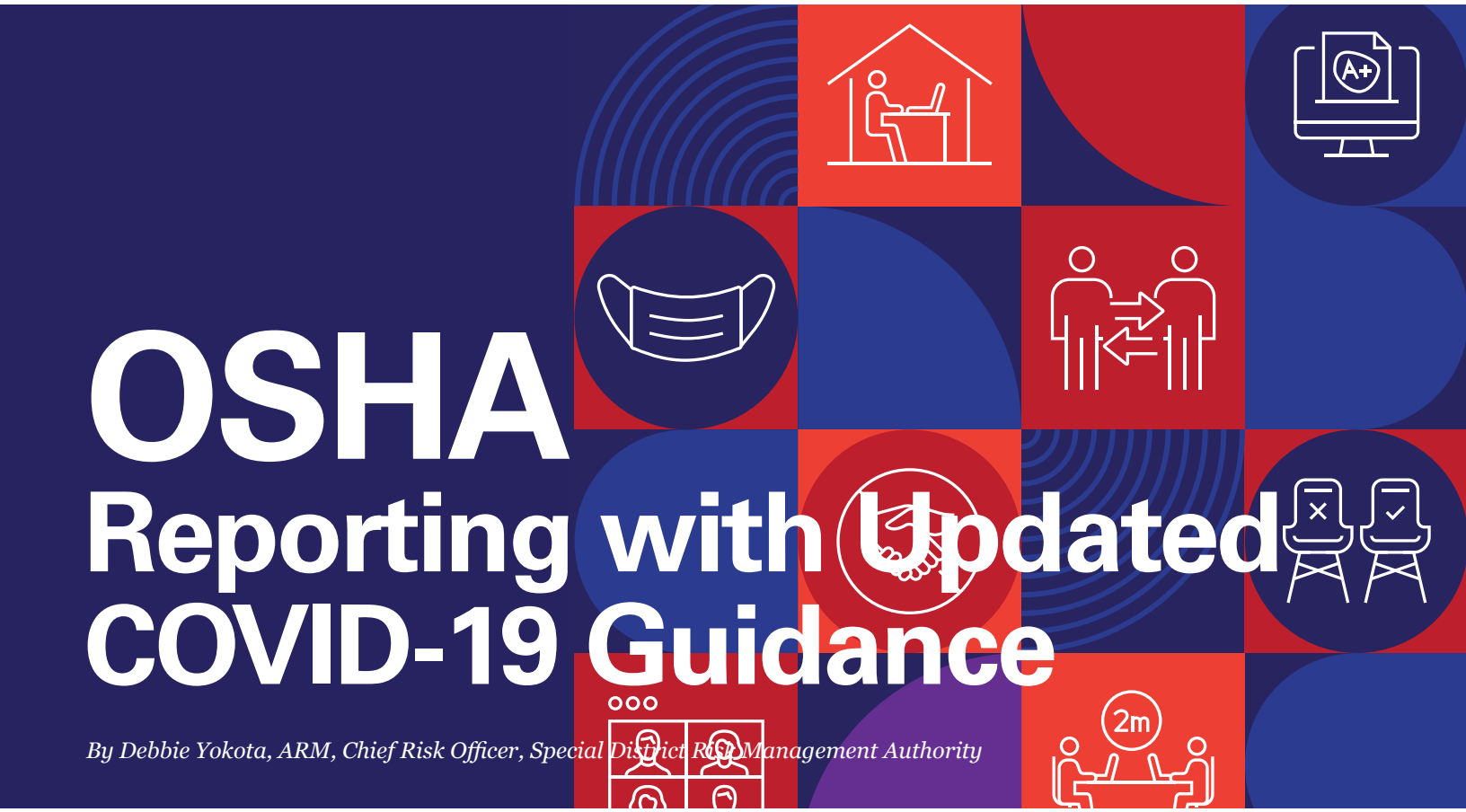

OSHA Reporting with Updated COVID-19 Guidance

By Debbie Yokota, ARM, Chief Risk Officer, Special District Risk Management Authority

Employers have had to adjust to a lot in 2020 in response to the COVID-19 pandemic. One item that may have slipped under the radar is Cal-OSHA's recording and reporting requirements for employees who contract COVID-19 on the job.

As described below, work-related COVID-19 infections are recordable for those employers who are required to maintain Cal-OSHA 300 logs. Certain work-related COVID-19 infections that result in death or hospitalization must also be reported to Cal-OSHA.

CAL/OSHA's 300 LOG REPORTING REQUIREMENTS

First it is important to remember what must be reported on a California employer's 300 log. To be recordable, an illness must be work-related and result in one of the following:

- Death (Reportable within 8 hours of employer's knowledge)
- Days away from work
- Restricted work or transfer to another job
- Medical treatment beyond first aid*
- Loss of consciousness
- A significant injury or illness diagnosed by a physician or other licensed health care professional. (Reportable within 8 hours of an employer's knowledge)

Employers with ten or fewer employees are exempt from the recordkeeping requirements and are only required to report illnesses that result in a fatality or an employee's in-patient hospitalization.

Employers in California that have establishments meeting one of the requirements below are required

annually to electronically submit Form 300A injury and illness data:

- All establishments with 250 or more employees, unless specifically exempted by section 14300.2 of title 8 of the California Code of Regulations.
- Establishments with 20 to 249 employees in the specific industries listed in Appendix H of Cal/OSHA's regulations regarding occupational injury and illness records.

The deadline for submission each year is March 2nd, and employers covered by the electronic submission requirements must submit their Form 300A data for the previous calendar year. For example, employers must submit their Form 300A data for the 2021 calendar year by March 2, 2022.

CAL/OSHA'S COVID-19 RECORDKEEPING REQUIREMENTS

Cal-OSHA maintains that work-related exposure to COVID-19 is a recordable incident and must be recorded in an OSHA 300 log if the following three requirements are met:

"While Cal-OSHA considers a positive test for COVID-19 determinative of recordability, a positive test result is not necessary to trigger recording requirements."

1. The case is a confirmed diagnosis of COVID-19 as defined by the CDC;
2. The case is "work-related," which is defined by OSHA as an "event or exposure in the work environment [that] either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness"; and
3. The case involves one or more of the general recording criteria specified by OSHA regulations, which are injuries and illnesses that result in one of the following: death; days away from work; restricted work or transfer to another job; medical treatment beyond first aid; loss of consciousness; and/or a significant injury or illness diagnosed by a physician or other licensed health care professional.

Given the manner in which a virus like COVID-19 is contracted, it can be difficult for employers to determine whether a COVID-19 illness is work-related, especially when an employee had possible exposure both in and out of the workplace. If an employee becomes sick at work, it does not matter if the illness is work-related. Employers must report all serious injuries, illnesses or deaths occurring at work without making a determination about work-relatedness. An employer should also report a serious illness if there is cause to believe the illness may be work-related, regardless of whether the onset of symptoms occurred at work.

While Cal-OSHA considers a positive test for COVID-19 determinative of recordability, a positive test result

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is not necessary to trigger recording requirements. There may be other situations in which an employer must make a recordability determination even though testing did not occur or the results are not available to the employer. In these instances, the case would be still be recordable if it meets any one of the other general recording criteria described above, such as resulting in days away from work. Cal-OSHA recommends erring on the side of recordability.

For COVID-19 cases, evidence suggesting transmission at or during work would make a serious illness reportable. An employer should consider these factors:

- Multiple cases in the workplace.
- The type, extent, and duration of contact the employee had at the work environment with other people, particularly the general public.
- Physical distancing and other controls that impact the likelihood of work-related exposure.
- Whether the employee had work-related contact with anyone who exhibited signs and symptoms of COVID-19.

For recordkeeping purposes, an injury or illness is considered 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. An injury or illness is presumed to be work-related if it results from events or exposures occurring in the work environment unless an exception in section 14300.5(b)(2) specifically applies.

A work-related exposure in the work environment would include interaction with people known to be infected with SARS-CoV-2 (the virus that causes COVID-19); working in the same area where people known to have been carrying SARS-CoV-2 had been; or sharing tools, materials or vehicles with persons known to have been carrying SARS-CoV-2. Given the disease's incubation period of 3 to 14 days, exposures will usually be determined after the fact.

If there is not a known exposure that would trigger the presumption of work-relatedness, the employer must evaluate the employee's work duties and environment to determine the likelihood that the employee was exposed during the course of their employment. Employers should consider factors such as:

- The type, extent, and duration of contact the employee had at the work environment with other people, particularly the general public.
- Physical distancing and other controls that impact the likelihood of work-related exposure.
- Whether the employee had work-related contact with anyone who exhibited signs and symptoms of COVID-19.

If after conducting the above good-faith inquiry the employer cannot determine whether it is more likely than not that the employee's exposure in the workplace caused the COVID-19 illness, the employer does not need to record the COVID-19 illness on their OSHA 300 log.

Thus, employers need to conduct an investigation into whether an employee's COVID-19 infection was work-related, even if that investigation is relatively straightforward. Employers should keep documentation of its work-relatedness investigation in the event OSHA questions the sufficiency of its decision not to record a COVID-19 illness.

OSHA'S COVID-19 REPORTING REQUIREMENTS

The same difficult work-relatedness assessment discussed above also comes into play when considering whether to report (by telephone or online) a confirmed COVID-19 case to OSHA. The reporting obligation applies to 1) in-patient hospitalizations, or 2) fatalities resulting from a work-related exposure to the virus. A hospitalization for COVID-19 only becomes reportable when the employee receives a formal admission to the in-patient service of a hospital or clinic for care or treatment (not merely observation or diagnostic testing) within 24 hours of exposure to COVID-19 in the workplace. Employers must report such a hospitalization to OSHA within 24 hours of knowing both that the employee became hospitalized and that the hospitalization resulted from a work-related case of COVID-19. This scenario has a lower probability given COVID-19's epidemiology, where individuals typically remain asymptomatic for the first 24 hours after exposure and hospitalizations (if they occur) happen later in time.

A fatality due to a work-related case of COVID-19, on the other hand, is reportable if it occurs within 30 days of the exposure to the virus in the workplace. Employers must report such a fatality within eight hours of learning that the employee died as a result of a work-related case of COVID-19. Obtaining reliable information on whether the employee's death resulted from COVID-19 may likely pose a practical challenge. The cause of death is protected health information and thus not simply a matter of contacting the treating health care institution for details. Sometimes family members of the employee will report this information to the employer. OSHA has not provided solutions for how employers are to acquire COVID-19-related health information from employees.

IS TIME AN EMPLOYEE SPENDS IN QUARANTINE CONSIDERED "DAYS AWAY FROM WORK" FOR RECORDING PURPOSES?

No. Unless the employee also has a work-related illness that would otherwise require days away from work, time spent in quarantine is not "days away from work" for recording purposes.