Does Trump's COVID-19 Case Need To Be Reported To OSHA? What Employers Can Learn From President's Illness

Insights
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President Donald Trump's recent hospitalization at the Walter Reed Medical Center has captured the American public's attention, especially given the potential implications with the election less than a month away. But for human resources and safety professionals, the news of the president's positive COVID-19 diagnosis and a subsequent hospitalization has raised questions unrelated to the election: namely, whether his illness is considered "work-related," and if so, how would it be treated under the Occupational Safety and Health Administration's (OSHA) recordability and reporting laws. What can this most high-profile case of COVID-19 teach employers about mandatory safety reporting obligations?

Recordability Under OSHA

Before we dive into President Trump's situation, let's examine the legal standards related to workplace injury recording. The Occupational Safety and Health Act (OSH Act) is the most broadly applicable statute regulating American workers' safety and health aspects of working conditions. Under the law, non-exempt companies must record work-related employee fatalities, injuries, and illnesses on OSHA 300 logs. Injuries and illnesses are only recordable if they result 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. Additionally, employers must report work-related incidents that lead to the in-patient hospitalization of one or more employees, an employee's amputation, or an employee's loss of an eye to OSHA within 24 hours.

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. OSHA notes that "work-relatedness is presumed for injuries and illnesses resulting from events occurring in the work environment" unless a specifically identified exception applies.

Suppose it is not obvious whether the precipitating event or exposure occurred in the work environment or away from work. In that case, 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." OSHA has advised that the "work event or exposure need only be one of the discernable causes; it need not be the sole or predominant cause."

COVID-19 Comes Into The Mix

On April 10, 2020, OSHA issued Enforcement Guidance for Recording Cases of Coronavirus Disease 2019, in which the agency stated that it would not enforce most non-healthcare industry employers' recordkeeping obligation to make a work-relatedness determination except where (1) "there is objective evidence that a COVID-19 case may be work-related" and (2) the "evidence was reasonably available to the employer."

OSHA's Revised Enforcement Guidance for recording cases of COVID-19 went into effect on May 26. Under this revised guidance, all employers must make determinations of work-relatedness for confirmed cases of COVID-19. Per the guidance, if the employer cannot determine whether it is more likely than not that exposure in the workplace caused a case of COVID-19 after it conducts a reasonable and good-faith inquiry, the employer does not need to record that COVID-19 illness.

OSHA has said it will consider the following factors for assessing whether an employer has made a reasonable determination of work-relatedness:

- ***The reasonableness of the employer's investigation into work-relatedness.*** Employers, especially small employers, should not be expected to undertake extensive medical inquiries, given employee privacy concerns and most employers' lack of expertise in this area. It is sufficient in most circumstances for the employer, when it learns of an employee's COVID-19 illness (1) to ask the employee how they believe they contracted the COVID-19 illness; (2) while respecting employee privacy, discuss with the employee their work and out-of-work activities that may have led to the COVID-19 illness; and (3) review the employee's work environment for potential SARS-CoV-2 exposure. The work enviorment review should be informed by any other instances of workers contracting COVID-19 illness in that area.
- ***The evidence available to the employer.*** The evidence that a COVID-19 illness was work-related should be considered based on the information reasonably available to the employer at the time it made its work-relatedness determination. If the employer later learns more information related to an employee's COVID-19 illness, then that information should be taken into account as well in determining whether an employer made a reasonable work-relatedness determination

- ***The evidence that a COVID-19 illness was contracted at work.*** OSHA compliance safety and health officers should take into account all reasonably available evidence, in the manner described above, to determine whether an employer has complied with its recording obligation. This cannot be reduced to a ready formula, but certain types of evidence may weigh in favor of or against work-relatedness. For instance:
    - COVID-19 illnesses are likely work-related when several cases develop among workers who work closely together and there is no alternative explanation.

- An employee's COVID-19 illness is likely work-related if it is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation.
- An employee's COVID-19 illness is likely work-related if their job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.
- An employee's COVID-19 illness is likely not work-related if they are the only worker to contract COVID-19 in their vicinity and their job duties do not include having frequent contact with the general public, regardless of the rate of community spread.
- An employee's COVID-19 illness is likely not work-related if they, outside the workplace, closely and frequently associates with someone (e.g., a family member, significant other, or close friend) who (1) has COVID-19; (2) is not a coworker, and (3) exposes the employee during the period in which the individual is likely infectious.

Thus, employers must record confirmed cases of COVID-19 on a case-by-case basis among its employees if it determines they are work-related. OSHA encourages recording employee diagnoses of COVID-19 unless, after conducting a reasonable and good-faith inquiry, the employer cannot determine whether it is more likely than not that exposure in the workplace caused a case of COVID-19.

Contract Tracing The President

And now, with this understanding under our belts, we can examine President Trump's situation. As with any inquiry into a workplace incident of COVID-19, determining the recordability of the president's illness requires contact tracing. According to the Centers for Disease Control and Prevention (CDC), "close contact" for COVID-19 contact tracing purposes is anyone who was within six feet of an infected person for at least 15 minutes during the time period of 48 hours before the person has any symptoms or tests positive for COVID-19. Thus, President Trump's positive COVID-19 diagnosis and subsequent hospitalization immediately raise questions about his whereabouts and personal interactions in the days before his diagnosis.

- On Saturday, September 26, 2020, President Trump hosted a ceremony in the White House Rose Garden where he announced his nominee for the U.S. Supreme Court, Amy Coney Barrett. Later that same day, he held a campaign rally in Middletown, Pennsylvania, where reports indicate that advisor Hope Hicks joined him.
- On Sunday, September 27, 2020, President Trump held a briefing at the White House. Notably, former New Jersey Governor Chris Christie attended the news conference. Christie reportedly tested positive on Saturday, October 3, 2020.
- On Monday afternoon, September 28, 2020, President Trump held another news conference providing an update on the S. Coronavirus Testing Strategy.

- On Tuesday, September 29, 2020, the president attended the first Presidential Debate at Case Western Reserve University, in Cleveland, Ohio. First Lady Melania Trump and Hope Hicks, among others, attended the debate.
- On Wednesday, September 30, 2020, the president attended a fundraiser near Minneapolis, and later a campaign rally in Duluth, Minnesota.
- On Thursday evening, October 1, 2020, Bloomberg reported that Hope Hicks tested positive for COVID-19 and had "traveled with Trump aboard Air Force One to and from the presidential debate in Cleveland on Tuesday and to a Minnesota rally on Wednesday." Hicks reportedly fell ill in Minnesota and "quarantined aboard the presidential plane on the way home."
- On Friday morning, October 2, 2020, at 12:54 a.m., President Trump tweeted that he and the First Lady tested positive for COVID-19 and would begin quarantining.

If a COVID-19 incident were to arise among your workforce, this is the type of review and analysis you would need to conduct to ensure you have completed a reasonable and good faith inquiry.

Weighing OSHA's Recordability Criteria To The Known Acts

Assume the president was one of your employees. What would you conclude in terms of whether you would need to record and report his COVID-19 diagnosis? Upon reviewing the above timeline, several of OSHA's recordability criteria weigh heavily in favor of a finding of work-relatedness. For example:

- Several positive cases have developed both before and after the president's positive diagnosis and hospitalization. Many of those positive cases are among "workers" who work closely together with the president. This includes, first and foremost, Hope Hicks, who was reported to have tested positive before the president and with whom the president had close contact within 48 hours of his diagnosis. Additionally, several Trump staffers and campaign aides or members – including Nicholas Luna, Kayleigh McEnany, Chris Christie, and Trump's campaign manager Bill Stepien – have tested positive. Assuming President Trump had close exposure to Hicks and the others during the last 48 hours before testing positive (and there is no alternative explanation for his diagnosis), the president's illness would likely be considered work-related.

- Undoubtedly, his job duties, particularly dating back to September 26th, included having frequent, close exposure, to the general public. However, there is no indication that the localities he visited had ongoing community transmission, lessening the likelihood of work-relatedness. That said, the president is not the only "worker" to contract COVID-19 regardless of community spread rate.

- Finally, the final factor weighs in favor of a work-relatedness finding, assuming First Lady, Melania Trump, is a co-worker. According to OSHA, an employee's COVID-19 illness is likely not work-related if they, outside the workplace, closely and frequently associate with someone (e.g., a family member, significant other, or close friend) who (1) has COVID-19; (2) is not a

coworker, and (3) exposes the employee during the period in which the individual is likely infectious. Generally, illness and symptom onset occur anywhere from two to 14 days after exposure, with a median time of four to five days from exposure to symptoms onset. And at least one study suggests that about 97.5% of people who develop symptoms of SARS-CoV-2 infection will do so within 11.5 days of exposure. The president and First Lady were together well within the period in which either person was likely infectious.

Was The President's "Hospitalization" Reportable To OSHA?

Next, we turn to the president's weekend stint at Walter Reed Medical Center. Speculating on the basis for and timing of President Trump's "hospitalization" is crucial to determine whether it is reportable to OSHA.

First, a hospitalization is only reportable if it occurred within 24 hours of the work-related illness. Thus, for the president's hospitalization to be reportable to OSHA, it must have not only been work-related but he must have been formally admitted to in-patient service within 24 hours of contracting the illness. Further, President Trump must have received medical treatment beyond mere observation within 24 hours of the illness.

Here, assuming the illness was work-related, it is uncertain whether the hospitalization was reportable to OSHA. We first learned of President Trump's positive test early Friday morning. He went to the hospital later that evening reportedly for a more thorough evaluation and monitoring. This would not in and of itself constitute reporting. At some point, the president reportedly received an 8-gram dose of an experimental drug cocktail and other over-the-counter substances like zinc, vitamin D, famotidine, melatonin and aspirin. It is not clear, however, precisely when or where he received these treatments. If it were at the White House, it would not be reportable. If at the hospital, after being admitted, it may be reportable.

Further, on either Friday or Saturday, the president also received doses of remdesivir, an antiviral drug identified early on as a promising therapeutic candidate for COVID-19 because of its ability to inhibit SARS-CoV-2 (MERS) infections. If the president received remdesivir on Friday within 24 hours of announcing his positive diagnosis, it would likely be reportable. If, however, he received the dose on Saturday, it would not be reportable.

Takeaways For Employers

The above analysis illustrates the often speculative and imprecise nature of contact tracing and inquiries employers must make to sufficiently adhere to OSHA's illness recording and reporting guidance. Of course, the president had close contact with countless others outside of work, providing plausible alternative explanations that his exposure and subsequent diagnosis of COVID-19 was not work-related.

But under OSHA's current guidance, employers and their workers are left only to speculate whether, after conducting a reasonable and good-faith inquiry based on OSHA's criteria, it is more likely than not that such a workplace exposure caused an employee's – or the president's – COVID-19 illness.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to our alert system to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the authors of this alert, or any member of our Post-Pandemic Strategy Group Roster.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation. A version of this Alert originally published in Law360 on October 9.

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