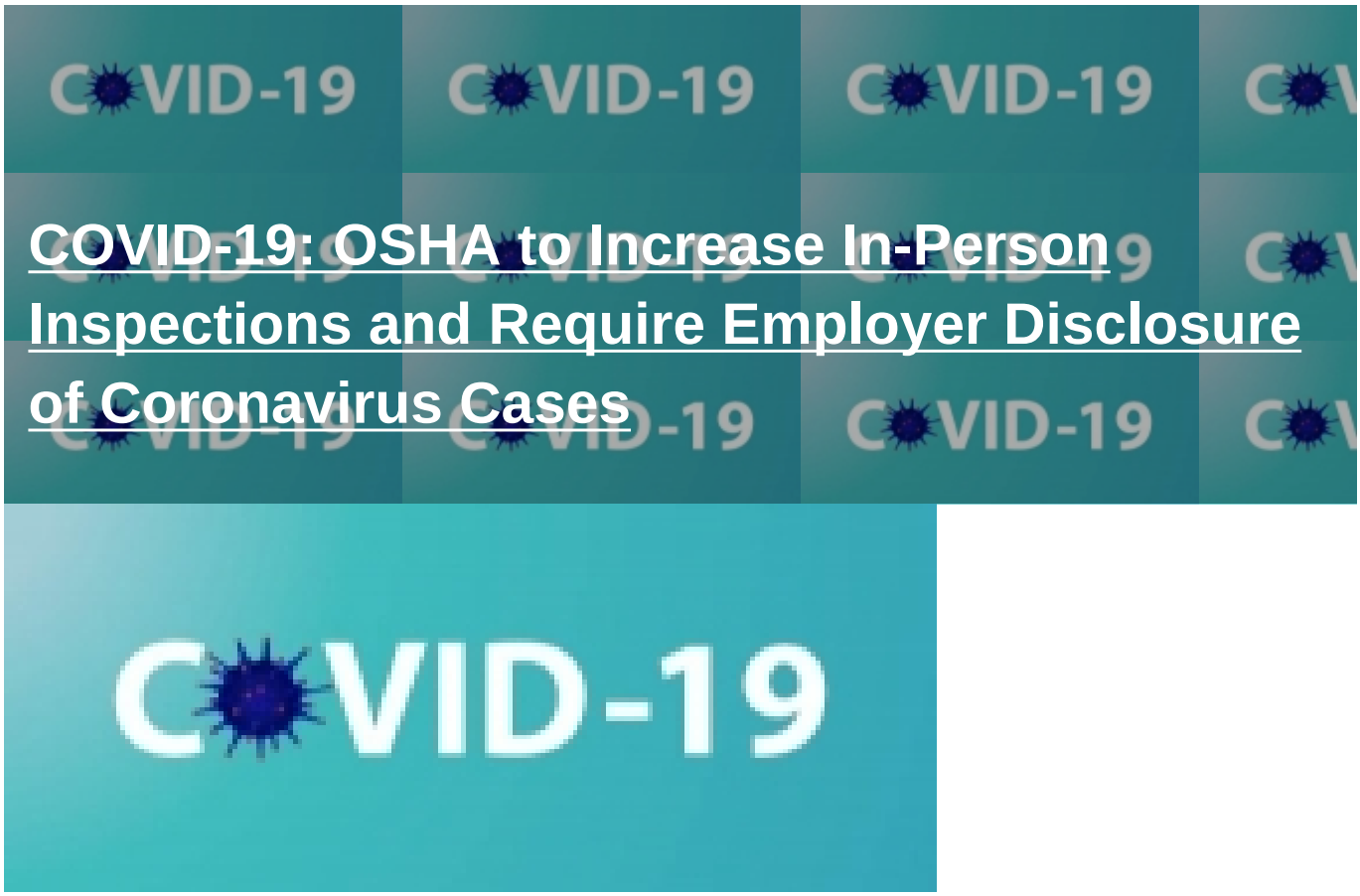


COVID-19: OSHA to Increase In-Person Inspections and Require Employer Disclosure of Coronavirus Cases

May 22, 2020

By Curry Sexton, John Vering, and Brenda Hamilton

In new enforcement memos issued Tuesday, May 19, the Occupational Safety and Health Administration (OSHA) informed state and regional officials that it planned to return to its pre-coronavirus playbook where community spread of COVID-19 had significantly decreased to reduce job-site hazards. At the height of the pandemic in April, OSHA ceased most in-person inspections. In addition, OSHA also indicated that all employers subject to its illness record-keeping rules must track and report workplace COVID-19 cases as best they can, changing course from an earlier policy that required only health care, corrections, and first response employers to report workplace COVID-19 cases.

Inspection Policy

The interim enforcement response **plan** will go into effect on May 26 and remain in effect until further notice. As in-person inspection activity increases, OSHA will continue to prioritize inspections related to COVID-19. In areas experiencing elevated community spread or resurgence in community spread, OSHA will continue to focus on COVID-19 fatalities and imminent danger exposures for inspection.

In the event OSHA performs an inspection and/or investigation and concludes that there was a violation of workplace safety rules, OSHA has the ability to fine employers. Violations cited under this plan will generally be classified as “serious” which can result in a fine of up to $13,260 per serious violation.

Record-Keeping Policy

The revised record-keeping **guidance** requires all businesses to record COVID-19 as a workplace illness where the employer can reasonably determine the infection occurred at work. According to the

guidance, a COVID-19 illness is likely work related and must be recorded as such if there is no alternative explanation and if:

- several cases develop among workers who work closely together and there is no alternative explanation; or
- contracted shortly after lengthy, close exposure to a particular customer or co-worker who has a confirmed case and there is no alternative explanation; or
- the employee's job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.

A COVID-19 illness is not likely work related if:

- one individual is the only worker to contract COVID-19 in his/her work vicinity, and his/her job duties do not include having frequent contact with the general public, regardless of the rate of community spread; or
- one individual, outside the workplace, closely and frequently associated with someone (*i.e.*, a family member, significant other, or close friend) who (1) has COVID-19, (2) is not a co-worker, and (3) exposes the employee during the period in which the individual is likely infectious.

OSHA inspectors are directed to give due weight to any evidence of causation, pertaining to the employee illness, provided by medical providers, public health authorities, or the employee.

If, after the reasonable and good faith inquiry described above, the employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role with respect to a particular case of COVID-19, the employer does not need to record that COVID-19 illness. In all events, it is important as a matter of worker health and safety, as well as public health, for an employer to examine COVID-19 cases among workers and respond appropriately to protect workers, regardless of whether a case is ultimately determined to be work-related.

The guidance reduces the scope of OSHA's enforcement discretion with respect to work-relatedness. Previously, OSHA stated that it would not require employers outside of the healthcare industry, emergency response organizations, and correctional institutions to make work-relatedness determinations unless there was objective evidence that a particular COVID-19 case was work related and that evidence was reasonably available to the employer. Now, OSHA will only exercise that enforcement discretion if, after a reasonable and good faith inquiry, the employer cannot determine whether it is more likely than not that exposure in the workplace played a casual role with respect to a particular COVID-19 case.

This article is general in nature and does not constitute legal advice. Please note that new guidance is being provided by authorities on a daily basis so please monitor new developments and guidance. Readers with legal questions about how these orders apply to your business and your employees should consult the authors, Curry Sexton (CSexton@sb-kc.com), John Vering (JVering@sb-kc.com), or Brenda Hamilton (BHamilton@sb-kc.com), or any other shareholder in Seigfreid Bingham's Employment Law Group, including: John Vering, John Neyens, Mark Opara, Shannon Johnson, Christopher Tillery, or Julie Parisi, or your regular contact at Seigfreid Bingham at 816-421-4460. For more information and update, visit our ***COVID-19 Resources page.***