Phylmar Group® Environmental Health & Safety Social Responsibility

19 June 2020

Doug Parker
Chief
Division of Occupational Safety and Health (DOSH)
Department of Industrial Relations
State of California
1515 Clay Street, Suite 1901
Oakland, CA 94612

RE: "*Recording and Reporting Requirements for COVID-19, Frequently Asked Questions"*

Dear Chief Parker:

First, members of the Phylmar Regulatory Roundtable – OSH Forum (PRR) strongly support the rapid development and distribution by DOSH of guidance documents which provide essential information to employees and employers about appropriate protections to address COVID-19 in the workplace. PRR stated this publicly during the May 2020 and June OSH Standards Board meetings and we encourage the continued development of such materials to help assure that workers are kept safe during business re-openings in California.

Second, the main purpose of this letter is to express concern about the *Recording and Reporting Requirements for COVID-19 Cases, Frequently Asked Questions* (FAQs) published by DOSH on its website, originally dated 27 May 2020. (This document has since been updated and is now dated June 2020.)

PRR members have been diligently working to keep essential workers safe during this pandemic, and are preparing their workplaces for the return of other employees as permitted or appropriate under state and local orders. Since 10 April 2020, when Federal OSHA released its initial enforcement Guidance regarding Recording Cases of Coronavirus Disease 2019 (COVID-19), PRR members with employees in California as well as other states, have followed this Guidance with the decades-old understanding that under 29 CFR 1904.37(b)(1), "State Plan States must have the ***same*** [emphasis added] requirements as Federal OSHA for determining which injuries and illnesses are recordable and how they are recorded." Federal OSHA on 19 May 2020 released an updated Enforcement Memo: *Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19)*. Although this revision included some clarifications, the substance remained the same.

PRR is a group of 40 companies and utilities; 15 of the members rank among the Fortune 500. Combined, PRR members employ more than 847,000 individuals in the U.S. PRR member companies are committed to continuously improving workplace safety and health. Toward that end, PRR provides informal benchmarking and networking opportunities to share best practices

for protecting employees. In addition, members work together in the rulemaking process to develop recommendations to federal and state occupational safety and health agencies for effective workplace regulatory requirements.

PRR members see that there are conflicting requirements between the Federal OSHA Guidance and the DOSH FAQs regarding Recording and Reporting requirements. There is further uncertainty because the DOSH FAQs do not indicate whether its responses are retrospective or prospective, and members question whether they are supposed to go back through their logs and illness information, specific to COVID-19 cases, (where they have it) for the past three months to re-evaluate prior cases.

In its new recordkeeping and reporting FAQs, DOSH has deviated from the federal requirement for State Plan States to have the "same requirements as Federal OSHA for determining which injuries and illnesses are recordable and how they are recorded." Since DOSH's FAQs were not developed through a rulemaking process (for obvious timeliness reasons), PRR is writing this to express our surprise and confusion about the Division's interpretation of the 29 CFR 1904.37(b)(1). We read from the Federal OSHA Preamble published on 19 January 2001 that "Explicit Rules Are Needed To Ensure Consistent Recording" (see page 5919, column 1) to achieve a goal of the revised regulation:

> "The OSHA recordkeeping system is intended to collect, compile and analyze uniform and consistent ***nationwide data*** (emphasis added) on occupational injuries and illnesses." (Page 5933, column 3)

Because, Federal OSHA determined that:

> "More consistent records will improve the quality of analyses comparing the injury and illness experience of establishments and companies with industry and national averages and of analyses looking for trends over several years." (Page 5918, column 2)

As you are aware, State Plans are required to be "at least as effective" as Federal OSHA and are therefore permitted to be more stringent, or different from, Federal OSHA standards and regulations. However, Federal OSHA has an unusual mandate for State Plan states for recording of occupational injuries and illnesses. OSHA states that:

> "State Plans ***must have recording and reporting regulations that impose identical requirements*** (emphasis added) for the recordability of occupational injuries and illnesses and the manner in which they are entered. These requirements must be the same for employers in all the States, whether under Federal or State Plan jurisdiction, and for State and local government employers covered only through State Plans, to ensure that the occupational injury and illness data for the entire nation are uniform and consistent so that statistics that allow comparisons between the States and between employers located in different States are created. (See page 6060, column 2 of the Federal Register notice.)

PRR is particularly concerned about the following conflicts between Federal OSHA and DOSH regarding the recording requirements for cases of COVID-19 illness in the workplace. We offer

these specifics with the goal of working together to obtain both clarity and hopefully modification by DOSH of its FAQs addressing the expectations of employers regarding the recording of COVID-19 cases.

COVID-19 Recording Requirement Conflicts

Please note that unless otherwise noted, quoted language is taken from Federal OSHA's Enforcement Memo: *Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19)* and DOSH's *Reporting and Recording Requirements for COVID-19,* FAQ's, as appropriate.

1. Requirement that Recordable COVID-19 Cases are *Confirmed* Positive

Federal OSHA Guidance: This guidance provides three clear triggers for when a case of COVID-19 needs to be recorded by employers. The first trigger states:

> "The case is a confirmed case of COVID-19, as defined by the Centers for Disease Control and Prevention (CDC)"

DOSH FAQs: In response to question *2: Does a COVID-19 case have to be confirmed recordable?* the Division states:

a. "Pursuant to recent federal OSHA guidance, a COVID-19 case should ***generally*** [emphasis added] be confirmed through testing to be recordable"

b. "…while Cal/OSHA considers a positive test for COVID-19 determinative of recordability, a positive test result is ***not necessary to trigger recording requirements*** [emphasis added]."and

c. "Cal/OSHA recommends erring on the side of recordability."

PRR Concern - Despite the language in the FAQs which states "pursuant to recent federal OSHA guidance," it is clear from the above quoted text that the Division's FAQs are not in alignment with "recent federal OSHA guidance."

We understand that DOSH believes that one reason for not requiring a confirmed test for recording purposes is a shortage of COVID-19 tests. However, Governor Newsom's COVID-19 Testing Task Force has improved access to tests on a daily basis through their public-private collaboration; testing locations in California now include Quest diagnostics labs, CVS locations, and forty-four (44) Project Baseline By Verily, drive through testing locations. As examples of the current availability of testing locations, using California's Find a Testing Site Location website, there are currently twenty-seven (27) COVID-19 testing sites within ten (10) miles of Sacramento, and three (3) within ten (10) miles of Barstow. Based on this availability, we believe that test shortages in California are not currently an issue, nor should they influence DOSH's guidance on recording occupational illnesses. Further, even if testing shortages did exist, Federal OSHA in its regulation does not permit State Plan states to have different recording criteria for injuries and illnesses.

2. The Reasonableness of an Employer's Investigation into Work Relatedness

Federal OSHA Guidance - The Enforcement Memo is clear that determining whether or not COVID-19 cases are work-related is difficult and offers specific guidelines and examples to help Compliance Safety and Health Officers (CSHO's) determine employer compliance with the recording of COVID-19. In turn, these guidelines are extremely helpful to employers on how to conduct investigations on determining work-related COVID-19 cases. In addition to presenting three clear steps to follow when investigating, the memo addresses how to evaluate evidence, and specifically, Federal OSHA states:

> "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."

DOSH FAQs – The Division does not provide any limitations on the scope of employer investigations. PRR members therefore presume that the Guidance by Federal OSHA for investigating applies.

PRR Concern - The understanding of COVID-19 continues to be a moving target for epidemiologists across the globe and within public health agencies such as the Centers for Disease Control and Prevention (CDC) and the National Institute for Occupational Safety and Health (NIOSH). These agencies and experts continue to release information, and many times have needed to revise it shortly after its release. John Howard, the Director of NIOSH, recently testified during a U.S. House of Representatives' Education and Labor Committee, Workforce Protections Subcommittee hearing on 28 May 2020, that he recommends that people do not print any of the guidance on COVID-19 because by the time it is done printing, it will change.

It is unreasonable to place the burden of contact tracing on California employers, especially with the uncertainty of whether they will be out of compliance if they follow the Federal guidelines to determine work-relatedness. Without clear guidance and limitations on the requirements for internal investigations of work-relatedness, employers across the state, especially small ones, will be forced to create their own scope. We believe that employers should be focused on protecting employees in the workplace instead of being concerned that they are not doing enough to determine whether or not a case is work-related.

Further, the State of California has already accepted the responsibility to contact trace cases of COVID-19 and in doing so, has created an entire program to launch this initiative, including specific training for contact tracers. In addition to being a workplace issue, the pandemic is a **public health crisis**.

3. Allowing an Employer to Consider Potential Exposure Outside of the Workplace When Determining if a COVID-19 Case is Work-Related

Federal OSHA Guidance - When employers are determining whether COVID-19 cases are work-related, Federal OSHA allows employers to consider potential exposure to the disease outside of the workplace. The memo states the following:

a. "While respecting employee privacy, discuss with the employee his work and out-of-work activities that may have led to the COVID-19 illness." and

b. "An employee's COVID-19 illness is ***likely not work-related*** [emphasis added] if he, 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."

DOSH FAQs - The Division's answer to question (3): *How does an employer determine if a COVID-19 case is work-related for recordkeeping purposes?*), does not include any consideration of potential exposure outside of the workplace and the only consideration would be under one of the exceptions to recordkeeping provided by 8 CCR 14300.5(b)(2), specifically subsection (B), "The injury or illness involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment."

PRR Concern - California employers should be able to consider potential, outside of work, exposure to COVID-19 in their determinations of work-relatedness. To do otherwise will improperly skew and distort state and nationwide data about COVID-19 illness in the workplace. PRR believes that accurate data is integral to not only understanding this disease, but ultimately being able to combat it. This is especially true in communities where the illness is widespread. Not allowing exposures outside of the workplace to be considered is inappropriate. For example, the basic process for contact tracing in California includes questions about the: "places you've been and the people you've spent time with recently." This simple question will address personal, public and work-related contacts and it is our belief that employers should be able to follow the same approach during their internal contact tracing investigations.

4. The Final Determination of Work-Relatedness Following a "Good Faith Inquiry" By the Employer

Federal OSHA Guidance - When determining whether a case is work-related, OSHA's enforcement memo includes multiple statements that allow the employer to make a "reasonable determination." These include:

a. Allowance for the employer to evaluate whether or not "there is no other explanation" to why the worker contracted the disease; and

b. "If, after the reasonable and good faith inquiry described above, the employer cannot determine whether it is ***more likely than not*** [emphasis added] 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."

DOSH FAQs – The Division clearly contradicts this principle in its response to question (2) when it "recommends erring on the side of recordability."

PRR Concern – Once more, following the DOSH FAQs will skew data that is necessary to understanding this disease, as well as its prevention and mitigation nationwide in occupational settings. In addition, the FAQs directly counter the Federal OSHA Guidance, and therefore DOSH is not in compliance with the regulation requiring State Plan states to have occupational injury and illness recording criteria that is identical to that from Federal OSHA.

Summary

PRR members are continually striving to protect their employees from workplace illness and injury and are working conscientiously during this pandemic to do just that. Following the Division's FAQs will result in more cases being recorded in California, frustrating the effectuation of the Federal OSHA policy to have consistent national occupational illness and injury data. Federal OSHA states:

> "Accordingly, the Part 1904 rules impose identical requirements where they are needed to create consistent injury and illness statistics for the nation and allow the States to impose supplemental or more stringent requirements where doing so will not interfere with the maintenance of comprehensive and uniform national statistics on workplace fatalities, injuries and illnesses." (Page 6060-6060, columns 3 and 4)

PRR members are not arguing that the recording of true workplace COVID-19 cases is not necessary. On the contrary, these employers seek certainty that they are properly complying with the requirements, and that multi-state employers are using the same criteria for recording cases. In addition, members are concerned that the Division and the State of California are not meeting their obligations as the Administrators of a State-Plan Program. We hope that DOSH will revise its FAQs. At a time like this: a global pandemic, it is imperative that expectations are crystal clear, and recording of work-related illnesses is consistent, not only in California, but across the country as well.

To repeat, PRR members are concerned about the conflicting guidance between the Division and Federal OSHA's requirements to record COVID-19 cases in the workplace for the following reasons:

(a) The Division is not following Federal OSHA's recordkeeping requirements as defined in 29 CFR 1904.37(b)(1);

(b) The recording by California employers of undiagnosed COVID-19 cases in the workplace and the recording of COVID-19 cases that cannot be determined to be work-related, will skew national data averages and result in tainted data on this global pandemic; and

(c) It is not clear that this guidance, issued the end of May 2020, and currently dated June 2020, will be retroactive and affect employer 300 logs for February, March, April, and May. This is concerning for a few reasons:

   i. Employers have been following the earlier guidance from Federal OSHA regarding COVID-19 recording requirements since 10 April 2020. Does

DOSH expect employer to go back to make changes to their Logs and create new Incident Reports?; and

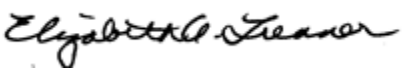
ii. This lack of clarity by the Division not only puts employers at risk of violation by some compliance officers but not all (due to potential interpretation differences), but will also cause inconsistency in the data because differences in documentation practices are bound to happen.

Conclusion

Thank you for accepting this letter and listening to PRR members. We look forward to a dialogue if you are available, which we understand is a challenge because you have so much on your plate now. Finally, we reiterate our appreciation for the continuous hard work of the Division and support to employers and employees while they return to work and battle this horrible disease.

Please let me know if you have any questions regarding our concerns.

Sincerely,



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