COVID-19 AND CAL/OSHA **RECORDING REQUIREMENTS**

In the state of California, all public and private employers are required to follow Cal/OSHA's Title 8 Standards of the California Code of Regulations (CCR).* The OSHA ***reporting*** and ***recording*** requirements can be a confusing topic for California employers and the current pandemic leaves many scratching their heads.

There are two key items for employers to keep in mind:

1. EVERY employer's operations and exposures are different, and it is the employer's ultimate responsibility determining how the Title 8 Regulations apply to their organization.
2. OSHA **reporting** and **recording** are two distinctly different employer responsibilities, and each should be evaluated independently. Refer directly to the applicable Title 8 regulations when determining how best to meet your organization's obligations.

Poms & Associates offers this informational document to those employers who seek guidance on how best to handle their organization's recording requirements specifically pertaining to COVID-19.

Recording

At this time, the presence of a pandemic (COVID-19) has not caused Cal/OSHA to alter their recording requirements. This could change. Employers should familiarize themselves with the Title 8 regulations which specifically address injury and illness recording criteria.

CCR Title 8 Section 14300 reads, *"The purpose of this rule (Article 2) is to require employers to record work-related fatalities, injuries and illnesses. **Note 1**: Recording a work-related injury, illness, or fatality does not mean that the employer or employee was at fault, that a Cal/OSHA regulation has been violated, or that the employee is eligible for workers' compensation or other benefits."*

Exemptions to the injury and illness recording criteria exist to those employers who have less than 10 employees over a calendar year, and certain industries whose operations fall under specific NAICS codes. Employers should first determine whether their company and/or operations are exempt from recording requirements by reviewing Title 8 Sections 14300.1 and 14300.2.

CCR Title 8 Section 14300.4. Recording Criteria establishes the basic recording criteria:

a. **Basic requirement.** *Each employer required by this article to keep records of fatalities, injuries, and illnesses must record each fatality, injury and illness that:*
    1) *Is work-related; and*
    2) *Is a new case; and*
    3) *Meets one or more of the general recording criteria of Section 14300.7 or the application to specific cases of Section 14300.8 through Section 14300.12."*

There are numerous intangibles to consider when evaluating whether an injury or illness is recordable as defined by Cal/OSHA. For example, an employer must determine whether an injury resulted in medical treatment beyond first aid. This, and additional criteria can be found under Title 8 Section 14300.7. Employers are encouraged to brush up on all of the recordable criteria outlined under Title 8 Sections 14300.8 through 14300.12.

COVID-19

How are employers to evaluate the recordability of employees who are confirmed cases of COVID-19? This answer can only be defined by each individual employer… for each instance… very purely on a case-by-case basis. There are numerous overlapping Cal/OSHA regulations to consider, and we will attempt to highlight the intricacies of these standards, so that you can make the most educated decision when determining whether an illness meets Cal/OSHA recording criteria.

Title 8 Section 14300.5, which defines how an employer should determine "work-relatedness" reads, *"Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in Section 14300.5(b)(2) specifically applies."*

One might read 14300.5 and interpret the word ***"presumed"*** to mean that an illness such as COVID-19 must be recorded as work-related. However, the standard goes on to read *"injuries and illnesses* ***resulting*** *from events or exposures* ***occurring*** *in the work environment…".* This wording places a burden of proof on determining that the illness **did occur** in the work environment. In most industries, there cannot be a presumption that COVID-19 occurred in the work environment unless confirmed otherwise.

Cal/OSHA's Aerosol Transmissible Disease (ATD) standard: 5199

Cal/OSHA also has a specific regulation, Title 8 Section 5199, for industries whose employees may be reasonably anticipated to be exposed to aerosol transmissible diseases (ATD's). COVID-19 does qualify as an aerosol transmissible disease and the standard requires extensive protocols be put in place for those industries to maintain compliance with the standard. Industries that meet the scope and application of this standard, are required to comply with all elements outlined within the 5199. Some industries such as hospitals, home health care and emergency responders, to name a few, are specifically named and must comply with all required elements of standard. For industries not specifically named, refer to the definition provided for "occupational exposure" under 5199(b), which begins *"Exposure from work activity or working conditions that is reasonably anticipated to create an elevated risk of contracting any disease caused by ATPs or ATPs-L if protective measures are not in place."* Employers attempting to determine whether they are required to comply with Cal/OSHA's ATD standard should understand how the definition (in its entirety) fits in with their specific operations. An *"elevated risk of contracting any disease caused by ATP's"* (aerosol transmissible pathogens) should not be interpreted as "possible", but rather as "reasonably anticipated."

> ***Scenario:***
> *During the COVID-19 pandemic, Donna's Janitorial Services sign a contract for services with ABC Property Management to perform daily deep cleaning and disinfecting of its 6-story*

building occupied by various law firms and accountants. Another employer, Jerome's Restoration, is busy responding to calls from a variety of companies, all requesting the deep cleaning and disinfecting of their facilities where employees confirmed with COVID-19 were working.

Using the definition of "occupational exposure" under the ATD standard, it is not likely that Donna's Janitorial Services should be reasonably anticipated to have an elevated risk of ATD exposures, and therefore, the ATD standard would likely not apply. However, the fact that employees of Jerome's Restoration are routinely traveling to facilities where confirmed COVID-19 cases (ATD's) are known to have been recently present, the ATD standard *may* apply.

Tying It All Together

To obtain a more focused understanding of employers' recording requirements, it's important to understand the purpose of California's ATD standard, and who it applies to. For those employers who are required to comply with Section 5199, it is generally established (but not always) that exposure to COVID-19 is a reasonably anticipated exposure and presumed to be "work-related." For example, if a paramedic contracts COVID-19, which requires medical attention beyond first aid, then the illness would likely be presumed as work-related and therefore, deemed as **recordable** on the employer's OSHA 300 logs.

For the majority of employers who do not meet the scope and application of the ATD standard, it stands to reason that exposure to COVID-19 is not a reasonably anticipated exposure for the day to day operations. Therefore, an employee of such a business who is confirmed as having COVID-19, is not likely to be required to be included on the employer's OSHA 300 logs.

Again, EVERY case is different, and each illness should be evaluated on its own merits. Employers should consider privacy issues when completing OSHA 300 logs and should refer to Section 14300.29 for more information on privacy considerations.

The California work climate during the COVID-19 pandemic is rapidly evolving. Governmental agencies are scrambling to plug the holes revealed during this unprecedented time, and the challenges employers face today, could change tomorrow. Poms & Associates is committed to staying abreast of the latest regulatory developments and providing clients with the most educated and thorough analysis possible.

This briefing has been prepared by Poms & Associates Insurance Brokers, LLC to provide information on recent developments of interest to our clients. It is not intended to offer legal or regulatory advice for a particular situation. Events are rapidly developing during this national state of emergency, and best practices are constantly changing. We recommend that individuals and entities carefully monitor and follow health directives of the WHO and CDC, along with federal, state and local authorities.