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TO: **MTC Council Presidents**

FROM: **President James Hart**

SUBJECT: **OSHA COVID-19 Reporting Update**

DATE: **May 21, 2020**

Dear Council President,

On May 19, 2020, the Occupational Safety and Health Administration (OSHA) published a Memorandum providing new guidance to its Compliance Safety and Health Officers (CSHOs) and the business community, on determining when COVID-19 cases must be recorded as work-related under the Occupational Health and Safety Act (OSHA) recordkeeping obligations. The Memorandum is effective May 26, 2020, and supersedes guidance issued just last month. For purposes of OSHA's recordkeeping requirements, COVID-19 is a recordable illness if:

1. The case is a confirmed case of COVID-19, as defined by the Centers for Disease Control and Prevention (CDC);
2. The case is work related, as defined by 29 CFR § 1904.5; and
3. The case involves one or more of the general recording criteria set forth in 29 CFR § 1904.7 (such as requiring medical treatment beyond first aid and missing time from work).

Under 29 CFR § 1904.5, a condition 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. Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception applies. Notably, one of the exceptions under Section 1904.5(b)(2) states that "contagious diseases such as tuberculosis, brucellosis, hepatitis A, or plague are considered work related if the employee is infected at work."

As the department continues to work with Congress to achieve an undebatable presumption that an illness like COVID-19 is presumed work related unless the employer can prove otherwise. Our collective understanding and adherence to this new standard is necessary in helping to achieve legislative success towards the aforementioned work related goal.

In the now superseded April guidelines, only health care employers, emergency response organizations, and correctional facilities were required to continue making work relatedness determinations under 29 CFR 1904. Recordkeeping requirements for all other employers were *not* enforced *unless* (1) there was objective evidence that COVID-19 was work related (*i.e.* a number of cases among workers without an alternative explanation), and (2) that evidence was reasonably available to the employer, meaning that information was learned in the ordinary course of managing the business and its employees.

The May 19 Memorandum drops OSHA's divided approach to its recordkeeping obligations. OSHA will now require all but the smallest employers and those in low hazard industries to make that determination. Specifically, in deciding whether an employer has complied with the recordkeeping obligations and made a reasonable determination of work-relatedness, Certified Safety and Health Officials (CSHOs) are instructed to consider the following:

- *Council Representatives should monitor 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 to: (1) ask the employee how he or she believes he or she contracted the disease; (2) while respecting employee privacy, discuss with the employee his or her work and out of work activities that may have led to the illness; and (3) review the employee's work environment for potential SARS-CoV-2 exposure. The review in (3) should be informed by any other instances of workers in that environment contracting COVID-19.
- *The evidence available to the employer.* The determination that a COVID-19 illness was work-related should be reviewed 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 conclusion.
- *The evidence that a COVID-19 illness was contracted at work*. CSHOs and local council representatives 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 was 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 the vicinity and the 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 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.
- CSHOs and local council representatives should give due weight to any evidence of causation, pertaining to the employee illness at issue, provided by medical providers, public health authorities, or the employee herself.

Employers are expected to make a reasonable and good faith inquiry using the points listed above to determine whether it is "more likely than not" that workplace exposure played a causal role in a particular case of COVID-19. If the employer concludes that a COVID-19 case is more likely than not work-related, it should be recorded as a respiratory illness on the OSHA Form 300 (which records must be maintained for five years). If the employer cannot make such a determination, there is no recording obligation. Regardless of whether a case is ultimately determined to be work-related, the Memorandum reminds employers to examine all COVID-19 cases among workers and respond appropriately to protect workers, as a matter of public health and worker safety.

Importantly, the Memorandum clarifies that the recording of a COVID-19 illness does not, in and of itself, indicate that the employer has violated any OSHA standard. Employers with 10 or fewer employees and certain employers in low-hazard industries have no recording obligations, they need only report work related COVID-19 illnesses that result in a fatality or an employee's inpatient hospitalization, amputation, or loss of an eye.

The new Memorandum will remain in effect until further notice.

The Metal Trades Department is following closely these and other developments related to COVID-19 as they impact the metal trades workforce. If you have questions, please feel free to contact me at your convenience or you can check the department's website at www.metaltrades.org for any and all worker related COVID-19 information and updates.