U.S. DEPARTMENT OF LABOR

Occupational Safety and Health Administration

- **Standard Number:** 1904.5(b)(2)(viii)

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November 15, 2023

Mr. Riki Ott, PhD
Director, The ALERT Project
Berkeley, CA 94704

Dear Mr. Ott:

Thank you for your letter to the Occupational Safety and Health Administration (OSHA) regarding the recordkeeping regulation contained in 29 CFR Part 1904 Recording and Reporting Occupational Injuries and Illnesses. Specifically, you request an interpretation regarding the work-related exception in § 1904.5(b)(2)(viii) for the common cold or flu.

Scenario: In your letter, you state that employers may be misclassifying some employee illnesses caused by oil-chemical exposure in the workplace as the common cold or flu because the initial symptoms for oil-chemical exposure mimic colds or flu.

General information: OSHA's recordkeeping regulation at § 1904.5(a) provides that employers "must consider an injury or illness to be 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 in Section 1904.5(b)(2) specifically applies."

Section 1904.5(b)(2)(viii) states that employers are not required to record injuries and illnesses if, ". . . the illness is the common cold or flu (Note: contagious diseases such as tuberculosis, brucellosis, hepatitis A, or plague are considered work-related if the employee is infected at work)." The exception for recording cases

involving the common cold or flu in § 1904.5(b)(2)(viii) is applied regardless of whether the employee contracted the illness in the work environment or outside of work.

Request: You present several questions that ask OSHA to clarify an employer's responsibility to record and report illnesses that have symptoms that mimic those of the cold or flu. Specifically, you ask:

- How does OSHA define the common cold and flu as used in § 1904.5(b)(2)(viii)?
- How should employers determine whether the common cold and flu is the source of an employee's illness, and thus exempt from recording and reporting requirements?
- How should employers handle a work-place exposure that can cause illness that mimics the symptoms of the common cold and flu?

Response: Under OSHA's recordkeeping regulation, employers are responsible for making accurate and good faith determinations about the recordability of a specific illness or injury. While OSHA's regulations do not require employers to record incidents of the common cold or flu, it is not sufficient for the employer to simply assume that the exception applies to a given situation where an employee is suffering from common cold or flu like symptoms without further investigation and analysis. As a general matter, when determining whether an employee has the common cold or flu, the employer should apply the same analysis used to evaluate the recordability of other employee injuries and illnesses. Below, we have walked through a number of the relevant steps in determining recordability, including highlighting specific advice related to determining the applicability of the common cold or flu exception.

Determining recordability:

Per 29 CFR 1904.4(a), each employer that is required by Part 1904 to keep records of fatalities, injuries, and illnesses must record each fatality, injury and illness that: (1) is work-related, as defined by § 1904.5; (2) is a new case, as defined by § 1904.6; and (3) meets one or more of the general recording criteria in 1904.7 (e.g., medical treatment beyond first aid, days away from work) or the additional criteria for specific cases found in § 1904.8 through § 1904.11 (e.g., recording criteria for work-related tuberculosis). See § 1904.4(a). In determining whether a case is recordable, the employer must first decide whether an illness, as defined by the part 1904 regulation, has occurred. Under § 1904.46 an injury or illness is an abnormal condition or disorder. Illnesses include both acute and chronic illnesses, such as, but not limited to, a skin disease, respiratory disorder, or poisoning. If the employer is uncertain whether an illness has occurred, the employer may refer the employee to a physician or other licensed healthcare professional for evaluation and may consider the healthcare professional's opinion in determining whether an illness exists.

If the employer determines that one of their employees has an illness, then the employer is responsible for making a good faith determination regarding the work-relatedness of that illness, based on the information available to them. For purposes of OSHA recordkeeping, an employee illness is work-related any time an event or exposure in the work environment either caused or contributed to the resulting illness, or significantly aggravated a pre-existing illness. Please note that any contribution from work makes an employee illness work related under Part 1904, it need not be the sole or predominant cause of the illness. See, the preamble to OSHA's January 19, 2001, final rule revising the recordkeeping regulation, 66 Fed. Reg. 5916, 5929.[1]

Note also that, per § 1904.5(a), work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in §1904.5(b)(2) specifically applies. The common cold and flu is one of those exceptions. If an employee has the common cold or flu, the employer need not record that illness, regardless of whether the case of common cold or flu resulted from an exposure in the work environment.

As noted above, if it is not obvious that an employee has the common cold or flu (e.g., where a healthcare provider has not diagnosed the employee as having one of these illnesses), the employer should go about assessing whether the employee's illness is the cold or flu or some other illness with similar symptoms using the same techniques that would be used if it is not obvious whether the event or exposure precipitating an injury or illness occurred in the work environment or occurred away from work. See § 1904.5(b)(3). Specifically, the employer should evaluate the employee's work environment and job duties to make a reasonable determination of whether the employee is suffering from the common cold or the flu (just like they would assess whether a given illness and injury is work-related). In this situation, the employer would consider the employee report of illness, the presence and risk of exposure to hazardous substances or chemicals in the employee's job, and other available information to determine work-relationship, and such evaluation may include consultation with a healthcare professional.

In carrying out the responsibility to make an accurate and good faith determination about the recordability of any underlying injury or illness which is causing an employee to experience cold or flu like symptoms, the employer should generally not rely exclusively on an employee's initial report of cold or flu like symptoms by itself to establish that the illness is the common cold or flu. Rather, the employer should make sure to consider any information that may come to light after the employee's initial report.

OSHA notes that employers may seek and consider an opinion from a physician or other licensed healthcare professional in determining whether an employee's illness is the common cold or flu. However, the ultimate responsibility for making this determination rest with the employer. This responsibility includes ensuring that an advisory physician's opinion is based on all available information and application of relevant part 1904 recording criteria.

We hope you find this information helpful. OSHA requirements are set by statute, standards, and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep appraised of such developments, consult OSHA's website at http://www.osha.gov.

Sincerely,

Lee Anne Jillings, Director
Directorate of Technical Support and Emergency Management

1 Note that the exception for the common cold or flu is one of nine situations where an injury or illness occurs in the work environment and is not considered work-related (and therefore is not recordable). See § 1904.5(b)(2).

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