jackson|lewis
Preventive Strategies and Positive Solutions for the Workplace
All We Do Is Work.℠

Workplace Safety and Health Update

Week of ***January 13, 2014***

Federal Agencies Report Progress on Chemical Safety

Agencies responsible for tightening chemical safety rules and procedures following a deadly explosion at a fertilizer plant last year say they are making headway.

In a progress report released in December, a working group of federal agencies said it has held four public meetings, begun collaborations with state, local and tribal emergency responders and launched a pilot program testing new ways to share information about the storage of dangerous chemicals.

The report came from the Chemical Facility Safety and Security Working Group, which is comprised of top-level officials from the Justice, Agriculture and Transportation departments. The task force is co-chaired by the EPA and the departments of Homeland Security (DHS) and Labor.

It was authorized by an Executive Order President Barack Obama issued in August, which called for a review of existing chemical safety policies following the West, Texas, fertilizer plant explosion in April that claimed 15 lives, including those of emergency responders.

"The Working Group has taken important steps towards substantial improvements in practices, operations, protocols, and policies to improve chemical facility safety and security," the agencies said.

The agencies are considering strengthening regulations already in place. For instance, revisions to DHS's "chemicals of interest" list are under consideration, and an update is in the works to the Bureau of Alcohol, Tobacco, Firearms and Explosives' regulations that would require anyone storing explosive material to notify local fire departments annually.

"The Group also is assessing methods that Federal and State agencies can use to identify chemical facilities that have not met their regulatory obligation or are otherwise out of compliance with important safety and security requirements," according to the report.

The Group said it is monitoring a pilot chemical data-sharing program being tried in New York and New Jersey. If successful, the initiative could serve as a model for a national program.

In addition, the Group has developed a "matrix of programs" that could be used to fill in gaps created by a patchwork of federal, state and local chemical safety and security policies. They include increased training for first responders, technical support to states and local governments and improved data sharing between the various levels of government.

A draft plan laying out recommendations is expected to be completed early this year, according to the report. Ultimately, the plan is likely to lead to tightened regulations for the sale, storage and handling of dangerous chemicals, including ammonium nitrate, the substance believed to have caused the explosion at the fertilizer plant.

The Group also continues to seek public input on options for strengthening chemical facility safety and security that have been developed to date. Six listening sessions have been held around the country, with two more set. In a notice (https://www.osha.gov/chemicalexecutiveorder/Section_6ai_Options_List.html), the Group provided the options and gave the public 90 days for comment.

OSHA Claims Trucking Firm Blacklisted Employee

OSHA is seeking back wages and damages totaling more than $100,000 from a Missouri-based trucking firm after alleging the company unlawfully retaliated against a former employee when he sought medical attention for a work-related injury.

OSHA ordered New Prime Inc. to pay the driver $41,373 in back wages and $60,000 in compensatory and punitive damages. After an investigation, the agency determined the carrier had violated the anti-retaliation provisions of the Surface Transportation Assistance Act by blacklisting the driver from work in the commercial trucking industry.

"Blacklisting an employee and sabotaging a worker's career is unacceptable," said Robert Kulick, OSHA's regional administrator in New York, whose offices conducted the investigation. "It can have a dangerous ripple effect if employees are compelled to drive when unwell or under medication because they are afraid they will lose their livelihood."

Mr. Kulick also said, "OSHA will not tolerate employers retaliating against its employees for reporting violations, including forcing employees to operate commercial motor vehicles when doing so would be unsafe for the driver and the public."

According to the agency, the driver notified his supervisors in October 2008 that he had sustained an on-the-job back injury and was seeking medical attention. The following month he provided documentation that the condition was serious enough to prevent him from returning to work because he had been prescribed medications that made operating a commercial motor vehicle unsafe.

In July 2009, the driver's physician released him for full duty. He decided not to return to New Prime Inc. and began seeking employment elsewhere in the industry.

After being rejected for a job, the driver learned his former employer had submitted damaging and misleading information about his employment to a provider of pre-employment and drug testing screening services, the agency said. The information appeared on the driver's Drive-A-Check Report, an employment history submitted by former employers in the trucking industry. The driver then filed a complaint with OSHA. The company has said it will appeal.

Employment Law Q&A

Q:

One of our employees has been on medical leave for about eight months following a stroke. He used all of his allotted FMLA leave but has not returned to work. Can we send him a letter stating that if he cannot return to work next week, his employment will be terminated?

A:

Once an employee's twelve weeks of Family and Medical Leave Act (FMLA) leave has expired, an employer should consider whether it must provide additional medical leave as a "reasonable accommodation" under the Americans with Disabilities Act (ADA). In January, 2009, the ADA was amended to greatly broaden the number of employees who are protected by that law, and a stroke requiring an absence from work for more than eight months surely would qualify.

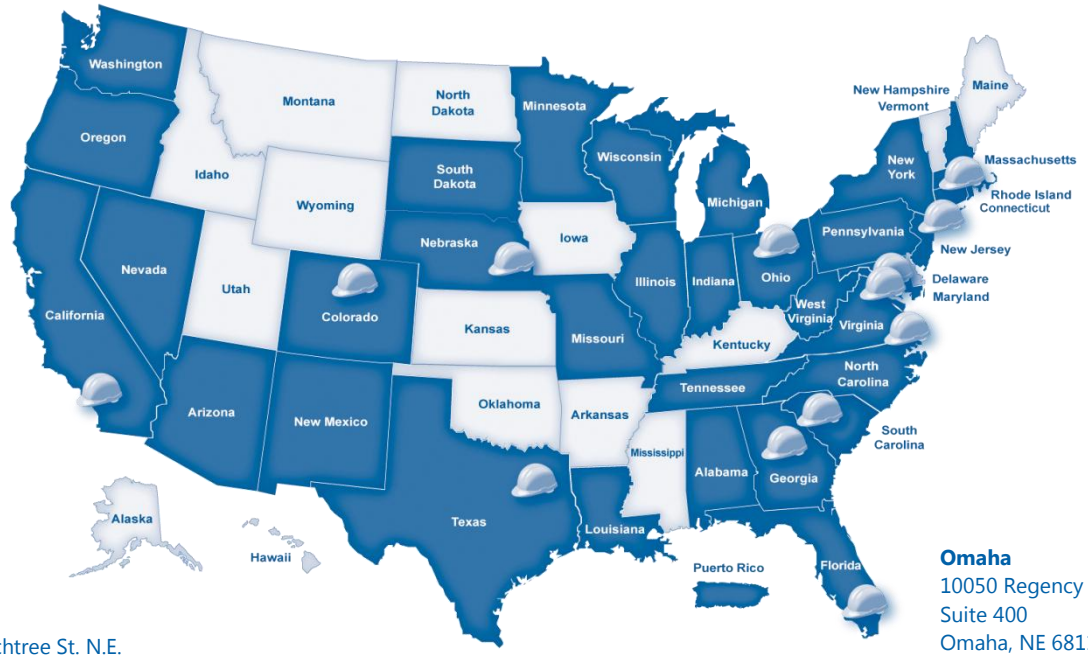
Instead of discharging this employee, ask him to obtain a letter from his health care provider confirming that he does have a disabling medical condition and estimating how much more medical leave he will need. Once the doctor has provided that estimate, the company should determine whether it can "reasonably" provide the additional leave. Unfortunately, there is no law or regulation indicating how much medical leave is "reasonable." Each situation must be evaluated based on its own facts. Also, so-called "inflexible leave" policies, giving all employees a defined maximum amount of medical leave, are no longer allowed.

If the doctor cannot determine how long the employee will be absent from work, or if the doctor does not believe the employee will ever be able to return, no additional leave is required. Nor must employers accommodate continually extended leave (where the doctor repeatedly excuses the employee from work for a few weeks at a time).

Also, before terminating employment, make sure you check any state laws that may provide additional leave rights, such as state FMLA or disability laws. If an absence is due to a workplace injury, check state worker's compensation laws. Finally, check your own policies to make sure they do not provide greater rights than you are allowing to this employee.

With experienced OSHA and MSHA attorneys located strategically throughout the nation,

Jackson Lewis is uniquely positioned to serve all of an employer's workplace safety and health needs:



Atlanta
1155 Peachtree St. N.E.
Suite 1000
Atlanta, GA 30309
Dion Y. Kohler, Esq.

Boston
75 Park Plaza, 4th Floor
Boston, MA 02116
Stephen T. Paterniti, Esq.

Cleveland
6100 Oak Tree Blvd.
Suite 400
Cleveland, OH 44131
Vincent J. Tersigni, Esq.

Dallas
3811 Turtle Creek Blvd.
Suite 500
Dallas, TX 75219
William L. Davis, Esq.

Denver
950 17th Street
Suite 2600
Denver, CO 80202
Donna Vetrano Pryor, Esq.
Mark N. Savit, Esq.

Greenville
55 Beattie Place
One Liberty Square
Suite 800
Greenville, SC 29601
Robert M. Wood, Esq.

Los Angeles
725 South Figueroa Street
Suite 2500
Los Angeles, CA 90017
David S. Allen, Esq.
Benjamin J. Kim, Esq.

Metro New York
58 South Service Road
Suite 410
Melville, NY 11747
Ian B. Bogaty, Esq.
Roger S. Kaplan, Esq.

Miami
One Biscayne Tower
2 South Biscayne Blvd.,
Suite 3500
Miami, FL 33131
Pedro P. Forment, Esq.

Norfolk
500 E. Main Street
Suite 800
Norfolk, VA 23510
Thomas M. Lucas, Esq.
Kristina H. Vaquera, Esq.

Omaha
10050 Regency Circle
Suite 400
Omaha, NE 68114
Kelvin C. Berens, Esq.
Joseph S. Dreesen, Esq.

Orlando
390 N. Orange Avenue
Suite 1285
Orlando, FL 32801
Lillian C. Moon, Esq.

Washington, D.C. Region
10701 Parkridge Blvd.
Suite 300
Reston, VA 20191
Henry Chajet, Esq.
Tressi L. Cordaro, Esq.
Garen E. Dodge, Esq.
Bradford T. Hammock, Esq.
R. Brian Hendrix, Esq.
Avidan Meyerstein, Esq.
Michael T. Taylor, Esq.

jackson|lewis

For more information on any of the issues discussed in this newsletter, please contact:

Brad Hammock at HammockB@jacksonlewis.com or (703) 483-8316, Henry Chajet at henry.chajet@jacksonlewis.com or (703) 483-8381, Mark Savit at mark.savit@jacksonlewis.com or (303) 876-2203, or the Jackson Lewis attorney with whom you normally work.

Mail regarding your subscription should be sent to contactus@jacksonlewis.com or Jackson Lewis P.C., 666 Third Avenue, New York, NY 10017, Attn: Client Services. Please include the title of this publication.