Do the FMLA Confidentiality Rules Trump the OSHA Recordkeeping Requirements?

By Jacqueline Bollas Caldwell, Esq.

In September 2014, the Occupational Safety and Health Review Commission (OSHRC) said yes -- the Family Medical Leave Act (FMLA) confidentiality requirements supersede an employer’s duty to record injuries and illnesses under the Occupational Safety & Health Administration standards. (Secretary of Labor v. United States Postal Service, OSHRC, No. 08 1547, 9/29/14).

Although the individual facts are always important, in general, in applying the OSHRC ruling, if an employer receives information in an FMLA leave application stating that a condition is work-related, but the employer does not have any independent knowledge of the information, then the employer does not have to record this information in its OSHA logs and reports.

In this case, an employee of the United States Postal Service (USPS) requested FMLA leave after finding out that she was allergic to dust in the facility where she worked. In her leave application, the employee included a statement from her physician that the employee’s condition was exclusively caused by her work environment. This matter was not recorded on the OSHA 300 or 301 forms. OSHA inspected after a complaint by the employee at issue and cited the USPS for failure to record. The USPS contested the citation, alleging that the FMLA required this information to remain confidential and solely in the possession of the FMLA coordinator; therefore, the employer could not be considered to “know” the condition was work-related. Because the employee’s supervisor did not have independent knowledge of this information, it did not need to be recorded.

The OSHRC sided with the employer, concluding that “Because the [FMLA] provision plainly states that the use of FMLA documentation for non-exempted purposes, we conclude that such documentation may not be reviewed by an employer for OSHA recordkeeping purposes.” In sum, the OSHA recordkeeping requirements may be trumped by confidentiality provisions in other labor laws.

For more information please contact Jacqueline Bollas Caldwell of Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A. at: 330-244-2864 or jcalldew@kwgd.com.

NOTE: This general summary of the law should not be used to solve individual problems since slight changes in the fact situation may require a material variance in the applicable legal advice.

December 11, 2014

“The 12 Days of Safety - Developing Safety Strategies for Outcomes”

Speaker: Valarie A. Nash
Deputy Director, Human Resources & Support Services, Summit County Children Services

If you want to experience enthusiasm at its most charismatic you will not want to miss our December luncheon. The always vivacious Valarie Nash will share her techniques to developing safety strategies that can get results!

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Please be sure to stop in and visit us at our new 5000 square foot US SafetyGear Canton South store at 2813 Cleveland Avenue S.W., Canton, Ohio, 44707. The store hours are Monday-Friday 8am-7pm and Saturday from 9am-2pm. Our store manager is Greg Flanigan and you can reach him at (234)214-8808.
Q: What are the employer responsibilities to protect temporary workers?

A: There is a joint responsibility of the host employers and the staffing agencies.

While the extent of responsibility under the law of staffing agencies and host employers is dependent on the specific facts of each case, staffing agencies and host employers are jointly responsible for maintaining a safe work environment for temporary workers - including, for example, ensuring that OSHA's training, hazard communication, and recordkeeping requirements are fulfilled.

OSHA could hold both the host and temporary employers responsible for the volatile condition(s) - and that can include lack of adequate training regarding workplace hazards. Temporary staffing agencies and host employers share control over the worker, and are therefore jointly responsible for temporary workers' safety and health.

OSHA has concerns that some employers may use temporary workers as a way to avoid meeting all their compliance obligations under the OSH Act and other worker protection laws; that temporary workers get placed in a variety of jobs, including the most hazardous jobs; that temporary workers are more vulnerable to workplace safety and health hazards and retaliation than workers in traditional employment relationships; that temporary workers are often not given adequate safety and health training or explanations of their duties by either the temporary staffing agency or the host employer. Therefore, it is essential that both employers comply with all relevant OSHA requirements.

A key concept is that each employer should consider the hazards it is in a position to prevent and correct, and in a position to comply with OSHA standards. For example: staffing agencies might provide general safety and health training, and host employers provide specific training tailored to the particular workplace equipment/hazards.

- The key is communication between the agency and the host to ensure that the necessary protections are provided.
- Staffing agencies have a duty to inquire into the conditions of their workers' assigned workplaces. They must ensure that they are sending workers to a safe workplace. They also must verify that the host has fulfilled its responsibilities for a safe workplace.
- Ignorance of hazards is not an excuse.
- Staffing agencies need not become experts on specific workplace hazards, but they should determine what conditions exist at their client (host) agencies, what hazards may be encountered, and how best to ensure protection for the temporary workers.
- And, just as important: Host employers must treat temporary workers like any other workers in terms of training and safety and health protections.
Dear Safety Council Friends,

On behalf of the Stark County Safety Council please accept our heartfelt thanks for the overwhelming number of mittens and hats donated by our members. Your generosity is truly appreciated by us but even more by needy families in our community.

At this year’s Light Up Downtown festivities on Dec. 4, the Canton Fire Department will be handing out hats and mittens to those families in need.

Don’t forget about our last community project of the 2014 season. The Stark County Safety will again host a Toys For Tots Holiday Toy Drive at our December 11th meeting. Many, less fortunate children in our community will not get the items on their wish lists this holiday season. Please join us in spreading some holiday happiness to these children by donating NEW, UNWRAPPED toys. You’ll help make a difference for these needy children and their families.

Don’t have time to shop? Company or personal donations checks made payable to Toys for Tots are also accepted.

UPCOMING

March 25 - Save the Date - SCSC CEO Breakfast at Skyland Pines: more info to follow.

March 31-April 2—Ohio BWC Safety Congress & Expo. For more information go to www.ohiobwc.gov.
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ow, as the old saying goes, “time flies when you are having fun!” Although it does not seem like two years have passed this message serves as my last communication as your Stark County Safety Council Chairman. I am truly grateful to have had the opportunity to serve you and very delighted to see the continued growth of unity and strength shown by our members. This fact alone is a major reason why we continue to be names as one of the top safety councils in Ohio year after year!

So many great things have happened during the past two years that it is difficult to focus on any one accomplishment. I am particularly proud to see a marked increase in member commitment and active participation. My main goal when I accepted this appointment was to make sure that each and every one of you knows that this is your safety council. We have been averaging 275 -300 members each month- how awesome are those numbers! It is rewarding for me to know that our members recognize the value and significance of safety council participation.

I want to thank our dedicated steering committee. What a diverse group of amazing individuals. In January Chris Zabel of US Safety Gear will take the reins and let me assure you that you are in very capable hands. The program committee has some very appealing topics lined up for 2015 and is in the midst of securing great speakers. Chris will give you more details in January.

What can I say about our BWC rep, Robin Watson! We are so fortunate to have the best of the best. Her guidance and expertise has been a true blessing to me. Thank you my friend!

Lastly I want to express my deep appreciation and gratitude to Connie Cerny, our safety council program manager. Her devotion and passion for the SCSC is unrivaled. She never misses a beat and always keeps us on track.

I wish you all a very safe and extraordinary Holiday Season and it has been a genuine pleasure serving you!

Fondly,

Deb