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Weekly Employment Brief

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Anthrax: OSHA's Risk Reduction Matrix

The US Department of Labor has issued guidelines to assist employers in responding to anthrax exposure. Specifically, OSHA has developed a "Risk Reduction Matrix" wich provides guidance, not requirements, for employer. The "green zone," which represents the majority of American worksite, applies to workplaces where exposure to anthrax spores is unlikely. The "yellow zone" and "red zone" apply, respectively, to workplaces where contamination is possible and where contamination has been confirmed, strongly suspected or where the employer itself encounters anthrax spores in emergency response or clean-up. For each "zone," OHSA suggests practices and certain protective equipment that may be required or used voluntarily. OSHA also provides references to other resources for information about anthrax and recent developments. OSHA's Risk Reduction Matrix is available at www.osha.gov/bioterrorism/anthrax/matrix/index.html.

Non-Compete Agreements: Another One Bites the Dust

California employers beware - an employer may be held liable for wrongful termination and tort damages for discharging an employee who refuses to sign an overbroad non-compete agreement. In *Walia v. Aetna, Inc.*, an Account Manager refused to sign a non-compete agreement prohibiting her from working in most of the healthcare industry in California for six months after her departure from the company. While Aetna claimed that the non-compete provision was necessary to protect its "trade secrets" the court held that the provision was unlawful and that the termination violated California public policy. California employers should be mindful of the serious ramifications of requiring employees to sign non-compete agreements. Such agreements are generally unlawful under California Business and Professions Code section 16600. Employers should consider using other measures, such as confidentiality agreements, to protect important proprietary information.

"Interactive Dialogue" Best Solution

An Eemployee who requested FMLA leave, but was asked to postpone the leave and was ultimately denied the leave, recently survived his employer's motion for summary judgment. In *Shtab v. Greate Bay Hotel and Casino, Inc.*, the plaintiff requested FMLA leave to care for his autistic son, but the employer wanted to delay his FMLA leave until after the Memorial Day weekend. The plaintiff did not work that weekend, and provided the employer with medical certification. Because the certification provided for intermittent leave beginning May 28, but failed to address the Memorial Day weekend absencebeginning after the weekend, the employer denied the employee's request for FMLA leave and terminated him. The court held that given the factual questions in the record, the employer might have been obligated to allow the employee to cure the deficiencies in his medical certification based on the provision in the FMLA requiring employers to allow employees to amend incomplete certifications. Additionally, the court held that the employer's request to delay the leave may have chilled the plaintiff's assertion of rights or contributed to the ultimate termination decision. As the court noted, and employers should take to heart, the employer's conduct was in "stark contrast to the type of 'interactive dialogue' in

which most employers engage with their employees who request FMLA leave." Such "'interactive dialogue'" may can not only foster a productive work environment, and but also prevent unintended problems and unwanted litigation.

Q & A COLUMN

Q: What happens when OFCCP schedules a Compliance Evaluation, but the contractor has splintered the employee populations at that EEO-1 "establishment" into two or more Affirmative Action Plan "establishments" (*i.e.*, balkanized the AAPs)? Which AAP or AAPs does OFCCP audit?

A: A "rugby scrum" ensues.
OFCCP currently schedules most Compliance Evaluations based on the contractor's self-declared "EEO-1 establishment." If the contractor has, however, balkanized the "EEO-1 establishment" into two or more AAP establishments, OFCCP will exercise its discretion to audit one or more or all of the AAPs it finds which cover employees reported as working at that EEO-1 establishment. Most commonly, OFCCP will audit one AAP, but not all of the AAPs, the contractor has developed for that EEO-1 establishment.

However, I also conclude that OFCCP has Fourth Amendment authority to review ALL of the several AAPs that OFCCP finds the contractor developed for the at-issue EEO-1 establishment (since OFCCP properly deployed, presumably, a "neutral administrative plan" to pluck the at-issue EEO-1 establishment out of the EEDS system for evaluation).

So, the contractor is left to rally common sense arguments to OFCCP (the "rugby scrum") about why OFCCP would not be well served to expend its resources to review more than one of the several, particular, balkanized AAPs at-issue.

Moral of the story: Be kind to your local OFCCP auditor.

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