
LEGAL ALERT

OSHA Criticizes Safety-Incentive Programs, Encourages Whistleblowers

For several years, we have encouraged employers to move away from safety-management programs which primarily track the program's effectiveness based upon recordable injuries, and which utilize monetary-incentive programs based on the number of recordable workplace injuries. Our principal reason for discouraging such programs is that recordable incidents focus on "lagging" indicators, may not identify causes, and may be affected by the capriciousness of timing and "bad luck."

But employers now have another reason to increasingly shift away from programs primarily driven by recordables. Even before the current Administration took office, its leaders questioned the accuracy of employer recordkeeping and asserted that employees underreport workplace injuries in order to participate in safety incentive programs, or as a result of pressure imposed upon them by employers.

Moreover, all branches of the U.S. Labor Department have steadily escalated their emphasis on the prosecution of whistleblower claims. OSHA has actively encouraged employees to be sensitive to possible retaliation and discrimination on the basis of protected behavior, including safety-related activities, especially "reporting recordable injuries." Numerous court decisions have come out in the last few years in which OSHA claimed that terminations for safety violations associated with injuries were a pretext for retaliation.

OSHA's Focus On Incentive Programs Is Increasing

Last June, Assistant Secretary Dr. Michaels, issued a memorandum stating that "a company whose incentive program has the potential to discourage worker reporting fails to meet the Voluntary Protection Programs (VPP) safety and health management system requirements." While OSHA's official position is that it would only refuse VPP approval if an incentive program discourages employees from reporting injuries, OSHA's public and private comments since that time indicate that the Agency may view all such programs negatively.

Then, on September 21, 2011, following the VPP announcement, OSHA issued an updated Whistleblower Investigation Manual, and followed up on March 1 of this year with a major restructuring of the "Office of Whistleblower Protection Programs," which officially further elevated the importance of whistleblower enforcement.

The Office now reports directly to the Head of OSHA, Assistant Secretary of Labor, Dr. Michaels. This move, along with the substitution of employer rights and whistleblower information for safety subjects in the



widely required OSHA_10 safety training program have caused observers to question why OSHA is so emphasizing whistleblower claims when its core safety enforcement efforts cry out for more resources.

What Your Response Should Be

With these concerns in mind, we recommend that employers carefully review the March 12, 2012 Memorandum on "Employer Safety Incentive and Disincentive Policies and Practices." Recognize that OSHA considers "reporting an injury to always be a protected activity," and will be suspicious if an employee is disciplined, terminated, or suffers other adverse action after reporting a workplace injury. OSHA considers a policy to discipline *all* employees who are injured, regardless of fault, to be discriminatory.

OSHA also states that it will "carefully scrutinize" situations where an employee who reports an injury or illness is disciplined, and the stated reason is that the employee has violated an employer rule about the time or manner for reporting injuries and illnesses. OSHA grudgingly recognizes that employers have a legitimate interest in establishing procedures for receiving and responding to reports of injuries, but emphasizes that employers should not "unduly burden the employee's right and ability to report."

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In the context of disciplining employees for not following reporting procedures, OSHA will consider 1) whether an employee's deviation was minor, inadvertent, or deliberate; 2) whether the employee had a reasonable basis for acting as he or she did; 3) whether the employer can show the importance of the rule and its enforcement; and 4) whether the discipline imposed appears disproportionate to the employer's interest.

In addition, OSHA will seek to determine if it appears that injured employees are disciplined more frequently or severely than uninjured employees who act in an unsafe manner. The Memorandum states that it will consider whether the employer actively monitors the workplace for compliance with the work rules "in the absence of an injury."

OSHA also will carefully scrutinize "vague rules, such as a requirement that employees maintain situational awareness or work carefully." Such a focus makes it essential that employers review and make effective near-miss, self-reporting, safety-observation and similar programs.

Finally, be careful not to establish "programs that unintentionally or intentionally provide employees an incentive to not report injuries." For example, programs awarding prizes or money to employees or a team of employees if no one from the team is injured over a certain period of time are not automatically illegal, but are frowned upon by OSHA. It is better to provide incentives to employees who use safe practices, get involved, obtain additional training, etc.

While there are countless effective ways to track and reward safe behaviors and to engage employees, employers have a legitimate desire want to track and consider recordables and related subjects in incentive and tracking programs. OSHA has provided little guidance on the balance and mix of actions.

This Memorandum, if viewed in the context of current OSHA whistleblower actions against employers raises other questions which employers should carefully consider, including:

- what is the role of recordable injuries and measuring the effectiveness of safety management processes and incentivizing employees?
- should an employer include recordable injuries as one of a number of factors in an incentive program?
- is it lawful to include recordable injuries along with other safety and non-safety factors in bonuses which consider productivity, quality, safety, and other operational factors?
- what "leading indicators" should be tracked and incentivized, and by what process?
- has the employer reviewed supervisor and management bonuses to determine if such bonuses may unintentionally discourage employees from reporting injuries, or be perceived as a discouragement by OSHA?

We hardly need another reason to encourage clients to review and revamp incentive programs or be wary of increased risks associated with whistleblower claims, but these developments certainly increase the sense of urgency.

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