OSHA Warning: Don't Get Caught in the Trap

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Last June, Assistant Secretary of Labor Dr. David 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 Sept. 21, 2011, following the VPP announcement, OSHA issued an updated Whistleblower Investigation Manual, and followed up on March 1 with a major restructuring of the Office of Whistleblower Protection Programs, which further elevated the importance of whistleblower enforcement. The office now reports directly to Michaels. This move, along with the substitution of employer rights and whistleblower information for safety subjects in the widely required OSHA 10-hour safety training program have caused observers to question why OSHA is emphasizing whistleblower claims when its core safety enforcement efforts cry out for more resources.

With these concerns in mind, we recommend the following steps:

1. Carefully review the March 12 memorandum on Employer Safety Incentive and Disincentive Policies and Practices.
2. 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.
3. 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.
4. OSHA also reiterates in the memorandum its increasingly aggressive consideration of whether application of facially neutral rules may be a pretext for taking action against employees for reporting injuries.
5. The memorandum next takes aim at a more problematic area where OSHA raises its concern that employers may "attempt to use a work rule (safety) as a pretext for discrimination against a worker who reports an injury." Put simply, 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.

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6. Such a focus makes it essential that employers review and make effective near-miss, self-reporting, safety observation and similar programs.
7. Finally, OSHA expresses concerns about employers establishing programs "that unintentionally or intentionally provide employees an incentive to not report injuries."
8. This memorandum, if viewed in the context of current OSHA whistleblower actions against general employers under Section 11(c) of the OSH Act and against railroad carriers, contractors or subcontractors, raises other questions that employers should carefully consider, including:

(a) What is the role of recordable injuries and measuring the effectiveness of safety management processes and incentivizing employees?

(b) Should an employer include recordable injuries as one of a number of factors in an incentive program?

(c) Is it lawful to include recordable injuries along with other safety and non-safety factors in bonuses that consider productivity, quality, safety and other operational factors?

(d) What "leading indicators" should be tracked and incentivized, and by what process?

(e) Has the employer reviewed supervisor and management bonuses to determine if such bonuses unintentionally discourage employees from reporting injuries, or could 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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