



Show Me the Money! Have You Reviewed Your Incentive and Bonus Programs Lately?

Insights

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Over the last couple of years, employee incentive programs have been under attack from the Department of Labor. However, OSHA and MSHA have undertaken their efforts against incentive programs in different ways. In the preamble to the 2016 proposed amendments to 29 CFR § 1904.35, OSHA discussed how it could issue citations to employers based on workplace safety incentive programs should the program be found to discourage reporting of injuries. MSHA has been battling the issue through litigation with appeals still currently pending as explained more fully below.

Now, OSHA plans to issue a Notice of Proposed Rulemaking to memorialize OSHA's most recent position on these issues through changes to 29 CFR § 1904.35(b)(1)(iv) related to safety incentive programs. A proposed regulation is projected for September, 2020.

What both agencies are showing is an inclination to weed out incentive programs based solely on injury or illness rates. If your incentive program is tied to the number of reported injuries, it should be reviewed regardless of which agency regulates your workforce.

OSHA'S Most Recent Position

In October 2018, OSHA issued a memorandum that purported to clarify its position that 29 CFR § 1904.35 does not prohibit workplace safety incentive programs. OSHA stated that actions taken under a safety incentive program would only violate OSHA regulations if the employer took the action to penalize an employee for reporting a workplace injury or illness rather than for the legitimate purpose of promoting workplace safety and health. OSHA further stated that rate based incentive programs are permissible under 29 CFR 1904.35 as long as they are not implemented in a manner that discourages reporting. Employers were encouraged to implement "adequate precautions" to ensure that employees feel free to report an injury or illness despite possibly losing out on an incentive due to an injury. OSHA does not state what "adequate precautions" could be under the rule. However, simply stating that employees are encouraged to report and will not face retaliation, may not be enough to ensure employees feel free to report according to the memo. OSHA does provide that employers can avoid the inadvertent deterrent effect of a rate based incentive program by taking positive steps to create a workplace culture that emphasizes safety and not just injury and illness rates.

While OSHA appeared out in front of the incentive program issue with their May 2016 amendments, MSHA has been attempting to enforce a similar policy through litigation.

MSHA'S Most Recent Position

Through litigation, MSHA is pushing the agenda that bonus or incentive programs may violate a miner's rights under the Mine Act if found to discourage reporting or the exercise of walk-around rights.

In *Secretary on behalf of Greathouse v. Monongalia County Coal, et al.*, 38 FMSHRC 941 (ALJ Miller May 2016), the mine implemented safety and production bonus plans at six of its mines. The plans offered miners monetary bonuses if their assigned section produced a certain amount of coal during their shift. The bonus amounts ranged from \$50-\$250 per shift depending on how much coal was produced. Certain circumstances disqualified miners from receiving a bonus notwithstanding sufficient coal production. These circumstances included not being physically present in the section the entire shift, if a lost time accident occurred to the crew, or if a certain type of citation was issued to that section.

Miners testified that the bonus potential made it less likely that miners were willing to serve as walk-around representatives as they would not be eligible for the full bonus amount. Other miners reported instances of individuals not reporting injuries as they did not want to disqualify themselves and their coworkers from receiving a bonus. As a result, this bonus plan scheme was found to be in violation of the Mine Act by interfering with the right to report injuries and participate with MSHA during an inspection. The case is currently on appeal to the D.C. Circuit.

Take-away

For the past few years, both agencies have signaled an intent to move employee incentive programs away from reported injuries and illness and towards more leading indicators, such as near miss reporting and safety participation activities. OSHA's memorandums and notice of proposed rulemaking provides employer's with more notice than MSHA's route of litigation, but both should warrant a review of employee incentive programs. For assistance with reviewing and creating programs containing leading indicators, please contact a Workplace Safety Attorney with Fisher Phillips.

Related People





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