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OSHA UPDATE

OSHA ISSUES A NEW GUIDANCE MEMO ON SAFETY INCENTIVE PROGRAMS

In its September 28, 2010 Directive on the Injury and Illness Recordkeeping National Emphasis Program (NEP), OSHA announced its intention to investigate "company policies that may have the effect of discouraging recording on the injury and illness records . . . . " Specifically, OSHA stated in the Directive that its Compliance Officers would look at "an awards program tied to the number of injuries and illnesses recorded on the OSHA 300 Log," as well as the "existence of incentive or disciplinary programs that may influence recordkeeping." The Recordkeeping Directive also contained specific interview questions that focus on the existence of such safety incentive programs: "Does the Company have safety incentive program or programs that provide prizes, rewards, or bonuses to an individual or groups of workers based on the number of injuries and illnesses recorded on the OSHA 300 Log?" "Are there demerits, punishment, or disciplinary policies for reporting injuries or illnesses?"

Although the Recordkeeping NEP Directive addressed such safety incentive and disincentive programs and policies, the Directive did not explain what, if any, consequence there was to having such programs or policies. With the issuance of its new March 12, 2012, **guidance memo**, OSHA has now explained how its Compliance Officers and Whistleblower Investigators are to respond to such programs and practices.

OSHA is taking the position in the March 12 guidance memo that practices that discourage employee reports of injury or illness can constitute unlawful retaliation under Section 11(c) of the OSH Act. Section 11(c) provides that an employer "shall not discharge or in any manner discriminate against any employee . . . because of the exercise . . . of any right afforded by [the OSH Act]." As OSHA explains it, "Reporting a work-related injury or illness is a core employee right, and retaliating against a worker for reporting an injury or illness is illegal discrimination under section 11(c)."

Among employer practices or policies that would lead to increased scrutiny, OSHA lists the following as "the most common potentially discriminatory policies":

1. Disciplinary actions against employees who are injured on the job, regardless of the circumstances surrounding the injury. If all employees were disciplined for incurring an injury, regardless of fault, then OSHA reasons that an employee is being disciplined for reporting the injury. Because § 1904.35(b) of the Record-keeping Regulations requires employers to establish a way for employees to report injuries, OSHA views the reporting of work-related injuries as a right protected under Section 11(c) from discrimination or retaliation.

2. Disciplinary action against an employee who has violated an employer's rule "about the time or manner for reporting injuries or illnesses." OSHA explains that while employers may have a legitimate interest in establishing procedures for the timely reporting of injuries and illnesses, "such procedures must be reasonable and may not unduly burden the employee's right and ability to report." The guidance memo identifies the following criteria in investigating such disciplinary action: Whether the employee's deviation from the procedure was inadvertent or deliberate, whether the employee had a reasonable basis for acting as he or she did, and whether the discipline is disproportionate to the employer's interest in having such a procedure or requirement.

3. Disciplinary actions for violations of a safety rule, if it is used as a pretext for discrimination against an employee for reporting an injury or illness. Compliance Officers and Whistleblower Investigators are directed to focus on whether the employer consistently monitors compliance with the safety rule in the absence of an injury and whether it uniformly disciplines for violation of the safety rule in the absence of injury. If discipline is issued only when an employee is injured, such disciplinary decisions will be considered suspect.

4. Programs that intentionally or unintentionally provide employees with an incentive not to report injuries or illnesses such as rewarding employees with prizes or bonuses if the employees have not been injured over a given period of time. OSHA's position is that if the effect of an incentive program is great enough to dissuade a reasonable employee from reporting a work-related injury, the employer may be found to have unlawfully discriminated against an employee under Section 11(c) of the OSH Act, and may also have failed to record a recordable case. OSHA does not specify what level of incentive would be great enough to dissuade an employee from reporting an injury or illness. Instead, OSHA encourages employers to develop incentives that promote employee participation in safety-related activities, such as identifying hazards, participating in the investigation of accidents, or serving on a safety committee.

Although this guidance memo does not ban the use of the typical safety incentive programs in which employees are rewarded either individually or as a group for going through a month, quarter, or year without incurring recordable cases or without a case involving days away from work, this memo signals that OSHA will more actively scrutinize such programs both as possible 11(c) discrimination and as a possible violation of recordkeeping requirements. OSHA has also stated that the potential for unlawful discrimination under any of these policies "may increase when management or supervisory bonuses are linked to lower reported injury rates."

Although not specifically addressed by the March 12 guidance memo, the issue of the use of incentive programs based upon injury and illness statistics has also been under increased scrutiny in OSHA's review of VPP applications and recertifications. The agency's official policy is that it is opposed to such programs only if they discourage employees from reporting injuries, which would suggest that some injury and illness based incentive programs would be acceptable. In practice, however, it appears that the agency may view all such programs negatively.

While it remains to be seen how the substance of this guidance memo will be translated into enforcement activity, it seems clear that OSHA has again signaled its intent to increase its enforcement efforts. Some employer with a particularly rich incentive, or with what is perceived as a particularly tough disciplinary program, will become the test case for this new enforcement policy. It seems hard to avoid the conclusion that employers with challenging labor relations environments will head the list of possible OSHA 11(c) targets if employees are being disci¬plined for either failing to report an injury in a timely manner or for violating a safety rule upon which an employee had been trained, despite the fact that this has always been an employer's legal right to take such disciplinary actions.

And, even employers who do not have particularly challenging labor relations issues, will be subject to an 11(c) investigation or a recordkeeping inspection if they have a safety incentive program whose incentives are deemed too rich by a Compliance Officer or Whistleblower Investigator. For example, if you raffle off a truck for those employees who went through a year without a recordable case, this procedure will have a much greater potential to bring OSHA to your door. As the proverb says, whatever you do, do it in moderation. And, if you have a safety incentive program tied to OSHA recordable cases, make sure that you reinforce with your employees the need to report all work-related injuries or illnesses.

If you have any questions, please email us at:

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