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LEGAL INFORMATION, NEWS AND COMMENTARY FOR EMPLOYERS

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OSHA sharpens focus on employer safety incentives and disincentives



BY NATHAN WHATLEY

The Occupational Safety and Health Administration (OSHA), the federal agency charged with assuring safe and healthy working environments, recently issued a memorandum which takes aim at employer safety incentive policies and practices. According to OSHA, some of the programs which employers frequently implement as a way to encourage safe workplace practices may be viewed by the agency as discouraging employees from reporting job-related injuries.

The stated purpose of the March 2012 memorandum issued by DOL Assistant Deputy Secretary Richard Fairfax is to “provide guidance to both field compliance officers and whistleblower investigative staff on several employer practices that can discourage employee reports of injuries and violate section 11(c), or other whistleblower statutes.” Section 11(c) of the Occupational Safety and Health Act specifically prohibits an employer from discriminating against any employee because the employee reports a work-related injury or illness.

The OSHA memo voiced concerns that safety programs which provide some sort of an incentive – particularly those with rewards such as financial bonuses or prizes – may intentionally or unintentionally provide employees an incentive NOT to report injuries. It goes on to say that, as a result, workplace safety may be compromised, those who report injuries may be subject to unlawful discrimination or harassment, and “whistleblowers” may be unfairly targeted for retaliation. OSHA also states that the policies and practices of these safety programs may violate recordkeeping regulations, specifically the requirement associated with employee injury reporting.

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So does that mean an end to monthly pizza parties? Or that employers should remove signs which tout the company's current safety record ("___ Days Without An Accident")? The OSHA memo offered no clear-cut answers, but did say, "One important factor to consider is whether the incentive involved is of sufficient magnitude that failure to receive it 'might have dissuaded reasonable workers' from reporting injuries."

Instead, OSHA suggests that companies offer incentives that focus on individual and corporate efforts to improve safety, not on the results of those efforts. For example, several recommendations mentioned in the memo include offering modest rewards to employees who suggest ways to strengthen safety or "throwing a recognition party at the successful completion of company-wide safety and health training."

The OSHA memo also identified three other types of workplace policies that will be subject to increased scrutiny because of their potential for discouraging reporting, constituting unlawful discrimination, and violating section 11(c).

First, the memo states that because reporting an injury is always a protected activity, any employer whose policy it is to discipline all employees who are injured, regardless of fault, is automatically in violation of section 11(c). The fact that the employer disciplines all – and not just some – injured workers does not make the practice nondiscriminatory.

Second, employers should exercise caution when disciplining an employee for not reporting an injury according to the employer's established procedures. While OSHA recognizes that employers have a legitimate right to establish specific reporting procedures and timelines so that they can respond accordingly in a timely and appropriate manner, "such procedures must be reasonable and may not unduly burden the employee's right and ability to report." Examples cited in the memo include instances where an employee does not immediately realize his injuries are serious enough to report, or that he is injured at all. OSHA suggests employers investigate these issues on a case-by-case basis before determining whether employee discipline is justified.

And finally, the memo even cautions employers about imposing discipline on employees who were injured as a direct result of violating company safety rules, as OSHA believes some employers "may attempt to use a work rule as a pretext for discrimination against a worker who reports an injury." Again, a case-by-case investigation is recommended to determine, among other things, whether the employer consistently imposed equivalent discipline against workers who violated the same policy but did not get injured, and whether company safety rules are enforced consistently among injured and non-injured workers.

OSHA's memorandum continues the trend among federal agencies of increased scrutiny and stepped-up enforcement against employers. The employee discipline issues addressed in the memo are fairly straightforward. The impact on safety incentive programs will take more time to discern. In the meantime, employers should examine their policies with attention to issues such as: the role of recordable injuries in measuring the effectiveness of safety programs; whether it is possible to include recordable injuries along with other safety and non-safety factors in bonuses which consider productivity, quality, safety, and other operational factors; and whether the employer has reviewed supervisor and management bonuses to determine if the factors going into determining such bonuses may unintentionally result in management discouraging employees from reporting injuries, or be perceived as a discouraging such reports.

McAfee & Taft is continuing our analysis of the memo and its likely long-term impact, and how programs might be revised to address the issues raised above. We will be presenting a webinar on June 13 that will feature an in-depth review of the memo and offer tips on staying clear of OSHA penalties while maintaining a program that has a positive impact on safety.

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