



MARCH 2012

Recent OSHA Memorandum Provides Important Guidance Regarding Employer Safety Incentive Programs

Many employers have policies and practices that reward employees for safe behavior. On March 12, 2012, the Occupational Safety and Health Administration (OSHA) issued a memorandum that provides important guidance about the agency's interpretation of policies and practices that lawfully reward employees for safe workplace behavior and those that may be considered unlawful because such policies (intentionally or unintentionally) provide employees a disincentive to report injuries. The memo clarifies that reporting a work-related injury or illness is a right and that employer retaliation against an employee for exercising that right is illegal under Section 11(c) of the OSH Act, other whistle-blower programs (for example, the Federal Railroad Safety Act), and OSHA's record-keeping regulations under 29 CFR 1904.35(b).

Section 11(c) prohibits an employer from discriminating against an employee because the employee reports an injury or illness. Employer practices or policies that discipline workers who report injuries for violations of work rules may be considered a violation of 11(c) if they are unreasonable or applied unevenly (for example, only to injured workers and not all workers) and could be considered a pretext for discrimination.

The memo also advises that incentive policies/programs that discourage workers from reporting injuries may be illegal, both under 11(c) and under the record-keeping rule if they dissuade workers from reporting. The most common workplace policies and practices that discourage reporting and violate an employee's rights under 11(c) for reporting an injury or illness include the following:

- Disciplinary sanctions against any employee who is injured on the job, regardless of the circumstances
- Procedures for receiving and responding to reports of injuries that are unreasonable or enforced with unjustifiably harsh sanctions
- Work rules that are used as a pretext for discrimination against an employee who reports an injury

- Incentive programs, including bonuses or drawings for prizes for those who don't report injuries or illnesses, that intentionally or unintentionally discourage reporting by employees

Significantly, the potential for an agency finding of unlawful discrimination under any of the above-listed policies may increase when management or supervisory bonuses are linked to lower-reported injury rates.

Due to OSHA's increased emphasis on whistle-blower enforcement, employers would be well-served to be prepared for OSHA inspections, which may involve onsite evaluations with specific questions designed to determine whether they are underreporting injuries and how incentive programs may affect the reporting of injuries and illnesses. The recent OSHA guidance evidences OSHA's expectation that employers will continue to promote and create an environment where managers and employees understand the importance of safe behavior, accident prevention, and internal reporting of unsafe activity and injuries in the workplace, including protection against retaliation for such reporting. Refresher safety training programs, quarterly or biannual employee notices, and user-friendly reporting policies in the company handbook are also considered best practices that may help to reduce the risk of whistleblower, retaliation, and record-keeping claims.

Download the full text of the memo here:
<http://www.osha.gov/as/opa/whistleblowermemo.html>.

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