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Legally Effective Incentive and Disciplinary Programs

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Introduction

For the past few years, incentive and discipline programs have come under increased critical scrutiny from the Occupational Safety and Health Administration (OSHA), culminating in the March 2012 release of a policy directive to enforcement personnel that recharacterizes the issue as both a "whistleblower" protection issue in violation of Section 11(c) of the Occupational Safety & Health Act of 1970 (OSH Act), and also as grounds for enforcement under 29 CFR Part 1904. The law also prohibits an employer from discriminating against an employee because the employee reports an injury or illness. 29 CFR 1904.36.

In addition, as discussed below, OSHA may demand changes to employer programs as a condition of a Corporate-Wide Settlement Agreement. These developments have ramifications for safety and health professionals, risk management personnel, and legal practitioners.

Much of the focus on incentive and disciplinary programs comes as the result of a perception that, applied improperly, they can result in underreporting of occupational injuries and illnesses (whether or not that is the intent of the program). When OSHA does an audit of records during an inspection, and finds that injuries/illnesses are not reported properly, it can cite and fine the employer under its "egregious" penalty system (a separate penalty per affected worker, rather than a single penalty encompassing all employees at the worksite in a single violation). Any employed cited by OSHA for egregious violations becomes subject to the agency's Severe Violation Enforcement Program (SVEP), which triggers a new inspection of every other worksite in the United States operated by that employer.

Although the Mine Safety and Health Administration (MSHA) has not released any policy specific related to incentive and disciplinary programs, it regularly conducts Part 50 audits of injury/illness records (the Form 7000-1), and will interview miners to see if there were injuries/illnesses that occurred in the workplace that were not reported. Generally, such violations are characterized as "high" negligence and may be specially assessed at up to $70,000 per violation. In addition, if miners tell MSHA that they were discouraged from reporting injuries or illnesses, or were deprived of bonuses or other benefits for doing so, it is likely that they will be encouraged to file a whistleblower complaint under Section 105(c) of the Mine Act. In these situations, not only can MSHA sue the employer to restore the worker's benefits or bonus, but it can also fine the company -- and any of its agents of management who were involved in the discriminatory action under Section 110(c) of the Mine Act -- in an amount up to $70,000.

OSHA notes that other whistleblower statutes that it enforces have similar constraints. For example, the Federal Railroad Safety Act (FRSA) prohibits railroad carriers, their contractors and subcontractors from discriminating against employees for reporting injuries. 49 U.S.C. 20109(a)(4).

OSHA's Policy on Incentive and Disciplinary Programs

OSHA's campaign, launched in its March 12, 2012, directive to its regional administrators and whistleblower enforcement personnel (http://www.osha.gov/as/opa/whistleblowermemo.html), targets traditional safety incentive programs that are injury/illness based: specifically, those that offer a monetary or other substantive record or prize to individual workers, teams of workers, and/or supervisors, where such reward is predicated on the worker, team or entire company having no lost workdays for a specific period of time.

While money-based programs are especially vulnerable to OSHA criticism, OSHA Assistant David Michaels told ASSE's Professional Development Conference, in 2010: "We also disapprove of incentive programs that, for example, offer a pizza party or allow workers to enter a raffle for a new truck. These incentive programs can discourage employees from reporting injuries because they want to receive the reward."

This is has been a concern of OSHA's for a while. In fact, in an interpretative letter from 2000, the agency's director of compliance programs assistance wrote: "OSHA neither approves nor disapproves the design or the effectiveness of safety incentive programs. However, we do not look favorably on safety incentive programs, which encourage under reporting of workplace injuries." *See* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=23721.

Why has OSHA has taken aim at incentive and discipline programs? Dr. Michaels, speaking at a conference for the Occupational Safety & Health Review Commission (OSHRC, which adjudicates federal OSHA citations), stated: "We are . . . concerned that many employers' reports of injuries and illnesses are inaccurate. Our inspections have uncovered evidence of employers discouraging workers from reporting injuries or seeking medical treatment that would lead to an OSHA-recordable incident. This is unacceptable." But, the real bottom line is impact on safety and health in the specific workplace. As Dr. Michaels said: "When worker injuries and illnesses are concealed, no investigation by the employer or OSHA can take place, so nothing is learned, nothing is corrected, and workers remain exposed to future harm."

OSHA does not have a bright-line test as to which incentive programs are, or are not, permissible. However, it does provide some insight via guidance in its Voluntary Protection Program (VPP). In 2011, the following information was published as a framework for acceptable (and unacceptable) incentive programs for existing VPP participants who wish to requalify, as well as for new applicants.

OSHA wrote:

> A positive incentive program encourages or rewards workers for reporting injuries, illnesses, near misses, or hazards; and/or recognizes, rewards, and thereby encourages worker involvement in the safety and health management system. Such an incentive program can be a good thing and an acceptable part of a VPP-quality safety and health management system. Examples of such positive incentives include providing tee shirts to workers serving on safety and health committees; offering modest rewards for suggesting ways to strengthen safety and health; or throwing a recognition party at the successful completion of company-wide safety and health training.

See *Revised VPP Policy Memorandum #5: Further Improvements to the Voluntary Protection Programs (VPP)* (6/29/2011), http://www.osha.gov/dcsp/vpp/policy_memo5.html.

In the same memorandum, OSHA took aim at what it termed "disincentive programs," stating:

> An incentive program that focuses on injury and illness numbers often has the effect of discouraging workers from reporting an injury or illness. When an incentive program discourages worker reporting or, in particularly extreme cases, disciplines workers for reporting injuries or hazards, problems remain concealed, investigations do not take place, nothing is learned or corrected, and workers remain exposed to harm. Disincentives to reporting may range from awarding paid time off to a unit that has the greatest reduction in incidence rates to rewarding workers with a pizza party for achieving an injury/rate reduction goal or maintaining an injury- and illness-free worksite for a period of time. A company whose incentive program has the potential to discourage worker reporting fails to meet the VPP's safety and health management system requirements.

For new VPP applicants, OSHA's memo suggests that, when faced with an incentive program containing provisions that could discourage injury and illness reporting, the OSHA Regional Manager should advise the applicant of OSHA's position and VPP policy. The applicant may choose to make an immediate change to its incentive program that will bring the program in line with VPP policy. If the applicant needs more than a short/nominal period of time to eliminate the disincentive and/or to revise its program, it would be appropriate to designate this needed improvement as a Merit goal, assuming the applicant qualifies for Merit participation. If the applicant refuses to make the needed change, OSHA will recommend that the applicant withdraw its VPP application.

For current VPP participants, when the agency reviews a Star participant's annual self-evaluation and finds a problem in the participant's incentive program, or if the VPP evaluation team uncovers disincentives to injury and illness reporting during its document review and employee interviews, the participant will be given the opportunity to bring its incentive program in line with VPP policy consistent with a 90-day item. Following the 90-day period during which the participant must eliminate the disincentive and/or revise its program, the Regional Administrator may choose to place the participant on Star One-Year Conditional status and

require the participant to demonstrate one year of effective implementation of the program change. A participant's refusal to make the recommended improvement to its incentive program is grounds for VPP termination.

While OSHA does not have regulations prohibiting employers from reducing bonuses based on the number of accidents reported, employers are required by regulation to record and maintain an accurate log and summary (OSHA Form 200) of all recordable injuries and illnesses. *See* 29 CFR 1904.2. Failure to include all recordable injuries and illnesses could result in the issuance of a citation and the assessment of a penalty, if the employee reports to OSHA that he or she was afraid to report the incident out of fear of retribution or losing a bonus or prize that they would otherwise receive under the company's incentive program.

Not all safety incentive programs are verboten, of course. If an employer rewards workers for safe behavior, using something other than injury/illness experiences as a measuring tool for what constitutes "safe behavior," that type of incentive program still passes muster and should not trigger adverse reactions from OSHA enforcement personnel. Examples include programs that reward workers for: conducting training toolbox talks, developing Job Safety Analyses for their tasks, making safety improvement suggestions, participating in audits, or being recognized for following safe procedures and implementing personal protective equipment.

Properly designed, safety incentive programs can have a 300 percent return on investment, according to Dr. W. Edwards Deming. Incentive programs can be an integral tool in pursuing the development of best practices in the workplace, can help employees identify when they are on the right track, and can benefit employees who get involved, identify potential hazards, make suggestions, and participate in creating a positive change in the workplace safety culture.

Disciplinary Programs Under Fire, Too

While much of the action arising from the OSHA policy emphasizes the incentive program issue, it does also address disciplinary programs (which OSHA views as having the potential for discouraging workers from reporting occupational injuries and illnesses). Given that having and enforcing disciplinary procedures linked to violations of OSHA standards or company safety policies is both common, encouraged by insurance companies, and a prerequisite for asserting the "unforeseeable employee misconduct" defense against OSHA citations, the discipline provisions in the policy are quite provocative.

The directive states that:

- An employer's policy to discipline all employees who are injured, regardless of fault, is not a legitimate nondiscriminatory reason that an employer may advance to justify adverse action against an employee who reports an injury.
- In OSHA's view, such a policy is inconsistent with the employer's obligation to establish a way for employees to report injuries under 29 CFR 1904.35(b), and a referral for a recordkeeping investigation should be made.
- Where an employee reports an injury or illness and 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, OSHA will careful scrutinize the case for a potential violation of Section 11(c).

- Where an employee reports an injury, and the employer imposes discipline on the ground that the injury resulted from the violation of a safety rule by the employee, OSHA may investigate.
- Although OSHA encourages employers to maintain and enforce legitimate workplace safety rules in order to eliminate or reduce workplace hazards, OSHA alleges that an employer may attempt to use a work rule as a pretext for discrimination, and more stringent enforcement against violators who also report an injury/illness may be a Section 11(c) violation.

In investigating such cases, factors such as the following may be considered by OSHA in determining whether a violation has occurred:

- whether the employee's deviation from the procedure was minor or extensive, inadvertent or deliberate,
- whether the employee had a reasonable basis for acting as he or she did,
- whether the employer can show a substantial interest in the rule and its enforcement, and
- whether the discipline imposed appears disproportionate to the asserted interest.

Shortly after the March 2012 policy was released, during an OSHA informal conference where disciplinary reports were produced by the employer, in support of an affirmative defense of unforeseeable employee misconduct, the OSHA area manager carefully scrutinized them to ascertain whether they were related to on-the-job injuries and required the employer to produce evidence that uninjured employees were similarly disciplined for the same offenses.

To determine what may and may not be permissible, it is helpful to review the questionnaires that were used by OSHA to interview workers as part of its outreach during the Recordkeeping National Emphasis Program that was in effect during 2009-2011 and which was, in part, the precursor for the incentive/discipline program memoranda of 2012. The questions hint at what OSHA considers to be "discipline" and invalid incentive programs that interfere with employees' rights under Section 11(c) or under 29 CFR Part 1904.

Among the questions asked was whether post-accident drug testing had the real-world impact of discouraging employees from reporting injuries on the job. OSHA was also directed to review copies of employer drug testing programs and policies, in addition to its review of incentive and discipline programs. Thus, drug testing and its impact on reporting of injuries/illnesses may be the next battleground under Section 11(c) if a sufficient number of employees responded positively (OSHA did not release its data on the responses to its questionnaires, which were subject to whistleblower protection privacy requirements).

The bottom line is that, while an employer can still impose discipline against workers who break the company's rules in terms of safety or who violate an OSHA standard, the agency will be on guard against discipline imposed in a disparate manner wherein those workers who were injured or became ill as a result of breaking the rule are penalized more harshly than those for whom the violation had no ill-effects ... or where the company does not follow its own published progressive discipline system.

Corporate-Wide Settlement Agreement Implications

Another development that should give employers pause is the inclusion of "Corporate-Wide Changes to Incentive Programs" provisions in Corporate Settlement Agreements (CSAs), where settlement of citations issued to one location of a company with many locations requires adoption of abatement procedures or other terms and conditions of settlement at all of a company's worksites. The utilization of CSAs is being encouraged by OSHA area offices in significant cases (those involving $100,000 or more in civil penalties) or where willful violations are involved. If the terms of the settlement are not honored, the employer can be prosecuted under OSHA's "failure to abate" provisions and additionally fined. As part of the CSA, the employer waives its right to seek a warrant or to require OSHA to obtain an administrative subpoena *duces tecum*, and the employer therefore is required to allow OSHA right of entry and free reign to obtain any documents it desires as a condition of settlement.

One recent example came in the case of *Secretary of Labor v. Exel Inc.* (OSHRC Docket No. 12-0683), involving a distribution center in the warehouse/storage industry sector in Pennsylvania. The company received five "willful" citation items for alleged violations of 29 CFR Part 1904 - the OSHA recordkeeping regulations - each of which was assessed at $50,000. The inspection was complaint-based and involved noise and ergonomic hazards (an "ergonomics letter" was issued, but that was not cited) but OSHA apparently did a recordkeeping audit as part of that inspection and discovered underreporting issues. The total proposed penalties were $283,000 and the CSA involved changing the "willful" classifications to "unclassified," dropping the penalties to $143,000, and requiring employer abatement of the safety/health hazards cited, and adoption of supplemental policies and training on recordkeeping.

It has not been uncommon for OSHA to require global abatement provisions in CSAs, or adoption of procedures or technology that goes beyond what is required by law (e.g., mechanical lifting devices to abate "ergonomic" based General Duty Clause citations), or even requirements to implement Safety and Health Management Programs. But what was a novel component of the Exel Inc. CSA was the section on Corporate Safety Incentive Programs.

The parties agreed "a positive incentive program can encourage workers and management employees to report and/or record injuries, illnesses, near-misses, or hazards, and can encourage worker and management employees' involvement in the safety and health management system. However, an incentive program that focuses on injury and illness numbers can have the effect of discouraging workers from reporting injuries or illnesses, and/or discouraging management employees from recording injuries or illnesses."

The employer agreed to eliminate any components of its incentive or bonus programs which provide any awards or benefits, or any reduction to awards or benefits, based upon the number of injuries or illnesses at a facility, and/or based upon attaining a certain injury and illness incidence rate over a set period of time. Exel Inc. agreed to eliminate a performance management process where incentive programs were reduced by 20 percent if there was more than one recordable injury in an area during a specified time period.

Exel Inc. also agreed, as a condition of settlement, to retain a Compensation and Benefits Expert who is qualified by education and experience in incorporating safety and health in incentive programs to assist the company in evaluating the inclusion of alternate safety-based

provisions in its Incentive and Bonus Programs. The consultant will be required to provide the employer with options for including in its incentive and bonus programs alternative methods of objectively measuring employee performance in the category of safety and health that do not rely upon the number of injuries or illnesses at a facility, and/or attaining a certain injury and illness incidence rate over a set period of time.

Conclusion

Both OSHA and MSHA will still permit the use of properly designed, and evenly enforced, incentive and disciplinary programs but how they are structured and applied is likely to be an issue when OSHA or MSHA do worksite inspections. Failure to adhere to the guidance provided, or disciplining workers simply because they were injured, could have a chilling effect on workers' willingness to timely and accurately report injuries and illnesses.

This absence of valid data thwarts both the employer's need to understand what is going on in its workplace for purposes of program improvement, and also interferes with OSHA's and MSHA's ability to compile accurate data that is part of both agency's statutory directives because the data are utilized to direct their rulemaking agendas and enforcement initiatives.

Knowing actions by an employer to interfere with workers' rights to report injuries without fear or retaliation can lead to costly litigation under both Section 11(c) of the OSH Act and Section 105(c) of the Mine Act, as well as possible underreporting penalties for violations of OSHA's Part 1904 and MSHA's Part 50.

The bottom line is that employers need to take prompt action to scrutinize their incentive programs before OSHA does it for them (with consequences) and, if necessary, get professional help on approaches to legally sound alternative incentive programs that will yield the desired outcomes of improving safety and health without the downside of potential litigation with OSHA. Insurance professionals need to consider these issues when consulting with their clients to ensure that recommendations or requirements for incentive/discipline programs as a condition of insurance do not place the employer in an untenable situation.