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STRATEGIC PERSPECTIVES—Safety incentive programs: Ready or not, here comes OSHA!

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For the last several years, OSHA has expressed concerns regarding a host of employer practices it believes may result in underreporting of injuries and illnesses as depicted by several recent high-profile cases of alleged employer underreporting. Heightening OSHA's interest is the position taken by some stakeholders that the annual injury and illness statistics published by the Bureau of Labor Statistics (BLS) underreports the true number of workplace injuries and illnesses due, in part, to employer incentive programs that discourage employees from reporting injuries and illnesses. The Agency has stated it will issue a final rule in the fall of 2015 that may make certain safety incentive programs illegal under OSHA standards and, just recently, OSHA sent such a proposed rule to the Office of Management and Budget ("OMB") for review. If the Agency does issue this final rule, it may change the landscape for many employers who have had success with such programs in the past.

OSHA's Recordkeeping National Emphasis Program

OSHA's initial foray into the issue of safety incentive programs came early on in the administration of President Obama. To identify the extent to which employers have been underreporting injuries and illnesses generally, and the extent to which safety incentive programs might contribute to that underreporting, OSHA launched a Recordkeeping National Emphasis Program (NEP) (CPL 10-02 (CPL-02), February 19, 2010). The NEP involved intense records reviews of targeted employers, comparing injuries and illnesses recorded by employers on their OSHA 300 Logs with worker's compensation information, first aid data, and information from employees' personal physicians or local health clinics, etc.

During NEP inspections, compliance officers were instructed to investigate programs or practices that could discourage employee reports of injuries and illnesses. Specifically, they were instructed to ask employees the following questions:

- Do you and your co-workers feel you are able to report injuries and illnesses without fear of a negative action for reporting these injuries or illnesses?
- Are you aware of any instances where an employee was disciplined or penalized for reporting a work-related injury or illness?
- Have you ever been discouraged from reporting an injury (for example, by pressure from management or co-workers)?
- Are any of the following programs or policies present at your workplace?
    - Safety incentive programs or programs that provide prizes, rewards, or bonuses

to an individual or groups of workers that is based on the number of injuries and illnesses recorded on the OSHA log?

- In your workplace, are there prizes, rewards, or bonuses to supervisors or managers that are linked to the number of injuries or illnesses recorded on the OSHA log?

- In your workplace, are there demerits, punishment, or disciplinary policies for reporting injuries or illnesses?

- In your workplace are there absenteeism policies that count absences due to work-related injuries as unexcused absences or assign demerits or points if a worker is absent due to a work-related injury?

- In your workplace, is there post-injury drug testing for all or most work-related injuries and illnesses?

- Are there any other programs, policies, or practices in your workplace that you believe affect workers' decisions about whether or not to report a work-related injury or illness?

OSHA further directed compliance officers in the NEP to consider the presence of incentive programs when classifying citation items: If a compliance officer found underreporting of injuries and illnesses *and* an incentive program was in place that discouraged reports of injuries and illnesses, the compliance officer was instructed to classify the violations as "willful" or "serious," as opposed to "other-than-serious."

OSHA never comprehensively released the results from the NEP, and ultimately the program simply lapsed with little fanfare. Many point to this and the fact that few high-profile enforcement actions were brought under the NEP as evidence that OSHA failed to accomplish its mission of proving widespread underreporting. Whether true or not, OSHA certainly did not end its focus on the issue of underreporting and safety incentive programs with the conclusion of the program.

OSHA's March 2012 Memorandum on Safety Incentive Policies

In March 2012, OSHA issued a memorandum to Regional Administrators on "Employer Safety Incentive and Disincentive Policies and Practices." The memorandum is "intended 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" ("Employer Safety Incentive and Disincentive Policies and Practices," Memorandum from Fairfax to Regional Administrators, Whistleblower Program Managers, March 12, 2012).

The memorandum provides further detail on the specific programs that OSHA believes can result in underreporting of injuries and illnesses and, thus, could be in violation of section 11(c) of the Occupational Safety and Health Act of 1970 or OSHA's recordkeeping rule. Section 11(c) provides that "[n]o person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or . . . because of the exercise by such employee on behalf of himself or others of any right afforded by this Act."

The memorandum highlights the following problematic programs and policies in OSHA's view:

- Employers entering all employees who have not been injured in the previous year in a

drawing to win a prize.

- Rewarding a team of employees a bonus if no one from the team is injured over a period of time.

The memorandum further states that the potential for unlawful actions under section 11(c) and OSHA's recordkeeping rule is enhanced when "management and supervisory bonuses are linked to lower reported injury rates."

The memorandum sets forth OSHA's enforcement posture with respect to employer practices that could negatively influence employee reports of injuries and illnesses. For the programs of concern to the Agency, the Agency directs OSHA compliance officers to initiate a full-scale recordkeeping audit to determine the extent to which there is actual underreporting of injuries and illnesses.

OSHA's enforcement memorandum is still in effect and, presumably, compliance officers are looking hard at these issues during the course of their inspections. It is hard to know from the outside, however, whether the memorandum is really having any effect on employer or employee behavior. One of the problems with the memorandum with respect to safety incentive programs is that it provides very few specifics regarding what programs are problematic from the Agency's view. And it provides no discussion as to whether an–undefined–"problematic" program could be acceptable in the context of other presumably acceptable safety incentive programs in a work environment.

OSHA's Proposed Rule on Electronic Recordkeeping

On November 8, 2013, OSHA published a notice of proposed rulemaking to amend the Agency's recordkeeping regulations to add new electronic reporting obligations. In particular, OSHA would require employers with over 250 employees (per establishment) to submit their OSHA 300 Logs to the Agency on a quarterly basis and OSHA would, in turn, post those OSHA 300 Logs on its website to make the information publicly available.

A number of stakeholders expressed concerns to the Agency regarding the proposal. One concern raised by labor stakeholders was that the new proposal "could motivate employers to under-record their employees' injuries and illnesses" (79 FR 47605). In addition, "[t]hey expressed concern that the proposal could promote an increase in workplace policies and procedures that deter or discourage employees from reporting work related injuries and illnesses."

As a result of this, OSHA is considering adding provisions in the rule that will make it a "violation for an employer to discourage employee reporting." If finalized, OSHA would be able to cite employers directly for having programs in place that OSHA determines discourage the reporting of injuries and illnesses. This would, presumably, be in addition to any citations regarding actual injuries and illnesses not accurately recorded.

In the *Federal Register* notice, OSHA asks several questions about practices that exist that could–in OSHA's view–result in discouraging employees from reporting injuries and illnesses. For example:

- Making employees who report an injury or illness wear fluorescent vests;

- Disqualifying employees who report two injuries or illnesses from their current job;

- Requiring an employee who reports an injury to undergo drug testing where there was

no reason to suspect drug use;

- Automatically disciplining employees who seek medical attention; and
- Enrolling employees who report an injury in an “Accident Repeater Program” that includes mandatory counseling on workplace safety and progressively more serious sanctions for additional reports.

(79 FR 47608.)

Ready or Not …

OSHA’s request for additional information on policies and procedures related to injury and illness reporting in the electronic recordkeeping proposal is a strong indicator that the Agency wishes to go forward with a rule that contains some sanction for programs that discourage reporting–at least in the Agency’s view. It also demonstrates that OSHA continues to focus on various employer incentive programs and the impact these programs can have on injury reporting.

Of course, OSHA has never considered the complexities of overlapping incentive programs and policies and whether programs can serve as disincentives to reporting in one workplace but not in another workplace–based upon workplace culture and other factors. In addition, OSHA has never discussed how incentive programs that combine leading and lagging indicators will be viewed by the Agency.

What should employers do in response, particularly considering that OSHA has submitted a “final rule” to OMB for review? At a minimum, employers should review all of their programs and practices that could impact injury and illness reporting. They should specifically revise those programs that emphasize lagging indicators to see if in fact they are affecting underreporting. This examination should involve a diverse group of individuals, including supervisors, human resource personnel, safety leads, and employees. It is also important for employers to audit their OSHA 300 Logs for accuracy to determine if, in fact, there is underreporting of injuries and illnesses. Getting ahead of OSHA’s emphasis on injury and illness reporting will serve to protect employers, particularly if OSHA finalizes its most recent electronic recordkeeping proposal.

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