OSHA DISFAVORS SAFETY INCENTIVE/DISINCENTIVE PLANS, BUT WHAT ENFORCEMENT ACTION CAN THE AGENCY TAKE?

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Mary, an executive for a food retail company, receives fifteen percent of her annual bonus based on the employee incident rate for the company. Also, employees working in one of the company's warehouses just received a pizza party for reaching their goal of remaining accident free for three months. Food retailers with these types of safety incentive or disincentive programs run the risk of violating the work-related injury recording and reporting requirements and the whistleblower provisions that the Occupational Safety and Health Administration ("OSHA") enforces. The questions are: How big is the enforcement risk? And what factors should employers consider when reviewing programs?

OSHA's Guidance: Incentive/Disincentive Programs May Result in a 'Comprehensive Records Review'

On October 6, 2015, OSHA revised its Field Operation Manual (FOM) to include its policy disfavoring the use of safety incentive or disincentive programs that are directly linked to injuries. As it initially announced in a memorandum dated March 12, 2012, OSHA believes that safety incentive or disincentive programs tend to discourage employees from reporting their work-related injuries. While this is not a new policy, including it in the FOM may be a sign that OSHA intends to increase its enforcement regarding safety incentive and disincentive programs. The FOM, which is readily available on OSHA's website, contains the policies and procedures that compliance officers must follow during an inspection or investigation.

At the start of each inspection, the compliance officer must review the employer's injury and illness records (OSHA 300 Log, OSHA 301 forms, and OSHA 300A) for a period of up to five prior calendar years. The revised FOM explains that if "unsound employer safety incentive policies are discovered, the [compliance officer] and the Area Director or designee may request assistance from the Regional Recordkeeping Coordinator. If there is evidence that the deficiencies or inaccuracies in the employer's records impair the ability to assess hazards, injuries, and/or illnesses at the workplace, a comprehensive records review shall be performed." The FOM further explains that

> There are several types of workplace policies and practices that could discourage employee reports of injuries and could constitute a violation of section 11(c) of the OSH Act [which prohibits

> employers from retaliating against employers for reporting work-related injuries and illnesses.] These policies and practices, otherwise known as employer safety incentive and disincentive policies and practices, may also violate OSHA's recordkeeping regulations.

Section 11(c) of the OSH Act contains the statute's whistleblower provision, which states that employers may not "in any manner discriminate" against an employee because the employee exercises a protected right, such as reporting an injury. For example, any food retailer that automatically disciplines an employee for reporting a work-related injury is in violation of the whistleblower provision under the OSH Act. Disciplining employees who fail to follow the company policy for reporting injuries and illnesses may also be problematic. OSHA believes that "[s]uch cases deserve careful scrutiny" because "the act of reporting an injury results directly in discipline." Although "employers have a legitimate interest" in injury-reporting policies, the policies must be "reasonable and may not unduly burden the employee's right and ability to report." For example, an employer's policy may require employees to report injuries "immediately," but some types of injuries – especially soft tissue injuries – may not manifest right away. In determining whether the discipline is retaliatory, OSHA essentially considers how far the employee deviated from the employer's policy and whether the discipline imposed by the employer is reasonable.

If employees fail to report injuries or illnesses because of an incentive or disincentive program, the employer's injury reporting system may not comply with OSHA's Recordkeeping regulation, and the employer's OSHA 300 Log will not be accurate. Also, according to OSHA, an incentive or disincentive program may encourage management employees not to record injuries or illnesses or to record them improperly to obtain a bonus or avoid a disincentive, which would result in violations of the Recordkeeping regulation that may be characterized as "willful."

What is OSHA's Enforcement Authority and How Can Employers Mitigate Enforcement Risk?

Despite this guidance, OSHA's enforcement authority is limited. An individual employee may file a Section 11(c) whistleblower complaint alleging that he or she was disciplined or terminated for reporting an injury. To issue a citation, OSHA must find a situation in which the employee did not report an injury that should have been recorded because he or she did not want to miss out on a bonus. Similarly, OSHA could seek to show that employees routinely do not report injuries because of a bonus structure such that the employer's injury reporting system is deficient under the Recordkeeping regulation – a high hurdle to clear. With regard to management bonuses, OSHA has to tie a management bonus directly to the failure to record injuries or illnesses.

The biggest impediment to OSHA enforcement is the six-month statute of limitations. In 2012, the District of Columbia Circuit Court of Appeals ruled that OSHA has six months from the time the employer failed to record or improperly recorded an injury or illness to issue a citation. *AKM/Volks LLC v. Secretary of Labor*, 675 F3d 752 (D.C. Cir. 2012). Although employers are required to keep OSHA 300 Logs for five years, OSHA is not permitted to cite the

employer for mistakes on the Log that are more than six months old. Using the examples, OSHA has to find a situation that occurred within the six months preceding the inspection when Mary declined to record an injury to get a bonus, or when employees wanted their pizza so they did not report injuries. In other words, OSHA has to find a needle in a haystack.

Food retailers with management or executive bonus programs or other employee safety incentive or disincentive programs that are directly tied to injuries should review those programs carefully. Food retailers may start by emphasizing to their executives that improper recording or discouraging employees from reporting injuries will not be tolerated. Also, centralizing the recordkeeping process such that executives do not control what injuries are reported and performing audits of the recordkeeping system are also helpful. Food retailers should also educate their managers and employees regarding an employee's right to report injuries without the fear of retaliation. Posting signs regarding injury reporting procedures and reviewing these procedures with employees periodically is also a good practice.

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