Employer Safety Incentive Programs Might be Unlawful - New OSHA Memo Clarifies, Threatens

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Employers who reward employees through certain kinds of safety incentive programs for the absence, or limited number, of workplace injuries might be violating OSHA's anti-retaliation and recordkeeping rules, according to a March 12, 2012, Guidance Memorandum issued by the agency to its Regional Administrators and Whistleblower Program Managers.

In the memo, the agency also challenges rules that impose discipline for (a) injuries, or (b) safety rule violations if the employer learns of the unsafe behavior as a result of the employee's report of an injury. Finally, the agency expresses concern with rules that impose discipline for the failure to report an injury within a specified time period without the employer first carefully considering potential justifications for the employee's failure to timely report, such as the employee initially thinking the injury was not serious enough to report.

The agency contends these types of rules and programs effectively discourage employees from reporting injuries and could violate Section 11(c) of OSHA, which prohibits employers from discriminating against employees "in any manner" for exercising a protected right under the statute, including reporting an injury. While there is no direct mention in the memo, OSHA's position conceivably even presents challenges to attendance bonuses.

In the case of safety incentive programs, the memo specifically warns that "if the incentive involved is of sufficient magnitude that failure to receive it might have dissuaded reasonable workers from reporting injuries," then the rule or program not only could violate OSHA whistleblower protections but could also lead the employer to fail to record injuries as required by OSHA regulations.

While the Obama Administration has been highly critical of employer safety bonus and incentive programs, OSHA now argues that these programs could themselves violate both anti-retaliation and recordkeeping laws.

Although there seems to be no direct support under OSHA or its regulations for this position, the agency left no doubt that it will subject employers with such rules or programs to heightened scrutiny in recordkeeping compliance inspections and that it may use these rules and programs as evidence against the employer in retaliation or recordkeeping enforcement cases.

Recommended Action

At a minimum, employers should identify and assess such rules and programs to eliminate any provision that may suggest the employer intends to limit, punish or discourage injury reporting. Employers should also coordinate safety reporting and compliance requirements with applicable provisions in collective bargaining agreements as well as in workers' compensation and general liability insurance plans and policies.