Safety Incentives and Awards: Creating an Effective Program That Won’t Raise Red Flags with OSHA

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Tuesday, March 14, 2017
1:30 p.m. to 3:00 p.m. Eastern
12:30 p.m. to 2:00 p.m. Central
10:30 a.m. to 12:00 p.m. Pacific
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March 13, 2017

Having great safety and health is vital …

1) it is morally the right thing.
2) it allows your employees to go home each night safely to their family and loved ones.
3) it keeps you from having to do the worst job any person would possibly have to do.
4) it is the law.
5) it is essential for a company to reduce injuries and reduce costs to be profitable and competitive in today’s marketplace.
Safety Incentive Programs

- Promote safety culture
- Reward safe and healthy work practices
- NOT required by OSHA

Safety Incentive Programs

- Objective: Raise awareness of hazards and eliminate unsafe behaviors that can result in injuries and process failures
- Resulting Benefits:
  - Injury reduction
  - Fewer lost work days
  - Minimize risk of OSHA citations/penalties
  - Workers' comp. savings (some states)
Incentives v. Disincentives

• Incentives
  ➢ Something that promises a positive consequence (reward) once the desired behavior has occurred – encourages behavior

• Disincentives
  ➢ Something that results in penalties for undesired behaviors – discourages behavior

OSHA’s View on Safety Incentive Programs

• OSHA has historically been critical of safety incentive programs.
OSHA's View

- April 30, 1996, Letter of Interpretation:

  “Some safety incentive programs actually present concerns to OSHA... [T]here are also some negative or dubious incentive programs that actually encourage employees to not report workplace injuries and illnesses.”

OSHA's View

- June 29, 2011, Memorandum:

  “[A] company whose incentive program has the potential to discourage worker reporting fails to meet the Voluntary Protection Program (VPP) safety and health management system requirements.”

Some incentive programs could:

1. Discourage reporting of workplace injuries and illnesses

2. Constitute unlawful discrimination
   
   OSH Act prohibits an employer from discriminating and retaliating against an employee because the employee reports an injury or illness.
   
   See Section 11(c) of OSH Act; 29 CFR 1904.36

Incentive programs cont’d

3. Violate OSHA’s recordkeeping regulations

   Example – OSHA requires employers to provide employees a way to promptly report work-related injuries and illnesses.
   
   See 29 CFR 1904.35(b)(1)
OSHA's View on Safety Incentive Programs-GAO Study
“Better OSHA Guidance Needed on Safety Incentive Programs”
April 2012

• GAO told OSHA to scrutinize safety incentive programs
• GAO compared rate-based incentive programs that reward employees for achieving low rates of reported injuries and illnesses and behavior-based programs that reward employees for certain behaviors such as recommending safety improvements
• Of the 25% of U.S. manufacturers with safety incentive programs in 2010
  ➢ 22% were rate-based programs
  ➢ 14% were behavior-based programs

• Almost 70% of manufacturers also had demerit systems that disciplined employees for unsafe behaviors and 56% had post-incident drug and alcohol testing policies
• GAO found that rate-based programs may discourage reporting of injuries and illnesses
• GAO recommended that OSHA implement criteria on safety incentive programs that prohibit employers from focusing on injury and illness rates
OSHA's View
Revised VPP Policy Memorandum #5
August 14, 2014

- OSHA former Chief, Dr. David Michaels, issued a memorandum for improving the administration of the Voluntary Protection Program (VPP)
- Stressed that when OSHA evaluates companies for VPP eligibility, their “incentive programs should promote safety awareness and worker participation in safety-related activities, and must not be the cause of under-reporting of injuries and illnesses.”

OSHA's View On Safety Incentive Programs
Revised VPP Policy Memorandum #5

“When programs discourage workers from reporting injuries or illnesses, problems stay concealed, no investigations take place, nothing is learned or corrected, workers remain exposed to harm.”

“We strongly disapprove of programs offering workers parties and prizes for not reporting injuries, or bonuses for managers that drive down injury rates, or that discipline workers for reporting an injury.”

- Dr. David Michaels, Former Assistant Secretary of Labor for OSHA
OSHA’s View On Safety Incentive Programs
Revised VPP Policy Memorandum #5

“Some of these ‘incentive’ programs should more accurately be called ‘blame the worker’ programs when they punish workers for reporting injuries and when they reward workers for not reporting injuries.”

“Any incentive program that deliberately punishes a worker (or a team or the whole workforce) for reporting an injury is a problem.”

- Dr. David Michaels, Former Assistant Secretary of Labor for OSHA

OSHA’s Stance On Safety Incentive Programs
Revised VPP Policy Memorandum #5

“On the other hand, we can get behind incentive programs that reward workers for demonstrating safe work practices, reporting hazards or near misses, or participating in health and safety training or on a health and safety committee.”

- Dr. David Michaels, Former Assistant Secretary of Labor for OSHA
Policies Under OSHA Scrutiny

1. Policies that discipline employees because they are injured on the job, regardless of the circumstances surrounding the injury.

OSHA's Position

- Discipline imposed under such a policy against an employee who reports an injury is considered a “direct violation” of antidiscrimination provisions of OSH Act.
- “Inconsistent” with obligation to provide employees a way to promptly report work-related injuries and illnesses.

Policies Under OSHA Scrutiny

2. Policies that discipline employees for failing to report injuries or illnesses within time limits and in manner required by employer’s policy.

OSHA's Position

- “Clear potential” for violating antidiscrimination provisions of OSH Act.
- OSHA recognizes importance of establishing procedures but policy and enforcement must be reasonable and may not unduly burden employee’s right and ability to report injuries.
2. Policies that discipline employees for failing to report injuries or illnesses within time limits and in manner required by employer’s policy. (cont’d)

**OSHA’s Position**

*Relevant Factors:*

- Whether employee’s deviation from procedure was minor or extensive, inadvertent or deliberate.
- Whether employee had reasonable basis for his/her actions.
- Whether employer can show a substantial interest in the rule and its enforcement.
- Whether the discipline imposed appears disproportionate to the asserted interest.

3. Policies that discipline employees on the basis that the reported injury resulted from a safety rule violation, where the rule is used as a pretext for discrimination.

**OSHA’s Position**

*Relevant factors:*

- Whether employer monitors for compliance with the work rule in the absence of an injury.
- Whether employer consistently imposes equivalent discipline against employees who violate the work rule in the absence of an injury.
- Whether vague rules such as “maintain situational awareness” or “work carefully” are at issue.
4. Incentive and bonus programs that intentionally or unintentionally dissuade an employee from reporting an injury or illness. (cont’d)

**Examples**
- Prize drawing for employees who have not been injured in previous year.
- Team bonuses/awards for period of time without accidents/injuries.

**OSHA’s Position**
- Possible unlawful discrimination, if safety incentive program disqualifies an employee or team when an employee has and reports an injury.
- If program dissuades reporting of injuries, it will result in the employer’s failure to report injuries, which is a violation of OSHA’s recordkeeping regulations.
Policies Under OSHA Scrutiny

4. Incentive and bonus programs that intentionally or unintentionally dissuade an employee from reporting an injury or illness. (cont’d)

OSHA’s Position

- Magnitude of incentive is key – Would the failure to receive it dissuade reasonable workers from reporting injuries?
OSHA’s Authority

• Government Accountability Office (GAO) Report, May 9, 2012
  ➢ OSHA has “limited” enforcement authority to address incentive programs that discourage reporting.

OSHA can
  • Cite employers for discriminating against employees for reporting injuries and illnesses
  • Cite employers for failing to record and report injuries
  • Request program, policy and other written documents during inspections
  • Interview non-management employees
OSHA’s Authority

OSHA cannot

- Cite employers merely for having a safety incentive program
  
  > There must be concrete evidence it caused an employee to not report an injury

- Cite employers merely for disciplining employees who have violated reasonable work rules

Questionable whether OSHA can cite an employer for a reporting violation if an employee failed to report the injury without the employer’s knowledge.
Whistleblower Actions Without Whistleblowers?

- Regardless of whether any employee actually alleges that he or she was the victim of retaliation, employers may receive an OSHA citation for implementing a reporting policy that has a perceived retaliatory effect against employees for reporting workplace injuries.
- Section 11(c) continues to protect the employee who files a safety and health complaint, asks for access to safety records or otherwise exercises any rights afforded to the employee by the OSH Act.
- OSHA anticipates that feasible means of abatement for a violation under Section 1904.35(b)(1)(iv) would “mirror” remedies available under Section 11(c) including eliminating the source of retaliation and making whole any employees that suffered adverse employment actions as a result of the retaliation.

OSHA could use all Section 11(c) whistleblower complaints as an employee complaint/referral to permit an on-site OSHA inspection of an employer. OSHA inspectors could ask:

- To review an employer’s injury/illness reporting policy
- Whether the employer has a Safety and Health Incentive Program or Drug and Alcohol Testing Program
Guidance

- Carefully review and critique your incentive programs
  - Is the program effective in creating a safer working environment?
  - What is the role of recordable injuries in measuring the effectiveness of safety management processes and incentivizing employees?
Guidance

• Are their any provisions that are unlawful or that may result in OSHA scrutiny?
  Example – Do bonuses discourage employees from reporting injuries?
• What changes must/should we made?
  Example – What “leading indicators” should be tracked and incentivized, and by what process?

Guidance

• Cannot discipline only for being injured or reporting an injury.
• But, permissible to discipline employees for violating reasonable work rules, even if the violation resulted in an injury.
  – OSHA will scrutinize whether discipline for work rule violations is implemented reasonably and consistently.
Guidance

• Despite OSHA’s warnings, safety incentive programs are not unlawful
  ➢ Individual and group prizes, bonuses, etc. are permissible
• Program should specifically set forth wanted or unwanted behaviors

Guidance

OSHA likely to investigate if incentive:
• Results focused - ex., injury free for 1 year
• Rewards one group at expense of another
• Penalizes group for failure by one individual
• Is too large/valuable
• Is offered to few individuals
Guidance

OSHA less likely to investigate if incentive:
• Rewards proactive behaviors (i.e., employee participation)
  ➢ Complying with all safety rules
  ➢ Reporting hazards/injuries immediately
  ➢ Participating in investigations of injuries
• Is small or relatively inexpensive
• Rewards everyone who meets behavioral criteria

Example – Management Bonuses
• May include recordable injuries as factor in bonuses, but best to include other safety and non-safety factors which consider productivity, quality, safety, and other operational factors.
Summary: The Four Big No-Nos According to OSHA

- Taking disciplinary action against all employees who are injured on the job, regardless of circumstances
- Implementing rigid rules about the time or manner for reporting injuries or illnesses
- Enforcing a safety rule violation more stringently against employee who suffers injury
- Creating a program that incentivizes employees not to report injuries

Summary: Keys To An Effective Safety Incentive Program

- Focus on positive behaviors rather than negative outcomes (i.e., behavior-based vs. rate-based program)
- Allow employees to feel empowered and part of SIP development process
- Goals should be long-term and very clearly spelled out
- Make sure awards are fair and achievable
Summary: Keys To An Effective Safety Incentive Program

- Make sure award criteria is fair – no random winners
- Give awards face-to-face in front of group
- Don’t punish group for actions of an individual
- Management commitment to SIP should be readily apparent
- Remember, SIP is only one piece of a comprehensive safety program

Conclusions

Generally, incentive programs are lawful and can be useful to create a culture of safety and to reduce unsafe practices and injuries.
Conclusions (cont’d)

Ultimately, employers should have incentive programs that are balanced, mixed, effective and tailored to the employer’s needs and desires.

FINAL QUESTIONS

“Judge a man by his questions, rather than his answers.”
~ Voltaire
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Thank You

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Safety Culture 2017 is the must-attend conference for safety and HR professionals looking to jumpstart performance, improve compliance and reduce costly incidents by championing a positive safety culture.

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- Evaluate and fine-tune incentives & disciplinary systems to ensure maximum effectiveness
- Define safety responsibilities across your organization
- Restructure your safety committee model to allow it to function at peak performance
- Optimize reporting, hazard tracking and other measurement metrics
- Implement proven encouragement models to engage workers in safety training
- Build essential leadership skills

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Edwin G. Foulke, Jr is a partner with Fisher Phillips LLP, a leading national labor and employment law firm. Mr. Foulke is co-chair of the firm’s Workplace Safety and Catastrophe Management Practice Group in its Atlanta, Georgia office. Prior to joining Fisher & Phillips, he was the Assistant Secretary of Labor for Occupational Safety and Health. Named by President George W. Bush to head OSHA, he served from April, 2006 to November 2008. During his tenure at OSHA, workplace injuries, illnesses and fatalities rates dropped to their lowest level in recorded history. Mr. Foulke was also the Chairman of the Occupational Safety and Health Review Commission, and is the only person in the country to have held both these positions. His practice includes workplace safety compliance and strategic safety planning, whistleblower compliance and litigation involving the 22 whistleblower statutes handled by OSHA, defense of employers in
responding to workplace health and safety cases including OSHA citations and providing advice and assistance to employers in responding to workplace fatalities and catastrophic accidents and in legislative and regulatory matters. Mr. Foulke has represented employers in thousands of OSHA inspections and OSHA citation contests. For approximately 30 years, Mr. Foulke has worked in the labor and employment area, specializing in occupational safety and health issues. In 2010, 2011 and again in 2012-13 he was named as one of the “50 Most Influential EHS Leaders” by EHS Today magazine, as well as being named one of the “50 Most Influential EHS Leaders” in the United States by Occupational Hazards magazine in 2008. Mr. Foulke is recognized as one of the nation’s leading authorities on occupational safety and health issues and one of the top speakers and writers in this area.