

Employer Safety Incentive and Disincentive Policies and Practices

OSHA's March 2012 Memorandum

By Gary Auman

On March 12, 2012, Richard E. Fairfax, deputy assistant secretary for the Occupational Safety and Health Administration (OSHA) issued a memorandum titled "Employer Safety Incentive and Disincentive Policies and Practices" to all regional administrators and whistleblower program managers (see www.osha.gov/as/opa/whistleblowermemo.html). This memo takes OSHA's enforcement actions for violations related to discrimination, section 11(c) of the Occupational Safety and Health (OSH) Act of 1970, to a level that most employers have not anticipated.

Most employers have been aware for years of the whistleblower protection afforded employees who make a complaint to their employer or to OSHA regarding safety hazards in their workplace. This protection is afforded to all employees under Section 11(c) of the OSH Act, which clearly states that "No person shall discharge or in any manner discriminate against any employee because such employee has filed or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by the Act."

What many didn't realize is that OSHA had developed and finalized a regulation under 29 CFR 1904.36 that extends the protection of section 11(c) to an employee reporting a work-related fatality, injury or illness. Title 29 CFR 1904.36 states: "Section 11(c) of the Act prohibits you from discriminating against an employee for reporting a work-related fatality, injury or illness. That provision of the Act also protects the employee who files a safety and health complaint, asks for access to the Part 1904 records, or otherwise exercises any rights afforded by the OSH Act."

Although most states have workers' compensation laws that prohibit discrimination against any employee who files or testifies in a workers' compensation claim, through the adoption of CFR 1904.36, the federal government extended the protection given by those state laws. Employers in states with a state OSHA may believe that they need not be concerned about this regulation, but the federal OSHA processes OSHA discrimination complaints even within states that have a state OSHA.

Since the adoption of 1904.36 on January 19, 2001, OSHA has had the ability to enforce discrimination complaints brought by employees who have felt that they were discriminated against because they reported a workplace injury. Fairfax's memorandum serves to reinforce this point. One issue not addressed in his memo is the potential of double jeopardy for an employer who is sued by an employee under a state's workers' compensation discrimination law and also has to respond to an OSHA discrimination complaint brought by the same employee.

In his memorandum Fairfax outlines four actions by employers that he believes have the potential of being discriminatory.

In the first of four numbered paragraphs in his memo Fairfax addresses situations in which employers have policies that require disciplinary action against employees who are injured on the job regardless of the circumstances surrounding the injury. He comments that "OSHA views discipline imposed under such a policy against an employee who reports an injury as a direct violation of section 11(c)." It appears that Fairfax supports his proposition by relying on the language in 1904.35(b), which encourages employers to develop methods for employees to report work injuries, and in 1904.36, which purports to protect employees from discrimination for reporting a work injury. In other words, because you the employer are supposed to encourage and even require your employees to report work injuries, you may not use such a report to discriminate against them.

This language creates a problem for those employers who have a policy that may result in the termination of an employee who has too many injuries, based on the rationale that such an employee is obviously not complying with job safety rules (according to this rationale, if the worker were complying, he or she would not suffer as many injuries). Such a policy may be defensible, but the defense could be costly, especially if your company is the test case, and of course the outcome cannot be guaranteed. No employer can watch every employee all the time, so injuries may occur with no witnesses to assist in establishing the cause of the injury. It should still be viable to make such repeated injuries part of your safety enforcement program if the program is created and administered carefully, with all efforts being made to treat the employee fairly and to protect his or her rights.

The situation described in the second point concerns an employer's discipline of an employee for violating a work rule about the timeliness and manner in which injuries are to be reported. I am very troubled by this point because many employers, in complying with 1904.35(b), have set up procedures for reporting injuries and illnesses and automatically challenge any report that does not follow the established procedure. Will such actions now be prohibited, so that an employer can no longer consider a 6-week or 6-month delay in reporting an injury suspicious and as grounds for denying the employee's workers' compensation claim? Are employers to be challenged by OSHA and forced to undergo an OSHA discrimination investigation because they treat such a claim differently from one filed in a timely manner? Because the memo does not define "disciplined," any disciplinary action might be considered grounds for an employee to report discrimination.

The third point, similar to the second, involves disciplining an employee who is injured as the direct result of violating an employer's safety rule. In both situations Fairfax allows that an employer may use the rule violation as a "pretext" for taking unlawful action against the employee, and in these cases the employer's conduct will be the subject of close scrutiny by OSHA. In particular, "vague rules" will require "an especially careful examination," with attention to how the employer applies the rule in situations where a violation did not result in any injury.

OSHA administrators frequently acknowledge the "chilling effect" an employer's actions may have on an employee who is reporting unsafe conditions in the workplace. If employees have to be concerned that a report may result in disciplinary action against them, they are not likely to report unsafe conditions, which could expose themselves and other employees to injuries. But it may be noted that this memo may have a chilling effect on employers who seek to maintain an effective safety program. Recently an administrative law judge upheld a willful violation against an employer, finding that among other things the employer did not have an effective disciplinary program (Secretary of Labor v. DeWitt Excavating, Inc., Occupational Safety and Health Review Commission [OSHRC] Docket No. 10-1515). In another recent decision a citation was upheld in part because the employer did not discipline a transgressing supervisor (Secretary of Labor v. ComTran Group, Inc., OSHRC Docket No. 11-0646). This published policy will only make things more difficult for the employer that wants to enforce an existing safety program.

After a safety program has been developed and carefully communicated to all employees, and after employees have demonstrated their knowledge of those rules, been retrained and had their knowledge reinforced by repeated safety training, consistent enforcement is the only tool the employer can use to achieve consistent compliance with the program. But how many employers are going to be willing to subject their company to an OSHA discrimination investigation when they are confronted by the discrimination enforcement guidelines outlined in OSHA's March 12 memorandum?

Your efforts to provide a safe workplace for all of your employees remain as important as ever. Attention to the following guidelines is crucial:

1. Be sure all of your safety rules are specific and provide definite requirements.
2. Effectively communicate your safety rules to your employees.
3. Ascertain your employees' knowledge about the safety rule in which they have been trained.
4. Establish a detailed, definite safety enforcement program.
5. Effectively communicate your safety enforcement program to all employees, and be sure that it is clearly understood by all.
6. Enforce your safety program consistently (you cannot afford to make exceptions).
7. Don't shy away from carrying out discipline when an employee suffers an injury because he or she violated a safety rule.
8. Conduct a thorough and effective investigation before you carry out discipline for any safety violation.
9. Be sure the reasons for disciplinary action following an injury are consistent with your enforcement program.
10. Document the circumstances leading to any disciplinary action.
11. Retain all records on disciplinary actions so they are available to demonstrate that you are consistently enforcing your safety program in both accident and non-accident situations.
12. Don't be afraid to discipline, but be sure you can demonstrate that any discipline is for a legitimate violation of company work rules.

The memo's fourth point touches on incentives, a practice that more employers are embracing as a means to encourage compliance with the company safety rules. OSHA has fairly consistently criticized incentive programs that use recordable injuries, lost-time injuries or injuries in general as the cornerstone for incentivizing employees. In fact, OSHA's concerns with such incentive programs were addressed in the failed Ergonomics Program Standard (29 CFR 1910.900, November 14, 2000). But the March 12 memorandum suggests that incentive programs linked to the elimination or reporting of injuries may be raised to the level of potentially discriminatory conduct.

The memorandum states that "Incentive programs that discourage employees from reporting their injuries are problematic because, under section 11(c), an employer may not 'in any manner discriminate' against an employee

because the employee exercises a protected right, such as the right to report an injury." This statement is amplified later in the paragraph: if an employer fails to award an incentive to an employee or his or her work group because the employee reports an injury, the employer could be engaging in unlawful discrimination. This raises the concern that an employer's use of an injury-report-based incentive program may generate an OSHA discrimination investigation if an employee or a group of employees is denied an incentive because one of them reported an injury.

I have counseled against such incentive programs in the past not because of the potential for discrimination but because peer pressure might cause an employee to work even when hurt, especially if the incentive is attractive enough. Imagine, for example, that an employer promises to award all employees on a team a bomber jacket if no OSHA recordable injuries occur in the first half of the year. One employee suffers a recordable injury 30 days before the end of the time period but doesn't say anything and works for 30 days while hurt so everyone can get the jacket. After the jackets are awarded, the employee reports the injury, which has gotten worse for lack of treatment. All get their jackets, but the employer now has a workers' compensation claim in which the costs have tripled because of the injured employee's actions. But according to the recent OSHA memo, the employer may also be charged with having engaged in discriminatory conduct.

If you have an injury-report-based incentive program, you should seriously consider replacing it with a program based on safety performance. Incentive programs are tools for an employer to achieve better safety compliance from its employees, but at the time of writing, they are not required by either the OSH Act or the OSHA standards. In light of Fairfax's interpretation and application of section 11(c), you may even wish to consider eliminating your incentive program.

The original statute was intended to remedy a situation that may exist with only a minority of employees, and protection in those situations is clearly warranted. However, the additional guidance provided by OSHA's March 12 memorandum may in some cases expose good employers who want only to ensure a safe workplace for their employees to the potential of significant costs in responding to unsupported and even frivolous claims of discrimination.

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