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Labor and Employment Alert: OSHA's Final Rule May Prohibit Safety Incentive Programs

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In October 2015, the Occupational Safety and Health Administration (OSHA) announced that it will soon issue a final rule concerning safety incentive programs that reward employees for low accident levels. OSHA currently does not have rules that cover safety incentive programs. However, the agency has long targeted those programs out of concerns that they discourage employees from reporting workplace accidents or injuries, and it is anticipated that OSHA's final rule will prohibit or severely restrict incentive programs.

Previously, in 2010, OSHA initiated a Recordkeeping National Emphasis Program to analyze possible underreporting of workplace injuries and illnesses. The Program involved extensive comparisons of certain employers' injuries and illnesses recorded on their OSHA 300 logs with first-aid records and data from employees' physicians. OSHA specifically instructed its compliance officers to investigate practices that could discourage employees from reporting injuries or illnesses (such as whether their workplace included safety incentive programs that awarded prizes or bonuses based on the number of reported injuries or illnesses). And if the compliance officer found both underreporting and a safety incentive program that could have encouraged that underreporting, the violations were to be classified as "willful" or "serious" instead of "other-than-serious."

Then, in 2012, OSHA issued a memorandum on "Employer Safety Incentive and Disincentive Policies and Practices." There, OSHA discussed incentive programs that intentionally or unintentionally "could discourage reporting and could constitute unlawful discrimination." For example, "an employer might enter all employees who have not been injured in the previous year in a drawing to win a prize, or a team of employees might be awarded a bonus if no one from the team is injured over some period of time." Disciplining employees who seek medical care could also discourage reporting as could situations where "management and supervisory bonuses are linked to lower reported injury rates." OSHA asserts that, not only could these activities discourage injury reporting, but the resulting underreporting would also violate the employer's separate recordkeeping obligations.

OSHA's proposed rule on safety incentive programs is being reviewed by the Office of Management and Budget, which is the final step before the rule is published. While the exact parameters of the rule are unknown at this point, employers may want to begin auditing their safety programs to ensure that they don't discourage reporting injuries and illnesses as well as the accuracy of their OSHA 300 logs. We will provide an update on the rule when it's published. In the interim, contact your Vorys lawyer if you have questions about safety incentive programs and OSHA compliance.