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MEMORANDUM

FOR: REGIONAL ADMINISTRATORS, WHISTLEBLOWER PROGRAM MANAGERS

FROM: RICHARD E. FAIRFAX

Deputy Assistant Secretary

SUBJECT: Employer Safety Incentive and Disincentive Policies and Practices

Section 11(c) of the OSH Act prohibits an employer from discriminating against an employee because the employee reports an injury or illness. 29 CFR 1904.36. This memorandum is intended to provide guidance to both field compliance officers and whistleblower investigative staff on several employer practices that can discourage employee reports of injuries and violate section 11(c), or other whistleblower statutes.

Reporting a work-related injury or illness is a core employee right, and retaliating against a worker for reporting an injury or illness is illegal discrimination under section 11(c). Other whistleblower statutes enforced by OSHA also may protect employees who report workplace injuries. In particular, the Federal Railroad Safety Act (FRSA) prohibits railroad carriers, their contractors and subcontractors from discriminating against employees for reporting injuries. 49 U.S.C. 20109(a)(4).

If employees do not feel free to report injuries or illnesses, the employer's entire workforce is put at risk. Employers do not learn of and correct dangerous conditions that have resulted in injuries, and injured employees may not receive the proper medical attention, or the workers' compensation benefits to which they are entitled. Ensuring that employees can report injuries or illnesses without fear of retaliation is therefore crucial to protecting worker safety and health.

There are several types of workplace policies and practices that could discourage reporting and could constitute unlawful discrimination and a violation of section 11(c) and other whistleblower protection statutes. Some of these policies and practices may also violate OSHA's recordkeeping regulations, particularly the requirement to ensure that employees have a way to report work-related injuries and illnesses. 29 C.F.R. 1904.35(b)(1). I list the most common potentially discriminatory policies below. OSHA has also observed that the potential for unlawful discrimination under all of these policies may increase when management or supervisory bonuses are linked to lower reported injury rates. While OSHA appreciates employers using safety as a key management metric, we cannot condone a program that encourages discrimination against workers who report injuries.

1. OSHA has received reports of employers who have a policy of taking disciplinary action against employees who are injured on the job, regardless of the circumstances surrounding the injury. Reporting an injury is always a protected activity. OSHA views discipline imposed under such a policy against an employee who reports an injury as a direct violation of section 11(c) or FRSA. In other words, an employer's policy to discipline all employees who are injured, regardless of fault, is not a legitimate nondiscriminatory reason that an employer may advance to justify adverse action against an employee who reports an injury. In addition, such a policy is inconsistent with the employer's obligation to establish a way for employees to report injuries under 29 CFR 1904.35(b), and where it is encountered, a referral for a recordkeeping investigation should be made. Where OSHA encounters such conduct by a railroad carrier, or a contractor or subcontractor of a railroad carrier, a referral to the Federal Railroad Administration (FRA), which may conduct a recordkeeping investigation, may also be appropriate.

2. In another situation, an employee who reports an injury or illness is disciplined, and the stated reason is that the employee has violated an employer rule about the time or manner for reporting injuries and illnesses. Such

cases deserve careful scrutiny. Because the act of reporting the injury directly results in discipline, there is a clear potential for violating section 11(c) or FRSA. OSHA recognizes that employers have a legitimate interest in establishing procedures for receiving and responding to reports of injuries. To be consistent with the statute, however, such procedures must be reasonable and may not unduly burden the employee's right and ability to report. For example, the rules cannot penalize workers who do not realize immediately that their injuries are serious enough to report, or even that they are injured at all. Nor may enforcement of such rules be used as a pretext for discrimination. In investigating such cases, factors such as the following may be considered: whether the employee's deviation from the procedure was minor or extensive, inadvertent or deliberate, whether the employee had a reasonable basis for acting as he or she did, whether the employer can show a substantial interest in the rule and its enforcement, and whether the discipline imposed appears disproportionate to the asserted interest. Again, where the employer's reporting requirements are unreasonable, unduly burdensome, or enforced with unjustifiably harsh sanctions, they may result in inaccurate injury records, and a referral for a recordkeeping investigation should be made.

3. In a third situation, an employee reports an injury, and the employer imposes discipline on the ground that the injury resulted from the violation of a safety rule by the employee. OSHA encourages employers to maintain and enforce legitimate workplace safety rules in order to eliminate or reduce workplace hazards and prevent injuries from occurring in the first place. In some cases, however, an employer may attempt to use a work rule as a pretext for discrimination against a worker who reports an injury. A careful investigation is needed. Several circumstances are relevant. Does the employer monitor for compliance with the work rule in the absence of an injury? Does the employer consistently impose equivalent discipline against employees who violate the work rule in the absence of an injury? The nature of the rule cited by the employer should also be considered. Vague rules, such as a requirement that employees "maintain situational awareness" or "work carefully" may be manipulated and used as a pretext for unlawful discrimination. Therefore, where such general rules are involved, the investigation must include an especially careful examination of whether and how the employer applies the rule in situations that do not involve an employee injury. Enforcing a rule more stringently against injured employees than noninjured employees may suggest that the rule is a pretext for discrimination against an injured employee in violation of section 11(c) or FRSA.

4. Finally, some employers establish programs that unintentionally or intentionally provide employees an incentive to not report injuries. 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. Such programs might be well-intentioned efforts by employers to encourage their workers to use safe practices. However, there are better ways to encourage safe work practices, such as incentives that promote worker participation in safety-related activities, such as identifying hazards or participating in investigations of injuries, incidents or "near misses". OSHA's VPP Guidance materials refer to a number of positive incentives, including providing tee shirts to workers serving on safety and health committees; offering modest rewards for suggesting ways to strengthen safety and health; or throwing a recognition party at the successful completion of company-wide safety and health training. See Revised Policy Memo #5 - Further Improvements to VPP (June 29, 2011).

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. FRSA similarly prohibits a railroad carrier, contractor or subcontractor from discriminating against an employee who notifies, or attempts to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury. If an employee of a firm with a safety incentive program reports an injury, the employee, or the employee's entire work group, will be disqualified from receiving the incentive, which could be considered unlawful discrimination. One important

factor to consider is whether the incentive involved is of sufficient magnitude that failure to receive it "might have dissuaded reasonable workers from" reporting injuries. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006).

In addition, if the incentive is great enough that its loss dissuades reasonable workers from reporting injuries, the program would result in the employer's failure to record injuries that it is required to record under Part 1904. In this case, the employer is violating that rule, and a referral for a recordkeeping investigation should be made. If the employer is a railroad carrier, contractor or subcontractor, a violation of FRA injury-reporting regulations may have occurred and a referral to the FRA may be appropriate. This may be more likely in cases where an entire workgroup is disqualified because of a reported injury to one member, because the injured worker in such a case may feel reluctant to disadvantage the other workgroup members.

Please contact the Office of Whistleblower Protection Programs at (202) 693-2199 if you have further questions.