DEALER ALERT

**To**: Environmental Health and Safety (EHS) Coordinator

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**Sub: Do’s & Dont’s of Safety Incentive Programs & Increased Compensation for Employees Denied Workers’ Comp (WC) Benefits Following an Injury**

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Safety Incentive Programs have been a positive influence on promoting safety and reducing accidents at the workplace. Reduced injuries from successful incentive programs have saved thousands of dollars toward workers’ compensation insurance premiums and also minimized other losses. Employee morale at safer places is also better resulting in greater productivity and profitability. All in all, it is a win-win situation for both the employees and the employer.

OSHA believes that in certain instances, the employer may be violating the law when the incentive program discriminates against employees or provides a disincentive to employees for reporting injuries. When safety incentive programs have a disparate impact, so as to falsely reduce the reportable injuries, OSHA requires employers to make changes. In this alert, we discuss ways to remain compliant and ensure that your incentive program meets OSHA’s sniff test.

A memo was written earlier last year by the U.S. Deputy Assistant Secretary of Labor, Richard Fairfax, and was sent to OSHA administrators across the U.S. The memo specifically references Section 11(c) of OSHA prohibiting employers from discriminating against an employee that reports an injury or illness caused at work. Any retaliation against an employee or disciplining an employee, exercising their right to report injury is considered illegal and OSHA wishes to enforce penalties under other whistleblower statutes. We note that there was major restructuring of the “Office of Whistleblower Protection” in 2012 that lends more teeth to the enforcement mechanism. Fairfax states that reporting injuries can lead to prompt treatment for injured employees and can also help employers correct dangerous conditions thereby protecting all employees at their workplace.

Also in question is the practice in which employers institute a disciplinary action against an employee involved in an injury. The application of OSHA rules would vary case by case; however, here are some issues that the Fairfax memo outlines as follows:

1. Safety Rules: OSHA encourages employers to maintain and enforce legitimate safety rules. However, an employer cannot use the violation of the safety rule as a pretext to discriminate against an employee reporting an injury. An investigation is required. Employers who have 1) clear cut rules communicated to employees that are 2) enforced in the absence of the injury and 3) employees violating those rules in the absence of an injury receive a reprimand, are more likely to prevail in situations where disciplinary proceedings are instituted against an employee who is injured as a result of that safety rule violation. Vague rules such as “work carefully” or “maintain situational awareness” will not meet muster with OSHA. Lastly, rules that require employees to report injuries immediately cannot be used to penalize employees when employees do not realize that their injuries are serious enough to report immediately, or in some cases may not even realize that medical intervention is needed, as some injuries surface after a period of time.
2. Incentive Programs: Fairfax says that OSHA recognizes that employers use safety as a key management metric. However, any incentive program that encourages *under reporting* or discrimination against workers must be discontinued. Fairfax notes that raffles held by employers in which non-injured parties participate is well-intentioned but better forms of programs may be available in which employees are provided with incentives to identify near misses or identifying hazards. We note that California Labor Code 3203(a)(2) specifies recognition of employees who follow safe and healthful work practices. See [www.dir.ca.gov/title8/3203.html](http://www.dir.ca.gov/title8/3203.html).

**AND OSHA GETS INTO ACTION**

Earlier this month, OSHA required Norfolk Southern Corp to pay $1.1 million for firing three employees who had stated that they were fired following injuries on the job. Over the last eighteen months, Norfolk Southern has been fined six times for terminating 11 employees for filing a claim for treatment following an injury on the job. In our September 2012 Newsletter, we had discussed the $300,000 payment to an injured employee from BNSF for denial of benefits following an injury. Rather, BNSF had placed the employee on unpaid medical leave and leveled disciplinary action following the injury. Both these cases indicate an OSHA that is critical of employers terminating employees following an injury on the job, then assesses hefty compensation for employees & penalties. California has statutory penalty provisions under Labor Code 132(a) that states as follows:

*Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file a claim for compensation is guilty of a misdemeanor and the employee's compensation shall be increased by one-half, but in no event more than ten thousand dollars ($10,000), together with costs and expenses not in excess of two hundred fifty dollars ($250). Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer.*

With penalties such as these, it is time that all dealers ensure that no retaliatory action is taken against employees rightfully filing their claim for Workers Compensation following a workplace injury. We must note that the California Labor Code 132(a) may not be the limit if OSHA was to assess penalties against employers in the state.

**WHAT TO DO AND WHAT NOT TO DO**

**NOT TO DO**: Do not discriminate against any employee for rightfully seeking treatment related to a workplace injury. There are penalties for wrongful denial and even delays in processing the claim. Let the Workers’ Compensation carrier process the claim. If you suspect foul play, alert the carrier. Let them deny the claim if they deem the claim to be non-meritorious. All managers must comply with this policy so that no individual takes action against an employee with a suspected claim. Suspected fraudulent claims should be kept under lid as any discussion of the matter with other employees may cause prejudice against the injured employee, which is prohibited by law. Do not make safety records part of the annual employee evaluation in which salary or promotions are discussed. Any denial of salary increment or promotion based on workplace injury records is prohibited by law!

**TO DO**: Discipline employees for safety rule violations whether related or unrelated to an injury, if you meet criteria as follows:

* Safety policy has been clearly communicated in writing with acknowledgment from employees
* Employees violating safety rules are disciplined when unrelated to injury as well

*This Newsletter is not to be considered as legal advice. Please consult your labor lawyer for legal issues, safety consultant for safety concerns and your WC insurance carrier for claims related issues. Send your comments to* [*sam@cellyservices.com*](mailto:sam@cellyservices.com)*.*