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Is Your OSHA Program Discriminatory?

Counter False Claims & Unsafe Behaviors Through Nondiscriminatory & Integrated Risk Management Programs

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Reducing injuries and creating a safe work environment is critical to reducing costs and increasing productivity. More companies are developing incentive programs to promote safe behavior. However, problems arise when these programs are discriminatory. Discriminatory incentive programs do not encourage a safe work environment, rather they discourage employees from reporting incidents when they occur.

In accordance with OSHA standards, organizations can take five steps to establish an effective, nondiscriminatory risk management program:

- 1) Recognize discriminatory programs.
- 2) Understand why unsafe behaviors occur.
- 3) Integrate incentives into risk management programs.
- 4) Refer to OSHA legislation.
- 5) Use baseline testing to combat false claims.

1) Recognize Discriminatory Programs

The first step in determining whether an OSHA program is discriminatory is determining what behaviors cause employees to be penalized or rewarded. The program could be considered discriminatory if employees are:

- penalized for having injuries;
- penalized for reporting injuries;
- penalized for violating safety rules;
- rewarded for not having incidents.



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2) Understand Why Unsafe Behaviors Occur

Based on Maslow's hierarchy of needs, the need for safety is the second most important after the basic need for food, water and shelter. However, unlike these physiological needs, human knowledge related to safety is not instinctual. Security for our bodies, property and resources is learned behavior.

Employees will not sacrifice their safety without good reason. When they engage in unsafe behaviors, it is for reasons such as trying to please their boss or customer or just not recognizing the hazard. Dan Petersen has been quoted as having said, "It is the way that people are measured and rewarded, and the culture of the organization that leads to unsafe behavior."

This means it is up to the company to reduce the number of unsafe behaviors. It can do this by integrating appropriate incentives into risk management programs that encourage safe behaviors, and by recognizing false claims.

3) Integrate Incentives Into Risk Management Program

Incentives are never a substitute for a well-structured risk management program. They may reduce the number of injury reports, but they do not promote safe behavior.

It is more effective to integrate incentives into the an operation's management program. More important than merely integrating incentives, it is critical that incentives are given for the appropriate actions.

Table 1 identifies practices that are considered discriminatory by OSHA that do not encourage safe behavior and those that encourage safe behaviors. According to OSHA (2012) and the Fairfax memo, giving incentives for not reporting or not having incidents can lead to a discriminatory program.

4) Refer to OSHA Legislation

Reporting an injury is a protected activity under the law. Several pieces of legislation protect this right.

The Fairfax memo (OSHA, 2012), which took effect in 2012, targeted organizations that employ safety incentive programs that discourage workers from reporting injuries or employers that act on policies requiring disciplinary action against employees who are injured on the job, violate injury-reporting guidelines or violate a safety rule. Safety rules violations include:

- Vague rules (e.g., mandates to “maintain situational awareness” or “work carefully”).
- Was the deviation from the procedure minor or extensive, inadvertent or deliberate?
- Was there a reasonable basis for decision?
- Was the discipline disproportionate to the act?
- The rules cannot penalize workers who do not realize immediately that their injuries are serious enough to report.

In a recent case, a contractor’s safety manager was charged and convicted of major fraud by the U.S. District Court in Tennessee. During his tenure, the safety manager underreported incidents at Tennessee Valley Authority (TVA) nuclear plants in Tennessee and Alabama. He deliberately falsified records of workplace injuries and obstructed justice by falsely testifying in court. He used the false injury reports to claim more than \$2 million in safety bonuses. In April 2013, he was sentenced to 6 years in prison followed by 2 years of probation.

The Shaw Group safety manager used a purely rate-based incentive program that encouraged concealing injuries by rewarding not having injuries, rather than encouraging safe practices. Organizations should establish a comprehensive injury and illness prevention program that addresses underlying safety issues. Only by finding and addressing workplace hazards can employers and safety managers promote real workplace safety.

OSHA’s Position on Safety Incentive & Disincentive Policies & Practices

- 29 CFR 1904.35(b)(1) covers incentive for not reporting injuries and illnesses.
- 29 CFR 1904.36 Section 11(c) of the OSH Act prohibits an employer from discriminating against an employee because the employee reports an injury or illness.

TABLE 1
Practices That Encourage & Discourage Safe Behavior

Behaviors	Positive recognition	Negative recognition
Violating safety rules		X
Not reporting/having accidents		X
Reporting all incidents daily	X	
Reporting hazards	X	
Completing JSAs	X	
Completing observation cards	X	
Completing training requirements	X	
Attaining new job skills	X	
Completing pretask inspections	X	
Attending safety meetings	X	

Source: OSHA (2012) Fairfax memo.

5) Use Baseline Testing to Combat False Claims

If a claim is one in which the injury occurred during the course and scope of employment, then a false claim is just the opposite. A claim is false if it is not work related, meaning it did not occur during the course and scope of employment, or the employee had a preexisting condition that was not worsened by work.

To combat false claims, companies should adopt baseline testing as a proactive risk management process. Baseline tests such as the Electrodiagnostic Functional Assessment (EFA) are an effective way to recognize and reduce false claims, and prevent discrimination through objective diagnosis. For example, for many years audiometric testing has been used with pre- and post-tests to document hearing loss prior to noise exposure. It is not only recognized by OSHA but also spelled out in many state workers’ compensation statutes. Baseline testing enables the employer to accept only claims that are arising out of employment, in the course of employment (AOE/COE).

To be effective and hold up in court, baseline testing must be evidence based, job related and consistent with medical necessity, not identify a disability and be specific for the parameters measured.

For example, soft tissue injuries, better known as musculoskeletal disorders (MSDs), are among the leading cost drivers for work-related injuries. Baseline testing to identify MSD injuries must specify physiological parameters tested and should include:

- electromyography;
- range of motion;
- functional assessment.

According to a study by American Physical Therapy Association, traditional functional assessments are not legally defensible and do not meet the criteria established by the *Daubert* standard, if their methods of

determining effort include Waddell's signs (i.e., coefficient of variation, ratio of heart rate and pain, subjective documentation or observation of pain behavior magnification). Tests such as EFA do meet *Daubert* requirements and are legally defensible.

Baseline Testing Procedure Using EFA

When establishing a baseline testing plan, several steps should be included:

- 1) Establish written job descriptions that identify the essential functions and the physical demands.
- 2) Develop testing protocols based on the essential functions of a position as outlined in the job description.
- 3) Test appropriate groups of existing workforce with a fitness-for-duty evaluation and store as a baseline and then store the unread data as the baseline. The data should not be evaluated or read until after an injury occurs.
- 4) After an injury occurs, perform test again and compare with baseline.

This process is similar to audiometric testing at the time of hire, then comparing annual audiograms or post-loss audiograms to the baseline to measure any change in hearing threshold to determine whether a loss has occurred.

Case Study Results

A U.S.-based global transportation leader implemented its EFA-STM program in October 2011. This testing prevented discrimination and allowed for the identification of false claims. In addition, if there was no claim, then there was nothing to enter onto the OSHA 300 log.

The corporate policy in the case study included the completion of baseline testing for all drivers. Drivers sign appropriate consent forms before the baseline testing is conducted, stating, "if there should be a work-related soft-tissue injury, the employee agrees to participate in the post-loss testing."

To be successful, a good baseline test is made up of eight important requirements:

- 1) objective and repeatable;
- 2) non-load-bearing and noninvasive;
- 3) consistent with job requirements;
- 4) evidence based;
- 5) HIPPA compliant;
- 6) meets Daubert test;
- 7) administered by qualified personnel;
- 8) appropriate consent forms are signed prior to beginning the program.

As of March 2013, 4,263 baselines were completed in locations including Texas, California, Indiana and Utah.

The average cost for a sprain/strain claim for the company is \$14,332. The EFA-STM program showed a 40% decrease in the frequency of soft-tissue claims as well as direct cost savings of more than \$601,944 in the program's first year.

To date, no workers' compensation claims have been filed for soft-tissue injuries that had an EFA-STM baseline test and where the test and medical evaluation proved there was no correlation to AOE/COE. Several claims were denied immediately following the post-loss medical evaluation and multiple others were unaccounted for, never to return or pursue the claims.

Conclusion

Safety performance improvements cannot be accomplished by discouraging incident reporting through the use of incentive programs. True safety improvement takes place once a firm understands why unsafe behaviors occur, then integrates incentives into the risk management program to encourage correct safe behaviors and by countering false claims with baseline testing.

Incentive programs that OSHA believes are discriminatory may reduce the number of injury reports, but do nothing to encourage a safe workplace or stop false claims. Baseline testing using such tools as EFA-STM can help identify cases in which false claims are being submitted. ■

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