On Thursday, March 10, 2016, OSHA held a public meeting to discuss its draft Safety and Health Program Management Guidelines (Guidelines). Most of the meeting was devoted to a discussion of the written comments received in the 90-day comment period, with a focus on areas that raised stakeholder concerns. One area of discussion was the Guidelines’ approach to the program element known as “Worker Participation.” The draft of the Worker Participation section states that employers should avoid the adoption of practices or procedures that would discourage worker participation in any aspect of the safety program, and identifies employer safety incentive programs and post-incident drug testing as activities that have the potential to “discourage injury and illness reporting.”

In its list of topics for discussion, OSHA indicated that it had received a significant number of comments indicating that OSHA’s “discouragement of ["properly designed"] incentive programs and post-incident drug/alcohol testing is misplaced.” OSHA’s inappropriate draft language would strongly discourage incentive programs even if they prevented serious injuries, serious illnesses and deaths, and had no discriminatory or retaliatory effect on employees.

The way incentive programs are framed in the Guidelines was passionately contested. Several of the organized labor representatives at the meeting asserted that OSHA should continue to discourage incentive programs because they allegedly “incentivize the wrong things” and put too much focus on employees. Some of the labor representatives even asserted that OSHA’s language should be strengthened to permit only those incentive programs that incentivize what they deemed to be “safe behaviors,” such as attending safety meetings or training sessions. They also asserted that behavior-based safety observations were not appropriate measures of “safe behaviors” or “leading indicators” because they supposedly were oriented toward placing the responsibility on employees. A number of labor representatives, echoing OSHA’s position, asserted that they believe these programs deter employees from reporting workplace accidents. However, apart from a few anecdotal stories, the organized labor representatives had no evidentiary support for these claims.

Lawrence Halprin, on behalf of the Great American Insurance Company and its Strategic Comp division, directly challenged the assertion that incentive programs discourage injury and illness reporting, or that there is any pervasive intentional underreporting of injuries and illnesses in the United States. Despite OSHA’s ideological paranoia in this area, and efforts to prove otherwise, Mr. Halprin pointed out that analyses performed by and on behalf of OSHA consistently demonstrate that
the accuracy rate for OSHA 300 injury and illnesses recordkeeping is between 90 and 95%. Rather than suppressed reporting, the data that is available demonstrates that the primary reason for inaccurate reporting (both over-reporting and underreporting) is a misunderstanding of the overly complex OSHA recordkeeping obligations. Mr. Halprin also stressed that the claims data developed by Strategic Comp for the 300,000 employees employed by its insureds demonstrated that properly implemented safety incentive programs significantly reduce the number of catastrophic workplace incidents with claims of $475,000 or more. It would, therefore, be irresponsible and contrary to OSHA’s mandate to ignore this benefit and focus on the hypothetical under-reporting issue in developing rules and guidance documents. He pointed out that Congress established a complaint mechanism to deal with alleged instances of retaliation and did not authorize OSHA to preemptively ban or discourage any employer practice or procedure that might in any way be perceived as reducing an employee’s enthusiasm for reporting a work-related injury or illness.

A number of stakeholders also took issue with OSHA’s attempt to discourage or regulate incentive programs in the Guidelines because they felt this was an unjustified intrusion into business management practices. Instead of discouraging these programs in the Guidelines, OSHA was encouraged to instead discuss incentive programs in an appendix with information about how incentive programs can be used effectively.

At the end of the meeting, OSHA stated that it was expecting additional comments on the proposed Guidelines from the National Advisory Committee for Occupational Safety and Health (NACOSH) and the American Conference of Governmental Industrial Hygienists (ACGIH) in the next few weeks. That suggests that anyone who wanted to comment, but missed the deadline, should take the opportunity provided by this unofficial extension of time to file comments. OSHA also announced that, based on stakeholder input from industry and labor, it concluded the draft guidelines were not appropriate for construction. OSHA plans to refer the draft Guidelines to the Advisory Committee on Construction Safety and Health (ACCOSH), and develop a parallel guideline for the Construction Industry --- all by June of 2016. It would seem inappropriate to draft a new document for construction and not provide all affected stakeholders with an opportunity to comment on that draft. Possibly, the draft will be made available to stakeholders when it is presented to ACCOSH for approval. Stay tuned!

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