

# Workers' Comp & Safety News



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Prevention

April/May 2016

Volume 14 • Number 2

## Do Your Safety Incentives Violate OSHA Regulations?

You consider your company's safety incentive program an effective way to promote safe behavior among your employees and reduce injuries. But OSHA could see the very same program as unlawful discrimination and a violation of OSHA recordkeeping regulations and whistleblower protections.

OSHA regards the ability to report injuries or illnesses without fear of retaliation as "crucial to protecting worker safety and health." Without that right, "Employees 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."



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## This Just In

With marijuana legalized in five states, and legal for medical use in 23 states plus Washington, DC, and Guam, what will that do to your drug-free workplace programs?

The state of Maine recently reported that 2015 brought the highest percentage of positive drug tests since testing began. Five percent of all drug tests run by Maine employers read positive for drug use. According to the state's Department of Labor, "...many employers use a common five-panel test including cannabinoids (marijuana), amphetamines, cocaine, opiates, and phencyclidine. Cannabinoids accounted for 84.1

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According to an OSHA memorandum to compliance officers, certain incentive programs discourage the reporting of injuries and encourage discrimination against workers who report injuries. These include:

- 1 Taking disciplinary action against all employees who are injured on the job, regardless of circumstances. Reporting an injury is always a protected activity, and OSHA views discipline against an employee who reports an injury as a direct violation of whistleblower statutes.
- 2 Taking disciplinary action against an employee who violates an employer rule about the time or manner for reporting injuries and illnesses. OSHA recognizes that employers have a legitimate interest in establishing procedures for receiving and responding to reports of injuries. 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.
- 3 Disciplining an injured employee because the injury resulted from his/her violation of a safety rule. OSHA encourages legitimate workplace safety rules to eliminate or reduce workplace hazards and prevent injuries. In some cases, however, an employer may use

a work rule as a pretext for discrimination against a worker who reports an injury. OSHA will investigate these situations carefully, looking at whether the employer monitors for compliance with the work rule in the absence of injury and whether it consistently disciplines employees who violate the work rule in the absence of an 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.

- 4 Creating a program that unintentionally or intentionally incentivizes employees 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 to encourage workers to use safe practices. However, there are better ways to encourage safe work practices.

### Acceptable Safety Incentives

A safety incentive program structured to recognize and reward positive behaviors, rather than punishing negative ones, is less likely to draw the wrath of OSHA. Suggestions include:

**percent of all positive test results."**

**Regardless of whether an employee is using marijuana (or any other drug that could affect reflexes or reaction time) for medical purposes, employers have the right to prohibit its use in safety-sensitive positions. For more information on drug testing and other safety procedures, please contact us.**



- ✦ providing tee shirts to workers serving on safety and health committees
- ✦ offering rewards for suggesting ways to strengthen safety and health
- ✦ throwing a recognition party at the successful completion of company-wide safety and health training.

For more suggestions on structuring a safety program and complying with OSHA rules and guidelines, please contact us. ■

# Successful Return-to-Work Programs

Fifty-five percent of employers are providing accommodations to assist employees in returning to work. Of these, 54 percent are reporting success. Forty-five percent are providing accommodations to employees with disabilities to stay at work in lieu of absence. Of these, 54 percent are reporting success.<sup>1</sup>

**R**eturn-to-work programs can get injured employees back to productive work, saving you workers' compensation lost time dollars. In addition, a worker who returns to work quickly is less likely to stay out on disability. So how do you develop a successful return-to-work program? What are the pitfalls to avoid?

A successful return-to-work program starts with a detailed company plan that has management support and has been thoroughly discussed with employees so that they understand their role in getting well and returning to work.

Three important components of the plan should be:

- ✱ **Job descriptions and analyses for each job.** Job descriptions and analyses are important tools for doctors and insurance companies to use to determine how soon an employee can return to work and what duties he or she will be able to do. Detailed job descriptions are especially helpful if the injured worker



has become disabled, making it relatively easy to decide whether he can perform his old job — with or without accommodation.

- ✱ **A process for regular communications.** Open and regular communications between the injured worker, his supervisor, the doctor and the insurance company help keep the worker's treatment on track. When workers know they are missed and that their managers are concerned about their recovery, they maintain a more positive attitude and tend to return to work more quickly.

- ✱ **Return-to-work agreement.** Using an agreement that clearly states the responsibilities of the employer and the injured worker will help employees understand what they need to do if they are injured. Both the employer and employee should sign the agreement.

## Pitfalls to Avoid

Return-to-work programs can be a minefield of problems due to the variety of rules and regulations that apply, including the Americans with Disabilities Amendment Act of 2008 (ADAAA), the Family Medical Leave Act (FMLA) and various state

workers' compensation laws.

**ADA issues:** ADAAA significantly expanded the definition of disabilities, and, therefore, more injured workers can be expected to be classified as disabled when they return to work. For instance, "physical impairment," a key part of the ADA definition of disability, now includes major life activities such as having difficulty in walking, standing, bending and lifting.

Workers with injuries that result in any of those impairments are considered disabled and require reasonable accommodation to perform their jobs. The workers are also usually eligible to receive a workers' comp disability settlement.

**FLMA rules:** An injured employee may choose to go on unpaid leave, rather than participate in an early return-to-work program. Under FMLA rules, the employer must accept the leave, and the employee maintains the right to have her job back after returning from FMLA. (The good news is that the company can usually stop making the workers' comp indemnity payments during the leave.)

**Long employee absence:** When companies are not able to develop a light duty schedule for injured workers, they stay at home until ready to assume their old job. The longer they stay home, the higher the chance they will malingering, finding physical reasons to further delay return. Immediately after a worker is injured, the manager should use the worker's job analysis to

identify those duties he or she may be able to perform during recovery. A return-to-work plan should allow a worker to perform as many of his normal tasks as possible, while augmenting them with other work that will not affect the injury.

**Insufficient budget:** Some companies make the mistake of not adequately funding return-to-work programs. Good programs have costs. Someone has to manage the program, and extra people may have to be hired to do part of the injured worker's job. However, return-to-work programs actually save money because employees are back at work sooner. Savings also come from:

- ✱ Lowering the odds of expensive litigation.
- ✱ Reducing claims reserves.
- ✱ Reducing the injury's impact on the company's workers' comp experience modification and insurance rates.

**Difficulties in following mandatory medical exams:** Companies need to follow strict guidelines for medical exams that are used to release employees back to work — for both full-time and light-duty assignments.

If you would like advice on how to develop a successful return-to-work program, give us a call. ■

<sup>1</sup>Source: *Prudential Ninth Annual Study of Employee Benefits*, released February 2016

## Using Ergonomics to Control Musculoskeletal Disorders (MSDs)

Whether you call them musculoskeletal disorders (MSDs), repetitive strain injuries or cumulative trauma disorders, they add up to a painful condition for affected workers...and a costly problem for employers.

The U.S. Department of Labor defines a musculoskeletal disorder (MSD) as an injury or disorder of the muscles, nerves, tendons, joints, cartilage, and spinal discs. MSDs do not include disorders caused by slips, trips, falls, motor vehicle accidents, or similar accidents. MSDs accounted for 32 percent of all injury and illness cases in 2014 for all types of employers, public and private. MSDs caused 33.8 cases per 10,000 full-time workers.

Workers in certain industries are more likely to experience an MSD. Nursing assistants and laborers and freight, stock, and material movers incurred the highest number of MSD cases.

## Ergonomics: Changes in Design and Thinking

MSDs result when there is a mismatch between the physical requirements of a job and the physical capacity of the human body. Rather than forcing the body to adapt to a job, the science of ergonomics adjusts the job to fit the body's needs by altering the ways tasks are done and eliminating aggravating activities.

Taking the following steps will help you improve ergonomics at your worksite:

- 1 Learn about body mechanics and the interrelationship of body and work environment in job performance. How can the physical environment be altered to make work safer and more productive?
- 2 Position equipment properly for the user and train workers on its safe use. Tailor chairs, desks and other office equipment to individual users as much as possible in terms of height, length,



distance and size adjustments. Also be aware of how individuals' medical conditions could influence how they operate within the workstation. Emphasize posture and body placement.

- 3 Instruct employees to take rests at given

intervals and show them stress-relieving stretches and exercises for bodies, wrists and eyes.

- 4 Evaluate tools and equipment: What are their intended uses? What is their expected volume of use? How much

strength/force do they require? What positions do employees use when working with the equipment? How much repetitive motion on the operator's part does the equipment require? Are employees using them correctly? Can you reconfigure existing equipment to make it more ergonomically correct, or do you need new equipment? A one-size-fits-all approach to workstation re-design won't help—instead, focus on devising ways to make the workstation conform to the individual.

- 5 Provide ergonomics education. Train employees in the proper use and placement of workplace equipment. It is important that workers think ergonomically. Training exercises and video

presentations can increase employee awareness about how to carry out job tasks most safely.

For more information on eliminating or mitigating ergonomic problems, please contact us. ■



## Working Against Workplace Violence

**N**early 2 million American workers report having been victims of workplace violence each year. Unfortunately, many more cases go unreported.

So what are the main steps you can take to minimize such risks?

OSHA recommends a “zero-tolerance policy towards workplace violence,” while the FBI says that “employers should adopt clear no-threats and no-violence policies and prevention plans.” A business should prevent the root causes of workplace violence by “creating an atmosphere of fairness, trust and cooperation between employees and management,” says the FBI’s National Center for the Analysis of Violent Crime.

Other recommendations include:

- \* Communicate anti-violence policies for employees
- \* Survey employees to get their ideas about the risk of violence and preventive measures
- \* Train employees to recognize the warning signs of violence
- \* Provide violence prevention training for managers, especially regarding downsizing and termination procedures
- \* Provide physically secure workplaces
- \* Adopt staffing policies that keep staff safe on the job

- \* Cooperate with unions and other business on employee safety
- \* Formulate action plans so managers and supervisors know what to do when violence occurs.

Richard V. Denenberg and Mark Braverman, the authors of an influential book called *The Violence-Prone Workplace: A New Approach to Dealing with Hostile, Threatening, and Uncivil Behavior*, caution managers and employers to avoid focusing too much on dysfunctional and violence-prone individuals, while not paying enough attention to the dysfunctional workplace. They identify failure to recognize and defuse conflicts as the primary causes of workplace violence.

Larry Chavez, an expert on workplace violence and crisis communications, recommends providing formal instruction for managers to recognize and eliminate organizational risk factors that have led to violence in other organizations. “They must also be instructed in defusing hostile employees so as to prevent an angry outburst from escalating into violence.”

For more information on preventing workplace violence, see OSHA’s website at [www.osha.gov/SLTC/workplaceviolence/index.html](http://www.osha.gov/SLTC/workplaceviolence/index.html) or consult with a safety professional. We can provide suggestions. ■

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