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Dear Mr. Free and Ms. Miller:

Thank you for your letter of April 18, 2012, expressing concerns about the Occupational Safety and Health Administration's (OSHA) March 2012 memorandum (memo) on employer safety incentive and disincentive policies.

Before I respond to your specific concerns, I wish to emphasize two points that were in the March 2012 memo. First, OSHA does not believe that all incentive programs are improper. I completely agree with you that incentives can be powerful tools to encourage desired behavior. OSHA is fully in favor of positive incentives for safety-related activities. Second, OSHA also recognizes employers' legitimate interest in establishing procedures for receiving and responding to reports of injuries, and nothing in the memo is intended to undermine that interest.

I will now address your specific comments. First, you state that, although "reporting an injury is an obligation of the employees" under the Occupational Safety and Health Act of 1970 (OSH Act), you "do not see it as an employee right." It is OSHA's position that the OSH Act itself makes clear that reporting injuries and illnesses is an employee right. There is certainly no question that reporting a hazard that has not yet resulted in an injury is a protected employee right under Section 11(c) of the OSH Act, which protects employees from discrimination for filing "any complaint . . . related to this Act." 29 U.S.C. 660(c); see also 29 C.F.R. 1977.9(c). One aspect of reporting injuries is reporting the hazards that led to the injuries, a right that is clearly protected. 29 C.F.R. 1904.36. The OSH Act recognizes that employers need information about workplace injuries both to correct whatever caused them so that other employees are not injured, and to ensure that the worker who is injured receives the correct medical treatment. If employees are afraid that they will lose their jobs or other benefits for conveying this information to their employer, they will be less likely to do so. As a result, the health and safety of the injured worker and that of his or her coworkers is put at risk, and the ability of employers to comply with Section 5 of the OSH Act is undermined.

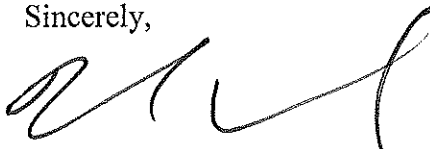
Much of your letter addresses concerns about employers' ability to enforce rules on the reporting of workplace injuries. As I said earlier, OSHA agrees that employers must be able to enforce reporting rules. The March 2012 memo itself notes, "OSHA recognizes that employers have a legitimate interest in establishing procedures for receiving and responding to reports of injuries." Further, the memo recognizes that employers may take steps to discipline employees who do not comply with reporting procedures, provided that the discipline is reasonable in the circumstances.

The memo targets discipline that is *not* reasonable, or that is meted out discriminatorily to employees who are injured. This includes situations in which an employer terminates an injured employee for a minor violation of injury reporting requirements, such as reporting an injury a few hours after it occurred, because that was when the employee realized the injury was significant enough to report. The imposition of such a severe sanction for a modest violation raises a question about whether the reporting rule violation was, in fact, the real reason for the termination. The March 2012 memo cautions investigators to examine such situations carefully, and lays out a number of factors to consider in determining whether the reporting requirement violation was the real reason for the termination. None of this is to say that employers may not enforce their injury reporting requirements. Rather, our point is that unreasonable enforcement of such requirements can discourage employees from reporting injuries and may violate the requirements of Section 11(c) and lead to violations of OSHA's recordkeeping requirements.

Finally, you also provided a robust defense of incentives because "the use of positive reinforcement techniques [is] a powerful tool in helping [employees] work toward shared goals." I whole-heartedly agree that incentives can be used to encourage positive behaviors. In fact the March 2012 memo suggests a number of positive incentive programs, such as those that promote worker participation in safety-related activities, such as identifying hazards or participating in investigations of injuries, incidents or "near misses." Programs that give awards based on an employee or work unit not having any reported injuries are likely to have the reverse effect of incentivizing workers to simply not report their injuries. When injuries are not reported, as noted above, employers are without information that will help them protect their other employees and ensure the injured employee receives appropriate treatment. In programs that penalize an entire workgroup because a single member reports an injury, the effect may be magnified because workers are often especially reluctant to report an injury if that report will have a negative effect on their colleagues, as well as themselves. In addition, if the employer fails to record an injury because the employee does not report it, the employer is in violation of OSHA's recordkeeping requirements.

Thank you for your interest in occupational safety and health. I would be happy to meet with you to discuss this matter further.

Sincerely,



David Michaels, PhD, MPH