Module 2: Worker Participation

Worker participation is critical to any health and safety program.

Who is the "expert" on any job performed in your workplace? Supervisors, managers, even safety directors may know a lot about the work performed in their workplace, but no one can understand a job as fully as the person who performs it. Workers are in the best position to understand the requirements and risks of the work they do, and they have unique insight into how these risks can be controlled. Effective safety programs include opportunities to tap into this knowledge and use it to improve the program.

Encourage Workers to Participate in the Program

Exercise: *In your groups, discuss some ways that a safety program can encourage employee participation. Prepare to report out to the class.*

Encourage Workers to Report Safety and Health Concerns

Employees should be given positive reinforcement when they report safety and health concerns. When hazards that are readily apparent to employees are reported to management, action can be taken to correct hazards before they result in employee injury and illness.

The following are examples of employee reporting:

- "Near miss" incident (accident) reports
- Hazard cards
- Report of unsafe condition
- Report of procedure gaps
- Reports of emerging hazards

If an employer tracks these types of reports, these can be measured as leading indicators in monitoring of safety performance.

OSHA prohibits retaliation against employees for reporting workplace hazards. However, if employees are hesitant to make reports, they should have an option to report anonymously.

Once a hazard is reported, management can demonstrate a commitment to safety by responding to each report in a timely manner. Ideally, management would implement the corrective action that the employee suggested. Management can also suggest alternative corrective actions if the one that is suggested could create other problems or is infeasible. It is helpful to engage employees in this problem solving process. Management also has the option of taking no action, but if this is the decision that is made, management should explain to the employee why the decision was made to take no action and be willing to listen to the employee's concerns. Regardless of the final outcome, management should thank the employee for caring enough about safety to bring the issue to management's attention.

Washington State Department of Labor & Industries
Division of Occupational Safety and Health

Report of a Workplace Hazard

Instructions: Use this **optional sample form** to report a workplace hazard. Fill out the top section and give it to your supervisor, safety manager, or designated person. This information will help address the hazard before someone gets hurt.

Name (Optional)
Date Submitted

Where is the hazard? (Give exact location(s), e.g. Tool Room #2)

Describe the hazard and possible injuries. (Provide details about the work process, equipment, tasks, procedures, etc., and include possible injuries you believe can occur.)

Report Submitted To _____ **Job Title** _____

Assessment of Hazard

☐ High/Immediate ☐ Medium ☐ Low

Notes:

Actions to Take: (List the steps to take to correct the hazard. Check off each item as it's completed.)

☐ _____
☐ _____
☐ _____
☐ _____
☐ _____

Completed By _____ **Date Completed** _____

Additional Actions: (For example, are there other facilities that may have similar hazards and need assessing? Do policies in the Accident Prevention Program or other written programs need to be updated?)

Completed By _____ **Date Completed** _____

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RESET

Give Workers Access to Safety and Health Information

OSHA regulations specifically require that employees are given access to information under a variety of workplace safety and health standards. Examples of information that workers legally have a right to see include:

- Safety Data Sheets (SDSs) for chemicals on the worksite's chemical inventory
- OSHA 300 logs with names removed and OSHA 300A Summary
- Industrial hygiene and exposure monitoring reports

Many OSHA standards contain requirements for worker participation. For example, the Permit Required Confined Space Standards for General Industry, Construction, and state standards in Oregon and Washington contain provide employees who enter permit spaces with a right to observe air monitoring of permit spaces and hazard analysis for the permit required confined spaces.

Washington State requires that employers maintain a safety bulletin board at every fixed worksite with 8 or more employees. Items to be placed on the safety bulletin board include:

- Safety bulletins
- Safety newsletters
- Safety posters
- Accident statistic
- Other safety educational material

No non-safety related content can be posted on the safety bulletin boards.

Employees should have access to written safety programs, safety policies, procedures, and guidelines for the workplace. Employees should be given time to attend training on workplace safety programs.

Some employers hold Safety Toolbox meetings. These are short, 10 to 15 minute, meetings that can be held daily, weekly, or monthly, at the start of the workshift or as part of a department or staff meeting.

New Employee Safety Orientation is required in Washington State as a component of the Accident Prevention Program. In other states this may not be specifically required. However, providing information about the employer's safety program when a new employee starts demonstrates the importance of safety to the organization and helps establish a culture of safety.

Washington State Department of Labor & Industries
Division of Occupational Safety and Health

Employee Safety Orientation Checklist

Instructions: Each employee must be given a safety orientation before beginning work. This checklist documents that each required item was explained to the employee. Both supervisor and employee should initial each topic after it's covered.

Employee's Name	
Date	

Employees should not sign at the end of the form unless all items have been explained and all questions have been sufficiently answered.

*Note: This **optional sample checklist** addresses required items of WAC 296-800 Safety & Health Core Rules. Additional requirements may apply to certain industries or kinds of work. If you use this form, be sure to modify it to fit the needs of your work place.*

	Supervisor Initials	*Employee Initials*
General Safety Information		
☐ A description of your company's total safety and health program and policies.		
☐ How and when to report on-the-job injuries.		
☐ How to report hazards, unsafe conditions and practices, and close calls ("near-misses").		
☐ Location of first-aid facilities/kits in your workplace.		
Emergency Procedures and Evacuation		
☐ Location of exits, the evacuation route from the assigned workstation, and assembly point.		
☐ What to do in emergency situations that might occur (fire, earthquake, power outage, violence, etc.).		
Chemical Hazard Communications *Identification of hazardous gases, chemicals, or materials used in the facility and their hazards according to the Hazard Communication Program training requirements, including:*		
☐ Where to find the Safety Data Sheets (SDSs) and written Hazard Communication Program.		
☐ How to read container labels and use SDSs.		
☐ Training on the hazards, precautions, and safe use of chemicals the employee will be using, including specific Personal Protective Equipment (PPE).		
☐ Emergency actions to take after an accidental exposure, spill, splash, or other incident.		

Continue to next page

RESET

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	Supervisor Initials	*Employee Initials*
Job/Task Specific Orientation *On-the-job orientation and training on what the employee needs to know to perform the initial job/task assignments safely (e.g. proper lifting, lock-out/tag-out, driving safety, etc.), including required Personal Protective Equipment (PPE).*		
Position Title:		
Job/Task:		
☐ Hazards associated with this job/task.		
☐ Safe practices and procedures.		
☐ Training on use and care of required PPE.		
Required PPE:		
Job/Task:		
☐ Hazards associated with this job/task.		
☐ Safe practices and procedures.		
☐ Training on use and care of required PPE.		
Required PPE:		
Job/Task:		
☐ Hazards associated with this job/task.		
☐ Safe practices and procedures.		
☐ Training on use and care of required PPE.		
Required PPE:		
Job/Task:		
☐ Hazards associated with this job/task.		
☐ Safe practices and procedures.		
☐ Training on use and care of required PPE.		
Required PPE:		
Job/Task:		
☐ Hazards associated with this job/task.		
☐ Safe practices and procedures.		
☐ Training on use and care of required PPE.		
Required PPE:		

The signatures below document that the appropriate items have been discussed to the satisfaction of both parties. Both the supervisor and employee accept responsibility to maintain a safe and healthful working environment.

Print Supervisor's Name ______________________ Supervisor's Signature ______________________ Date

Print Employee's Name ______________________ Employee's Signature ______________________ Date

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Involve Workers in All Aspects of the Program

It can sometimes be difficult to convince employees to follow safety rules or procedures. However, if they understand the need for the safety rules and are involved in developing them, they will feel a sense of ownership for the safety program. Employees will follow identified procedures because they are written in a way that makes sense to the workers and addresses their concerns. If an employee believes in the value of the safety procedure, he/she can then champion this procedure to their coworkers.

Employees can contribute by:

- Providing input and review of safety programs and policies
- Setting realistic goals
- Assisting in evaluating whether or not a hazard control will be effective
- Participating in worksite safety inspections
- Providing on-the-job safety training to co-workers and new employees.

Safety Committees

Employee safety committees provide a formal process for employee involvement in the safety program, and allow employees and management to come together in a cooperative manner to work towards to improving the safety program and reducing hazards. Safety committees are invaluable in developing a strong safety program.

Within Region 10, Oregon and Washington mandate workplace safety committees. Employee safety committee representatives must be ***E***lected by their coworkers, as opposed to ***SE***lected by management. Safety committee members are elected for terms of one year, although neither state has established term limits. Members must elect a chairperson.

Minutes must be taken for each safety committee meeting. Washington requires that safety committee minutes be kept for a period one year. In Oregon, safety committee meeting minutes must be kept for three years.

437-001-0765 Safety Committees and Safety Meetings

This rule requires employers to establish and administer a safety committee, or hold safety meetings, to communicate and evaluate safety and health issues.

Purpose: The purpose of safety committees and safety meetings is to bring workers and management together in a non-adversarial, cooperative effort to promote safety and health. Safety committees and safety meetings will assist you in making continuous improvement to your safety and health programs.

Scope: This rule applies to public or private employers in Oregon subject to Oregon OSHA jurisdiction, except as listed below.

You do not have to comply with this rule if you are:

- The sole owner and only employee of a corporation;
- A member of a board or commission and do not participate in the day-to-day activities of the company. You are not considered an employee for purposes of this rule.
- Engaged in agricultural activities covered by Division 4, Subdivision C.
- Engaged in forest activities covered by Division 7, Subdivisions B and C.

Division 2, Subdivision L OAR 437-002-0182 (7) requires employers engaged in **fire service** activities to establish a separate fire service safety committee or opt for safety meetings if they meet the criteria in the following table.

You can choose a committee or meetings.

(1) You must establish and administer an effective safety committee or hold effective safety meetings as defined by these rules:

Table 1 - Safety committee or safety meeting

If	You can have a Safety Committee	You can have Safety Meetings
You have 10 or fewer employees more than half of the year (including seasonal and temporary)	Yes	Yes
More than half of your employees report to construction sites	Yes	Yes
More than half of your employees are mobile or move frequently between sites	Yes	Yes
Most employees do not regularly work outside an office environment	Yes	Yes
You have more than 10 employees at a location, and none of the above applies	Yes	No
You have satellite or auxiliary offices with 10 or fewer employees at each location	Yes	Yes

Safety Committees

(2) If you have 20 or fewer employees you must have at least 2 members. If you have more than 20 employees you must have at least 4 members.

(3) You must have an equal number of employer-selected members and employee-elected or volunteer members. If both parties agree, the committee may have more employee-elected or volunteer members.

NOTE: Management can select a supervisor to represent them. Employees can elect a supervisor to represent them.

(4) Your safety committee members must:

- Have a majority agree on a chairperson.
- Serve a minimum of one year, when possible.
- Be compensated at their regular rate of pay.
- Have training in the principles of accident and incident investigations for use in evaluating those events.
- Have training in hazard identification.
- Be provided with meeting minutes.
- Represent major activities of your business.

(5) Your safety committee must meet on company time as follows:

- Quarterly in situations where employees do mostly office work.
- Monthly for all other situations (except the months when quarterly worksite inspections are performed).

(6) You must keep written records of each safety committee meeting for three years that include:

- Names of attendees.
- Meeting date.
- All safety and health issues discussed, including tools, equipment, work environment, and work practice hazards.
- Recommendations for corrective action and a reasonable date by which management agrees to respond.
- Person responsible for follow up on any recommended corrective actions.
- All reports, evaluations and recommendations made by the committee.

(7) Your safety committee must establish procedures for conducting workplace safety and health inspections. Persons trained in hazard identification must conduct inspections as follows:

Table 2 - Safety committee procedures for inspections

Where	Who	When
Primary fixed locations	Employer and employee representatives	Quarterly
Office environments	Employer and employee representatives	Quarterly
Auxiliary and satellite locations	Employer and employee representatives	Quarterly
Mobile work locations, infrequently visited sites, and sites that do not lend themselves to quarterly inspections	Employer and employee representatives or a designated person	As often as the safety committee determines is necessary

(8) In addition to the above requirements, your safety committee must:

- Work with management to establish, amend or adopt accident investigation procedures that will identify and correct hazards.
- Have a system that allows employees an opportunity to report hazards and safety and health related suggestions.
- Establish procedures for reviewing inspection reports and for making recommendations to management.
- Evaluate all accident and incident investigations and make recommendations for ways to prevent similar events from occurring.
- Make safety committee meeting minutes available for all employees to review.
- Evaluate management's accountability system for safety and health, and recommend improvements. Examples include use of incentives, discipline, and evaluating success in controlling safety and health hazards.

(9) If you have multiple locations, you may choose to have a centralized safety committee. A centralized safety committee must represent the safety and health concerns of all locations and meet the requirements for safety committees. If you rely on a centralized committee, you must also have a written safety and health policy that:

- Represents management commitment to the committee.
- Requires and describes effective employee involvement.
- Describes how the company will hold employees and managers accountable for safety and health.
- Explains specific methods for identifying and correcting safety and health hazards at each location.
- Includes an annual written comprehensive review of the committees' activities to determine effectiveness.

NOTE: Two or more employers at a single location may combine resources to meet the intent of these rules.

Safety Meetings

(10) Safety meetings must:

- Include all available employees.
- Include at least one employer representative authorized to ensure correction of safety and health issues.
- Be held on company time and attendees paid at their regular rate of pay.

(11) Hold safety meetings with the following frequency if:

Table 3 - Safety meeting frequency

Nature of the Business	Frequency of Meetings
You employ construction workers	At least monthly and before the start of each job that lasts more than one week.
Your employees do mostly office work	At least quarterly
All other employers	At least monthly

(12) Safety meetings must include discussions of:

Safety and health issues

Accident investigations, causes, and the suggested corrective measures.

(13) Employers in construction, utility work and manufacturing must document, make available to all employees, and keep for three years a written record of each meeting that includes the following:

- Hazards related to tools, equipment, work environment and unsafe work practices identified and discussed during the meeting.
- The date of the meeting.
- The names of those attending the meeting.

All other employers do not need to keep these records if all employees attend the safety meeting.

(14) If you are a subcontractor on a multi-employer worksite, to meet the intent of (11) through (13), your employees may attend the prime contractor's safety meetings. You may keep the minutes from these meetings as a part of your records to meet the intent of (13). If you choose this option, you must still meet to discuss accidents involving your employees.

(15) Innovation. After you apply, OR-OSHA may grant approval for safety committees or safety meetings that differ from the rule requirements yet meet the intent of these rules.

(16) Effective Dates. The effective date for compliance with this rule is January 1, 2009. For employers with 10 or fewer employees, other than those in construction, the effective date is September 19, 2009.

Stat. Auth.: ORS 654.025(2) and 656.726(4).
Stats. Implemented: ORS 654.176.
Hist: WCD Admin. Order, Safety 10-1982, f. 7/30/82, ef. 11/1/82.
OR OSHA Admin. Order 12-1990, f. 6/18/90, ef. 6/18/90 (temp).
OR OSHA Admin. Order 28-1990, f. 12/18/90, ef. 3/1/91 (perm).
OR OSHA Admin. Order 6-1994, f. 9/30/94, ef. 9/30/94.
OR OSHA Admin. Order 9-1995, f. 11/29/95, ef. 11/29/95.
OR-OSHA Admin. Order 8-2001, f. 7/13/01, ef. 7/13/01.
OR-OSHA Admin. Order 6-2003, f. 11/26/03, ef. 11/26/03.
OR-OSHA Admin. Order 7-2006, f. 9/6/06, ef. 9/6/06
OR-OSHA Admin. Order 9-2008, f. 9/19/08, ef. 1/1/09.

296-800 WAC
Safety and Health Core Rules

(1) Establish a safety committee.

- Make sure your committee:
  - Has employee-elected and employer-selected members.
    - The number of employee-elected members must equal or exceed the number of employer-selected members.

> *Note: Employees selected by the employees bargaining representative or union qualify as employee-elected.*

    - The term of employee-elected members must be a maximum of one year. (There is no limit to the number of terms a representative can serve.)
    - If there is an employee-elected member vacancy, a new member must be elected prior to the next scheduled meeting.
  - Has an elected chairperson.
  - Determines how often, when, and where, the safety committee will meet.

> *Note:*
>
> *Meetings should be one hour or less, unless extended by a majority vote of the committee.*
>
> *If the committee cannot agree on the frequency of meetings, the department of labor and industries regional safety consultation representative should be consulted for recommendations. (See the resources section of this book for contacts.)*

You must:

(2) Cover these topics:

- Review safety and health inspection reports to help correct safety hazards.
- Evaluate the accident investigations conducted since the last meeting to determine if the cause(s) of the unsafe situation was identified and corrected.
- Evaluate your workplace accident and illness prevention program and discuss recommendations for improvement, if needed.
- Document attendance.
- Write down subjects discussed.

(3) Record meetings.

- Prepare minutes for each safety committee and:
  - Preserve them for one year.
  - Make them available for review by safety and health consultation personnel of the department of labor and industries.

WAC 296-800-13025 Follow these rules to conduct safety meetings.

You must:

IF:	*THEN:*
You have 10 or fewer employees; or If you have 11 or more employees that • Work on different shifts with 10 or fewer employees on each shift; or • Work in widely separate locations with 10 or fewer employees at each location	You may choose to hold a safety meeting instead of a safety committee

(1) Do the following for safety meetings.

- Make sure your safety meetings:
  - Are held monthly. You may meet more often to discuss safety issues as they come up.
  - Have at least one management representative.

(2) Cover these topics.

- Review safety and health inspection reports to help correct safety hazards.
- Evaluate the accident investigations conducted since the last meeting to determine if the cause(s) of the unsafe situation was identified and corrected.
- Evaluate your workplace accident and illness prevention program and discuss recommendations for improvement, if needed.
- Document attendance.
- Write down subjects discussed.

Note: There are no formal documentation requirements for safety meetings except for writing down who attended and the topics discussed.

Sample Safety Meeting Agenda

1. Accidents, injuries, near-misses, discuss
- incidents that have occurred in your company since the last meeting,
- any follow-up that has been done as a result of investigations into incidents,
- Incidents that have happened in other companies.
- Updates to the company's Accident Prevention Plan from "lessons learned."

2. Results of safety inspections.
- Discuss the results of recent safety inspections.
- Follow up on assignments for eliminating or controlling identified hazards.
- Encourage employees to identify any unsafe conditions or tasks, and
- discuss ways to eliminate or control the hazards.
- When appropriate, assign responsibilities for eliminating or controlling identified hazards.

3. Training.
- Discuss any new safe work procedures or other policies and procedures that need to be implemented.
- Safety Topic of the Month: a presentation and discussion on the chosen topic.

4. Open forum.
- Any one who has a concern about safety and health should bring it up for discussion.

5. Next meeting.
- Set the time, date and place for the next meeting.
- Select a Safety Topic and designate the presenter/discussion leader.

Persons attending this meeting:

_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____

Signed: _____

Remove Barriers to Participation

It is important for employees to feel that their involvement is welcome, and employers must ensure that there are no intentional or unintentional barriers to the reporting of workplace safety issues.

It is important to address reports of safety issues in a manner that focuses on fact finding and not fault finding. Employees may not trust that an employer places as much value on safety as they hope, and if that is the case, they may be hesitant to come forward. A "blame the messenger" or "blame a coworker" attitude will discourage future participation.

Some employers offer incentive programs in order to promote safety. If the incentive program rewards employees for not "having" (i.e., "reporting") accidents, then employees are effectively encouraged to withhold information about accidents that occur in the workplace. This deprives the employer of the opportunity to identify the causes of the accident and take action to prevent future accidents from occurring.

Many employers have come to appreciate the value of teamwork among employees: An effective work team has higher moral and does better quality work. If an employee suffers an accident and reports it, which in turn deprives co-workers of a bonus or a pizza lunch, this would have negative impacts to the work team. Sometimes, employee groups will then turn on and "bully" the employee who made the report.

Disciplinary action and/or drug testing that occurs only after an accident or a hazard is reported can be a barrier to employee participation. OSHA has an expectation that employers use disciplinary action to enforce safety rules in the workplace, however, disciplinary action must be used any time an employee violates a safety rule and not just when violation of the rule results in an accident. If an employer requires drug testing of employees, it must be part of a comprehensive program and not conducted only after an accident has occurred. Neither disciplinary action nor drug testing can be used to target a specific group of employees or in any other discriminatory manner. Documenting disciplinary and drug testing policies and procedures, training managers on employer requirements and ensuring that they are followed can protect the employer from charges of discrimination or retaliation. In addition, employees see that these measures are applied fairly.

Whistleblower Protection

Employees have the right to report safety issues without repercussions. The OSH Act 11(c) gives employees the right to act as whistleblowers, and gives OSHA the authority to oversee and investigate complaints of discrimination or retaliation against whistleblowers.

Employees who work in federal OSHA states, such as Idaho, can file whistleblower complaints through OSHA. Employees who work in state plan states, such as Alaska, Oregon and Washington would file whistleblower complaints through their state.

Activity: *Work with your group to design either a*

- *incentive program,*
- *disciplinary program, or*
- *drug testing program*

that does NOT act as a disincentive to employee safety participation. Be prepared to share with the class.

MAR 12 2012

MEMORANDUM FOR: REGIONAL ADMINISTRATORS, WHISTLEBLOWER PROGRAM MANAGERS

FROM: RICHARD E. FAIRFAX
Deputy Assistant Secretary

SUBJECT: Employer Safety Incentive and Disincentive Policies and Practices

Section 11(c) of the OSH Act prohibits an employer from discriminating against an employee because the employee reports an injury or illness. 29 CFR 1904.36. This memorandum is intended to provide guidance to both field compliance officers and whistleblower investigative staff on several employer practices that can discourage employee reports of injuries and violate section 11(c), or other whistleblower statutes.

Reporting a work-related injury or illness is a core employee right, and retaliating against a worker for reporting an injury or illness is illegal discrimination under section 11(c). Other whistleblower statutes enforced by OSHA also may protect employees who report workplace injuries. In particular, the Federal Railroad Safety Act (FRSA) prohibits railroad carriers, their contractors and subcontractors from discriminating against employees for reporting injuries. 49 U.S.C. 20109(a)(4).

If employees do not feel free to report injuries or illnesses, the employer's entire workforce is put at risk. Employers 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 to which they are entitled. Ensuring that employees can report injuries or illnesses without fear of retaliation is therefore crucial to protecting worker safety and health.

There are several types of workplace policies and practices that could discourage reporting and could constitute unlawful discrimination and a violation of section 11(c) and other whistleblower protection statutes. Some of these policies and practices may also violate OSHA's recordkeeping regulations, particularly the requirement to ensure that employees have a way to report work-related injuries and illnesses. 29 C.F.R. 1904.35(b)(1). I list the most common potentially discriminatory policies below. OSHA has also observed that the potential for unlawful discrimination under all of these policies may increase when management or supervisory bonuses are linked to lower reported injury rates. While OSHA appreciates employers using safety as a key management metric, we cannot condone a program that encourages discrimination against workers who report injuries.

1. OSHA has received reports of employers who have a policy of taking disciplinary action against employees who are injured on the job, regardless of the circumstances surrounding the injury. Reporting an injury is always a protected activity. OSHA views discipline imposed under such a policy against an employee who reports an injury as a direct violation of section 11(c) or FRSA. In other words, an employer's policy to discipline all employees who are injured, regardless of fault, is not a legitimate nondiscriminatory reason that an employer may advance to justify

adverse action against an employee who reports an injury. In addition, such a policy is inconsistent with the employer's obligation to establish a way for employees to report injuries under 29 CFR 1904.35(b), and where it is encountered, a referral for a recordkeeping investigation should be made. Where OSHA encounters such conduct by a railroad carrier, or a contractor or subcontractor of a railroad carrier, a referral to the Federal Railroad Administration (FRA), which may conduct a recordkeeping investigation, may also be appropriate.

2. In another situation, an employee who reports an injury or illness is disciplined, and the stated reason is that the employee has violated an employer rule about the time or manner for reporting injuries and illnesses. Such cases deserve careful scrutiny. Because the act of reporting the injury directly results in discipline, there is a clear potential for violating section 11(c) or FRSA. OSHA recognizes that employers have a legitimate interest in establishing procedures for receiving and responding to reports of injuries. To be consistent with the statute, 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. Nor may enforcement of such rules be used as a pretext for discrimination. In investigating such cases, factors such as the following may be considered: whether the employee's deviation from the procedure was minor or extensive, inadvertent or deliberate, whether the employee had a reasonable basis for acting as he or she did, whether the employer can show a substantial interest in the rule and its enforcement, and whether the discipline imposed appears disproportionate to the asserted interest. Again, where the employer's reporting requirements are unreasonable, unduly burdensome, or enforced with unjustifiably harsh sanctions, they may result in inaccurate injury records, and a referral for a recordkeeping investigation should be made.

3. In a third situation, an employee reports an injury, and the employer imposes discipline on the ground that the injury resulted from the violation of a safety rule by the employee. OSHA encourages employers to maintain and enforce legitimate workplace safety rules in order to eliminate or reduce workplace hazards and prevent injuries from occurring in the first place. In some cases, however, an employer may attempt to use a work rule as a pretext for discrimination against a worker who reports an injury. A careful investigation is needed. Several circumstances are relevant. Does the employer monitor for compliance with the work rule in the absence of an injury? Does the employer consistently impose equivalent discipline against employees who violate the work rule in the absence of an injury? The nature of the rule cited by the employer should also be considered. Vague rules, such as a requirement that employees "maintain situational awareness" or "work carefully" may be manipulated and used as a pretext for unlawful discrimination. Therefore, where such general rules are involved, the investigation must include an especially careful examination of whether and how the employer applies the rule in situations that do not involve an employee 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 in violation of section 11(c) or FRSA.

4. Finally, some employers establish programs that unintentionally or intentionally provide employees an incentive 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 by employers to encourage their workers to use safe practices. However, there are better ways to encourage safe work practices, such as incentives that promote worker participation in safety-related activities, such as identifying hazards or participating in investigations of injuries, incidents or "near misses". OSHA's VPP Guidance materials refer to a number of positive incentives, including providing tee shirts to workers serving on safety and health committees; offering modest rewards for suggesting ways to strengthen safety and health; or throwing a recognition party at the successful completion of company-wide safety and health training. *See Revised Policy Memo #5 - Further Improvements to VPP* (June 29, 2011).

Incentive programs that discourage employees from reporting their injuries are problematic because, under section 11(c), an employer may not "in any manner discriminate" against an employee because the employee exercises a protected right, such as the right to report an injury. FRSA similarly prohibits a railroad carrier, contractor or subcontractor from discriminating against an employee who notifies, or attempts to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury. If an employee of a firm with a safety incentive program reports an injury, the employee, or the employee's entire work group, will be disqualified from receiving the incentive, which could be considered unlawful discrimination. One important factor to consider is whether the incentive involved is of sufficient magnitude that failure to receive it "might have dissuaded reasonable workers from" reporting injuries. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006).

In addition, if the incentive is great enough that its loss dissuades reasonable workers from reporting injuries, the program would result in the employer's failure to record injuries that it is required to record under Part 1904. In this case, the employer is violating that rule, and a referral for a recordkeeping investigation should be made. If the employer is a railroad carrier, contractor or subcontractor, a violation of FRA injury-reporting regulations may have occurred and a referral to the FRA may be appropriate. This may be more likely in cases where an entire workgroup is disqualified because of a reported injury to one member, because the injured worker in such a case may feel reluctant to disadvantage the other workgroup members.

Please contact the Office of Whistleblower Protection Programs at (202) 693-2199 if you have further questions.

https://www.osha.gov/as/opa/whistleblowermemo.html

OSHA® FactSheet

Filing Whistleblower Complaints under Section 11(c) of the OSH Act of 1970

Employees are protected from retaliation for raising workplace health and safety concerns and for reporting work-related injuries and illnesses.

Covered Employees

Section 11(c) of the *Occupational Safety and Health Act of 1970* (OSH Act) prohibits employers from retaliating against employees for exercising a variety of rights guaranteed under the OSH Act, such as filing a safety and health complaint with OSHA, raising a health and safety concern with their employers, participating in an OSHA inspection, or reporting a work-related injury or illness.

A covered employee is any private sector employee in a business affecting interstate commerce, an employee of the U.S. Postal Service, an employee of certain tribal employers, or a non-federal public sector employee in a state having an OSHA-approved state program.

Protected Activity

A person may not discharge or in any manner retaliate against an employee because the employee:

Filed any complaint or instituted or caused to be instituted any proceeding under or related to the OSH Act.

Exercised any right afforded by the OSH Act. Examples include, but are not limited to, communicating orally or in writing with management personnel about occupational safety or health matters, including asking questions or expressing concerns, requesting safety data sheets, reporting a work-related injury or illness, or requesting copies of OSHA regulations; filing a safety/health complaint with OSHA, participating in an OSHA on-site inspection.

Unfavorable Employment Actions

A person may be found to have violated Section 11(c) of the OSH Act if the employee's protected activity was a motivating factor in the person's decision to take unfavorable employment action(s) against the employee. Unfavorable employment actions may include:

- Firing or laying off
- Blacklisting
- Demoting
- Denying overtime or promotion
- Disciplining
- Denying benefits
- Failure to hire or rehire
- Intimidation
- Making threats
- Reassignment affecting prospects for promotion
- Reducing pay or hours

Deadline for Filing Complaints

Complaints must be filed within 30 days after the alleged unfavorable employment action occurs (that is, when the employee is notified of the retaliatory action).

Employees filing untimely retaliation complaints with OSHA may be referred to the National Labor Relations Board (NLRB) for possible further action.

How to File an 11(c) Complaint

An employee, or representative of an employee, who believes he or she has been retaliated against in violation of Section 11(c), may file a complaint with OSHA within 30 days (see above). Complaints may be filed verbally with OSHA by visiting or calling the local OSHA office at 1-800-321-OSHA (6742), or may be filed in writing by sending a written complaint to the closest OSHA regional or area office, or by filing a complaint online at www.whistleblowers.gov/complaint_page.html.

Written complaints may be filed by facsimile, electronic communication, hand delivery during normal business hours, U.S. mail (confirmation services recommended), or other third-party commercial carrier.

The date of the postmark, facsimile, electronic communication, telephone call, hand delivery, delivery to a third-party commercial carrier, or

in-person filing at an OSHA office is considered the date filed. No particular form is required and complaints may be submitted in any language.

To file a complaint electronically, please visit www.whistleblowers.gov/complaint_page.html.

To contact OSHA to file a complaint, please call 1-800-321-OSHA (6742) and they will connect you to the closest office; or visit www.osha.gov/html/RAmap.html.

Upon receipt, OSHA will review the complaint to determine whether it is appropriate to conduct a fact-finding investigation (e.g., whether the complaint was filed within 30 days; whether the allegation is covered by Section 11(c)). All complaints are investigated according to statutory requirements in 29 CFR 1977.

In the 27 states with OSHA-approved state plans, employees may file a complaint under Section 11(c) of the OSH Act with both the state plan and Federal OSHA. For a list of state plans, please visit: www.osha.gov/dcsp/osp.

What to do about a Dangerous Situation at Work

If workers believe working conditions are unsafe or unhealthful, it is recommended that they bring the conditions to their employers' attention, if possible.

Workers may file a complaint with OSHA concerning a hazardous working condition at any time. For information on occupational safety and health laws and regulations, visit OSHA's website at www.osha.gov.

However, workers should not leave the worksite merely because they have filed a complaint. If a worker, with no reasonable alternative, refuses in good faith to expose themselves to a dangerous condition, the worker would be protected from subsequent retaliation. Where possible, the employee must have also sought, but been unable to obtain, a correction of the condition from the employer or OSHA. For more information, go to www.osha.gov/workers.

Results of the Investigation

If the evidence supports an employee's claim of retaliation and a voluntary settlement cannot be reached, OSHA, through the Office of the Solicitor (SOL), may litigate the case in U.S. District Court. OSHA may seek possible relief to make the employee whole, including:

- Reinstatement.
- Payment of back pay with interest.
- Compensation for special damages and other expenses the employee may have incurred as a result of the violation.
- Punitive damages.
- Other non-monetary relief.

If the evidence does not support an employee's claim of retaliation, OSHA's non-merit finding will become a final order of the Secretary of Labor unless either party objects to the determination within 15 days to the Directorate of Whistleblower Protection Programs (DWPP).

To Get Further Information

For a copy of Section 11(c) of the *Occupational Safety and Health Act* (29 U.S.C. §660(c)), the regulations (29 CFR 1977), and other information, go to www.whistleblowers.gov.

OSHA's Whistleblower Protection Program enforces the whistleblower provisions of more than twenty federal whistleblower laws. To learn more about the whistleblower statutes which OSHA enforces, view our "Whistleblower Statutes Desk Aid" at www.whistleblowers.gov/whistleblower_acts-desk_reference.pdf. You can also call OSHA at 1-800-321-OSHA (6742) if you have questions or need more information.

This is one in a series of informational fact sheets highlighting OSHA programs, policies or standards. It does not impose any new compliance requirements. For a comprehensive list of compliance requirements of OSHA standards or regulations, refer to Title 29 of the Code of Federal Regulations. This information will be made available to sensory-impaired individuals upon request. The voice phone is (202) 693-1999; teletypewriter (TTY) number: 1-877-889-5627.

For assistance, contact us. We can help. It's confidential.

OSHA® Occupational Safety and Health Administration

www.osha.gov (800) 321-OSHA (6742)

U.S. Department of Labor

DWPP FS-3812 06/2015

OSHA® FactSheet

Your Rights as a Whistleblower

You may file a complaint with OSHA if your employer retaliates against you by taking unfavorable personnel action because you engaged in protected activity relating to workplace safety or health, asbestos in schools, cargo containers, airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health insurance reform, motor vehicle safety, nuclear, pipeline, public transportation agency, railroad, maritime, motor vehicle safety, and securities laws.

Whistleblower Laws Enforced by OSHA

Each law requires that complaints be filed within a certain number of days after the alleged retaliation.

- *Asbestos Hazard Emergency Response Act* (90 days)
- *Clean Air Act* (30 days)
- *Comprehensive Environmental Response, Compensation and Liability Act* (30 days)
- *Consumer Financial Protection Act of 2010* (180 days)
- *Consumer Product Safety Improvement Act* (180 days)
- *Energy Reorganization Act* (180 days)
- *Federal Railroad Safety Act* (180 days)
- *Federal Water Pollution Control Act* (30 days)
- *International Safe Container Act* (60 days)
- *Moving Ahead for Progress in the 21st Century Act* (motor vehicle safety) (180 days)
- *National Transit Systems Security Act* (180 days)
- *Occupational Safety and Health Act* (30 days)
- *Pipeline Safety Improvement Act* (180 days)
- *Safe Drinking Water Act* (30 days)
- *Sarbanes-Oxley Act* (180 days)
- *Seaman's Protection Act* (180 days)
- *Section 402 of the FDA Food Safety Modernization Act* (180 days)
- *Section 1558 of the Affordable Care Act* (180 days)
- *Solid Waste Disposal Act* (30 days)
- *Surface Transportation Assistance Act* (180 days)
- *Toxic Substances Control Act* (30 days)
- *Wendell H. Ford Aviation Investment and Reform Act for the 21st Century* (90 days)

Unfavorable Personnel Actions

Your employer may be found to have retaliated against you if your protected activity was a contributing or motivating factor in its decision to take unfavorable personnel action against you. Such actions may include:

- Applying or issuing a policy which provides for an unfavorable personnel action due to activity protected by a whistleblower law enforced by OSHA
- Blacklisting
- Demoting
- Denying overtime or promotion
- Disciplining
- Denying benefits
- Failing to hire or rehire
- Firing or laying off
- Intimidation
- Making threats
- Reassignment to a less desirable position, including one adversely affecting prospects for promotion
- Reducing pay or hours
- Suspension

Filing a Complaint

If you believe that your employer retaliated against you because you exercised your legal rights as an employee, contact OSHA as soon as possible because you must file your complaint within the legal time limits.

An employee can file a complaint with OSHA by visiting or calling the local OSHA office or sending a written complaint to the closest OSHA regional or area office. Written complaints may be filed by facsimile, electronic communication, hand delivery during business hours, U.S. mail (confirmation services recommended), or other third-party commercial carrier. The date of the postmark, facsimile, electronic communication, telephone call, hand delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA

office is considered the date filed. No particular form is required and complaints may be submitted in any language.

For OSHA area office contact information, please call 1-800-321-OSHA (6742) or visit www.osha.gov/html/RAmap.html.

Upon receipt of a complaint, OSHA will first review it to determine whether it is valid on its face. All complaints are investigated in accord with the statutory requirements.

With the exception of employees of the U.S. Postal Service, public sector employees (those employed as municipal, county, state, territorial or federal workers) are not covered by the *Occupational Safety and Health Act* (OSH Act). Non-federal public sector employees and, except in Connecticut, New York, New Jersey, the Virgin Islands, and Illinois, private sector employees are covered in states which operate their own occupational safety and health programs approved by Federal OSHA. For information on the 27 State Plan states, call 1-800-321-OSHA (6742), or visit www.osha.gov/dcsp/osp/index.html.

A federal employee who wishes to file a complaint alleging retaliation due to disclosure of a substantial and specific danger to public health or safety or involving occupational safety or health should contact the Office of Special Counsel (www.osc.gov) and OSHA's Office of Federal Agency Programs (www.osha.gov/dep/enforcement/dep_offices.html).

Coverage of public sector employees under the other statutes administered by OSHA varies by statute. If you are a public sector employee and you are unsure whether you are covered under a whistleblower protection statute, call 1-800-321-OSHA (6742) for assistance, or visit www.whistleblowers.gov.

How OSHA Determines Whether Retaliation Took Place

The investigation must reveal that:

- The employee engaged in protected activity;
- The employer knew about or suspected the protected activity;
- The employer took an adverse action; and
- The protected activity motivated or contributed to the adverse action.

If the evidence supports the employee's allegation and a settlement cannot be reached, OSHA will generally issue an order, which the employer may contest, requiring the employer to reinstate the employee, pay back wages, restore benefits, and other possible remedies to make the employee whole. Under some of the statutes the employer must comply with the reinstatement order immediately. In cases under the *Occupational Safety and Health Act*, *Asbestos Hazard Emergency Response Act*, and the *International Safe Container Act*, the Secretary of Labor will file suit in federal district court to obtain relief.

Partial List of Whistleblower Protections

Whistleblower Protections under the OSH Act

The OSH Act protects workers who complain to their employer, OSHA or other government agencies about unsafe or unhealthful working conditions in the workplace or environmental problems. You cannot be transferred, denied a raise, have your hours reduced, be fired, or punished in any other way because you used any right given to you under the OSH Act. Help is available from OSHA for whistleblowers.

If you have been punished or discriminated against for using your rights, you must file a complaint with OSHA within 30 days of the alleged reprisal for most complaints. No form is required, but you must send a letter or call the OSHA Area Office nearest you to report the discrimination (within 30 days of the alleged discrimination).

You have a limited right under the OSH Act to refuse to do a job because conditions are hazardous. You may do so under the OSH Act only when (1) you believe that you face death or serious injury (and the situation is so clearly hazardous that any reasonable person would believe the same thing); (2) you have tried, where possible, to get your employer to correct the condition, and been unable to obtain a correction and there is no other way to do the job safely; and (3) the situation is so urgent that you do not have time to eliminate the hazard through regulatory channels such as calling OSHA. For details, see www.osha.gov/as/opa/worker/refuse.html. OSHA cannot enforce union contracts or state laws that give employees the right to refuse to work.

Whistleblower Protections in the Transportation Industry

Employees whose jobs directly affect commercial motor vehicle safety or security are protected from retaliation by their employers for, among other things, reporting violations of federal or state commercial motor carrier safety or security regulations, or refusing to operate a vehicle because of violations of federal commercial motor vehicle safety or security regulations or because they have a reasonable apprehension of death or serious injury to themselves or the public and they have sought from the employer and been unable to obtain correction of the hazardous condition.

AKOSH
Whistleblower Fact Sheet

Alaska Occupational Safety and Health (AKOSH) is responsible for enforcing Alaska Statute 18.60.089, which says it is unlawful for an employer to retaliate against an employee for engaging in a protected activity.

What is a protected activity?

- Filing a safety/health complaint with AKOSH (Alaska Occupational Safety and Health)
- Participating in an AKOSH enforcement inspection or proceeding
- Reporting workplace safety/health concerns to management
- Reporting/Filing workplace injuries, illnesses, or fatalities.

Unfavorable Personnel Actions

Your employer may be found to have retaliated against you if your protected activity was a contributing or motivating factor in its decision to take unfavorable personnel action against you. Such actions may include:

- Firing or laying off
- Demoting
- Disciplining
- Blacklisting
- Denying overtime

How AKOSH Determines Whether Retaliation Took Place

The investigation must reveal that:

- The employee engaged in protected activity;
- The employer knew about the protected activity;
- The employer took an adverse action; and
- The protected activity was the motivating factor (or under some laws, a contributing factor) in the decision to take the adverse action against the employee. If the evidence supports the employee's allegation and a settlement cannot be reached, AKOSH will issue an order requiring the employer to reinstate the employee, pay back wages, restore benefits, and other possible remedies to make the employee whole.

Limited Protections for Employees Who Refuse to Work

You have a limited right under the OSH Act to refuse to do a job because conditions are hazardous. You may do so under the OSH Act only when (1) you believe that you face *death or serious injury* (and the situation is so clearly hazardous that any reasonable person would believe the same thing); (2) you have tried to get your employer to correct the condition, and there is no other way to do the job safely; and (3) the situation is so urgent that you do not have time to eliminate the hazard through regulatory channels such as calling AKOSH. Regardless of the unsafe condition, you are not protected if you simply walk off the job. For details, see http://www.osha.gov/as/opa/worker/refuse.html.

OSHA cannot enforce union contracts or state laws that give employees the right to refuse to work.

Filing a Complaint:

If you believe your employer retaliated against you because you engaged in the above protected activity(s) you must file a written complaint with 30 days of the unfavorable personnel action. For more information call **907-269-4940.**

What is considered discrimination or retaliation?

By law, no one including your employer may take action against you for exercising your rights under the Washington Industrial Safety and Health Act. If that happens, you may have been discriminated against. Discriminatory or retaliatory actions include but are not limited to:

- Demoting you or laying you off.
- Assigning you to an undesirable job assignment or shift.
- Taking away your seniority.
- Reducing your pay or earned benefits.
- Blacklisting, threatening or intimidating you.

What should I do if my rights have been violated?

Make a list of the facts while they are fresh in your mind. Record the names and addresses of the people involved and what happened. Also, note the names of any witnesses, when and where the incident happened, and anything else that may be significant. Keep any documents, letters or notes that relate to the incident.

Can I file a complaint?

If you believe you have been punished or fired for reporting your safety and health concerns, you or your representative should contact L&I's Division of Occupational Safety and Health (DOSH) as soon as possible.

You must file your discrimination complaint within 30 days from the time a disciplinary or retaliatory action occurred.

Can I walk off the job to protest unsafe conditions?

No! However, you can refuse to do a specific task if you reasonably believe that doing so would be dangerous to your life and/or health. But you need to stay on the job until the issue is resolved. If you walk off the job, DOSH may not be able to protect you.

Your right to refuse a task is protected if all of the following conditions are met:

1. The refusal to work must be genuine. It cannot be a disguised attempt to harass your employer or disrupt business.
2. A reasonable person (or most people) would agree that there is a real danger of death or serious injury if you were to perform the job.
3. There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as filing a complaint with DOSH.

When all three of the above conditions are met, you should:

1. Ask your employer to correct the hazard.
2. Ask your employer for other work.
3. Tell your employer that you won't perform the work unless the hazard is corrected.
4. Remain on the worksite until ordered to leave by your employer.

How do I file a complaint?

Contact DOSH at the Department of Labor & Industries, in person at any L&I office, by letter or by telephone within 30 days from the time a discriminatory action occurred. You may file your complaint with the Assistant Director for DOSH at this address:

Assistant Director
Division of Occupational Safety and Health
Department of Labor & Industries
P.O. Box 44600
Olympia WA 98504-4600

You may file the complaint yourself, or you may authorize a representative, such as your union, to do it for you.

Discrimination complaint forms are available online at **www.Lni.wa.gov/Safety** and from local L&I offices (see back cover).

You may also file a retaliation complaint with the U.S. Department of Labor, Occupational Safety & Health Administration (OSHA) within 30 days of the retaliatory act. Although OSHA will not conduct a parallel investigation, filing an OSHA complaint allows you to request a federal review of your retaliation complaint if you are dissatisfied with the state's final determination. Contact the OSHA Regional Office at 300 Fifth Ave., Suite 1280, Seattle, WA 98104-2442, or call 206-757-6700.

Oregon OSHA

FACT SHEET

Incentive programs

OAR 437
Division 1

Oregon OSHA's rules on recording workplace injuries and illnesses require employers to have a reasonable procedure for employees to report work-related injuries and illnesses. The rules also ban retaliating against employees for reporting work-related injuries or illnesses.

These retaliation prohibitions can affect how employers use incentive programs. This fact sheet will clarify some of those issues.

Incentive Programs

Oregon OSHA does not prohibit incentive programs. However, employers must take care in how they are developed and applied. The rule bans taking adverse action against employees simply because they report work-related injuries or illnesses. Adverse actions can affect not only the worker who reported the injury, but co-workers as well when a benefit is withheld.

Withholding a benefit—such as a cash prize drawing or other substantial award—simply because of a reported injury or illness would likely be considered retaliating against an employee and a violation of the rule. Penalizing employees simply because an employee reported a work-related injury or illness without regard to the circumstances surrounding the injury or illness is not "objectively reasonable," and therefore not a legitimate reason for taking adverse action against employees.

For example, an employer raffles a $500 gift card at the end of each month with no accidents that require any employees to miss work. Then, the employer cancels the raffle one month because an employee reported a lost-time injury. This likely violates the rule because the employer did not consider the circumstances of the injury. Canceling the raffle is an adverse action against an employee with a work-related injury.

Providing an incentive for employees to comply with legitimate safety rules or to participate in safety related activities would not violate the rule. For example, raffling a $500 gift card each month where employees universally complied with legitimate workplace safety rules—such as wearing hard hats and fall protection and following lockout-tagout procedures—would not violate the rule. Likewise, rewarding employees for participating in safety training or identifying unsafe working conditions would not violate the rule.

Oregon OSHA encourages employers to find creative ways to incentivize safe work practices and accident-prevention measures. However, employers must make sure those ways do not penalize workers who report work-related injuries or illnesses.

Oregon OSHA may cite an employer if it determines the employer withheld a benefit from an employee for reporting an injury or illness without taking into account the circumstances surrounding the injury or illness.

Oregon OSHA
A Division of the Department of Consumer and Business Services
osha.oregon.gov

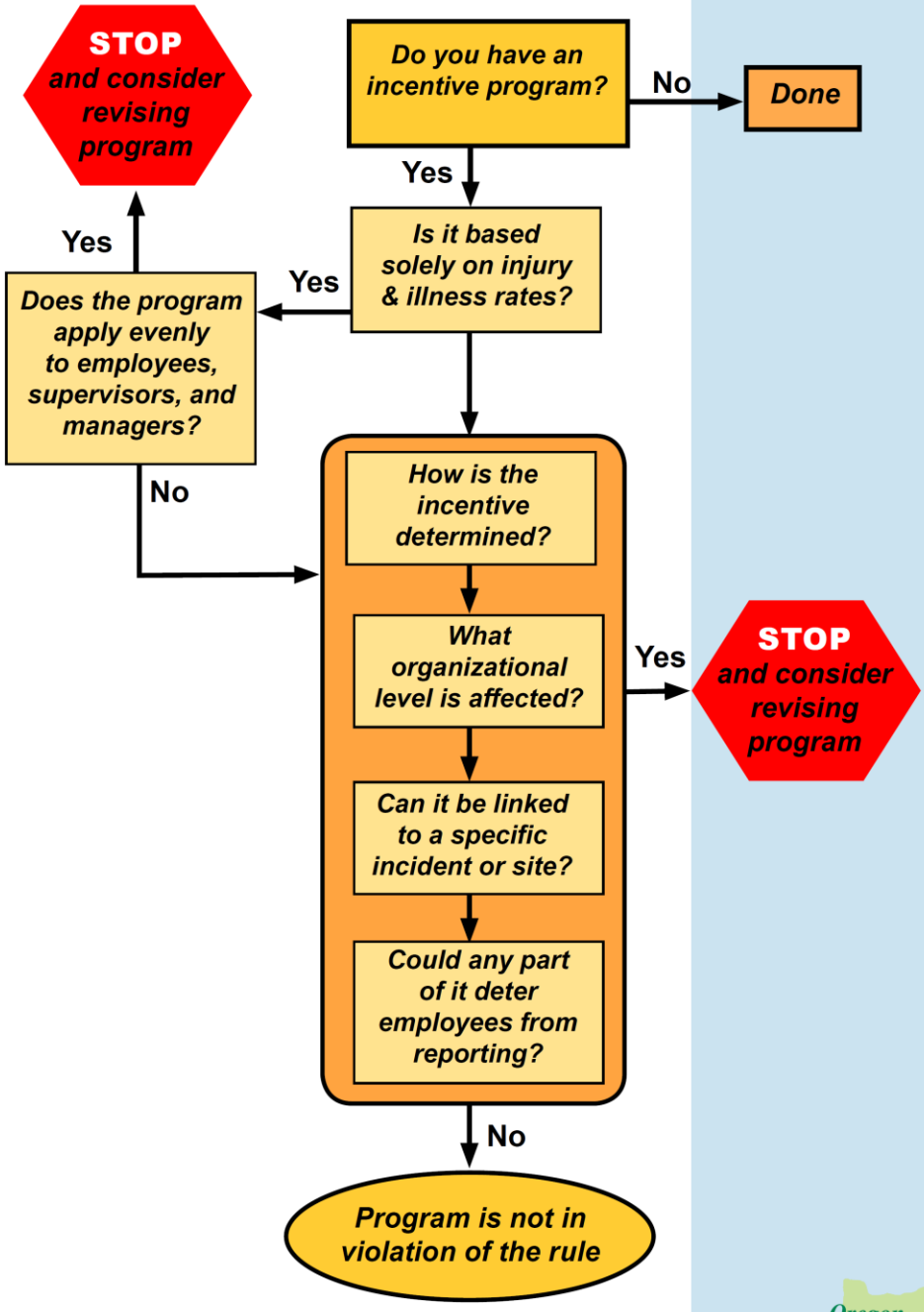
Salem Central Office
350 Winter St. NE
Salem, OR 97301-3882

Phone: 503-378-3272
Toll-free: 800-922-2689
Fax: 503-947-7461

Incentive programs– *continued*

The flowchart below can be used to help decide if an incentive program is in compliance with the rules.

Decision Flowchart



The Standards and Technical Resources Section of Oregon OSHA produced this fact sheet to highlight our programs, policies, or standards. The information is from the field staff, research by the technical resources staff, and published materials. We urge readers to consult the actual rules as this fact sheet information is not as detailed.

OR-OSHA (12/16) FS-69

Oregon OSHA
A Division of the Department of Consumer and Business Services

Oregon OSHA

FACT SHEET

Post-incident drug and alcohol testing

OAR 437
Division 1

Oregon OSHA's rules on recording workplace injuries and illnesses include explicit language that requires employers to have a reasonable procedure for employees to report work-related injuries and illnesses. The rule also prohibits retaliating against employees for reporting work-related injuries or illnesses.

These retaliation prohibitions can affect how employers use drug testing policies. This fact sheet will clarify some of those issues.

Alcohol and Drug Testing

Oregon OSHA does not prohibit employers from drug testing employees who report work-related injuries or illnesses as long as they have an "objectively reasonable" basis for testing.

The rule does not apply to drug testing employees for reasons other than injury reporting. Also, Oregon OSHA will not issue citations for drug testing conducted under a state workers' compensation law or other state or federal law. Drug testing under state or federal law does not violate the rule. The rule only prohibits drug testing employees for reporting work-related injuries or illnesses without an objectively reasonable basis for doing so.

When Oregon OSHA evaluates the reasonableness of drug testing a particular employee who has reported a work-related injury or illness, we will consider certain factors, including:

- Does the employer have a reasonable basis for concluding that drug use could have contributed to the injury or illness (and therefore the result of the drug test could provide insight into why the injury or illness occurred)?
- Were other employees involved in the incident that caused the injury or illness and were they also tested or did the employer test only the employee who reported the injury or illness?
- Does the employer have a heightened interest in determining if drug use could have contributed to the injury or illness due to the hazardousness of the work being performed when the injury or illness occurred?

Alcohol is the only substance that has a test that will indicate actual impairment. If the employer relies on a less comprehensive test that does not measure impairment, then Oregon OSHA may decide that the focus of the employer's test is not to understand what happened. Oregon OSHA will consider this factor only when evaluating an employer's approach to alcohol use in the workplace, and not when evaluating other drug-testing activities.

Oregon OSHA
A Division of the Department of Consumer and Business Services
osha.oregon.gov

Salem Central Office
350 Winter St. NE
Salem, OR 97301-3882

Phone: 503-378-3272
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Fax: 503-947-7461

Post-incident drug and alcohol testing – *continued*

The general principle is that drug testing may not be used by the employer as a form of discipline against employees who report an injury or illness. However, drug testing may be used as a tool to evaluate the root causes of workplace injuries and illnesses in appropriate circumstances. This does not prohibit employers from having a zero-tolerance drug policy, nor would it prohibit pre-hire, random, or for-cause drug tests. Some federal OSHA discussions leave the impression that drug testing is not allowed unless it measures impairment; that is not Oregon OSHA's approach (nor does Oregon OSHA believe it accurately reflects the federal position).

Workplace example: Crane accident

A crane accident injures several employees working nearby, but the crane operator is not injured. The employer does not know the causes of the accident. Yet, there is a reasonable possibility that it could have been caused by operator error or by mistakes made by other employees responsible for ensuring that the crane was in safe working condition.

Result

In this scenario, it would be reasonable to require all employees whose conduct could have contributed to the accident to take a drug test, even if they did not report an injury or illness. Testing would be appropriate in these circumstances because there is a reasonable possibility that drug test results could provide the employer insight on the root causes of the incident. If the employer tested only the injured employees, but did not test the operator and other employees whose conduct could have contributed to the incident, such disproportionate testing of reporting employees would likely be a violation.

Drug testing an employee whose injury could not possibly have been caused by drug use would likely be a violation. For example, drug testing an employee for reporting a repetitive strain injury would not be reasonable because drug use could not have contributed to the repetitive injury.