

# PUBLICATION

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## OSHA Update: Blaming Workers for Injuries?

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In 2012, OSHA warned employers to be cautious about safety incentives that encourage workers not to report workplace injuries. See <https://www.osha.gov/as/opa/whistleblowermemo.html>. As part of this memo from OSHA, employers were told to make sure that employees were free to report workplace injuries and illnesses, and that disciplining an employee for reporting an injury could result in a violation of Section 11(c) of the Occupational Safety and Health Act (the Act) – the whistleblower provision of the Act. Recently, many unions and worker advocate groups are discussing the concerns related to "blame the worker" programs. Safety incentive programs that reward workers for no lost time accidents or that use signage indicating the number of workdays that have passed since the last accident have become indicators of these "blame the worker" type of safety programs. But what is an employer to do about employees who violate safety policies and, as a result, suffer a workplace injury? Does this mean that an employer cannot discipline an employee who violates a safety rule and is injured? The answer is a resounding "No!"

Under the Act, an employer is entitled to present an affirmative defense of employee misconduct to any alleged violation of the Act. To qualify for this defense, there are four criteria that an employer must prove:

1. There is a work rule (safety program or policy).
2. That work rule is adequately communicated to employees (training).
3. The employer monitors for compliance with the work rule (audits or other safety inspections).
4. The employer disciplines employees who violate the rule (OSHA mentions progressive discipline policies many times, but there can be a "cardinal sin" type of caveat).

Establishing the grounds for the affirmative defense of employee misconduct can actually improve an employer's safety program. If you look at the elements of the defense, these are the same things that an employer needs to have in place to help protect employees. Certainly, an employer is required to address hazards at the workplace and that may be accomplished by having a specific work rule that protects an employee, training the employee on the work rule, and ensuring that the work rule is followed. These are all elements of a good safety and health program. So, before anyone jumps to the conclusion that disciplining employees for violating safety rules is simply a "blame the worker" program, consideration should be given to the employee misconduct defense and the positive effects it can have on an employer's safety program.

March's tip for avoiding OSHA citations: Review your company's safety incentive policies and discipline policies. Does your company adequately train the employees on the work rules? Do you monitor the employees to ensure that they are complying with safety rules? Would your company meet the elements of the employee misconduct defense?