



## “Recent OSHA Ruling May Impact Ability to Use Safety as an Incentive Metric”

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### Safety as An Incentive Metric

Some companies in the oil and gas, energy, utility, and manufacturing industry sectors have included safety compliance and/or improvement as a performance metric in their incentive compensation plans. Safety as a performance criteria appears frequently in incentive compensation plans for both executives as well as broad-based employee groups. Now, regulators have raised a potential problem with the use of safety as a performance metric.

### Background

In the spring of this year, the Department of Labor’s Occupational Safety and Health Administration (OSHA) released a final rule regarding its regulation on “Recording and Reporting Occupational Injuries and Illnesses.” This final rule requires employers in most industry sectors with more than 10 employees to keep records of occupational injuries and illnesses at their establishments and to report such data annually to OSHA. The final rule amends OSHA’s recordkeeping regulations to add requirements for the electronic submission of injury and illness data for certain employers with more than 250 employees. In addition, the OSHA regulation requires employers to inform employees of their right to report work-related injuries and illnesses as well as compelling that an employer’s procedures for reporting such incidents to be reasonable and not deterring or discouraging employees from reporting. The new OSHA rule becomes effective on January 1, 2017.

### The Incentive Compensation Issue

Embedded in the OSHA rule is a provision that raises the issue of incentive compensation plans that may discourage employees from reporting injuries and illnesses as a potential violation of the new regulation. OSHA expresses concern that employees who participate in incentive compensation plans that contain some form of safety metric may be reluctant to report the occurrence of an injury or illness incident because he or she may be potentially diminishing or forfeiting a monetary award pursuant to the incentive compensation plan. The new regulation explicitly states:

### Key Takeaways

- *The Occupational and Safety Administration (OSHA) has released a new final rule pertaining to the requirement of employers in certain industry sectors to report data annually with respect to the occurrence of injuries and illnesses.*
- *In this new rule, OSHA requires employers to inform their employees of the right to report work-related injuries and illnesses and that employers need to adopt procedures for reporting such incidents to be reasonable as well as not deterring or discouraging employees from reporting such incidents.*
- *A provision in the new rule raises the issue of incentive compensation plans that may discourage employees from reporting injuries and illnesses as a potential violation of the regulation. In essence, OSHA states that employees who participate in incentive compensation plans that contain some form of safety metric may be reluctant to report injuries or illnesses because their monetary rewards under such plans may be diminished or forfeited pursuant to such plans.*
- *It is the experience of Pay Governance in its consulting capacity that many oil and gas, energy, utility, and manufacturing companies employ the safety metric of Total Reportable Incident Rate (TRIR) versus goal (or improvement therein) as an incentive compensation performance metric.*
- *If your company uses a safety performance metric in its incentive compensation plan(s), we advise you to seek the opinion of legal counsel.*

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“The specific rules and details of implementation of any given incentive program must be considered to determine whether it could give rise to a violation of paragraph (b)(1)(iv) of the final rule. It is a violation of paragraph (b)(1)(iv) for an employer to take adverse action against an employee for reporting a work-related injury or illness, whether or such adverse action was part of an incentive program. Therefore, it is a violation for an employer to use an incentive program to take adverse action, including denying a benefit, because an employee reports a work-related injury or illness, such as disqualifying the employee for a monetary bonus or any other action that would discourage or deter a reasonable employee from reporting the work-related injury or illness.....”

Reference: See Federal Register/Vol. 81, No. 92, Section 1904.35(b)(1)(iv)

It has been our experience as consultants in the design of incentive compensation plans for many companies in the oil and gas, energy, utility, and manufacturing industry sectors to use a safety metric as part of the performance criteria in their annual incentive compensation plans. The safety metric, typically expressed as Total Recordable Incident Rate (“TRIR”) performance against a stated benchmark or annual improvement therein, is frequently used as a performance criteria in management annual incentive plans as well as many broad-based incentive compensation plans. In our consulting work with several companies in establishing performance measurement criteria for the 2017 plan year, we have learned that some companies have effectively removed their safety goals from their incentive compensation plans for next year. We are also familiar with several companies, based upon advice rendered by their outside legal advisors, that have retained safety criteria as an integral part of their 2017 incentive plan designs.

### **You Should Seek Advice of Legal Counsel**

Because there is no legal precedent or case history regarding the new OSHA rule and its interpretation, Pay Governance recommends that you seek a formal legal opinion if one or more of your incentive compensation plans contain a safety metric for plan years 2017 and beyond.

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