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OSHA Docket Office,
Docket No. OSHA-2015-0025 or RIN 1218-AC49,
Technical Data Center, Room N-2625,
OSHA - U.S. Department of Labor,
200 Constitution Ave. NW.,
Washington, DC 20210

19 January 2016

RE: Comments of the American Exploration & Production Council (“AXPC”) and Independent Petroleum Association of America (IPAA) in Response to the Occupational Safety & Health Administration (“OSHA”) Draft Guidance Document entitled “*Protecting Whistleblowers: Recommended Practices for Employers for Preventing and Addressing Retaliation*” (OSHA-2015-0025)

Dear Docket Clerk:

On 5 November 2015, the Occupational Safety and Health Administration (OSHA) requested comments on a draft guidance document entitled “*Protecting Whistleblowers: Recommended Practices for Employers for Preventing and Addressing Retaliation*”. This guidance is intended to help employers in developing an anti-retaliation program to protect employees who raise concerns about a workplace condition or activity that could have an adverse impact on the safety, health, or well-being of the reporting employee, other workers, or members of the public.

The American Exploration & Production Council (AXPC) is a national trade association representing 30 of America’s largest and most active independent natural gas and crude oil exploration and production companies. AXPC’s members are “independent” in that their operations are limited to the exploration for and production of natural gas and crude oil. Moreover, its members operate autonomously, unlike their fully integrated counterparts, which operate in additional segments of the energy business, such as downstream refining and marketing. AXPC’s members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce crude oil and natural gas, and that allow our nation to add reasonably priced domestic energy reserves in environmentally responsible ways.

The Independent Petroleum Association of America (IPAA) represents the thousands of independent oil and natural gas explorers and producers, as well as the service and supply industries that support their efforts, that will be the most significantly affected by the actions resulting from this proposal. Independent producers drill about 95 percent of American oil and natural gas wells, produce about 54 percent of American oil, and more than 85 percent of American natural gas.

OSHA’s draft guidance document is based on the recommendations of the Whistleblower Protection Advisory Committee (WPAC) as outlined in their document entitled *Best Practices for Protecting Whistleblowers and Preventing and Addressing Retaliation*.

In reviewing the WPAC document – in regards to “*Prevention: Fostering a “Speak Up” Culture*” culture, page 4 of this “best practice” document states:

- *“Employers should eliminate all workplace incentives, whether formal or informal, that discourages reporting of concerns. The most important encouragement is to follow through and fairly address the issue without being defensive or retaliatory”.*
- *“Employers should have a policy of no punishment, explicit or implied, for reporting concerns or incidents. Be alert also to punishments for unrelated reasons, including retaliatory changes in employee status (e.g., changes in hours, duties, assignments, vacations, etc.) or other retaliatory actions soon after a reported incident or injury.”*

Based on these “best practices”, the OSHA guidance document includes the following recommended practice:

- *Employers can help foster an anti-retaliation culture by “eliminating all formal and informal workplace incentives that encourage or allow retaliation or discourage reporting. Examples of problematic incentives include rewarding employee work units with prizes for low injury rates or linking supervisory bonuses to lower reported injury rates. (For additional information on incentive programs, see OSHA’s memorandum on “Employer Safety Incentive and Disincentive Policies and Practices”).*

The addition of examples of problematic incentives appears to be an unfounded condemnation of all incentive programs, is not consistent with the WPAC “best practice”, and is contrary to OSHA’s guidance on incentive programs.

Properly managed incentive programs – even those based on injury rates – can and do result in positive workplace improvements. For example, AXPC members complete an annual environmental and safety survey that includes the various OSHA-required recordable injury rates. This survey allows AXPC members to benchmark their performance. In some cases, AXPC members use the survey to establish their Company’s goals related to injury rates which have an impact on annual performance bonuses. This type of incentive program would not be “encouraging or allowing retaliation or discouraging reporting”. In fact this type of workplace incentive program drives improved performance and is specifically recognized as acceptable by OSHA (refer to OSHA’s 2014 memo entitled “Revised VPP Policy Memorandum #5: Further Improvements to the Voluntary Protection Programs”).

The focus of the guidance should not be simply on the existence of an incentive program but on the proper management of that program. Any incentive program (including those which are not injury based) which is not properly managed can lead to unintended consequences. The WPA best practice document recognized this fact in stating - *The most important encouragement is to follow through and fairly address the issue without being defensive or retaliatory*

Additionally – as written – the OSHA draft recommended practice fails to mention that an important factor to consider in evaluating if an incentive is problematic is whether the incentive involved is of sufficient magnitude that failure to receive it “might have dissuaded reasonable workers from” reporting injuries. OSHA specifically highlighted this factor in their memorandum on “Employer Safety Incentive and Disincentive Policies and Practices” but fails to recognize this factor in their “blanket” recommendation to eliminate of all workplace injury based incentive programs.

We suggest OSHA eliminate the examples of problematic incentives and revise this section to be aligned with the WPAC cited “best practice” as follows:

- *Employers can help foster an anti-retaliation culture by “eliminating formal and informal workplace incentives that specifically encourage or allow retaliation or discourage reporting and being alert to retaliatory actions, explicit or implied, for reporting concerns or incidents”.*

We appreciate the opportunity to provide these comments and look forward to an opportunity to discuss these issues further with OSHA.

Sincerely,

A handwritten signature in blue ink that reads "V. Bruce Thompson".

V. Bruce Thompson
President
American Exploration & Production Council

A handwritten signature in black ink that reads "Barry Russell".

Barry Russell
President and CEO
Independent Petroleum Association of America