

EMPLOYER CONSIDERATIONS ON VACCINE MANDATES AND EMPLOYEE INCENTIVES

Advisory
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Last week, the U.S. Food and Drug Administration (FDA) granted full approval for the Pfizer COVID-19 vaccine. This development, along with the recent surge of COVID-19 and the Delta variant, has led many companies to consider implementing vaccine mandates, offering vaccine incentives (such as enhanced paid time off, raffles, gift cards, and even pay raises), imposing surcharges or higher healthcare premiums on the unvaccinated, and other strategies to encourage employees to get vaccinated. When considering these strategies, employers must navigate a wide variety of employment and benefits-related laws to avoid lawsuits and penalties.

Employers are generally permitted to mandate COVID-19 vaccinations for their employees, but must consider and accommodate employees who cannot get the vaccine due to a disability or a sincerely held religious belief. In particular, the "sincerely held religious belief" exception features many potential traps for the unwary as the government has taken an extremely broad view of what is considered a "sincerely held religious belief," and employers must navigate Equal Employment Opportunity Commission (EEOC) guidance limiting the circumstances in which employers are permitted to ask questions and what questions employers may ask.

While employers are generally allowed to offer vaccine incentives and "disincentives", such incentives and "disincentives" are limited if the employer or its agent is administering the vaccine rather than relying on a third-party (e.g., pharmacy, employee's doctor, or public clinic). Specifically, if the employer or its agent is providing the vaccine to employees, then, according to the EEOC, the employer cannot offer an incentive or disincentive that is so substantial as to be "coercive." Unfortunately, the EEOC has not explained what it considers to be

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"coercive" other than to say that employees should not "feel pressured to disclose protected medical information," which is prohibited by the Americans with Disabilities Act (ADA). However, this incentive limitation does not apply if the employer or its agent is not providing the vaccine, and, instead, is only offering incentives for employees who receive the vaccine from a third-party.

Finally, some employers are considering imposing higher healthcare premiums for unvaccinated employees due to the high cost associated with COVID-19. However, employers should consider the cost of the current coverage and the effect of COVID treatments for the unvaccinated as well as the wellness incentive limitations and how the planned surcharge may affect the affordability of coverage for purposes of the Affordable Care Act (ACA).