



Incentivizing Employees To Get COVID-19 Vaccinations: Considerations For Employers

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As the distribution of COVID-19 vaccines becomes more widespread over the coming months, many employers that are hesitant to mandate vaccines are considering ways to encourage employees to become vaccinated on a voluntary basis. One such alternative is offering employees an incentive to obtain the vaccination. However, this raises additional questions: Is an incentive allowed? If so, what is an appropriate incentive and how do I implement it?

May an employer offer an incentive to employees who get vaccinated?

The short answer is “yes, employers may offer employees an incentive to get the COVID-19 vaccine.” Employers will need to balance the amount and type of the incentive with the culture of their particular workplace so as to generate interest while also complying with relevant legal requirements. Some of the legal requirements that need to be considered include the following issues.

Will providing vaccines and offering vaccines be subject to ADA and ERISA regulation?

Although the Equal Employment Opportunity Commission (EEOC) has not specifically addressed the issue of providing incentives for COVID-19 vaccines, the EEOC has stated that simply providing a vaccine and/or asking for proof of being vaccinated is not a disability-related inquiry under the Americans with Disabilities Act (ADA). However, due to the likelihood

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that any vaccine would be preceded by medical history questions, the EEOC warns that such questions would be considered a disability-related inquiry which are restricted under the ADA unless the inquiry is provided through a “voluntary” wellness program in order to comply with the ADA and the Genetic Information Non-Disclosure Act (GINA). The determination of whether a wellness program is considered “voluntary” by the EEOC depends on the level of incentive provided. Under prior guidance, the EEOC indicated that an incentive that did not exceed 30% of the cost of health coverage would be considered “voluntary” but this standard was struck down by a federal court which required the EEOC to issue new guidance addressing incentives for wellness programs. On January 7, 2021, the EEOC issued proposed regulations which state that instead of up to 30% of the cost of health coverage, incentives for a “voluntary” wellness program must be de minimis. Examples of de minimis incentives in the proposed guidance include a water bottle or a gift card of a nominal amount. The proposed regulations do not identify what amounts will be considered “nominal.” Although this new guidance is “proposed” and not yet effective or controlling and may be impacted by the incoming administration, it may foreshadow how the EEOC may ultimately interpret incentives for wellness programs. The proposed regulations are currently open for public comment before being finalized. Due to the impact of the proposed guidance, we anticipate that stakeholders will submit numerous comments challenging the EEOC’s position, which may affect the final version of such guidance.

An additional consideration when providing incentives for vaccinations is the application of the Employee Retirement Income Security Act (ERISA). Because a vaccine is considered to be “medical care” under ERISA, a program sponsored by an employer to provide a vaccine would likely be subject to ERISA. A vaccination program may be provided as part of a larger benefit program (e.g., an EAP, major medical coverage, wellness program, etc.) or provided on a stand-alone basis. Either way, employers providing a vaccination program, like flu shots, will need to consider the application of ERISA (e.g., annual Form 5500 requirements, distribution of summary plan descriptions, etc.) and make sure that all reporting and disclosure requirements are met.

Do I have to provide accommodations to someone who does not wish to obtain a vaccine?

In addition to ADA and ERISA compliance, employers may need to consider providing accommodations to employees who request the incentive but do not want to get the vaccine due to a disability or a sincerely-held religious belief. As we set forth in a prior *Fast Laner*, the EEOC has said that the ADA and Title VII may require an employer to consider accommodation requests from employees who object to certain vaccination policies. Additionally, the EEOC has commented that any wellness program must be made available to employees who are unable to participate in the wellness program due to a disability. Although not explicitly addressed by the EEOC in the wellness program context, presumably an accommodation due



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to religious reasons would also be necessary. Due to the possibility of someone requesting an accommodation, employers may wish to consider the type of accommodations that could be offered prior to implementing the vaccination program. Accommodations to obtaining the vaccine may include completing additional COVID-19 safety training, wearing face masks or face shields, and maintaining physical distancing requirements.

What are some practical considerations when implementing a vaccine incentive program?

Each workplace is different, so we recommend carefully considering the receptivity of a vaccination incentive. If an employer decides to offer an incentive, the employer should consider the length of the time period that the incentive is being offered. A time period that is too short may not provide enough time for the employees to obtain a vaccination, especially if the employer is in an industry where the vaccine is not being extensively distributed.

Employers should provide advance notice about the vaccine program and accompany the notice with applicable Centers of Disease Control (CDC) guidance which may be found at this link. In addition to providing educational information about the vaccine, employers are cautioned not to endorse a particular vaccine, especially as more vaccines become available for emergency use. Employers should also emphasize the voluntary nature of the program, and that employees assume the risk of any negative reaction to the vaccine.

Employers will need to consider whether they will offer the vaccination at the workplace or off-site (e.g., at the local pharmacy) and require proof of vaccination. Although offering the vaccine on-site may be more convenient, doing so will almost certainly invoke the requirements under the ADA and GINA as opposed to simply requiring proof of being vaccinated by a third party that is not the employer itself or under contract with the employer to provide the vaccine. HIPAA protections may also be necessary depending on circumstances.

Finally, employers will need to consider the incentive itself. Will it reduce cost-sharing components of the group health plan? Will it be a taxable benefit such as cash or a gift card? Will time-off be approved to obtain the vaccine and will such time be paid or unpaid?

As employers strive to prevent COVID-19 outbreaks in the workplace, incentivizing employees to get vaccinated is one way to address this challenge. Given many individuals' hesitancy of obtaining the vaccine as reported in various news outlets and related polls, employers will need to thoroughly assess the various incentive options and determine the effectiveness of offering vaccine incentives in the workplace.