

Blog Post

Considering Incentives for Employee COVID-19 Vaccines – Tips and Traps

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This blog was based on guidance which is now outdated. An employer may offer an incentive to employees to voluntarily provide documentation or other confirmation that they received a vaccination on their own from a pharmacy, public health department, or other health care provider in the community, according to new guidance issued by the EEOC on May 28, 2021. For more information, please see our [recent blog post](#).

Despite this week's well-publicized hiccups with concerns having been raised about the safety of certain COVID-19 vaccines, our country's march toward widespread community vaccination continues. American employers are eying society's increasing vaccination rates with interest and optimism, as a critical component of their safe and secure workplace strategies and physical return-to-work operational plans.

Certain large employers are going so far as to leverage available governmental resources to offer vaccines on their physical employer premises. But larger numbers of employers are entering the vaccine discussion in a less direct way. For example, employer-sponsored group health plans are paying for the full cost of the vaccines themselves, as well as the administration charges for those vaccines.

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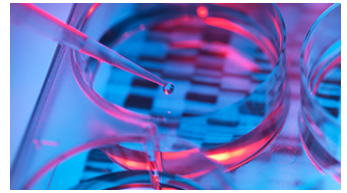
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Additionally, employers are considering further incentivizing vaccinations outside their group health plans.



Given the various alternatives under consideration today, let's first flag topics that are outside the scope of this particular article. First, this article will not address health plan reimbursement topics or insurance industry guidance or announcements, nor will it address employers outside the healthcare industry contracting with a healthcare provider to come on-site to administer vaccines to employees during or after working hours. We also will not focus on mandated vaccination policies of employers.

Instead, we will focus below on the practical considerations for employers contemplating a voluntary vaccination policy along with employer-provided incentives to encourage those vaccination decisions. We will also run through some legal traps for the unwary in the space.

Required Balance for Employers Offering Incentives for Vaccinations

Employers have a responsibility and an affirmative obligation to maintain a safe workplace. CDC guidance is clear that widespread vaccinations have the ability to dramatically reduce the long-term community spread of COVID-19. Not surprisingly, employers are wise to encourage vaccinations among their employee base – in particular within industries which require high rates of physical attendance at assigned worksites during working hours.

Great! So then employers can and should do their part to encourage vaccinations. That seems simple enough. And it is easy to imagine that cash or other incentives could drive sound employee decisions with respect to healthy behaviors in terms of vaccines. Indeed, new employer incentives already run the gamut, from taxable cash bonuses processed through payroll, to gift cards, to additional vacation

time, and even to extra paid time off specifically intended to enable employees to leave their workplace in order to obtain the vaccine(s) and/or to recover from any potential side effects of the vaccine(s).

Unfortunately, we find ourselves in a situation where prompt employer encouragement is prudent, yet legally pre-approved incentive program designs are not yet available from the relevant governmental agencies. The fundamental challenge for employers right now is to craft an incentive for COVID-19 vaccines in a fashion that will be both (a) robust enough to motivate employees to become vaccinated, yet (b) modest enough to allow for the ultimate vaccination decision and the correlated willingness of an individual to complete the vaccine process's required screening questionnaire to remain fully voluntary and uncoerced.

On this last point, the Equal Employment Opportunity Commission (EEOC) has in the past concluded that high-value incentives could violate the Americans with Disabilities Act (ADA) by coercing participation in wellness activities. Unfortunately, there is currently a lack of guidance from EEOC, the Occupational Safety and Health Administration (OSHA), or other relevant agencies in the incentive value space.

Employer-Sponsored Wellness Program Incentives Under the EEOC

Even before vaccines became widely available, some employers messaged incentive programs under the EEOC's proposed rules that had been issued on January 7, 2021. These rules had offered helpful guidance regarding employer-sponsored wellness programs and the level of incentives employers could have offered to participate in those programs. The proposed rules had limited incentives to a "*de minimis*" standard. Examples of some clearly permissible incentives would have included offering a bottle of water or a \$5 gift card. But airline tickets

or gym memberships were determined to be too valuable to fall under these standards.

Fast forward, past the inauguration. These proposed rules were quickly frozen, as they were swept into the Biden Administration's Memorandum for the Heads of Executive Departments and Agencies on January 20, 2021. Because of the legal implications at issue, coalitions of businesses and associations have in recent months sent correspondence to the EEOC requesting renewed and additional guidance on the types of COVID-19 vaccine incentives that are permissible. Unfortunately, the EEOC and other agencies have remained silent to date.

Until such time that the EEOC or other agencies provide actionable guidance, we would suggest that most employers consider an incentive program that falls within the longstanding guidance for wellness programs.

Under the regulations, an activity-only wellness program is one that requires an individual to complete an activity related to a health factor to obtain an award, without requiring a specific health outcome. An activity-only, health-contingent wellness program must meet the following 5 requirements:

1. The program must give eligible individuals the opportunity to qualify for the reward at least once a year.
2. The program must not exceed the permitted total wellness program incentive limit. The application of this limit is a facts-and-circumstances undertaking for each employer. The maximum allowed incentive under HIPAA for a non-tobacco purpose is currently 30 percent of the total cost of employee-only coverage, or 30 percent of the total cost of coverage for employees and dependents. When calculating HIPAA's limit, all employer offered incentives related to health-contingent wellness programs must be considered. So, employers that offer incentives for

a health-contingent wellness program must consider those incentives in addition to the vaccination program incentives when determining its HIPAA incentive limit. All of the wellness program incentives must be below the stated limit.

3. The program must be reasonably designed to promote health or prevent disease (which seems easily satisfied here, given the demonstrated public health benefits of vaccinations).
4. The program must either allow a reasonable alternative standard or waiver of an otherwise applicable standard for obtaining the reward for any individual for whom it is (a) unreasonably difficult to satisfy the standard due to a medical condition or (b) medically inadvisable to attempt to satisfy the standard. There is a fair amount of latitude in how the employer can determine a reasonable alternative method. It is permissible to require a doctor's note for a waiver of the vaccine requirement to obtain the incentive; however, the employer should not require the doctor's note to state a specific medical reason why the vaccine is inadvisable or would be unreasonably difficult due to a medical condition.
5. The reasonable alternative standard (or ability to waive the standard to obtain the award) must be disclosed in all wellness program materials. The program document does not need to provide the specific requirements for obtaining a waiver in the program document. It is sufficient to state that a waiver is available if it is medically inadvisable for an individual to obtain the vaccine and provide the contact information for obtaining specific details about the waiver requirement.

Other Employer Considerations If Offering Vaccine Incentives

Employers that offer incentives to employees to get vaccinated may need to comply with federal and state laws such as the following.

ERISA

For employers that are subject to ERISA, employer-sponsored major medical group health plans will pay for vaccinations. ERISA will also require the plan to be operated in accordance with that requirement. Providing additional incentives outside of that plan, and presumably offering those incentives to a larger population of individuals than “just” to those who have elected and paid for coverage in the group health plan, may well be appropriate and advisable. But careful consideration needs to be given under ERISA to each employer’s overall design structure. Benefits advisors will therefore focus on the interplay of the major medical plan and any employee assistance programs or wellness programs, from the perspective of ERISA’s participant disclosure, reporting, and fiduciary duty rules.

HIPAA

Depending upon design, scope, and eligibility, certain incentive-based health programs can also be subject to HIPAA’s nondiscrimination requirements. In this context, we are not addressing HIPAA’s privacy and security provisions. Rather, we are focusing on the lesser-known portions of HIPAA that generally prohibit discrimination with regard to employee premiums or contributions based on “health factors” or “health status-related factors.”

Under HIPAA, employees who cannot receive a vaccine due to an adverse health status factor—*e.g.*, potential adverse reaction to the vaccine or a severe allergy to an ingredient within the vaccine, must be able to obtain the incentive in another way. This is the reasonable accommodation concept addressed above. An employer has significant discretion in determining what the alternative method of achieving the vaccine incentive may be. In this scenario, an employee who cannot get the vaccine should receive the same incentive offered to a vaccinated employee.

ADA

The ADA applies when employers make disability-related inquiries or request medical examinations designed to elicit information about a disability. Under EEOC guidance, a vaccination, like the COVID-19 vaccine, is not itself considered a medical examination under the ADA. But we know that the administration of the COVID-19 vaccine is only possible after the successful completion of a number of screening questions. And those very screening questions are likely disability-related inquiries under the ADA's medical examination construct.

Employers have similar ADA questions in terms of obtaining "proof" of vaccination for incentive or other purposes. Fortunately, we do expect that asking for proof of vaccination in order to receive an incentive would be permitted under the ADA, as asking for proof of a vaccine is not considered a disability related inquiry or a medical examination. A word of caution, however. An employer delving any further into why an employee did or did not receive a vaccine would likely cross the EEOC's line into a disability-related inquiry.

GINA

GINA generally precludes employers from requesting genetic information from employees. Though commonly misunderstood, GINA may actually apply to wellness programs because of the broad meaning of "genetic information." If employers request proof of vaccination in order to earn an incentive, the request should be accompanied by a warning to employees reminding them not to provide genetic information with that proof of vaccination. If this warning is included, then any subsequent disclosure of genetic information as defined by GINA is unlikely to be considered a violation.

Conclusion

Employers are wise to consider ways to assist their employees in becoming vaccinated for COVID-19. Such encouragement is prudent as part of maintaining a safe workspace, as well as doing their part to address public health crisis response more broadly. Specifically, many employers are offering or considering offering incentives to drive vaccinations among their employee populations.

Without EEOC or other agency guidance on point today, however, employers are *also* wise to carefully consider their group health plan designs, their existing wellness programs, their existing financial wellness incentives for non-COVID reasons, and any number of additional benefit plan-related and disability-related points prior to rolling out any vaccine incentive program. Should you have questions about a COVID-19 vaccine incentive program, contact your Akerman attorney.

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