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Potential Pitfalls with COVID-19 Vaccination Incentives

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Who Needs to Know

Employers who plan to enact voluntary vaccination programs.

Why It Matters

Although employers can generally make vaccinations mandatory (subject to accommodation obligations), in an attempt to avoid the legal and practical implications of a mandatory vaccination program, many employers have chosen to enact voluntary vaccination programs instead. There are numerous issues for employers to consider when designing and enacting voluntary vaccination programs, including wage and hour, disparate impact, and HIPAA non-discrimination implications.

While widespread COVID-19 vaccinations seemed a far-off concept even just a few months ago, the increasing accessibility to vaccinations has prompted many employers to consider whether to implement a vaccination program for their workforces. The initial threshold that employers grapple with is whether to make vaccinations mandatory for their employees. Notwithstanding state or local regulations that provide otherwise, employers can generally make vaccinations a mandatory condition of employment so long as employers accommodate exemptions on the basis of a sincerely held religious belief or disability. However, in an attempt to avoid the legal and practical implications of a mandatory vaccination program, employers have generally shied away from mandatory vaccination requirements and have chosen to enact voluntary vaccination programs instead.

In designing these voluntary programs, many employers have questioned whether to provide incentives to employees to encourage vaccination. Examples of these incentives may include paid time off, bonuses, gift cards, or company swag. While employers may have good intentions in offering these incentives, the type, amount, and exceptions to these incentives may present legal risks. Employers must therefore strike a balance between offering a benefit that is enticing, yet not too valuable to be perceived as coercive.

EEOC Withdraws Its Proposed Rules

As has been the case with many COVID-19-related issues, employers must maneuver the potential risks associated with vaccination incentives with limited guidance. Although the U.S. Equal Employment Opportunity Commission (EEOC) published proposed rules regarding wellness programs in early-January, it withdrew the proposed rules in mid-February.

The proposed rules addressed wellness programs that are subject to the Americans with Disabilities Act (ADA)

and Genetic Information Non-Discrimination Act (GINA), including acceptable incentives that can be provided as part of these wellness programs.^[1] The proposed rules stated that employers should offer no more than “de minimis” incentives to participate in a wellness program. While the EEOC did not specifically define “de minimis,” the proposed rules included concrete examples like a water bottle or gift card of modest value, and noted that providing an incentive that is too valuable could have the effect of making employees feel coerced to participate in order to receive the reward or avoid a penalty.

Even before the EEOC issued the proposed rules, several companies had already publicized their voluntary COVID-19 vaccine incentive programs, many of which included additional paid time off either to get vaccinated or as a reward for getting vaccinated. Although the EEOC withdrew its proposed rules, employers now have at least some insight as to how the agency will approach and evaluate these types of wellness incentives — the greater the value of the incentive, the greater the risk that it may be viewed as coercive or punitive. As such, paid time off to get vaccinated, a gift card of modest value (e.g., less than a day’s worth of wages), or an additional one to two days of paid time off will likely be acceptable, whereas providing an additional week of paid time off or substantial cash bonus or gift card could be viewed as coercive.

Access to Incentives for Employees with Accommodations

Another area for consideration is the potential disparate impact vaccine incentive programs can have on employees who do not get the vaccine for disability or religious reasons. If the incentive is so substantial that it can be akin to an employment benefit, employers may face legal challenges to these incentive programs as discriminatory for denying or withholding such benefits on the basis of a protected characteristic (religion, medical condition, and/or disability). As such, employers should consider alternative means for employees who receive an accommodation exemption to nevertheless earn the incentive (or another comparable benefit), such as attending a COVID-19 training during working hours.

Wage and Hour Concerns

Depending on the type of incentive offered, employers also must not forget their wage and hour obligations under federal, state, and local laws. For example, just as with bonuses, providing a gift card, cash gift, or other means of monetary value may affect the calculation of overtime premiums for nonexempt employees. Likewise, paying nonexempt employees for the time spent to get vaccinated may trigger overtime or expense reimbursement obligations.

HIPAA Nondiscrimination Wellness Program Regulations

Depending on how it is structured, a COVID-19 vaccine incentive program may constitute a wellness program subject to HIPAA’s nondiscrimination requirements and related wellness program regulations. For example, if the incentive is related to the employer’s existing medical plan — such as lower employee contribution rates or lower out-of-pocket costs (e.g., a lower deductible or lower copayments) — or if the vaccine is paid for by the employer’s existing medical plan (as required by the Affordable Care Act’s (ACA) preventive care coverage mandate), then such a vaccine incentive program constitutes a wellness program subject to the HIPAA nondiscrimination regulations. Only if the incentive is not related to the employer’s existing medical plan and if the vaccine is not paid for in any way by the employer’s existing medical plan might the employer be able to take the position that

such a vaccine incentive program is not subject to the HIPAA nondiscrimination regulations that apply to wellness programs.

When a vaccine incentive program is subject to the HIPAA nondiscrimination regulations, there is some question as to whether the program would be considered a participatory program or an activity-only, health-contingent program. If the former, there is no specific limit on the value of the incentive, and generally the program just needs to be offered under the same terms and conditions to all similarly situated employees. If the latter, the value of the incentive is limited to 30% of the cost of the employer's medical plan, and a reasonable alternative must be offered to employees for whom it is unreasonably difficult or medically inadvisable to get the vaccine so that they can earn the same incentive.

Takeaways

Throughout the duration of this pandemic, employers have had to adapt by monitoring and implementing guidance and laws on the federal, state, and local levels. The EEOC's proposed rules, which were published and withdrawn in just one month, are a prime example of the continuation of this ever-changing, fluid guidance. Employers should educate themselves on the potential legal risks and considerations of providing incentives while designing their vaccination programs so they can make the best choice for their business and workforce. Employers must also remain prepared to make changes to adapt to any new guidance or regulations that may be released, especially with the increasing accessibility to vaccinations.

Troutman Pepper's Vaccine Task Force will continue to monitor these dynamic developments and update its [COVID-19 Vaccine FAQs](#) accordingly.

[1] A wellness program is subject to the ADA if it includes a medical examination or disability-related inquiries. A wellness program is subject to GINA if it involves an employee providing family medical history, which includes information about an employee's family members' manifestation of a disease or disorder. A COVID-19 vaccine incentive program is a wellness program subject to the ADA and GINA if an employee has to complete a pre-vaccine screening questionnaire that includes disability-related inquiries or family medical history questions.

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