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Insights

Can Employers Incentivize Employees to Get the COVID-19 Vaccine?

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A year ago, many employers did not know the variety of questions that would arise during the COVID-19 pandemic concerning their workplaces and employees. But here we are, and the questions and issues continue. As vaccines become more readily available, one question at the forefront is whether employers can incentivize their employees to get a COVID-19 vaccine. The answer is yes, in most cases; however, the type and amount of incentive could implicate a variety of laws. Thus, as with any decision, employers should be aware of the legalities of offering an incentive to their employees who receive the COVID-19 vaccine.

The biggest question in creating an incentive program is what to offer. The answer depends on whether the employer is administering the vaccine or contracting for its administration, or if the employee receives the vaccine from an unaffiliated third party.

1. **Employer Vaccine Administration/Contracted Party**

   If the vaccine is being administered by the employer or a party with which the employer contracts to administer the vaccine, it could be considered a wellness program governed by the Americans with Disabilities Act ("ADA"). The ADA applies to employer-sponsored voluntary wellness programs that include a medical examination or disability-related inquiry. In this case, the program must be reasonably designed to promote health or prevent disease, not overly burdensome, and not a subterfuge for discrimination. The program cannot be a "gateway plan", requiring employees to submit to a medical examination or inquiry in order to access an enhanced benefits package. The program must also offer reasonable accommodations to persons for whom it is medically inadvisable to participate. And participants must be provided with a notice informing them of why their information is being requested, how it will be used, and how it will be protected.

   In addition, if such a program is created, the ADA and the Genetic Information Nondiscrimination Act ("GINA") limit what employers can offer as an incentive, however, currently that limit is undefined. On January 7, 2021, proposed regulations under the ADA and GINA provided that a *de minimis* standard for incentives must be followed; examples included a water bottle or gift card of modest value. However, that guidance was withdrawn by the Biden Administration and no additional guidance has been issued. It is likely that there will be limits to these incentives and thus employers that are administering vaccines or contracting with a party to do so should seek the advice of counsel before creating an incentive for vaccination.

2. **Third Party Vaccination**

If an employee receives the vaccine from a third-party of his or her choosing, the ADA and GINA incentive limits do not apply. However, employers should ensure that they are not collecting employee medical information. An employer can ask for proof of vaccination without implicating ADA standards regarding medical inquiries of employees but asking additional questions, such as why an employee refuses to be vaccinated, could implicate the ADA. Further, employers will want to ensure that any records regarding vaccination are kept confidential as any other medical record would be.

After determining what to offer, employers must ensure the incentives are available to all employees. This could involve accommodating those employees who are unable to be vaccinated because of either a disability or a religious objection.

Employers should also consider the impact of a vaccine incentive program on employee morale and whether vaccines are readily available to all employees. There are many other ways to encourage employees to be vaccinated without providing financial incentives, such as management leading by example, education, and offering paid time off to receive the vaccine.

If your organization determines it would like to offer an incentive, many additional legal considerations could arise, including with respect to what to offer, how to administer such a program, and whether it is effective. Our Labor and Employment Law team is available and ready to assist with these inquires. Please contact **Elizabeth M. Roberson** or another member of our **Labor and Employment Law Team** for further analysis on the specific situation.

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