



Charting The Risk Associated With Common Workplace COVID-19 Vaccine Incentive Programs

Insights

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Now that a COVID-19 vaccine is becoming increasingly available, how can employers encourage employees to receive it? Beyond requiring the shots as a mandatory condition of employment – which is not an option many employers are currently considering due to the many legal and employee relations questions it raises – one concept appears to be on the minds of most employers: offering employees incentives to take the vaccine. While this may be an attractive option to many employers, you need to understand the risks associated with various possible incentive programs before launching one at your workplace.

While incentives can be an effective way to increase the number of employees who choose to get vaccinated, you must first consider several federal (and possible state) laws to determine what incentive may be right for your workforce. Various levels of risk arise under each of these laws depending on how the employee obtains the vaccine, the value of the incentive you want to offer, and how you choose to respond to employees who want the incentive but cannot take the vaccine due to medical or religious reasons. This article discusses some options that employers are considering or implementing, along with the risks associated with those options.

Applicable Laws To Take Into Account While Developing Incentive Program

You should not begin to implement an incentive program without considering, at minimum, the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act, the Health Information Portability and Accountability Act (HIPAA), and, depending on the nature of the incentive, the Fair Labor Standards Act (FLSA). You will also need to consider any related state or local laws that may apply in your jurisdiction.

The ADA and HIPAA are applicable in part because offering certain incentives to employees – even as innocuous as gift cards – could cause your program to be considered part of a wellness program under these statutes. And, unfortunately, the state of the law related to wellness programs currently remains in flux.

The ADA – Wellness Rules Component

Employers can offer incentives to employees to receive the COVID-19 vaccine without running afoul of the ADA. However, employers must be careful to avoid making disability-related inquiries, except

as permitted.

With respect to vaccines, neither administering a vaccine nor asking an employee for proof of vaccination constitutes a disability-related inquiry or medical exam. The EEOC has also stated that ADA restrictions do not apply to pre-vaccine screening questions posed by a third party that is not contracted with the employer to conduct testing (such as a neighborhood pharmacy or clinic). Disability-related screening questions may also be asked if vaccines are offered on a fully voluntary basis. Employers may not retaliate against or intimidate an employee who declines to answer pre-vaccine questions and thus is not vaccinated.

Complications and legal requirement arise, however, if an employee cannot take the vaccination (and thus not qualify for the incentive) for medical reasons. If an employee asks for an accommodation or alternative to be able to earn the incentive, the ensuing interaction necessarily invokes ADA coverage and requirements.

Further legal issues could arise if the program is not considered in fact “voluntary” in view of applicable history, guidance, and court decisions. If the incentive offered is too high, the EEOC believes that employees could feel coerced to participate, thus leading to wellness program rules violations when employees are “forced” to disclose protected medical information in order to gain the incentive.

Earlier this month, the EEOC issued a proposed rule expressly permitting only *de minimis* incentives as passing muster under participatory wellness programs. The proposed rule contained language referring to a permissible incentive as a “water bottle” or something of equivalent value. However, the Biden administration withdrew the proposed rule under a regulatory freeze typically seen when new leadership takes charge at the White House. The proposed rule is now pending review and it is unclear when or what form it may re-emerge. Nonetheless, the EEOC’s thinking on incentives under a participatory wellness program is clear and the safest incentives would therefore be relatively small. Offering more robust incentives will likely come at a higher risk.

The ADA – Reasonable Accommodations

Beyond the wellness rules component, the ADA is also implicated because you will also need to consider offering alternative means by which an employee can earn an incentive if they are unable to vaccinated due to a disability. Alternative ways to earn the incentive might be watching a workplace COVID-19 safety video or reviewing CDC literature on how to mitigate the spread of COVID-19 in the workforce. You may also want to review vaccine alternatives you have offered in the past, if you have done so for something like the flu.

Title VII – Religious Objections

Title VII prohibits discrimination based upon various protected characteristics, including religion. The EEOC requires employers to provide exemptions and accommodations to employees who cannot receive the COVID-19 vaccine because of a sincerely held religious belief. If an employee raises a religious objection to vaccination, you must consider an alternative means by which the employee can earn the incentive, similar to the analysis described for an ADA accommodation. The standard for determining what religion-based accommodation must be provided are some different, however.

HIPAA Considerations

HIPAA requires health-contingent wellness programs, which connect incentives with health status goals, to meet certain tests. For example, the full incentive must be available to all similarly situated individuals. HIPAA also places limits on the amount of incentives that may be offered.

FLSA – Wage And Hour Concerns

The FLSA requires you to pay all employees for all time worked. It also requires you to compensate employees when they are required to spend money for your convenience to the extent that failing to reimburse would, effectively, cut into the employee's FLSA-protected wages. State or local wage and hour law may also create similar, or even higher, obligations.

Types Of Incentives And Associated Risks

As explained above, the risks associated with COVID-19 vaccine incentives depend on various factors, including who administers the vaccine, the amount of the incentive being offered, and your approach to accommodating employees who cannot be vaccinated for medical or religious reasons. Although specific facts and circumstances may make a difference, the following are a few emerging approaches to vaccines and the associated level of risk.

Educating Employees: Little To No Risk

A critical – and the possible best – way to encourage employees to get the COVID-19 vaccine is to educate them. The biggest barrier to employees agreeing to get vaccinated is likely apprehension because of misinformation or lack of information, particularly in today's environment. Employees who understand how the vaccine has been tested, its effectiveness, and track record are more likely to get vaccinated. It will also be important for respected organizational leaders to demonstrate their confidence in the vaccine by taking it up front.

A robust and ongoing communication campaign can help employees understand the efficacy and safety of the vaccine, explain why you want them to receive it and, most importantly, how being vaccinated will benefit them. You should ensure that your organization emphasizes your concern for each individual's health and safety. You should consider incorporating a vigorous education program to accompany any of the options below if you decide to take it one step further by offering something of tangible value to your workers.

Providing Paid Time Off For All Workers: Low Risk

This option carries the least level of risk when it comes to offering something of tangible value to your workforce. You could provide all your employees a specific amount of paid time off (two hours, a half day, or a full day, for example), which could be used to obtain the COVID-19 vaccine from a third-party vendor of the employee's choosing. Once the employee receives the paid time off in their PTO bank, it is up to them to get the vaccine of their own accord, but you would not mandate nor require proof of inoculation. Further, if an employee is voluntarily obtaining the vaccine, you likely would not have to cover any cost incurred in obtaining it.

Because you are not mandating how an employee spends their time during this block of hours, you run a very low risk of liability with respect to wage and hour concerns, accommodation issues, or wellness program rules.

Offering A De Minimis Incentive For Those Who Get The Vaccine: Low Risk

A *de minimis* incentive for those that receive the vaccine is also a low-risk option because it comports with the EEOC's thinking that low-cost incentives will not put undue pressure on an employee to participate. The EEOC views *de minimis* incentives to be low cost items, such as a water bottle, a similar item, or a modest gift card (likely at a value of \$25 or less), though further consideration would need to be given to potential FLSA implications with respect to the particular incentives provided to non-exempt employees. However, in order to comply with reasonable accommodation obligations, both disability- and religious-related, you will also need to ensure that you offer the same incentive or an equivalent to any worker who establishes such a reason for not receiving the vaccine.

Providing Paid Time Off For Those Who Get the Vaccine: Medium Risk

You could inform employees that, if they choose to voluntarily receive the vaccine, they will be entitled to paid time off at a certain level. Even if employees receive the vaccine off-site by a third party of their choosing, paid time off may constitute more than a *de minimis* incentive depending on the amount of paid time off you provide. Where two hours of paid leave appears closer to a modest incentive, for example, higher amounts would tend to increase risk. Incentives that are too high may lead to claims that the vaccine was not actually voluntary and therefore a violation of the wellness plan rules.

As noted above, you may also need to consider offering the same levels of PTO to those unable to be vaccinated due to valid disability status or religious beliefs as a reasonable accommodation. It may help reduce your risk by informing workers that the amount of PTO offered is not an incentive, per se, but instead intended to ensure that no one declines to get the vaccine, in part, because they have little to no PTO available. However, this plan could face scrutiny, especially under wage and hour law principles.

Providing Compensation To Cover “Costs” Associated With Vaccine: Medium Risk

A related plan may be to inform your employees that you encourage them to get vaccinated and will provide them an amount of compensation to cover the costs associated with getting the vaccine. You could inform them that this amount is intended to cover the travel time to the vaccination site, the mileage costs incurred, the family care costs associated with traveling to a vaccination site, and related items. Whether and how much you want to individualize this program (only offering family care costs to those employees with children or other family members that require care, for example) will impact the riskiness of this strategy. Again, accommodations may need to be considered as well. Moreover, if you want to “cover” these costs, a fact-specific analysis might very well lead you to the conclusion that the best practice for purposes of the FLSA is to treat the actual time as hours worked (for all purposes) and reimburse for related costs.

Making Vaccine Recipients Eligible For Prize Drawings: Medium Risk

Some employers have made vaccine recipients eligible for internal drawings, through which those employees could win prizes. The value of the prizes, which may affect the riskiness of this approach, has ranged from *de minimis* value to cash prizes of a thousand dollars or more or luxury gift items such as an Apple watch. The employers may offer a range of prizes or just one or two of the higher-value items. Setting aside any state laws that could affect the legality of such programs as well as any tax implications, the pivotal question will be whether the value of participating is so great that it exceeds the *de minimis* threshold described by the EEOC, rendering the incentive improper. That argument may boil down to whether the value that an employee receives for participating (e.g., a *chance* to win a bigger prize) is equivalent to the value of a raffle ticket *or* equivalent to the prize that is ultimately received. The greater the value of the incentive received for getting a vaccine, the greater the risk of offering it, as explained elsewhere in this Alert. As this pivotal question regarding this option is open, the risk associated with this option would at least be in the medium range.

Offering An Incentive Of Greater Value For Those Who Get The Vaccine: Higher Risk

If you believe that a minimal incentive will not induce your workers to get vaccinated, you may want to consider offering an incentive of greater value. However, the higher the value, the greater the risk that your program will be seen as unnecessarily coercive and therefore in violation of the wellness program rules. There are a number of factors to consider when making this determination, including your geographic location, your industry, the median pay of your workforce, and other relevant factors.

What Are The Risks Of Non-Compliance?

An employee claiming disability discrimination under the ADA can seek back pay, front pay, compensatory damages (think emotional distress), punitive damages (capped depending on the number of individuals employed by the employer) and attorneys’ fees and costs. An employee

claiming religious discrimination under Title VII can seek the same type of damages as with an ADA claim.

Failure to comply with HIPAA wellness program provisions could potentially invalidate the incentive scheme. In some circumstances, a monetary penalty of \$100 per day per individual affected by the noncompliance may be imposed.

Wage and hour violations could lead to a variety of liability and penalties. Depending on the violation, you could face liability for unpaid wages, liquidated damages, penalties, and attorneys' fees and costs.

Conclusion

As the COVID-19 crisis has repeatedly demonstrated, employers must weigh risks and benefits in making decisions about how reduce safety risks, while balancing business needs and potential legal exposure. This continues to be an evolving and fact-specific situation. You should confer with your Fisher Phillips attorney for additional assistance before implementing any incentive plan.

Make sure you are subscribed to [Fisher Phillips' alert system](#) to get the most up-to-date information. If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our [Vaccine Resource Center for Employers](#) or contact the authors, your Fisher Phillips attorney, or any attorney on our [FP Vaccine Subcommittee](#).

This Legal Alert provides an overview of developing workplace issues. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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