

EMPLOYERS NOW HAVE 2 CLEAR OPTIONS TO PROVIDE VACCINE INCENTIVES THANKS TO NEW EEOC GUIDANCE

Insights
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The EEOC kicked off the unofficial start of summer with a bang by clearing the way for employers to offer their employees incentives to get the COVID-19 vaccine in new guidance released on the eve of the Memorial Day weekend. The May 28 updates to the agency's COVID-19 Technical Assistance guidance now provides employers with two clear options, drawing a key distinction based on who administers the shot:

1. If your employees voluntarily provide documentation confirming they have been vaccinated and got the shot on their own from a pharmacy, public health department, or other health care provider in the community, **you can offer them any incentive you'd like with no apparent limitations.**
2. If your organization (or an entity acting on your organization's behalf) administers the vaccine, you can still offer incentives – **but they cannot be so substantial in value as to be considered coercive.**

Regardless of which path you travel, there are still hoops to jump through if you want to provide vaccine incentives – providing accommodations, ensuring confidentiality, etc. – but you now have a clear direction to take to encourage your workers towards vaccination. What do you need to know about this critical update?

Why Was This Guidance Necessary?

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Before we take a deeper dive into discussing the options and other considerations, some employers may be wondering why this guidance was even necessary. Couldn't you just offer some cash or PTO or some other reward to induce employee behavior without concern about the legal ramifications?

The main sticking point troubling employers for months concerned wellness program rules. Historically, the EEOC has indicated it didn't want employers to force employees to make medical-related decisions through the use of incentives. Until this latest guidance, the EEOC believed that too significant of an incentive could coerce employees to participate, thus leading to legal violations if employees are "forced" to disclose protected medical information to gain the incentive. Through rules, guidance, and federal litigation, the EEOC has taken steps to ensure that any employment decisions in this regard were genuinely voluntary.

Earlier this year, [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 still pending review and it is unclear when or what form it may re-emerge. Against the backdrop of this uncertainty, employers have been attempting to navigate the thorny path of vaccine incentives, concerned that offering robust incentives could bring about a higher legal risk. [At the urging of business groups seeking clarity on the matter](#), the EEOC finally heeded the call and provided the certainty that employers have been craving.

Option 1: Unlimited Incentives

Under the first option, you are seemingly permitted to provide unlimited incentives to your workforce so long as your employees voluntarily provide you with documentation or other confirmation they received the COVID-19 vaccine, **and** they received the vaccination on their own from a third-party provider that is not an "agent" of your organization. The EEOC describes such third parties as pharmacies, public health departments, or other health care providers in the community.



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Option 2: Restricted Incentives

On the other hand, if employees are voluntarily vaccinated by you or your “agent,” you can offer only incentives that are “not so substantial as to be coercive.” Which leads to two questions: what is an “agent,” and how substantial is “substantial”?

Definition of “Agent” and How to Avoid This Designation

- The EEOC guidance defines “agent” as being an individual or entity having the authority to act on behalf of, or at the direction of, the employer (which could include an onsite nurse, onsite medical staff, and perhaps beyond).
- The agency further notes that the purpose for this distinction is that it would prefer employers to stay as far away from employee medical examinations as possible, and administering vaccines requires necessary pre-shot screening questions that could reveal information it would rather you not obtain. “When an employer asks employees whether they obtained a COVID-19 vaccine from a third party in the community, such as a pharmacy, personal health care provider, or public clinic,” the EEOC says, “the employer is not asking a question that is likely to disclose the existence of a disability.” Of course, care should continue to be taken not to ask follow-up questions such as why the employee has not been vaccinated or whether the employee suffered side effects of the vaccine.
- Thus, to avoid the incentive limitation that arises in such a situation, you would want to do everything you could to keep a wall up between you and the healthcare provider offering the vaccines – especially if you are setting up a vaccine clinic at your worksite to make it as easy as possible for your workers to get inoculated. Unnecessary entanglements could arise if you gather medical information about your employees, assist with screening questions, or include an onsite nurse or other medical staff members to aid the healthcare provider in administering the shots. In a perfect world, you would limit your involvement to setting up a sign-up link to organize the schedule and giving your vaccine provider access to the information generated by the link. The “sign up” link and employee-facing communications should be self-serving in this regard. You could even state in the sign-up link that “Your responses cannot be shared with anyone, including your employer, without your authorization. This

form is not such an authorization." You may also want to consider an arms-length written agreement with the vaccine provider confirming that it does not have the authority to act on your behalf or at your direction.

Definition of "Substantial" and How to Avoid Violations

- But if your organization or your agent is administering the vaccine, and you are interested in offering incentives, you will need to carefully thread the needle between offering a strong enough incentive to encourage employees but one not so strong that it could be considered coercive. You will want to tip the scale to help employees to choose to get vaccinated without twisting their arms.
- Unfortunately, the EEOC does not provide detail or a definition regarding what might be considered too substantial, leaving you to navigate this terrain based on your own comfort and risk tolerance level. And this is not a term of art that the EEOC has often – if ever – used in this context. It appears that the term "substantial" would permit you to offer incentives at some level higher than a *de minimis* amount – higher than the "water bottle or its equivalent" level typically associated with incentives – but there is no clear answer about where to draw the line.
- A rule of thumb to keep in mind: the higher the value, the greater the risk your program will be seen as unnecessarily coercive and therefore in violation of the EEOC's 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.

Other Considerations

Whichever path you take, there are several other considerations to keep in mind when offering vaccine incentives based on voluntary inoculations.

Accommodations

Some employees may have legitimate medical or religious reasons not to get vaccinated, and failure to provide them with the same types of incentives could lead to claims under the Americans with Disabilities Act (ADA) or Title VII. You will need to consider offering alternative means by which an employee can earn an incentive if they cannot be vaccinated

due to a disability or sincerely held religious belief. Alternative ways to earn the incentive might be watching a workplace COVID-19 safety video or reviewing CDC literature on mitigating the spread of COVID-19 in the workforce.

Confidentiality

Once you gather information from employees about whether they have been vaccinated or not, you must maintain confidentiality. You should maintain the records as you would any other medical-related documentation (in a separate file, accessible to only those who need to know, etc.) and comply with all other state-specific privacy rules (such as in California).

Family Members

While you can offer an incentive to employees to provide documentation or other confirmation from a third party not acting on your behalf that their family members have been vaccinated, the EEOC confirmed that you may ***not*** offer incentives to your employees in return for their family members getting vaccinated by your organization or your agent. This would be considered a violation of the Genetic Information Nondiscrimination Act (GINA) Title II health and genetic services provision. Asking pre-screening medical questions would lead to you receiving genetic information in the form of family medical history of the employee, and GINA regulations prohibit employers from providing incentives in exchange for genetic information. However, you can still offer an employee's family member the opportunity to be vaccinated by your organization or your agent if you take certain steps to ensure GINA compliance.

Possible Incentives to Consider

If you are now considering what kind of incentives to offer your workforce in light of this new guidance, you might find comfort knowing that employers' two most common incentive options include cash/gifts (38%) and paid time off (30%). This is according to [an FP Flash Survey conducted earlier this year](#), which found that more than one in five employers were providing vaccine incentives. That number is bound to rise given that close to half of all respondents (43%) said they were unsure about whether to offer some form of incentive, many commenting that the then-current legal uncertainty fueled their hesitancy.

Cash/Gifts

- When it comes to those considering cash/gifts, about a quarter of respondents (24%) said they will provide compensation worth over \$100, while a similar number (22%) will consider an amount under \$100. The remainder of employers are either considering nominal company swag (6% will provide company-branded merchandise such as t-shirts or water bottles, or gift cards to the company store) or are unsure of what kind of gift or how much cash they will give (48%).
- One of the more creative cash/gifts incentives offered by several respondents was a company raffle, whereby those choosing to get inoculated will be entered into a contest to win a prize such as a \$1,000 cash prize, an Apple watch, or some other luxury item.

Paid Time Off

- As for those employers considering providing employees with paid time off, employers are split between providing four hours or less (11%) or a full day off (11%).
- A very small percentage (2%) was considering offering more than one day off.
- However, 76% of employers considering giving PTO to their workers were unsure how much time off they will provide.

Conclusion

We will continue to monitor developments related to the COVID-19 vaccines and related workplace questions that arise. Make sure you are subscribed to [Fisher Phillips' Insight 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 your Fisher Phillips attorney or any attorney on our [FP Vaccine Subcommittee](#).