

INSIGHTS

## Vaccine Incentives: How Employers Can Encourage Employee Vaccination

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As COVID-19 vaccines become available to broader groups during winter and spring 2021, employers are considering how they can encourage employees to get vaccinated. While the Equal Employment Opportunity Commission (EEOC) has stated that employers may require that employees get vaccinated, as long as they address accommodation issues, (see our alert on that guidance [here](#)), most employers have not yet indicated that they will mandate vaccines.

Instead, many employers are exploring alternatives – at least at this stage – to encourage vaccination when it becomes available to employees.

One option being considered is to provide incentives, such as a bonus, gift card or other reward, to employees who provide proof of vaccination. Generally, providing an incentive is a legal method for employers to encourage vaccination, but several issues should be considered.

### The Type and Amount of Incentive

Employers should consider their company culture in determining the type and amount of the incentive that will be most effective in encouraging vaccination. While the type and amount of incentive needs to pique employee interest, employers should also be cognizant that some employees may interpret incentives as conveying that vaccination is risky<sup>1</sup> (and the greater the incentive the greater the perceived risk). Additionally, particularly valuable incentives could lead to potential claims that vaccination was not a “voluntary” decision on the part of the employee.

### Wellness Programs

Legal authority is unclear as to whether a vaccination incentive program will be considered a wellness program by the EEOC. Under the Americans with Disabilities Act (ADA) regulations, participation in an employee health program or wellness program that involves disability-related inquiries must be voluntary.<sup>2</sup> While the EEOC has stated that asking an employee whether he or she has been vaccinated is not a disability-related inquiry, the agency also warns employers that pre-vaccination medical screening questions can include disability-related

inquiries.<sup>3</sup>

If the vaccination incentive program requires employees to respond to disability-related inquiries (e.g., requiring employees to answer questions about the medical reason that prevents them from getting the vaccine), then the EEOC may review the incentive to determine if the program is voluntary. In 2016, the EEOC issued a final rule “to provide guidance on the extent to which employers may offer incentives to employees to participate in wellness programs that ask them to answer disability-related questions.”<sup>4</sup> In that final rule, which applied to “wellness programs that require employees to answer disability-related inquiries . . . in order to earn a reward or penalty,” the EEOC limited the incentives for voluntary plans to a percentage of the cost of certain insurance coverage.<sup>5</sup> This final rule was challenged in court and did not become effective.

*Just last week*, on January 7, 2021, the EEOC issued a proposed rule again addressing incentives for wellness programs.<sup>6</sup> The EEOC summarizes the proposed rule as “adopt[ing] the view that allowing too high of an incentive would make employees feel coerced to disclose protected medical information to receive a reward or avoid a penalty and, therefore, states that most wellness programs that include disability-related inquiries and/or medical examinations may offer no more than de minimis incentives to encourage employees to participate.”<sup>7</sup> *De minimis* is described as “a water bottle or gift card of modest value.”<sup>8</sup> Although this rule is at the proposed rule stage, it demonstrates the EEOC’s position that a significant incentive to engage in wellness-related behavior that includes disability-related inquiries may render that program involuntary.

Again, legal authority is unclear about whether vaccination incentive programs will be deemed wellness plans covered by the ADA regulations, but employers should be aware of this possibility.

## **Administering the Incentive Program**

Employers that implement an incentive program should consider designating a program coordinator or other assigned individuals to receive, review and respond to questions and document vaccinations and receipt of the incentive. Information received from employees documenting vaccination should be treated as confidential.

One of the more challenging potential issues will be employees who request the incentive even though they will not get vaccinated due to a legally protected reason.

### **Employees with Disabilities**

Employers have an obligation under the ADA to provide reasonable accommodations to employees with disabilities to enable them to “enjoy equal benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities.”<sup>9</sup> If an employee informs the employer that a medical condition prevents him or her from getting

vaccinated, but requests the incentive, the employer could seek medical certification of the employee's inability to receive the vaccine. If the employee provides this certification, then he or she may be entitled to a reasonable accommodation that allows him or her to receive the incentive (unless the employer can show that providing the incentive would be an "undue hardship" as defined by the ADA).<sup>10</sup>

The CDC has not published a list of medical conditions that would prevent employees from being vaccinated. However, the CDC recommends against vaccination for individuals who have had a severe allergic reaction to any ingredient in the vaccine or who are allergic to certain compounds.<sup>11</sup> For individuals with potential severe allergic reactions, employers will need to determine whether the individual is "disabled" as defined by the ADA, based on the facts and the medical certification provided by the employee.

### **Employees with Sincerely Held Religious Beliefs**

Employers also have accommodation obligations under Title VII for employees who decline the vaccine due to a sincerely held religious belief but who seek the incentive. In one way, this situation is more difficult because employees may not be able to provide documentation to prove that their belief prevents vaccination. Employers may be in a situation of trying to determine based on limited information if an employee has a "sincere religious belief" that prevents the employee from getting vaccinated.

Title VII requires employers to accommodate employee sincerely held religious beliefs "unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business."<sup>12</sup> The EEOC's position regarding undue hardship in the religious accommodation context is that undue hardship results if the accommodation "is costly, compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, or requires other employees to do more than their share of potentially hazardous or burdensome work."<sup>13</sup> Notably, although both Title VII and the ADA require employers to provide a reasonable accommodation unless the accommodation would result in "undue hardship," courts have held that employers have a lower burden to prove undue hardship with religious accommodations than disability accommodations.<sup>14</sup>

In both accommodation situations, it is important for the employer to consider how potential accommodation requests will be handled before the program is implemented. The employer, for example, could require individuals who cannot get the vaccine for legally protected reasons to engage in another activity before receiving the incentive. One option would be for employers to require these individuals to view a training video outlining actions they can take to reduce the likelihood of contracting and spreading COVID-19.

### **Incentive Program Timing and Messaging**

Another aspect of incentive programs that will affect their effectiveness is timing. Employers will likely want to set a time period during which employees must be vaccinated in order to

receive the incentive. A shorter time period could be used to encourage employees to get vaccinated as soon as it becomes available to them. A longer time period might allow employees to delay vaccination (e.g., employees who are pregnant) and still ultimately be eligible for the incentive. Employees who provide proof that they were vaccinated before the incentive was in effect should probably be eligible for the incentive.

In discussing the incentive to employees, employers may want to leave open the possibility that they may mandate vaccination at a later date. The message may be that if the employer implements a mandatory vaccination program, employees who were not vaccinated during the incentive timeframe would not be eligible to receive the incentive.

## **Other Methods to Encourage Vaccination**

Employers may want to consider the following additional options either in place of or in addition to incentives:

- Roll out a communication program that encourages employees to follow the CDC's recommendation regarding vaccination. Employers should focus on CDC recommendations, rather than suggesting that the employer endorses any particular vaccine.
- Provide employees with factual information about the vaccines to assist the employee in making his or her decision. For example, information provided by the CDC outlines common questions about the vaccine (such as how it was developed, how it works, the pros and cons of vaccination and vaccination questions for subgroups such as pregnant women).
- Provide employees with logistical information about the vaccines to assist employees in getting vaccinated, such as helping them figure out where to get the vaccine, how to make an appointment, and what to expect when they get there. State or local health departments provide information about vaccination locations and appointments.
- If feasible, make the vaccine available on site for no cost to the employee (much like many employers do for the flu vaccine) so it is convenient for employees to get vaccinated.
- Offer approved time off from regularly scheduled work (paid or unpaid) to get vaccinated. For some employees, it may take a full day to get vaccinated, in which case it could be akin to a floating holiday.

Because employers want to drastically reduce the number of COVID-19 cases among their employees, many employers are searching for ways to encourage their employees to get vaccinated. Employers have a number of options available but they need to consider the issues

involved as well as what will be most effective for their particular workforce.

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<sup>1</sup> See, e.g., George Loewenstein & Cynthia Cryder, *Why Paying People to Be Vaccinated Could Backfire*, N.Y. Times (Dec. 15, 2020), <https://www.nytimes.com/2020/12/14/upshot/covid-vaccine-payment.html>.

<sup>2</sup> 29 CFR § 1630.14(d) (2020).

<sup>3</sup> U.S. Equal Emp. Opportunity Comm'n, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at K.2 (Dec. 16, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

<sup>4</sup> U.S. Equal Emp. Opportunity Comm'n, *EEOC's Final Rule on Employer Wellness Programs and Title I of the Americans with Disabilities Act*, at Section 3, <https://www.eeoc.gov/regulations/eeocs-final-rule-employer-wellness-programs-and-title-i-americans-disabilities-act> (last visited Jan. 14, 2021).

<sup>5</sup> *Id.* at Section 11.

<sup>6</sup> U.S. Equal Emp. Opportunity Comm'n, *Amendments to Regulations Under the Americans With Disabilities Act* (proposed Jan. 7, 2021), <https://www.eeoc.gov/regulations/proposed-rule-amendments-regulations-under-americans-disabilities-act>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See 29 CFR § 1630.2(o)(1)(iii) (2020).

<sup>10</sup> Under the ADA, an “undue hardship” is “significant difficulty or expense . . . when considered in light of . . . factors” such as “(i) The nature and net cost of the accommodation . . . (ii) The overall financial resources of the facility . . . (iii) The overall financial resources of the [employer] . . . (iv) The type of operation or operations of [employer]; and . . . (v) The impact of the accommodation upon the operation of the facility.” 29 CFR § 1630.2(p)(1) (2020).

<sup>11</sup> Ctrs. for Disease Control and Prevention, *COVID-19 Vaccines and Allergic Reactions*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/allergic-reaction.html> (last updated Dec. 31, 2020).

<sup>12</sup> 29 CFR § 1605.2(b)(1) (2020).

<sup>13</sup> U.S. Equal Emp. Opportunity Comm’n, *EEOC’s Religious Discrimination*, <https://www.eeoc.gov/religious-discrimination> (last visited Jan. 14, 2021).

<sup>14</sup> See, e.g., *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (analyzing “the extent of the required accommodation” under Title VII, and holding that it would be an “undue hardship” to require the employer to “bear more than a de minimis cost” to accommodate the employee).