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COVID-19 vaccination incentive programs for employees: Too generous to be legal?

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As COVID-19 vaccinations become more available in the U.S., the ultimate effectiveness of the nationwide vaccination effort may turn on whether a large enough segment of the population agrees to be vaccinated. Experts and observers have discussed the expected reluctance of many parts of the population to accept even free vaccinations because of public skepticism about vaccines.

Because epidemiologists tell us that a refusal to be vaccinated impacts not only the person who won't take the shot but those whom that person may infect in their families and community, efforts are underway by many governmental and private sector organizations to persuade their constituencies of the safety and efficacy of the COVID-19 vaccines and the public duty and benefits of wider vaccine acceptance. Indeed, improving rates of vaccine acceptance is a top priority of the Biden administration, which recently announced a partnership with leading business organizations to promote vaccination and other safety measures.

Tragically, COVID-19 can be a deadly disease for many who contract it. At present, there have been more than 500,000 deaths from COVID-19 in the United States. And, even when the disease is not fatal, it can have long-lasting health problems. Accordingly, workforces that are impacted by COVID-19 face productivity, manpower, and financial difficulties. Thus, from an employer's perspective, there are clear benefits to having as many employees as possible vaccinated against COVID-19.

As vaccinations continue to be increasingly available to the general public, there will be some in every workplace who will rush to be vaccinated and some who are skeptical or outright refuse. Our December 23, 2020 [alert on Mandatory Vaccination Programs](#) discusses the legal risks associated with mandatory COVID-19 vaccination programs in the workplace. In some cases, there are valid medical or religious reasons to refuse vaccination, raising a number of legal issues for employers to navigate.

Employer programs encouraging vaccination

Because of these risks and other practical concerns, many employers have opted to encourage, but not require, their employee population to be vaccinated. There are a number of steps employers can take to increase voluntary participation, such as:

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- Educating employees with the most current data showing the efficacy and safety of the vaccine
- Promoting acceptance of the vaccine by trusted members of the workforce and the local community through print, social media, and in-person persuasion
- Offering to pay for any costs associated with vaccination so that it is free or very inexpensive to employees
- Setting-up workplace vaccination clinics and not requiring employees to clock out while visiting the clinic, so that it is quick, easy, and no-cost to employees (The [CDC has issued guidelines](#) on how to conduct such workplace clinics.)
- Granting employees paid time off to get vaccinated (even where long lines may mean several hours away from work)
- Encouraging vaccination through incentives and other challenges, such as contests between or among departments or work teams
- Promoting acceptance of the vaccine as a selfless act that protects co-workers
- Visibly leading from the top so that executives and senior managers are presented as role models for participating in the vaccination program.

All of these techniques can be effective in increasing participation, keeping the employee population working in safer conditions, and avoiding the difficult issues and legal risks associated with mandatory COVID-19 vaccination programs.

Incentive-based vaccine programs

Recently, there has been a great deal of press coverage concerning well-known companies which have elected to encourage participation in voluntary vaccination programs by providing monetary incentives to those who accept vaccination. The specific incentive varies among employers, but may include direct compensation, paid time off, and gift cards to employees who receive vaccinations.

Critics of these incentive programs have responded by opining that incentive programs may backfire on employers, leading to less participation. For those who are skeptical of vaccination, being offered payment to take a vaccine could reinforce their fears about the safety of the vaccine. “If they have to pay me to do it, then there must be something wrong with it,” is the reasoning.

If someone is truly skeptical about vaccines, the incentive offered will have to be large enough to overcome this hesitation. If an incentive is large enough to accomplish its intended purpose, courts may find that the voluntary program is not “voluntary” at all because the money or its equivalent was too great to give the employee a meaningful choice. If that is the case, then legal considerations associated with mandatory vaccine programs could come into play.

Too good to be voluntary?

Employers have long struggled to obtain definitive federal guidance on the types of incentives that can be offered to employees to encourage participation in company-sponsored wellness plans. There has been little regulatory guidance on this issue since 2018 when a court struck down the U.S. Equal Employment Opportunity Commission’s (EEOC’s) previous guidelines on the type of incentives that would still be considered voluntary. Recently, the EEOC withdrew proposed rules that would have required that employers offer no more than “de minimus” incentives (using the

example of a water bottle or a modest gift card) to avoid the program being considered coercive. If the amount of incentive is too great, the EEOC has said in proposed rulemaking that “would make employees feel coerced to disclose protected medical information,” thereby violating the Americans with Disabilities Act (ADA). With the withdrawal of the proposed rules, the questions remain: How much is too little? How much is too much?

Furthermore, the law is not clear as to whether a COVID-19 vaccination incentive program would be considered a “wellness plan” under the ADA. Prior to the wellness program rules being withdrawn, business groups requested the EEOC to specifically address COVID-19 vaccine incentive programs and provide guidance on the types of incentives they could offer without violating the ADA and other laws.

The EEOC has stated that it is considering the issue and that further guidance will be forthcoming. Meanwhile, the Biden administration has touted the vaccine incentive programs provided by mass retailers. Among the programs praised by the Biden administration:

- Compensating hourly employees for the time it takes to get their vaccine or providing additional paid time off credits to be used for this purpose
- Free rideshare credits for employees to use getting to and from vaccine appointments
- Vaccine stipends to be used for child care, transportation, etc.
- Additional paid time off for employees who obtained a vaccine to use as they see fit
- Additional sick time to employees who may suffer side effects from getting vaccinated

Additionally, some retailers are rolling out vaccine incentive programs in connection with gratitude or “hero pay” bonuses for frontline workers, without tying the bonus to their vaccination status.

Additional legal considerations of incentive-based vaccine programs

As noted in our prior Alert, employees, in some circumstances, may have a valid basis to refuse vaccination because of a disability or on religious grounds. Anti-discrimination laws prohibit discrimination in the terms and conditions of employment, and that includes fringe benefits available by virtue of employment. Accordingly, employers offering vaccine incentive programs need to make sure that their plan includes a means for reasonable accommodation of those employees who cannot be vaccinated.

Moreover, employers need to be mindful of the potential wage and hour implications of providing direct compensation to employees. For example, certain payments to employees may be considered non-discretionary bonuses under state and federal law that must be included in the “regular rate of pay” for overtime purposes.

Finally, employers should be mindful of privacy considerations whenever they inquire into and collect information about employee health. Even though the EEOC has issued guidance clarifying that an employer’s inquiry into an employee’s vaccine status is not a disability-related inquiry under the ADA, the information gathered by the employer may nevertheless be considered confidential medical information deserving of protection under various laws.

Employers must first tread carefully in offering incentives to encourage vaccinations. As agency guidance and case law emerge to answer these questions, Nixon Peabody’s [Labor and Employment](#) group will continue to update you and provide the guidance needed to navigate this legal minefield.

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