

Risks in Implementing COVID-19 Vaccination Incentive Programs

03.10.2021

As the COVID-19 vaccines become more readily available, many employers are considering offering incentive programs that offer additional paid time off, gift cards, etc. in order to motivate employees to get vaccinated. Generally, these programs must be carefully designed and implemented in order to not run afoul of the “wellness” program rules: ERISA, HIPAA, the ADA and GINA. Unfortunately, at this time, there is no clear guidance on how to correctly design and implement these types of programs.

Nevertheless, what we currently know is that one of the most important requirements for a vaccination incentive program is that participation in the program must be completely voluntary. This does not mean, however, that employers can not implement a mandatory vaccination requirement. This Newsflash is referring to the situation where an employer permits the employees to decide whether or not to receive the vaccination, but creates an incentive program to reward the employees who are vaccinated. For this type of arrangement, the incentive offered cannot be so significant that it changes participation from being voluntary to mandatory because employees cannot afford not to participate and receive the incentive. However, the type and amount of incentive that may be offered under the ADA and GINA and still satisfy the requirement that participation is voluntary is uncertain. On January 7, 2021, the U.S. Equal Employment Opportunity Commission (“EEOC”) proposed two new rules that would significantly restrict incentives employees could receive under wellness programs. Specifically, the new rules limited incentives to *de minimis* amounts, i.e. a water bottle, etc. However, on

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February 17, 2021, the EEOC withdrew the two proposed rules. This leaves employers with additional uncertainty as to the type and amount of incentives that are allowable under the “wellness” program rules.

In recognition of the uncertainty, 42 business groups sent a letter in early February 2021 to EEOC Chairwoman Charlotte Burrows urging the agency to take a broad approach in determining what vaccine incentives are legal. However, as of the date of this Newsflash, no guidance from the EEOC has been issued. Watch for additional updates as more information becomes available.

In addition to watching for compliance issues under the “wellness” program rules, it is important to recognize that these programs can raise discrimination related issues. For example, employees who are unable to receive the vaccine for legally protected reasons, i.e. due to a disability or a sincerely-held religious belief, could claim that they were treated less favorably than other employees were able to get the vaccine and receive the related incentive. Under both the ADA and Title VII, employers have an obligation to provide a reasonable accommodation to employees with disabilities or sincerely-held religious beliefs that prevent them from getting a vaccine, as long as the accommodations do not place an undue burden on the employer. If an employee raises a religious or disability related objection to the vaccination, employers should consider offering them an alternative method of earning the incentive, such as COVID-19 safety training.

The Employment, Labor, and Benefits Department at Koley Jessen is closely monitoring the COVID-19 pandemic and its effect on the workforce. Employers with questions are encouraged to contact a member of our team.