



Can Employers Offer an Incentive to Employees to Get the COVID Vaccine? Probably, But Stay Tuned

Client Advisories

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Employers nationwide are contemplating offering incentives to encourage employees to receive a COVID-19 vaccine as a way to avoid the practical and potentially disruptive alternative of requiring employees to be vaccinated. Although it has been determined by the federal Equal Employment Opportunity Commission (EEOC) that requiring all employees to be vaccinated is generally legal, whether it is legal to offer incentives as an alternative is still an open question. The prevailing view is that a reasonably small incentive should ultimately be legal, but employers reaching that decision should remain vigilant for future developments in the law on COVID incentives.

Employers concerned about safety, for their workers, customers and clients, are assessing the best way to get their employees fully vaccinated. The EEOC has issued guidance which permits employers to mandate vaccines for their workers; yet, this approach is fraught with problems, from inconsistent vaccine supply to morale and practical barriers to forced vaccines. As a result, many employers are exploring the “carrot” approach – offering employees financial incentives if they get the COVID vaccine. This rational solution does appear, for now, to be legal, but the legality of this approach is far from settled.

Despite the incentive approach being a voluntary choice left with the employees, legal issues do exist, including those arising under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act of 2008 (GINA). These laws regulate wellness programs, and because a vaccine involves an employee’s health, a vaccine incentive program is indeed considered a wellness program, which must comply with these two laws. And, under these laws, wellness programs are legal, but they must comply with various rules, particularly observing the limits on the level of incentive that can be offered. The key issue is this: vaccine incentives cannot be too substantial (monetarily) or else they will violate these federal laws.

Earlier this year, the federal government had attempted to provide some guidance on the legality of vaccine incentives, and particularly how much is too much. In January 2020, the EEOC issued proposed rules aiming to

address the scope and degree of COVID-19 vaccine incentives that employers may offer to employees without violating applicable laws. Specifically, the EEOC took the position that employers were limited to offering only a “de minimis incentive” to encourage employees to receive the vaccine. At the time, the rule was merely a proposal and employers were not yet obligated to comply. Nevertheless, the rule provided insight into the EEOC’s interpretation, and subsequent enforcement, with respect to these laws on wellness programs.

However, the insight was less than complete because it left an important unanswered question: what is the dollar cutoff of a “de minimis incentive?” Yet, even that initial attempt at legal guidance has become obsolete, as the EEOC has withdrawn its proposed rule. Thus, although a vaccine incentive program is still considered a wellness program, the EEOC’s view on what is a permissible incentive for wellness programs remains unknown.

With the withdrawal of the EEOC’s rules, agency guidance on the permissibility of offering incentives continues to be silent in the context of a pandemic and employers must rely on previous interpretations of the laws. Both the ADA and GINA prohibit employers from making medical inquiries unless there is a demonstrated business necessity or the employee’s response is voluntary. From those requirements, the government has previously determined that the financial size of an incentive can impact the “voluntariness” of the employee’s participation. As a result, large incentives could be interpreted as coercing participation or impermissibly penalizing employees who opt against participation, and therefore would be illegal.

For these reasons, employers should use caution before offering significant financial incentives to encourage workers to get vaccinated. It is relatively clear that employers can at least offer a financial incentive that compensates employees for their time or expense in receiving the vaccination, such as the out-of-pocket cost (if any) of the vaccine and missed pay if the vaccine was received during work hours. In addition, the prevailing view in the legal community is that a financial incentive beyond that, such as a gift card or small stipend, is also permissible. Again, there is no guidance on a maximum incentive, but a stipend equivalent to less than one day’s wages should not place an employer at risk.

Of course, as with all wellness incentives, employers must provide the ability for employees who cannot take the vaccine to receive a reasonable alternative. For example, employees with disability-related or religious restrictions may be entitled to accommodations allowing them to receive the incentive, or an alternative incentive, even without receiving the vaccination.

The complexity of these laws and the lack of agency guidance leaves many employers in limbo, despite a reasonable belief that a small incentive should be both legal, but indeed desirable from a public policy standpoint. As always, employers considering wellness program incentives should consult with counsel before implementation to minimize legal risks. But, the best course of action is to stay tuned – further guidance on the permissible level of incentives is hopefully coming soon.

If you have any questions regarding COVID-19 vaccination incentives, please contact **Meghan O’Brien** at 856-354-3060 or mobrien@archerlaw.com, or **Peter Frattarelli** at 856-354-3012 or pfrattarelli@archerlaw.com, or any member of Archer’s **Labor & Employment Group** in: Haddonfield, NJ at 856-795-2121, Princeton, NJ at



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