

Publications

EEOC Issues Guidance on Mandatory Vaccine Policies and Vaccine Incentive Programs (Part 2)

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On May 28, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) updated its “What you should know about COVID-19” Frequently Asked Questions, providing some long-awaited guidance about COVID-19 vaccination policies and incentives. This alert is part two of a two-part series highlighting key takeaways from the EEOC’s new FAQs. This edition addresses common questions related to employer vaccine incentives. To read part 1, [click here](#).

The EEOC confirms that employers *can* provide incentives to encourage employees to get vaccinated. The permissible amount or type of the incentive may depend in large part on whether the employee obtains the vaccine independently in the community or from the employer.

An employer may offer unlimited incentives to employees to voluntarily provide documentation that they received a COVID-19 vaccination on their own.

Requesting vaccination documentation is not a disability-related inquiry covered by the Americans with Disabilities Act (ADA), nor is it a request for genetic information restricted by the Genetic Information Nondiscrimination Act (GINA). Therefore, an employer may offer an incentive to employees to voluntarily provide documentation of a vaccination that they (or their family members) received. There is no limit on the type or amount of incentive an employer may provide to employees in this situation.

An employer may offer limited incentives to employees for voluntarily receiving a vaccination administered by the employer.

Under the ADA, employers may offer employees incentives to get vaccinated under a program administered by an employer (or its agent) so long as any incentive “is not so substantial as to be coercive.” The EEOC explains that “[a] very large incentive could make employees feel

pressured to disclose protected medical information in answering pre-vaccination disability-related screening questions.” Though most employers who are providing incentives for vaccinations are providing a reward, the EEOC notes that an “incentive” includes both rewards and penalties.

Although this EEOC guidance permits incentives for voluntary employer-provided vaccinations, such a program must still comply with other applicable laws. Typically this will require an incentive for an employer-provided vaccination to be provided under the employer’s group health plan, wellness program, or employee assistance program.

An employer may not offer an incentive to an employee in return for an employee’s family member getting vaccinated by the employer or its agent, but it may offer family members the opportunity to be vaccinated without offering the incentive to the employee.

GINA prohibits an employer from offering any incentives to an employee in exchange for a family member’s receipt of a vaccination from the employer or its agent. Providing such an incentive would require the employer to ask the family member the pre-vaccination medical screening questions, which would lead to the employer’s receipt of genetic information (the employee’s family medical history) in violation of GINA. However, GINA does not prevent an employer from offering vaccinations to an employee’s family members, so long as the employer: (1) does not require employees to have their family members get vaccinated; (2) does not penalize employees if their family members decide not to get vaccinated; (3) obtains prior, knowing, voluntary, and written authorization from the family member before asking any questions about medical conditions; and (4) ensures that all medical information obtained from family members during the screening process (a) is only used for the purpose of providing the vaccination, (b) is kept confidential, and (c) is not provided to any managers who make employment decisions about the employees.

Remember, incentives may be taxable.

Cash and cash equivalents (like gift cards) are always taxable. Incentives credited to a health savings account or health reimbursement account would not be taxable. While it may be possible to provide non-taxable, non-cash incentives, such incentives are uncommon because most people who have not received a vaccine will not be motivated by getting things like a mug, shirt, hat, or other items of minimal value.

Conclusion

The EEOC’s guidance is helpful for employers considering vaccination incentives, but it is just one part of the analysis in crafting incentive programs. Contact your Vorys lawyer if you have questions about implementing (or revising) your vaccination incentives in response to this evolving legal landscape.

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VORYS COVID-19 TASK FORCE

Vorys attorneys and professionals are counseling our clients in the myriad issues related to the coronavirus (COVID-19) outbreak. We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at vorys.com/coronavirus.