

Employee Benefits Issues Implicated by Incentivizing Employees to Obtain the COVID-19 Vaccine

Many employers are grappling with the decision of whether to provide an incentive (e.g., a cash payment, other form of financial incentive or increased time off) to employees to encourage them to receive the COVID-19 vaccine. Employers wishing to implement a COVID-19 vaccine incentive program should be aware that such a program will likely be considered a “wellness program” which implicates a myriad of legal issues, including issues under the Americans with Disabilities Act (ADA), Genetic Information Nondiscrimination Act (GINA), and Health Insurance Portability and Accountability Act (HIPAA).

However, if structured properly, and administered in accordance with the applicable legal requirements, employers may be able to offer a COVID-19 vaccine incentive program to their employees. Below is a brief summary of the issues to consider under such laws.

ADA and GINA

Incentive Limits

Both the ADA and GINA limit the amount that can be provided to employees as an incentive to receive the COVID-19 vaccine.

The state of the incentive limit imposed by the ADA and GINA is currently in flux. However, proposed regulations issued on Jan. 7, 2021 provided that under the ADA and GINA, employers may offer *no more than a de minimis incentive*. The proposed regulations stated that a water bottle or gift card of modest value were examples of de minimis incentives. It is important to note that these proposed regulations have not been finalized and are therefore subject to change. Furthermore, employer groups recently requested that the Equal Employment Opportunity Commission (EEOC) provide guidance clarifying the extent to which employers may offer employees incentives to receive the COVID-19 vaccine without violating the ADA or other laws enforced by the EEOC. Therefore, additional guidance may be issued in the near future that will address the permissible incentive limit under the ADA and GINA in the context of COVID-19 vaccine incentive programs.

There is an important exception to the incentive limits described above. Under that exception, the ADA and GINA incentive limits do not apply if the vaccine is administered by a third-party provider that is not contracted by the employer (e.g., a pharmacy or other vaccine distribution center). It is likely that many employers considering a vaccine incentive program will structure their programs to fall within this exception to avoid the strict incentive limits imposed by the ADA and GINA.

Other ADA Requirements

In addition to the incentive limitations described above, in order to comply with the ADA, employers must make the COVID-19 vaccine incentive program available to all employees, provide reasonable accommodations to employees with disabilities, comply with ADA provisions prohibiting discrimination in the terms, conditions, and privileges of employment, and maintain the confidentiality of medical information provided by the employees.

In order to comply with the ADA's reasonable accommodation requirement, employers would need to undertake a reasonable accommodation analysis to allow an individual to receive the incentive by some other means, if they are unable to be vaccinated due to a disability or religious objection.

HIPAA

In addition to the ADA and GINA, a COVID-19 vaccine incentive program also needs to comply with HIPAA's nondiscrimination requirements.

The HIPAA nondiscrimination requirements that would likely apply to a COVID-19 vaccine incentive program provide that incentives cannot exceed 30% of the total cost of employee-only coverage under the employer's health insurance plan, and that the program must provide for a reasonable alternative standard. The reasonable alternative standard requirement is similar to the ADA's reasonable accommodation requirement, and requires that a reasonable alternative standard (or waiver of the standard) be provided to employees for whom it is unreasonably difficult due to a medical condition to satisfy the standard or for whom it is medically inadvisable to attempt to satisfy the standard.

In contrast to the ADA and GINA incentive limitation, it is not likely that a COVID-19 vaccine incentive program can be structured so that the HIPAA incentive limitation does not apply.

Additionally, the HIPAA rules that likely apply also impose a frequency of reward, reasonable design, uniform availability, and notice of availability requirement on COVID-19 vaccine incentive programs.

Takeaway

Employers considering a COVID-19 vaccine incentive program will need to carefully structure the program to comply with applicable legal requirements. While simple in theory, such programs require advance planning and attention to a number of compliance details before implementation.

If you have any questions, please contact [Daniel J. Nugent](#), any [attorney](#) in our [Employee Benefits and Executive Compensation practice](#) or the attorney at the firm with whom you are regularly in contact.

