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BLOGS

COVID-19;Discrimination

Vaccination Incentive Guidance Requested

On Wednesday, February 10, the CDC announced that individuals who are fully vaccinated against SARS-CoV-2 do not necessarily have to quarantine following exposure to someone with suspected or confirmed COVID-19.

In addition, businesses have asked the U.S. Equal Opportunity Commission (EEOC) to clarify the types of incentives employers can legally provide employees to encourage them to get COVID-19 vaccinations. Incentives offered by some employers might, for example, include:

- Time off from work to get vaccinated, often with pay
- Incentive bonus (for example, \$100)
- Gift cards
- Time off after the 2nd vaccination

Do these and other incentives run afoul of wellness program regulations? The EEOC, in recent proposed rules to regulate wellness program incentives, has said that employers can offer a gift card of modest value, or a water bottle, or items of similar value. The EEOC's proposed rules provide, however, that more significant incentives make a wellness program involuntary and, thus, prohibited by federal law. But it is not yet clear whether regulations over wellness programs will apply to vaccinations, nor when final rules or additional guidance may be forthcoming.

More than 40 business groups, including the U.S. Chamber of Commerce, signed a letter to the Chair of the EEOC, stating:

The undersigned organizations represent employers nationwide, large and small, all of whom are concerned with the threat the COVID-19 pandemic continues to pose to workers, the public at large, and the economy. We are hopeful that COVID-19 vaccines will provide a pathway to safely restart the economy, and we want to help facilitate and expedite the vaccination process. To that end, we write asking the Equal Employment Opportunity Commission (EEOC) to quickly issue guidance clarifying the extent to which employers may offer employees incentives to vaccinate without running afoul of the Americans With Disabilities Act and other laws enforced by the EEOC. Employer-provided incentives can assist governments in quickly and efficiently distributing vaccines. Legal uncertainty about providing such incentives, however, has many employers concerned over liability and has made them hesitant to act. We, therefore, urge the EEOC to issue guidance providing clarification on the extent to which employers may offer their employees incentives to vaccinate. To ensure the guidance is as effective and efficient as possible, we also encourage the EEOC to define what qualifies as a permissible incentive as broadly as possible. We recognize that wellness incentives have been closely scrutinized over the years and are the subject of recent regulations. We believe, however, that the paramount needs of the current crisis can be



distinguished from wellness programs. We strongly encourage the EEOC to act quickly and provide guidance on this important issue.

The letter cited that wellness incentives have been closely scrutinized over the years and are the subject of recent regulations, but noted that the critical needs of the current crisis can be distinguished from wellness programs. The letter also noted that employer-provided incentives can assist the efficient distribution of vaccines, and bringing clarity to this issue is the next step.

The EEOC enforces federal anti-discrimination laws including the Americans with Disabilities Act (ADA), which could limit the incentives companies can offer if vaccinations are viewed under the same lens as wellness programs. The EEOC has stated that vaccines are not medical exams, but prescreening questions could trigger the ADA since they are likely to elicit information about disabilities.

In December the EEOC posted an updated and expanded technical assistance publication addressing questions arising under federal laws related to the COVID-19 pandemic. [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#) includes information on COVID-19 vaccinations and the legal requirements of the ADA, Title VII, and the Genetic Information Nondiscrimination Act (GINA).