

E is for ERISA

DECEMBER 3, 2020 · 6:42 PM

COVID-19 Vaccines: Employer Mandate & Incentive Issues



Regular readers of this blog know that I limit my practice to ERISA and employee benefit issues. However, my partner Pau Wilcox has stepped in as a guest co-author to address the employment law issues around COVID-19 vaccines and your workforce (Q&A 1 – 4, below). I follow up below with a few questions on using wellness incentives to encourage employees to get vaccinated.

Q.1: Now that COVID-19 vaccines are coming, can I require employees be vaccinated as a condition of employment?

A.1: The law does not provide a clear answer to that question at the moment and there is reason to be cautious. For example, the Americans with Disabilities Act (ADA) says that a vaccination is a medical exam and sharply limits the circumstances in which employers can require medical exams. The Equal Employment Opportunity Commission (EEOC), which enforces the ADA, previously issued guidance saying that employer-mandated COVID testing, which is also a medical exam, is permissible because it is within a permitted category under the ADA. Hopefully the EEOC will also issue guidance speaking to the issue of vaccinations in the near future.

Q.2: Do we have to treat all employee objections to vaccination equally or do some types of objections trigger legal duties of accommodation, etc.?

Q.2: The law requires employers to consider reasonable accommodations for persons with disabilities who may be particularly impacted by vaccination and for people with religious beliefs that are inconsistent with vaccination. Whether an accommodation of a disability or religious belief is required depends on the circumstances, but the employer generally

must consider the issue even if the ultimate answer is that the requested accommodation will not be granted. Generally speaking, accommodations that would result in a direct risk of harm to other employees are not required. Again, hopefully the EEOC will issue guidance that will assist employers on this issue.

Q.3: Will I get in trouble if I only require some employees, such as customer-facing workers, get vaccinated but not other employee groups?

A.3: No, not necessarily. Making distinctions between employees based on job duties is generally permissible.

Q.4: Will my company face potential liability if an employee has a bad reaction to the vaccination? Does it matter that formal FDA approval is still pending?

A.4: The law also does not provide a clear answer to this question, although the general answer is that employer liability for work-related injuries is confined to the workers' compensation system, so any liability might be covered by workers' compensation insurance. Workers' compensation is a "no fault" system, meaning that whether the injury was caused by negligence or in the absence of negligence is not a relevant issue.

Q.5: Can I offer wellness program incentives to encourage employees to get a COVID-19 vaccine?

A.5: Yes. The incentive could take the form of a cash reward or gift card, for instance. Note that cash and cash equivalent rewards are [taxable to employees](#) and are generally compensation counted under 401(k) and other retirement plans.

Q.6: Is there a dollar limit on the incentive I could offer?

A.6: Not a flat dollar amount or percentage, but the incentive must be reasonable in amount. As Paul noted above, vaccinations are characterized as medical examinations and therefore you must abide by ADA regulations governing wellness plans. Those regulations are aimed at insuring, among other things, that employee participation in work-related wellness programs that include medical examinations, such as health risk assessments, is voluntary on the part of the employee. In past years the EEOC has sued [employers whose wellness rewards it deemed to be excessive](#). The [EEOC issued regulations in 2016](#) that capped wellness rewards at 30% of the total cost of self-only coverage under the lowest-cost plan on offer. Litigation ended up with a court vacating that section of the regulations, and the [EEOC removed it](#), but the underlying ADA concept of reasonable and not coercive incentives remains. As a consequence, many employers continue to keep their total wellness incentives within the 30% limit.

Q.7: If employees have a disability that makes the vaccination inappropriate for them, do we still need to offer a way for them to earn the vaccination incentive?

A.7: Yes. Reasonable accommodation provisions in the ADA wellness regulations remain in effect, such that you must modify or adjust your wellness program for persons with disabilities that make the COVID-19 vaccine medically inadvisable. Examples might be virtual/remote attendance at a class on COVID-19 mitigation measures such as mask wearing, hand washing, and social distancing.

Q.8: Do I have to notify employees about the special incentive offered for getting a COVID-19 vaccine?

A.8: Yes. Notification duties under the ADA wellness regulations apply when employees' medical information is gathered. Here, the vaccination process will gather an employee's vaccination status together with any health information the employee must disclose as part of enrolling for the vaccine. The notice must be written in a language reasonably likely to be understood by the participating employees, must describe the type of information that will be gathered, and must describe the confidentiality measures that are in place to protect this information. This latter requirement imposes on you, or your health insurance carrier, the duty to ensure that the vendor administering the vaccinations complies in all respects with HIPAA, for example. The ADA provides a notice template [here](#); note that it is designed for use with a Health Risk Assessment and will need to be modified to reflect the information gathered in the vaccination process.

Note: The above information is a brief summary of legal developments that is provided for general guidance only and does not create an attorney-client relationship between the author and the reader. Readers are encouraged to seek individualized legal advice in regard to any particular factual situation.

(c) 2020 Christine P. Roberts and Paul K. Wilcox, all rights reserved.

Photo Credit: Top photo: Emin Baycan, Unsplash

Share this:



Related

[Final Rules on Wellness Program Design: A Chart and FAQs](#)

In "Affordable Care Act"

[It's \(Summer\) Time for Wellness Plan Re-Design](#)

In "Affordable Care Act"

["Participation-Only" Wellness Program Survives ADA Challenge](#)

In "Benefit Plan Design"