



Vaccine Incentive Help is on the Way: EEOC Announces Upcoming Employer Guidance

Insights

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Heeding calls from a consortium of over 40 business groups, the EEOC announced yesterday that it would soon provide guidance to employers across the country on workplace incentives and the COVID-19 vaccine. Noting that businesses asked the EEOC in early February to clarify the extent to which employers can offer employees incentives to vaccinate without running afoul of the Americans with Disabilities Act (ADA) and other federal anti-bias laws, the agency said it “expects to update its technical assistance about COVID-19 to address these issues, among others, and that work is ongoing.” The EEOC’s April 15 letter, signed by Acting Legal Counsel Carol Miaskoff, did not provide a date for when you could expect this guidance, but the hope is that the information will come soon.

Why Does This Need Exist?

While offering employees incentives to take the vaccine may be an attractive option to many employers, there are potential legal risks associated with various common incentive programs. Beyond the ADA, several federal statutes – Title VII of the Civil Rights Act, the Health Information Portability and Accountability Act (HIPAA), and, depending on the nature of the incentive, the Fair Labor Standards Act (FLSA) – could all come into play, not to mention related state or local laws.

The potential legal issues implicated are dependent on a variety of factors that could arise in a typical workplace setting: how the employee obtains the vaccine, the value of the incentive offered, and how you choose to respond to employees who want the incentive but cannot become vaccinated due to medical or religious reasons. The various permutations and considerations have created an air of uncertainty among those in the business community. This uncertainty directly impacts the day-to-day operations of many employers: a recent FP Flash Survey revealed 43% of employers are unsure about how to proceed with incentives given the potential legal entanglements.

What Can We Expect?

The business groups asked two specific questions of the EEOC, which we can hope are addressed in the upcoming guidance. First, the groups encouraged the EEOC to define what qualifies as a permissible incentive “as broadly as possible.” The FP Flash Survey noted that many employers were considering relatively small incentives (for example, 28% of those considering cash or gifts were inclined to offer under \$100 or nominal swag), which could be motivated by a concern that too large of an incentive could lead to legal violations under wellness program rules.

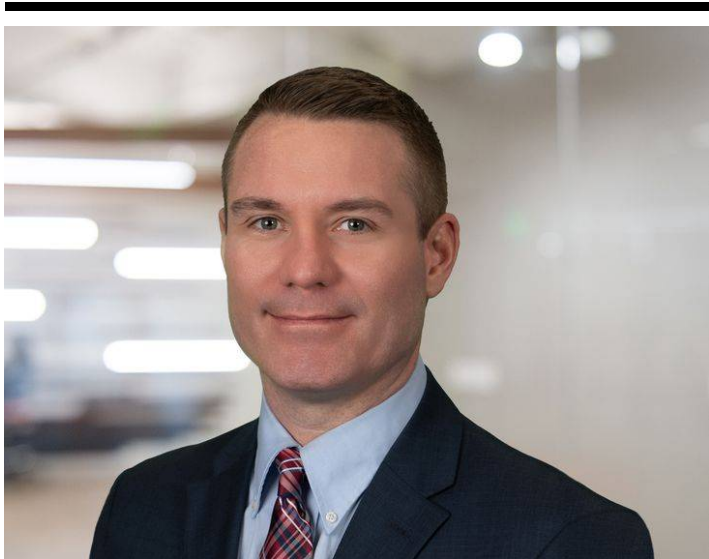
Second, bowing to the urgent and critical need for a robust incentive program, the groups asked the EEOC to deliver guidance explaining that vaccine incentives can be distinguished from wellness programs. “We recognize that wellness incentives have been closely scrutinized over the years and are the subject of recent regulations,” the groups said. However, by removing vaccine incentives from wellness program standards, employers would be more likely to participate in such a plan, free of this specific legal concern.

What Should You Do?

While waiting for EEOC guidance, we recommend reviewing our previous publication charting the most common incentive programs – education programs, paid time off, cash or other rewards, prize drawings – and the various risks associated with them all. We also recommend coordinating with your legal counsel to determine the most appropriate path forward for your organization, given the specific circumstances at your workplace.

We’ll monitor the situation and provide an update once the EEOC issues its long-awaited guidance, so make sure you are subscribed to Fisher Phillips’ Insight system to get the most up-to-date information. If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our Vaccine Resource Center for Employers or contact your Fisher Phillips attorney or any attorney on our FP Vaccine Subcommittee.

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