

COVID-19 Vaccination Incentive Programs: Additional Guidance and Some Comfort

by [Christopher S. Lockman](#) on May 28, 2021

Earlier today the U.S. Equal Employment Opportunity Commission (EEOC) released guidance confirming that employers may offer incentives to employees who voluntarily obtain a COVID-19 vaccination. The guidance ([available here](#)) appears as an update to earlier technical guidance issued by the EEOC and also offers new information regarding an employer's ability to mandate COVID-19 vaccinations and provide necessary accommodations.

As vaccines have become more widely available, employers have looked for ways to incentivize their employees to get vaccinated. Many employers were concerned, however, that a program offering incentives (such as paid time off or additional compensation) in exchange for proof of vaccination may result in the inadvertent creation of a wellness program subject to the rules under the Americans with Disabilities Act (ADA) and/or the Health Insurance Portability and Accountability Act of 1996 (HIPAA), particularly if the incentive program was linked to an onsite vaccination clinic.

Today's guidance clarifies the legal requirements that apply to the design of a vaccine incentive program. The guidance confirms that employers may offer incentives to employees to voluntarily provide proof of vaccination because requesting vaccine status is not a "disability-related inquiry." In addition, employers may offer only limited incentives to employees who voluntarily receive a vaccination administered by an employer or an agent hired by the employer because the prescreening questions essential to vaccine delivery are disability-related inquiries that will subject the incentive program to the ADA wellness program rules. Incentives under this type of program can take the form of either a reward or penalty but must not be "so substantial as to be coercive."

The guidance also addresses the implications of the Genetic Information Nondiscrimination Act of 2008 (GINA) on vaccination incentive programs. It clarifies that GINA permits an employer to offer incentives to employees who voluntarily provide confirmation that they or their family members were vaccinated by a third party (not the employer or its agent). Employers may also offer incentives to employees vaccinated by the employer or its agent without running afoul of GINA. The guidance points out, however, that an employer may not provide incentives for an employee's family members to be vaccinated by the employer or its agent, because GINA prohibits an employer (and its agent) from asking the employee's family members pre-vaccination medical screening questions, the responses to which constitute genetic information about the employee.



The guidance does not address all outstanding questions. Perhaps most importantly it does not discuss what the EEOC views as an incentive level that would be “coercive,” and it does not attempt to address whether HIPAA wellness program rules might apply to a particular program. It does, however, provide a solid foundation on which employers can build (or shore up) the design of their vaccination incentive programs.

Please contact a member of Verrill's Employee Benefits & Executive Compensation Group if you have questions about implementing a COVID-19 vaccination incentive program.



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