

Employer Vaccine Overview

January 2021

As vaccines for COVID-19 are being distributed around the country, many employers have questions about whether they can require or incentivize their employees to get vaccinated for COVID-19 (when a vaccine becomes available for their workforce). Some employers also question whether they have an obligation to require COVID-19 vaccinations for their workforce. An assortment of factors, such as industry, geographic location, and the interplay between federal and state law, makes analyzing these questions complex.

Mandatory Vaccines

Making vaccines mandatory for employees may sound appealing to many employers, especially in specific industries where COVID-19 transmission may pose a greater risk to employee or customer health and/or business operations. This question's complexity is further increased because the COVID-19 vaccines are being approved under an Emergency Use Authorization and not the more common and established Biologics License Application.

Federal Guidance

Past guidance from various federal agencies, especially from the EEOC, indicates employers can require employees to get vaccinated so long as the employer provides reasonable accommodations, when feasible, for employees that have medical and religious reasons for not getting vaccinated. This guidance has carried forward to the newly available COVID-19 vaccines. Click [here](#) for the current guidance from the EEOC. See Section K for specific information about vaccines.

State Guidance

Generally, when both state and federal laws are at issue, state laws that are more deferential to the employee will not be superseded by federal law. This means when there

is guidance from a state or a state agency that carries the weight of law, employers will have to comply with both the federal and state requirements. Like the EEOC, many state authorities are issuing guidance on this issue. We recommend that employers look to the relevant state authority websites to ensure awareness of any state laws that may impact a mandatory vaccine program for employees.

Incentivizing Vaccines

Some employers may not want to require their employees to get vaccinated but may want to encourage them to get vaccinated by incentivizing their employees to voluntarily receive the COVID-19 vaccine. There are a few compliance issues to keep in mind when thinking about instituting an incentive program. These issues arise primarily because a vaccine incentive program likely qualifies as a wellness program for purposes of Federal law.

Due to a lack of guidance on this issue, and because certain individuals cannot receive the COVID-19 vaccine because of certain health conditions, we believe the safest course of action is to treat an incentive program as an activity-only, health-contingent wellness program for purposes of the HIPAA

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wellness rules.¹ Accordingly, for this type of wellness program, the employer would need to provide a reasonable alternative standard for obtaining the incentive/reward.

The medical questionnaire that must be completed before the vaccine is received could be considered a disability-related inquiry triggering the EEOC's wellness regulations. A recent Q&A from the EEOC distinguishes between the situation in which the employer provides an incentive if the employees get the vaccine from their own healthcare providers (EEOC regulations would not apply) and the situation in which the employer contracts with a provider to administer the vaccines (EEOC regulations would apply).²

If the employer contracts with a provider to administer the vaccines and the EEOC regulations apply to the vaccine program, the program's status as a participatory program or a health-contingent program has additional consequences. If the program is a health-contingent program for HIPAA purposes, the proposed EEOC wellness regulations indicate that the program complies with those EEOC regulations if it complies with the HIPAA wellness rules. On the other hand, if the program is participatory, then the proposed EEOC wellness regulations would prohibit the employer from providing anything more than a de minimis incentive for participating in the vaccine program. The EEOC wellness regulations are currently proposed regulations. At this time, the likelihood that the regulations will be finalized as they are currently written is unclear.

As with a vaccine mandate, there may be ADA and religious discrimination issues at play where employees cannot receive the incentive because they are unable to get, or object to getting, a vaccine due to a disability or religious belief.

Consult an Employment Attorney First

Given the complexities and lack of legal clarity regarding the above-highlighted issues, it is imperative employers work with their attorneys who have specialization in employment and labor (the EEOC wellness regulations and HIPAA) to determine what course of action is best for their organization. If you do not have attorneys that you can work with, please reach out to us. For labor and employment issues, ask us for information about the FordHarrison Employment Law Helpline. Through the Helpline, employers have access to the highest quality labor and employment advice and legal services. There are additional resources we can connect you with regarding the HIPAA and EEOC aspects of this issue.

¹ According to the HIPAA regulations, "an activity-only wellness program is a type of health-contingent wellness program that requires an individual to perform or complete an activity related to a health factor in order to obtain a reward but does not require the individual to attain or maintain a specific health outcome. Examples include walking, diet, or exercise programs, which some individuals may be unable to participate in or complete (or have difficulty participating in or completing) due to a health factor, such as severe asthma, pregnancy, or a recent surgery." Without further and clear guidance, we believe an incentivized vaccine program would meet these criteria.

² See Q/A K.2: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.