Incentivizing (COVID-19) Vaccinations: What Employers Need to Know

Article By
Jessica E. Kuester
Matthew Hoffman
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
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Saturday, February 13, 2021

As COVID-19 vaccines become available to greater swaths of the population, many employers are considering ways to incentivize employees to get vaccinated. Incentives can take many forms, including extra pay, paid time off, gift cards, or tangible gifts. Employers that offer incentives to employees to get vaccinated may be creating group health plans under the Employee Retirement Income Security Act of 1974 (ERISA). In addition, incentivized vaccination programs may need to comply
with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Americans with Disabilities Act (ADA). Finally, guidance issued under the Genetic Information Nondiscrimination Act of 2008 (GINA) provides a road map for employers to avoid running afoul of GINA.

**ERISA**

When an employer provides or pays for employees’ medical care, the employer has likely created a group health plan under ERISA. Because a vaccination is medical care under ERISA, if an employer provides or pays for employees to be vaccinated, then the employer may want to be mindful of ERISA. Certain vaccination programs that incentivize employees to get vaccinated could create an ERISA compliance obligation. Although such a program could be subject to ERISA, compliance is generally not overly burdensome. Many employers may decide to wrap the vaccine incentive programs into their existing medical plans for ERISA compliance purposes.

**HIPAA-Covered Wellness Programs**

Certain ERISA-covered health programs are subject to HIPAA’s nondiscrimination rules. If a program is subject to those nondiscrimination rules, and an employer wants to incentivize wellness activities (such as vaccinations), then the program must comply with HIPAA’s wellness program rules. Earlier in the pandemic, the U.S. Department of Health and Human Services, U.S. Department of Labor, and U.S. Department of the Treasury provided guidance stating that a wellness program offering COVID-19 diagnosis and testing would not be subject to the HIPAA nondiscrimination rules. However, that guidance did not explicitly extend to vaccination programs.

Without explicit guidance exempting vaccination programs from HIPAA’s nondiscrimination rules, employers that are incentivizing vaccination programs may want to consider how those rules impact their vaccination programs. HIPAA-covered wellness programs that rely on employees satisfying a standard related to a health status factor are called “health-contingent” programs. A health status factor could include an employee’s allergy or other medical condition that makes vaccination medically inadvisable. A vaccination program with an incentive might be considered a health-contingent wellness program because certain employees would be unable to receive the vaccine due to adverse health status factors. An incentive offered by an employer to employees who take the COVID-19 vaccine may then be governed by the HIPAA wellness program rules.

There are two main consequences to a wellness program being considered a health-contingent program under HIPAA: (1) the program must comply with HIPAA’s limits on incentives, and (2) employees who cannot receive the vaccine due to adverse health status factors must be provided a reasonable alternative method for earning the incentive. In general, the HIPAA wellness program incentive limit is tied to the cost of coverage under the employer’s medical plan. HIPAA limits wellness program incentives to 30 percent of the total cost of medical plan coverage (the percentage is increased to 50 percent for programs that include a tobacco-cessation incentive). In applying the limit, all incentives related to health-contingent wellness programs must be included. That is, an employer that already offers incentives for a health-
contingent wellness program (such as a premium discount for achieving certain biometric outcomes) must consider those incentives in addition to the vaccination program incentives when applying the incentive limit. All of those wellness program incentives, taken together, must be below the applicable limit.

In addition, HIPAA requires that employees who cannot receive a vaccine due to an adverse health status factor (such as an allergy to the vaccine) be provided with an alternative method for earning the incentive. An employer will have wide latitude in determining the alternative method: it may be a doctor’s note informing the employer that the employee cannot receive the vaccine, or there may be an additional activity that the employee must complete (such as completing targeted training related to reducing the spread of COVID-19). If the employee completes the reasonable alternative standard, the employee must be able to earn the same incentive as an employee who was vaccinated.

ADA

The ADA applies when employers make disability-related inquiries or request medical examinations designed to elicit information about a disability. According to the U.S. Equal Employment Opportunity Commission (EEOC), a vaccination is not a medical examination. The screening questions asked prior to vaccination administration, however, are likely disability-related inquiries. If an employer offers the vaccine, or contracts with a third party to offer the vaccine to employees (for example, in an onsite vaccination program), then the vaccination program must comply with the ADA’s voluntary wellness program rules.

Employers that ask for proof of vaccination, and nothing more, have not made a disability-related inquiry under the ADA. However, if an employer asks why an employee did not receive the vaccine, then the EEOC has indicated that such a question would be a disability-related inquiry subject to the ADA. Employers may want to ask why an employee did not receive the vaccine as part of the reasonable alternative standard under HIPAA. If they do, then the incentive must comply with the ADA’s voluntary wellness program rules.

The ADA’s wellness program rules are currently in a state of transition. The EEOC withdrew its final regulations regarding wellness programs and issued new proposed rules in January 2021. However, those rules will not be published in the Federal Register until President Biden’s EEOC appointees have reviewed them.

GINA

GINA prohibits employers from requesting genetic information from their employees, except in very limited circumstances. Because GINA defines “genetic information” very broadly, GINA can apply unexpectedly to wellness programs. For example, collecting certain information from an employee’s spouse can be considered genetic information related to the employee. Employers that administer the vaccine or contract with a third party to do so may want to ensure that the screening questions asked prior to administering the vaccine do not elicit genetic information. The EEOC advises employers that request proof of vaccination to warn employees not to provide genetic information as part of the proof of vaccination. For employers that
provide this warning, any disclosure of genetic information may be considered inadvertent and not a GINA violation. Employers that provide incentives to an employee’s spouse, or that collect medical information related to an employee’s spouse, may want to be careful when designing their plans to avoid application of GINA.


National Law Review, Volume XI, Number 44