Can employers offer incentives for employees to get a COVID-19 vaccine? In short, yes. Incentives may take many forms, such as a one-time bonus, a gift card or a few extra vacation hours. Employers can get creative.

There are two issues to consider when implementing a vaccine incentive program for purposes of complying with employment and benefits laws: the concepts of coercion...
and reasonable accommodation.

**IN-DEPTH**

**INCENTIVES: HOW MUCH IS TOO MUCH?**

Employers must carefully consider the value of the offered incentive if they plan to administer the vaccines themselves or through a contracted third party. As of May 2021, the US Equal Employment Opportunity Commission (EEOC) provided additional clarity on this issue.

If employers (or their contractors) are providing the vaccination to the employees, then employers cannot offer an incentive that is so substantial as to be coercive. This is because COVID-19 vaccinations require employees to answer pre-vaccination disability-related screening questions; employers are generally limited in their ability to ask employees for disability-related information. Limited exceptions include instances where the information is job-related and consistent with business necessity or where the information is disclosed voluntarily as part of a wellness program.

When an employer (or its contractor) is administering the vaccine and offering a very large incentive, the EEOC cautions that this could make employees feel pressured to disclose medical information that is protected under the Americans with Disabilities Act (ADA), rendering the disclosure non-voluntary and in violation of the ADA. The EEOC has not given employers direct feedback on what qualifies as “substantial” or “coercive” in this context, other than now-rescinded guidance that a water bottle is not coercive, but a gym membership is. (On balance, a few hours of paid time off seems to fall toward the non-coercive side of the scale.). In addition, if the employer (or their contractors) are administering the vaccine, this could unintentionally create a “group health plan” under the Employee Retirement Income Security Act of 1974 (ERISA); this would create unforeseen employer compliance obligations.

The above “coercion” and ERISA issues do not apply if the employer is simply offering a program where the employer gives employees an incentive payment or perk in exchange for the employee providing the employer with proof of vaccination (assuming the employer is not the vaccinator). If employees obtain vaccinations elsewhere and provide proof of vaccination, then the employer can offer any incentive of any size. This is because asking for proof of vaccination alone is not a disability-related inquiry under the ADA, and therefore the employer is not seen as “coercing” disability-related information from employees. With such proof-of-vaccination programs, employers should explicitly caution employees not to provide medical or genetic information when providing proof of vaccination.

**ALTERNATIVE WAYS TO OBTAIN THE INCENTIVE**

There may be employees who cannot obtain a COVID-19 vaccination due to a legally protected reason (such as religion or disability) and thus cannot obtain the incentive or perk by way of vaccination (or proof of vaccination). In such case, employers should consider whether a reasonable accommodation can be provided to permit the
employee to obtain the perk in an alternate way, unless doing so would pose an undue burden.

Employers should also consider whether any non-cash perks given to employees will be considered taxable income to the employee. Perks could be excludable from income if they are “de minimis” in the view of the Internal Revenue Service (IRS).

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