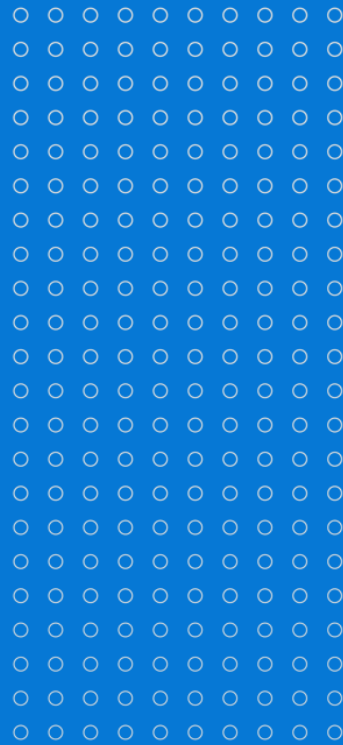


Beyond COVID-19: Vaccines and the Workplace

Employer Wellness Incentives / Surcharges and the COVID-19 Vaccines



February 5, 2021



Introduction

Many employers are considering how best to encourage their employees to receive the COVID-19 vaccine. However, employers should carefully consider how best to approach this issue. Specifically, HUB recommends employers carefully consider their goals and objectives to ensure the strategy they pursue will garner the result they desire.

Most employers view COVID-19 vaccination as part of workforce safety, to ensure the highest levels of safety for their staff. Therefore, if an employer chooses to implement a vaccination program, they should focus their attention on workplace safety rather than promoting health with the goal of controlling health plan costs. Tying the vaccine to health plan participation will likely not achieve the workplace safety goal.

Below are various considerations for employers in designing any vaccine program. No single consideration is paramount, but all the different decision points must be taken as a whole. In the final analysis, Hub believes in most cases it will be best to encourage employees through education given the practical and compliance considerations with various approaches.

Voluntary vs. Mandatory

- Voluntary wellness programs are just that – voluntary. This means that not everyone will opt in to participate. As a result, encouraging vaccination through a voluntary wellness program may not guarantee 100% participation.
- Individual feelings on taking the vaccine are a key consideration as it relates to impact on culture within your organization. The current climate is already highly politically and emotionally charged for many. An employer's perceived "stance" on promoting the vaccine through an offer of a financial reward could be viewed as an endorsement.

Incentives and Surcharges Considerations

- Individual financial incentives may have little to no bearing on whether a person decides to take the vaccine.
 - **Employees unwilling to take the vaccine:** Employees who are fearful or have religious or personal reasons against vaccination will not be swayed to pursue vaccination if offered a gift card or premium credit/surcharge. It is unlikely that incentivizing these employees will encourage them to change their mind on something they feel strongly against. Again, this would not achieve the result the employer is looking for in a mass vaccination effort. Some of these individuals may ultimately be persuaded to take the vaccine if they are encouraged to do so by their personal physician. However, an incentive is unlikely to tip the scales here.
 - **Employees willing and ready for the vaccine:** In turn, those who are eager to get the vaccine will get it with or without incentives. In that case, the financial incentives the employer offers would be unnecessary as the financial incentive was never required to persuade that population to be vaccinated. The employer would be spending money they would not otherwise need to spend on this population.

- An incentive or surcharge program tied to the health plan will require compliance with the ADA, GINA, and HIPAA, rules for employer-based wellness programs. In that case, any offer of a financial reward in exchange for taking the vaccine will require the employer to carefully review and comply with GINA, HIPAA and ADA regulations, if the vaccination campaign is part of a wellness programs tied to the group health plan (i.e. gift cards, cash rewards, etc.).
- An incentive or surcharge program not tied to the health plan will likely still trigger ADA and GINA compliance if it seeks employee medical information. (See “Medical Information Considerations” below).
- Should an employer decide to offer an individual financial incentive (whether or not as part of the health plan), HUB cannot offer specific guidelines on the thresholds for the financial award amount, since we do not have final rules from the EEOC on the application of ADA and GINA to wellness programs. We can only remind employers that rewards must be reasonable and structured in a way as to not be perceived as coercive. When formal guidance is finalized, we will be able to provide more specific recommendations on the size of the rewards or incentives.
- Many employers may offer an incentive as part of their health and safety program. In fact, it's common for employers to build incentives into safety programs. However, these safety incentives also come with important limitations and guardrails. Specifically, with respect to the COVID-19 vaccine, there has not been any confirmation that having the vaccine will reduce the contagious nature of the virus. In fact, neither the CDC nor the FDA, have confirmed whether an individual vaccinated against COVID-19 can carry and transmit the virus. This is just one of the reasons that the CDC maintains its guidance for employers to maintain safety protocols (masks, hand washing, disinfecting, social distancing, etc.). Moreover, the CDC has confirmed that it does not know how long the vaccine will provide immunity. Employers should keep this in mind as they make decisions regarding their approach to the vaccine in the workplace and any related safety programs and/or incentives.
- One approach that could potentially motivate and encourage employees to get vaccinated is a concerted communication campaign effort. Clear communication on the benefits, drug efficacy, and safety could go a long way in sharing an employer's thoughts around getting the vaccine, without involving financial incentives or mandates. HUB's Communications and Design team can provide campaign materials that can be used within your organization.
- Employers interested in developing incentives should do so based on a group or department within your organization. Group/department incentives and contests are a way an employer might create excitement and motivate interest in a vaccination effort. Generally, a group contest or incentive will not trigger regulatory obligations so long as the employer does not engage in employee medical inquiries. However, employers should excuse qualified individuals with a disabling condition under the ADA and those with a sincerely held religious believe that conflicts with receiving a vaccine. Likewise, the vaccine has not been approved for use for pregnant women therefore, they should also be excluded. Those employees should be excluded from the contests and the employer should avoid asking any questions regarding their decision to “opt out” of a vaccine program to avoid asking medical questions.
- If an employer is set on a mass vaccination effort, we suggest they consider a mandatory vaccination program or policy, which is best developed in conjunction with their legal counsel.

Medical Information Considerations

- The COVID vaccine, much like the flu vaccine, will likely be administered only after a pre-screening medical questionnaire is completed on the individual. The questionnaire will be considered a “medical inquiry” (under the Americans with Disabilities Act) since it will ask for information that could be deemed disability and/or genetic information triggering ADA and potentially GINA obligations and limitations.
- **Mandatory Vaccination Programs:** if the employer requires employees to obtain the vaccine and employees receive the vaccine from the employer or a vendor engaged by the employer, the medical pre-screening questions are subject to the ADA. If the employer requires (i.e. mandatory vaccination program) an employee to receive the vaccine administered by the employer, the employer must show that disability-related screening inquiries (for example, the medical pre-screening questions) are “job-related and consistent with business necessity.” Likewise, employers must keep this information confidential, filed securely, and provide only to know who “need to know” (which is construed very narrowly).
- **Voluntary Vaccination Program:** if the employee can voluntarily choose to receive the vaccine (and is not required to do so), the employer must likewise make the medical questionnaires voluntary. With respect to a voluntary program, employers should avoid asking any medical questions. In fact, if an employee declines the vaccine employers should not ask any follow-up questions to avoid unnecessarily or unintentionally eliciting medical information.

Conclusion

Given the various regulatory hurdles and the limitations on effectiveness of incentives in this context, employers should consider an education campaign as their primary tool for encouraging vaccination against COVID-19. For employers desiring a more direct approach, a mandatory program may be the best fit if designed compliant with ADA rules. Any mandatory or voluntary program with incentives will need to comply with all applicable rules. Employers should consult with experienced legal counsel in designing any mandatory or voluntary program.

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