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EEOC Issues Vaccine Incentive Guidance

The Equal Employment Opportunity Commission (EEOC) recently issued guidance concerning employer vaccine incentives. These incentives do not require employees to receive the COVID-19 vaccine, but encourages them to do so. When an employer offers incentives for its employees to get vaccinated by the employer itself or the employer's agent, **"very large incentives**" should be avoided. The EEOC believes that very large incentives may be so substantial as to be coercive to the employee. This is a potential problem where an employer's agent is administering vaccines to employees who must answer disability-related screening questions before receiving a vaccine. Thus, a **"very large incentive"** could coerce an employee to disclose protected medical information to their employer.

The EEOC indicated there are no employer incentive limitations where the employer encourages employees to get vaccinated in the community (not by the employer or the employer's agent). An employer is free to give its employees incentives to get vaccinated at third party sites and subsequently collect the vaccination information from the employees. The employer is required, however, to keep vaccination information confidential pursuant to the ADA.

While the EEOC did not offer examples of what constituted a very large incentive, it made clear that incentives for vaccines administered by employer or employer agents fall under the wellness plan participation incentive rules. These incentive rules concern employer or health care provider incentives designed to encourage employees to join voluntarily wellness programs.

This vaccine guidance offers a probable window into the Biden's administration's posture on wellness incentive plans in general. Wellness plan incentive regulations have been in flux for quite a while now. The Obama Administration set out regulations that provided wellness plan participation incentives were permissible if they were not too substantial. Specifically, the Obama Administration established if a wellness program is open only to employees enrolled in a particular plan, the maximum allowable incentive an employer can offer is **30 percent of the total cost for self-only coverage** of the plan. When an employer offers more than one group health plan but participation in a wellness program is open to all employees, regardless of enrollment choice, the employer may offer a maximum incentive of **30 percent of the lowest cost major medical self-only** plan offered.

The Trump Administration previously attempted to significantly restrict wellness plan incentives by issuing a rule which provided that **voluntary wellness programs could only offer de minimis incentives to encourage an employer to join.**

The Biden Administration, however, pulled down the Trump Administration rules and have reverted back to the 30% rule. It is anticipated that when the Biden Administration issues its regulations on wellness plan incentives, that they may allow broader wellness plan incentives than were allowed by the Obama Administration. It is unknown, however, how far the Biden administration will go or what the specific regulations will say.

For more information, please contact Tony Stergio.