

Employee Benefit ■ Plan Review

Ask the Experts

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COVID VACCINATIONS AND PERMITTED MEDICAL EXAMS

Q Our company would like to provide COVID-19 vaccinations to our employees once the vaccines become more readily available. Are we permitted to do so under the laws regulating medical inquiries of employees?

A Assuming that state or local laws applicable to your company and your employees do not provide otherwise, federal law permits you to provide COVID vaccinations to your employees. The Equal Employment Opportunity Commission (“EEOC”) recently published helpful guidance (in Q&A format) addressing this issue. Per those Q&As, the EEOC clarified that providing a COVID vaccine to an employee would not be considered a disability-related inquiry or a medical exam that could be subject to restrictions and limitations under the federal Americans with Disabilities Act (“ADA”), nor would it implicate the Genetic Information Nondiscrimination Act (“GINA”).

However, the Q&As caution that the screening questions asked of the employee before the vaccination is given may constitute a disability-related inquiry and could implicate GINA. As such, if the employer (or its contractor) administers the vaccine, as opposed to an unaffiliated third-party, then the employer must first get comfortable that those screening questions are “job-related and consistent

with business necessity” and should also ensure that the screening questions do not include questions about genetic information (such as family history). The Q&As make clear that the “job-related and consistent with business necessity” standard does not apply if the vaccination is completely voluntary or if the employee receives the vaccination from a third-party who does not have a contract with the employer (for example, a pharmacy or the employee’s doctor). GINA is also not implicated if the employee receives the vaccine from such a third-party.

EMPLOYER-SPONSORED VACCINATION PROGRAMS AND ERISA

Q My company is planning to partner with an outside vendor to offer COVID-19 vaccinations to our eligible employees, at our company’s expense. We will offer this COVID-19 vaccination program on a voluntary basis to all of our employees who are eligible to receive the vaccination under applicable state guidelines, regardless of whether or not they are enrolled in our company’s group health plan. Since this company-sponsored COVID-19 vaccination program will not be offered through any of our company-sponsored group health plans, does this mean that we do not need to worry about ERISA requirements with respect to the program?

A Not necessarily. As of February 2, 2021, the Department of Labor has not issued

any specific guidance addressing this question with respect to COVID-19 vaccination programs. However, your company's proposed arrangement sounds very similar to other types of company-sponsored vaccination programs, such as employer-sponsored flu shot clinics. It is generally understood that such company-sponsored vaccination programs are, in and of themselves, subject to ERISA. For such an employee wellness program to be considered an "employee welfare benefit plan" under ERISA, (i) there must be a plan, fund, or program, (ii) that is established or maintained by the employer, (iii) for the purpose of providing (among other things) medical, surgical, or hospital care or benefits, through the purchase of insurance or otherwise, (iv) to participants and their beneficiaries.¹

If an employer's wellness program constitutes an "employee welfare benefit plan" under ERISA, it will need to comply with various ERISA compliance requirements, including, without limitation, having a written plan document the terms of which are strictly followed and to which fiduciary standards apply, providing summary plan descriptions and summary material modifications to plan participants, filing a Form 5500 annually (subject to certain exceptions), and establishing and following ERISA claims procedures. An ERISA employee welfare benefit plan that provides medical benefits is also a "group health plan" under ERISA that is subject to additional ERISA compliance requirements. Employer-provided flu shot programs have generally been understood to be wellness programs that provide medical benefits, and therefore "group health plans" subject to ERISA (as well as "employee welfare benefit plans" under ERISA).

Because of the numerous ERISA compliance requirements, rather than structure employer-sponsored vaccination programs as stand-alone group health plans, many employers

choose to combine such programs with other existing ERISA employee welfare benefit programs (for example, an employee assistance program). This way, the employer-sponsored vaccination program does not need to meet ERISA's compliance requirements separately, but rather can be combined as part of another ERISA welfare benefit plan of the employer.

You mention that your proposed program would be offered to employees on a voluntary basis. Note that, if this were instead a mandatory vaccination program for the benefit of the employer and the health and safety of your workplace, rather than for the benefit of the employee, there may be an argument that the program is not an ERISA employee welfare benefit plan. We await agency guidance on this as well as other questions on how the government will view employer-sponsored COVID-19 vaccination programs for purposes of ERISA and other employee benefits laws. In the meantime, we recommend that you consult with employee benefits legal counsel for advice on the best way to structure your proposed employer-sponsored vaccination program.

EEOC PROPOSED WELLNESS RULE: DE MINIMIS EXCEPTION

Q We are considering adding a new wellness program that is separate from our group health plan. I read recently that wellness programs must be "de minimis" unless they are offered as part of a group health plan. Is this correct? What amount would be considered "de minimis."

A On January 7, 2021, the federal Equal Employment Opportunity Commission ("EEOC") proposed rules that would limit financial incentives that may be offered under certain employer-sponsored wellness programs. The proposed rules would apply to participation-based wellness programs that require a medical examination

or screening or make disability related inquiries in exchange for a financial incentive.

The EEOC proposed two separate rules. The first proposed rule sets forth the standards for compliance with the Americans with Disabilities Act ("ADA") and the second sets forth standards for compliance with the Genetic Information Nondiscrimination Act ("GINA").

The proposed rules would limit financial incentives offered in connection with a participation-only wellness program to a "de minimis amount." The proposed rule does not define what constitutes "de minimis." However, the EEOC provides an example of what is de minimis—"a water bottle or gift card of modest value."

The proposed ADA rule provides an exception from the de minimis rule for certain health contingent programs that are offered as part of a group health plan. Under this exception, the wellness program may offer the maximum incentive offered under applicable 2013 Health Insurance Portability and Accountability Act ("HIPAA") regulations. Under applicable HIPAA regulations, the maximum incentive is 30 percent of the total cost of employee-only coverage (if the incentive is available only to employees) or 30 percent of the total cost of employee and dependent coverage (if the incentive is offered to both employees and dependents). The 30 percent limit is increased to 50 percent for tobacco-related wellness incentives.

To comply with the group health plan exception, the incentive must meet four additional requirements:

- (1) Eligible individuals must be given an opportunity to qualify for a reward at least once per year;
- (2) The program must offer a reasonable alternative standard (or waiver) to qualify for a reward to any individual for whom

it is unreasonably difficult or medically inadvisable to satisfy the standard due to a medical condition;

- (3) The program must be reasonably designed to promote health or prevent disease and not be overly burdensome, a subterfuge for discriminating based on a health factor, or highly suspect in the method chosen to promote health or prevent disease; and
- (4) The program must disclose a reasonable alternative standard to qualify for the reward in plan materials, and in the case of an outcome-based program, in any disclosure that an individual did not satisfy an initial outcome-based standard.

After the Department of Labor proposed the wellness rules, President Biden’s administration issued an executive memorandum requesting withdrawal of certain proposed rules, including the proposed wellness rules. In early February 2021, over 40 industry groups wrote to the EEOC asking that the EEOC quickly issue guidance clarifying the extent to which employers may offer incentives for COVID-19 vaccinations without running afoul of the Americans With Disabilities Act and other laws enforced by the EEOC. The letter encouraged the EEOC to define what qualifies as a permissible incentive as broadly as possible. We are hopeful that additional guidance on wellness rules will be provided in the near future. 🌟

NOTE

- 1. See ERISA § 3(1).

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