

# **Legally Use Covid-19 Vaccine Incentives to Boost Employee Consent**

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# Legal Risks & Practical Solutions: Vaccine Incentives

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# Agenda

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## Employment Laws To Consider with Vaccine Incentives

- ADA – 15 or more employees
- Title VII – 15 or more
- GINA – 15 or more
- Fair Labor Standards Act – All sizes
- OSHA – All sizes
- State and local equivalents – usually cover smaller businesses

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## Discrimination Law Considerations

- Equal Employment Opportunity Commission is the federal agency that administers anti-discrimination laws
- EEOC has issued COVID-19 guidance; this is a helpful resource to refer to for future questions:
  - <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- Let's discuss key takeaways relevant to today's discussion

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## Key Takeaways from EEOC Guidance

### Prescreening for Vaccines – Giving Vaccines to Your Employees

- ADA and GINA set limits on types of questions employers can ask employees, so as not to elicit medical/protected information
- Administering COVID-19 vaccine to your own employee is not “medical examination” under ADA and does not implicate GINA
- But pre-vaccine questions are “medical examinations” and are only permitted if “job related and consistent with business necessity”
  - Unless vaccine offered on voluntary basis, and no penalty for saying no

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## Key Takeaways from EEOC Guidance

### Proof of Vaccine

- It is OK to ask for proof of vaccines
- Be cautious in asking follow-up questions, like “why not” – these may be prohibited disability-related inquiries
- Better to ask for vaccine cards or yes/no question
- Store proof of vaccine in separate, confidential files

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## Key Takeaways from EEOC Guidance

### Vaccine Incentives

- In early 2021, EEOC suggested “de minimis” incentives were OK as part of a wellness program, but has since withdrawn proposed rule
- Right now, no federal guidance on incentives, but EEOC says it is coming

**So what do we know? And, what are the risks in using incentives?**

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## Vaccine Incentive Rules and Risks

- **Background: “De Minimis” Incentives as part of Wellness Programs**
  - Normally, participation in a wellness program requires employees to either take a medical exam or answer medical questions, which implicate the ADA and GINA
  - For a brief time, EEOC said that “de minimis” incentives to participate were ok
  - Never defined what “de minimis” was – but generally understood to be things of small value, like low-value prizes (water bottles, small cash rewards or gift cards); by contrast rewards worth several hundred dollars were considered too much
  - Legal challenges caused the rules on this to be revoked

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## Vaccine Incentive Rules and Risks

### ■ Why does this matter?

- Because there is no guidance on this issue, there is some risk in offering an incentive, even if de minimis
- Discrimination law prohibits workplace policies that have a disparate impact on certain workers in protected classes
  - Employees with disabilities (in some states, pregnancy too)
  - Employees with sincerely-held religious beliefs
- Because certain employees may not be able to participate in an incentive program, businesses risk a claim of discrimination
- But note, employees who distrust vaccine, or prefer not to get it, are not covered by anti-discrimination statutes

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## Vaccine Incentive Rules and Risks

### ■ What to do now?

- Understand that no clear direction now
- If you develop an incentive program, make the incentive small
- Be clear the program is voluntary
- Consider alternatives for employees who cannot be vaccinated


### ■ What are other businesses doing?

- Small gift cards or cash
- Paid time off

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Vaccine Incentive Rules and Risks


- Aldi: 4 hours paid time off
- American Airlines: one day off + \$50 toward recognition program
- Amtrak: 2 hours paid time off
- Bolthouse Farms: \$500 bonus
- Instacart: \$25 gift card
- Kroger: \$100 bonus
- Target: Free rides to vaccine sites (or up to \$30 if Lyft rides)

Source: <https://www.cnn.com/2021/03/24/business/covid-vaccine-incentives-companies/index.html>

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Scenario 1

- You announce a vaccine incentive program for your employees: Each employee who shows proof of vaccination will receive 4 hours of paid time off and a \$25 visa gift card.
- Your employee, Julie, does recordkeeping at your office. She interacts with other employees, but rarely patients.
- Julie lets you know that she is not planning to get vaccinated, but does not say why.
- What should you do next? Can you ask why? Can you encourage her to do it?

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## Scenario 2

- You announce a vaccine incentive program for your employees:  
Each employee who shows proof of vaccination will receive 4 hours of paid time off and a \$25 visa gift card.
- Your employee, Julie, refuses to provide proof of vaccination. But says she did it.
- What should you do next? Can you withhold the incentive without proof of vaccination?

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## Wage and Hour Considerations

- Do you have to pay employees, if you require or incentivize them to get vaccinated?
- Generally, under Fair Labor Standards Act, no
  - If employer is administering vaccine, more likely compensable, even if voluntary
- Some states may require pay
  - For example, in Massachusetts, if an employer requires employees to get vaccinated at a particular time or place, that would be “working time” and thus compensable (including travel time); but if required generally to get vaccinated, then not compensable
  - Other states, like New York, passed statutes requiring pay

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Wage and Hour Considerations

- **Family First Coronavirus Response Act**
  - Employers, may, on a voluntary basis, allow employees to take emergency sick time in connection with COVID-19 matters
  - If employers provide this leave, employees can use up to two weeks of sick time between April 1 and September 30, 2021
  - A reason for leave is getting vaccinated, or recovering from a vaccine
  - Federal government will reimburse employer for sick time via a tax credit
- **State sick leave laws**
  - Some states have expanded paid sick leave to include vaccination appointments (e.g., California)



Wage and Hour Considerations

- **Overtime pay**
  - Federal DOL says that a “gift” need not be computed in calculating overtime pay, but state law may vary
  - A non-discretionary payment (e.g., flat-rate bonus) should be included in calculating an employee’s regular rate of pay



## Wage and Hour Considerations

### ■ Best Practices:

- If offering to vaccinate workers onsite, pay for time spent giving vaccine, even if not during regular working hours
- If requiring employees to get vaccinated at a particular time or place, pay for travel time and time spent getting vaccinated
- If offering a flat-rate bonus, include payment in regular rate of pay for purposes of calculating overtime
- Review local and state laws for specific pay requirements

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## Scenario 3

- You announce a vaccine incentive program for your employees:  
Each employee who shows proof of vaccination will receive 4 hours of paid time off and a \$25 visa gift card.
- Do you count the 4 hours of paid time off toward the 40 hour work week, for purposes of calculating overtime pay?

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Workplace Safety Considerations

■ OSHA – Federal Workplace Safety Statute

■ Under OSHA, employers are responsible for providing a safe and healthy workplace free from recognized hazards likely to cause death or serious physical harm.


■ OSHA guidance provides that employers may not distinguish between employees who are vaccinated and those who are not, with regard to protective measures

• All employees should continue to follow safety protocols in your office (e.g., mask wearing)


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Questions



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Thank you!

