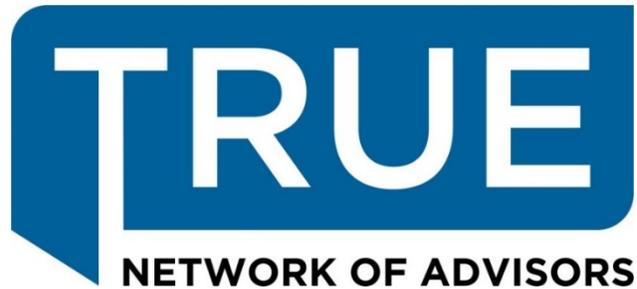


Vaccine Mandates, Incentives, and Surcharges: Employer Update



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COVID-19 OSHA Update

- ▼ Nationwide mask wearing standard; Infectious disease standards
- ▼ *OSHA issues Emergency Temporary Standard for health care employers only (June 10, 2021)*
- ▼ **OSHA updates guidance to include CDC recommendations (including mask wearing for vaccinated employees). these are recommendations only, and that the “guidance is not a standard or regulation, and it creates no new legal obligations.”**



Vaccine Program FAQs

▼ Employees' Objections

- ▼ Individual employee objections about COVID-19 that are personal to the employee's circumstances, health issues, or concerns about PPE should typically be treated like a request for an ADA accommodation
- ▼ Assess, have an interactive discussion, document it, and act reasonably to try and build consensus

EEOC Re-Issues Guidance on Employer Vaccine Requirements

▼ Reasonable Accommodations (ADA/PDA/Title VII)

▼ Reasonable Accommodations Based on Health Factor

▼ Reasonable Accommodations Based on Religion



State & Local Laws

- ▼ **Caution: State/Local law restrictions on employer vaccine requirement**
 - ▼ **Prohibitions on businesses, employers**
 - ▼ **Vaccine mandate vs requiring vaccine documentation**



EEOC Issues Guidance on Employer Vaccine Requirements

- ▼ August 23, 2021 – FDA grants full approval of the Pfizer Covid-19 vaccine for people age 16 and older
 - ▼ EUA still in effect for Moderna and Johnson & Johnson

▼ EEOC Guidance on Employer Vaccine Requirements

- ▼ On December 16, 2020, EEOC issued updated FAQs on its COVID-19 page regarding employer vaccination requirements

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

- ▼ EEOC acknowledges that employers **may require employees to provide proof of vaccination**
- ▼ **To adequately document the requirement for ADA purposes**, the employer should have a **written policy** that specifies it is a qualification standard for employment that “an individual shall not pose a direct threat to the health or safety of individuals in the workplace.”
- ▼ **Reasonable accommodations** (health factor, pregnancy, religion)

EEOC Re-Issues Guidance on Employer Vaccine Requirements

▼ Relaxation of Wellness Incentive Rules for Vaccine Incentive Programs

- ▼ Many employers are offering incentives to employees who provide proof of COVID-19 vaccines, such as gift cards, extra PTO days, and similar incentives.
- ▼ EEOC approves the use of incentives so long as the value of the incentive is not so substantial as to remove the voluntary nature of employee participation.
- ▼ Incentives tied to benefits require more...





Employment Law Considerations: COVID Vaccine

- ▼ **ADA Confidentiality Requirements**
- ▼ **Disparagement vs. Protected Conduct**
- ▼ **Employee objections that are about the broader applicability of the employer's safety/COVID-19 concerns (whether they are in favor of greater safety protocols or fewer), should be treated as something more risky**
- ▼ **Potentially implicate Section 7 of the National Labor Relations Act's protected concerted activity rules, where an employee's complaint for the "mutual aid or protection" of himself and at least one other employee is entitled to protection from retaliation**
 - ▼ **Ultimately, when employees act "in concert" about an issue of concern with their employment, it is among the most serious risks an employer faces, because it doesn't take much more for them to turn to a union for help**
- ▼ **Take the complaints seriously, work to build consensus, seek expert assistance if you need it**

Vaccine Incentives & Surcharges

- ▼ **Incentive/Surcharge related to health plan premiums**
 - ▼ **Delta Airlines**
- ▼ HIPAA Nondiscrimination Rules prohibit treating individuals differently based on health factor ---- vaccination status
- ▼ Exception: **Wellness Programs**
- ▼ Participatory vs. Activity-Only or Outcome-based health contingent wellness program



Five Requirements for Health-Contingent Wellness Programs

1.	Frequency of Opportunity to Qualify	Eligible individuals must be given an opportunity to qualify for the reward at least once per year
2.	Maximum Reward Size	May not exceed 30% of the total cost of employee-only coverage (50% in the case of programs designed to reduce or prevent tobacco use)
3.	Reasonable Design	Reasonable chance of improving the health of or preventing disease in participating individuals It is not overly burdensome, is not a subterfuge for discriminating based on a health factor, and is not highly suspect in the method chosen to promote health or prevent disease
4.	Uniform Availability	Must provide <u>reasonable alternative standards</u>
5.	Notice Requirements	Must disclose the options to qualify for the reward through reasonable alternative standards

Vaccine Incentives & Surcharges

- ▼ Opportunity to qualify at least once per plan year
 - ▼ Coordinate with Open Enrollment 2021?
- ▼ 30% limitation (combined)
- ▼ Implications on ACA Affordability
 - ▼ 9.83% in 2021, 9.61% in 2022
- ▼ Reasonable Alternative Standards

Reasonable Alternative Standards

Universal Availability → Reasonable Alternative Standards (“RAS”)

- ▼ When is a RAS required?
 - ▼ *Activity-Only* → Must allow RAS (or waiver of standard) to an individual for whom the standard is (i) unreasonably difficult, or (ii) medically inadvisable
 - ▼ *Outcome-Based* → Must always allow RAS for individuals who fail to satisfy initial standard
- ▼ When can plan require verification from physician?
 - ▼ *Activity-Only* → A wellness program may require verification from a physician that an individual’s health factor makes it unreasonably difficult or medically inadvisable to attempt to satisfy the regular standard
 - ▼ *Outcome-Based* → Not for the original applicable standard
 - ▼ May require verification at “second level” if second RAS would be an activity-only wellness program

When is a Reasonable Alternative Standard *Reasonable*?

- ▼ Reasonableness based on facts and circumstances
- ▼ Must satisfy the following:
 - ▼ Time commitment required must be reasonable
 - ▼ Educational program: plan must make educational program available or assist employee in finding such a program and may not require an individual to pay for the cost of the program
 - ▼ Diet program: plan is not required to pay for the cost of food but must pay any membership or participation fee
 - ▼ Accommodate requests of individual's physician
- ▼ Reasonable Alternative Standards for COVID Vaccine???
 - ▼ Consistent testing
 - ▼ Educational program or materials
 - ▼ Physician consultation
 - ▼ Waiver

Notice of Reasonable Alternative Standards

- ▼ **Wellness rules require that the plan provide notice of the availability of RAS (or waiver of the standard, if applicable)**
- ▼ **Notice must be in all plan materials that describe the health-contingent wellness plan**
 - ▼ **For outcome-based wellness programs, notice also must be included in any disclosure that an individual did not satisfy an initial outcome-based standard**
- ▼ **Must include contact information for obtaining the RAS**
- ▼ **Must also include a statement that a recommendation of an individual's personal physician will be accommodated**

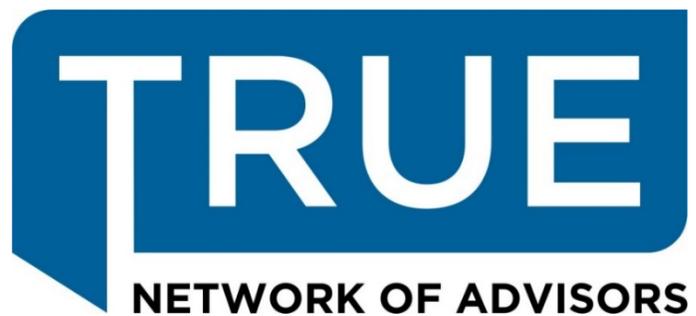
Vaccine Incentive Wellness Program

▼ Best Practices

- ▼ Program should be in writing
- ▼ Plan document / SPD
- ▼ Communication is key

Vaccine Program as Group Health Plan?

- ▼ **Is your vaccine program also a GHP?**
 - ▼ Depends on structure
 - ▼ Who covers the cost?
 - ▼ How provided?
 - ▼ Related to health plan?
- ▼ **Employer providing vaccine likely subject to group health plan requirements**
 - ▼ Risk/enforcement?
- ▼ **Integration with health plan**



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