

COVID-19: EEOC WITHDRAWS PROPOSED RULES ON EMPLOYER WELLNESS INCENTIVES, LEAVING UNCERTAIN THE PERMISSIBILITY OF COVID-19 VACCINATION INCENTIVES

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By: Scott G. Kobil, Erinn L. Rigney

The U.S. Equal Employment Opportunity Commission (EEOC) announced last Friday that it was withdrawing two proposed rules regarding the incentives employers can provide their employees as part of a wellness program without violating the Americans with Disabilities Act (ADA) or Genetic Information Nondiscrimination Act (GINA). Originally, the proposed rules had stated that, for the most part, employers could offer only “de minimis” incentives for employees participating in a wellness program—incentives that potentially could apply to employees receiving a coronavirus (COVID-19) vaccine. With the withdrawal of those rules, employers have little guidance in terms of what incentives, if any, they may offer employees.

HOW WE GOT HERE

We [previously explained](#)¹ the genesis of the proposed ADA and GINA rules, which the EEOC issued on 7 January 2021. Briefly, those proposed rules were promulgated to fill the void left by a set of earlier rules that the EEOC had withdrawn in 2018 in response to a court order.² The January 2021 proposed rules generally allowed employers to offer employees only de minimis incentives (e.g., a water bottle or gift card of modest value) for participating in a wellness program. However, if the incentive was in connection with a health-contingent insurance plan, employers could offer employees an incentive of up to 30 percent of the total cost of coverage.

While the January 2021 proposed rules attempted to provide some guidance regarding the permissible scope of incentives, a number of employers sought further clarity as to what “de minimis” meant in this context. In particular, employers wanted to know what incentives they could offer to encourage their employees to receive a COVID-19 vaccination without violating the ADA or GINA. In fact, on 1 February 2021, a coalition of 41 business groups, including the U.S. Chamber of Commerce, sent a letter to the EEOC requesting that it “quickly issue guidance clarifying the extent to which employers may offer employees incentives to vaccinate without running afoul of the Americans With Disabilities Act and other laws.” The letter further urged the EEOC to define the scope of a permissible incentive “as broadly as possible.”

Because the January 2021 proposed rules were never finalized, by definition they were subject to revision or withdrawal. But what caused the proposed rules' immediate demise was the fact that they were not published in the Federal Register by the time of President Biden's inauguration—a 20 January 2021 White House Memorandum by and large required all executive departments and agencies to immediately withdraw any proposed rules that had not yet been published in the Federal Register. Accordingly, on 12 February 2021, the

EEOC formally withdrew the January 2021 rules and removed them from its website.³ The EEOC's next steps are "under consideration."

WHAT INCENTIVES EMPLOYERS MAY OFFER NOW

With the EEOC's withdrawal of the January 2021 proposed rules, employers are in the same position that they have been in since 2018, when the previous rules were withdrawn: a position under which there is little regulatory guidance. Meanwhile, the pandemic continues, and as vaccine distribution expands to more and more essential industries, employers must decide whether and how to incentivize their employees to receive vaccinations.

Even while the proposed rules were pending, many employers forged ahead in offering incentives, which ranged in scope from paid time off to cash payments to employees who received vaccinations. However, in the face of legal uncertainty, many employers are still grappling with developing an incentive program that complies with applicable anti-discrimination laws. In the absence of specific guidance from the EEOC, if employers offer a vaccine incentive, they must be mindful of employees who cannot receive a COVID-19 vaccination because of religious beliefs or other medical conditions. Specifically, the ADA requires employers to provide reasonable accommodations so that employees with disabilities can enjoy the same "benefits and privileges of employment" as similarly situated employees without disabilities.⁴ Title VII of the Civil Rights Act of 1964 requires similar accommodations for employees' religious practices.⁵

Just as employers wishing to mandate vaccinations for their workforce must make reasonable accommodations for employees having religious or disability-based objections (a topic covered in an [earlier alert](#)⁶), so too should employers make appropriate accommodations for employees who cannot earn the vaccination incentive. For example, employees who cannot get the vaccine might be asked to watch a COVID-19 safety video or attend a COVID-19 class in order to obtain the same incentive that vaccinated employees receive.

Of course, in addition to the legal ramifications, employers may want to consider the business and cultural implications of offering vaccination incentives. For example, the financial risk of paying employees for getting vaccinated may be weighed against the possible increase in employee morale and customers' perception of a safe environment that broad vaccination of the workforce might obtain. Additionally, while an incentive might persuade an otherwise ambivalent employee to get vaccinated, it could also create the impression that the employer is trying to pay off its employees to do something that is unsafe. As a consequence, some employers may determine that, in lieu of an incentive program, they will simply encourage employees to get vaccinated by providing access to information from reliable sources, such as the Centers for Disease Control and Prevention and state and local health agencies, about the advisability of receiving the COVID-19 vaccine.

FOOTNOTES

¹ [Well Done? EEOC's New Proposed Rules Would Limit Employer Wellness Programs To De Minimis Incentives— With Significant Exceptions](#), K&L Gates (Jan. 12, 2021).

² See *AARP v. EEOC*, 267 F. Supp. 3d 14 (D.D.C. 2017); 83 Fed. Reg. 65,296 (Dec. 20, 2018).

³ [Rulemaking](#), U.S. Equal Employment Opportunity Commission.

⁴ See 29 C.F.R. § 1630.2(o)(1)(iii).

⁵ See 29 C.F.R. § 1605.2.

⁶ [COVID-19: Mandatory Vaccinations: New EEOC Publication Provides Timely Guidance for Employers](#), K&L Gates (Dec. 23, 2020).

KEY CONTACTS



SCOTT G. KOBIL
COUNSEL

NEWARK
+1.973.848.4149
SCOTT.KOBIL@KLGATES.COM



ERINN L. RIGNEY
PARTNER

CHICAGO
+1.312.807.4407
ERINN.RIGNEY@KLGATES.COM

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