

COVID-19 VACCINATION SWEEPSTAKES: BEST PRACTICES FOR EMPLOYEE INCENTIVES

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In the current pandemic environment, employers are searching for increasingly creative ways to incentivize COVID-19 vaccination among their employees. “Vaccine sweepstakes,” by which employers offer cash or other prizes (often substantial) to winning employees who are randomly selected from a pool of vaccinated entrants, are gaining popularity across all industries. Indeed, the popularity of such sweepstakes may increase further after [the U.S. Supreme Court recently blocked a nationwide vaccination-or-testing mandate for large employers.](#)

To date, no official guidance has been issued on sweepstakes as a vaccine incentive tool. However, by observing the existing guidance on traditional vaccine incentives and certain other best practices, employers can run fair (and fun!) vaccine sweepstakes programs aimed at increasing workforce vaccination and boosting company morale.

TRADITIONAL VACCINE INCENTIVES

On 28 May 2021, the U.S. Equal Employment Opportunity Commission (EEOC) issued guidance, previously addressed [here](#), stating that employers may offer incentives to employees for voluntarily disclosing that they have been vaccinated. The permissible size of the incentive is dependent on whether the employer is administering the vaccine or is encouraging vaccination by an unaffiliated third-party provider. In the latter scenario, where vaccination is to be administered by an employee's personal physician or pharmacy, or a state-run vaccination center, employers may offer unlimited incentives to their employees. If, however, the employer or its agent is offering to administer the vaccine, the incentive must not be “so substantial as to be coercive.” This distinction is designed to ensure that employees are not pressured into disclosing their confidential medical information to their employer in violation of the Americans with Disabilities Act (ADA).

Under this guidance, at the most basic incentive level, employers have offered small cash prizes and other rewards to employees who provide proof of vaccination. Some employers have opted for a more intricate incentive plan, offering discounts or imposing surcharges (up to 30%) on the cost of group health insurance premiums based on the participants' vaccination status.¹ Now, employers are exploring new ways to incentivize employee vaccination.

VACCINE SWEEPSTAKES SWEEP THE GLOBE

Hoping to incentivize employees unmotivated by the offer of small rewards to all vaccinated employees, some employers have upped the ante on their incentive programs, offering much larger incentives to vaccinated employees who are randomly selected as winners of a vaccine sweepstakes. There currently is no official guidance on the use of sweepstakes as a vaccination incentive. Employers should take care to structure their

programs, first, in compliance with the existing guidance and laws on traditional vaccine incentives and sweepstakes and, second, taking into consideration certain best practices.

EXISTING GUIDANCE AND LAWS

Incentivize Third-Party Vaccination

Per the existing EEOC guidance on traditional vaccine incentives, if the employer or its agent administers the vaccine, the employer's incentive must not be "so substantial as to be coercive." Since sweepstakes incentives are often "substantial," employers offering vaccine sweepstakes should not offer to administer the vaccines. Rather, employers should encourage their employees to get vaccinated off-site by their own healthcare providers or a government agency. In short, do not offer vaccines on-site if a substantial incentive will be offered.

Provide Reasonable Accommodation

Some employees may have medical conditions or sincerely held religious beliefs that prevent them from receiving a vaccine and, therefore, may be eligible for a reasonable accommodation under the ADA or Title VII of the Civil Rights Act of 1964. Further, some state vaccination laws require the provision of reasonable accommodations for employees who remain unvaccinated for reasons beyond a medical condition or religious belief. Excluding these accommodated individuals from a vaccine sweepstakes would likely expose the employer to discrimination claims. To avoid this, employers should make reasonable accommodations for these employees. One such accommodation would be to allow the accommodated employees to enter the same sweepstakes offered to vaccinated employees upon agreement by the accommodated employees to wear a mask, submit to regular COVID-19 testing, or participate in a COVID-19 safety course. Regardless of the method, do offer reasonable accommodations for employees with medical conditions and sincerely held religious beliefs.

Comply with Applicable Laws

Most states have enacted gaming laws that define and govern sweepstakes, lotteries, contests, and other promotions run in their states. Some states require that sweepstakes be registered with the state if they offer prizes valued at greater than \$5,000. Further, most states prohibit lotteries, i.e., raffles that require consideration for entry. While many states define "consideration" to mean only monetary payment for entry, some states may find that consideration is given where the entrant undertakes any burden for entry. Further, employers should consider state laws that restrict an employer's ability to distinguish between employees on the basis of vaccination status. Thus, it is important that employers considering vaccine sweepstakes do ensure compliance with all applicable laws.

OTHER BEST PRACTICES

Issue Official Rules

Employers should condition entry in a vaccine sweepstakes on their employees' acceptance of official program rules prepared by the employer. At a minimum, the rules should clearly define:

- Employee eligibility (including any residency restrictions);
- The method and period of entry;
- The procedure for winner selection and verification;

- The prizes to be awarded (and that the winnings will be treated as taxable compensation to the winner); and
- Reasonable accommodations for employees with medical conditions, sincerely held religious beliefs or other bases for accommodation required by state law that prevent vaccination.

The rules also may include other conditions, like choice-of-law provisions and release and indemnification of the employer from claims arising from participation in the sweepstakes, including, for example, an employee's decision to get vaccinated, the acceptance and use of a prize, and the public disclosure of the employee's identity and vaccination status as a winner of the sweepstakes (addressed further below). In addition, the employer may wish to state that the prize will not be considered part of the winner's base compensation so as to avoid future claims that overtime or other supplemental compensation is owed based on an artificially inflated base salary or hourly wage. Employers with unionized employees should consider consulting their collective bargaining agreement and union representatives regarding program details and rules.

Run a Transparent and Fair Sweepstakes

To avoid any appearance of impropriety or talk (however unfounded) of the vaccine sweepstakes being “rigged,” the winner should be selected in a clear and fair manner. Ideally, the drawing should be public, or at least conducted in front of witnesses. Employers may wish to invite all employees to observe the drawing, which may have the added benefit of increasing office morale. If very large prizes are awarded, employers should consider enlisting outside auditors to oversee the process. As an added measure, employers may wish to exclude executives or highly-compensated employees. This exclusion should be made clear in the official rules.

Obtain Consent to Disclosure

Finally, as a condition of entry in the vaccine sweepstakes, the employer should obtain from its employees written consent to disclosure, internally or externally, of the employee's identity as a winner of the sweepstakes. At a minimum, the consent should permit disclosure of the winner's name, prize amount, and the winner's vaccination status, as any announcement that an employee has won the vaccine sweepstakes necessarily discloses that the winner is vaccinated (or, depending on the program rules, accommodated). Such consent is particularly important if the employer seeks to gain favorable media coverage in connection with the award.

FUTURE CONSIDERATIONS

Subject to consideration of applicable guidance and laws, vaccine sweepstakes may be a viable option for employers looking to encourage, rather than mandate, their employees to get vaccinated against COVID-19. Given the ever-evolving nature of COVID-19 measures and guidance, employers considering vaccine sweepstakes should remain vigilant in identifying and understanding any new or additional potentially applicable rules and recommendations issued at the federal, state, and local levels.

FOOTNOTES

¹ The Departments of Labor, Treasury, and Health and Human Services approved these insurance premium incentives in a set of Frequently Asked Questions issued on 4 October 2021, previously addressed [here](#).

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