

Employer Covid-19 Vaccine Incentives—A Difficult Dilemma: Legal Insight

By R. Anthony Prather | March 4, 2021 4:01AM ET

Some employers are offering incentives to employees to get vaccinated against Covid-19, like bonuses, days off, or gifts. R. Anthony Prather, partner at Barnes & Thornburg LLP, warns that may work, but could lead to legal problems. Employers faces a difficult choice: They can offer de minimus incentives that don't really incent or offer larger incentives and open the company up to allegations of coercion or discrimination.

According to the Centers for Disease Control and Prevention, “immunization with a safe and effective Covid-19 vaccine is a critical component of the United States strategy to reduce COVID-19 related illnesses, hospitalizations, and deaths and to help restore societal functioning.”

The CDC's efforts to promote the vaccine have been admirable considering the supply channel challenges. Its “[Vaccinate with Confidence](#)” strategy offers six ways to help build Covid-19 confidence.

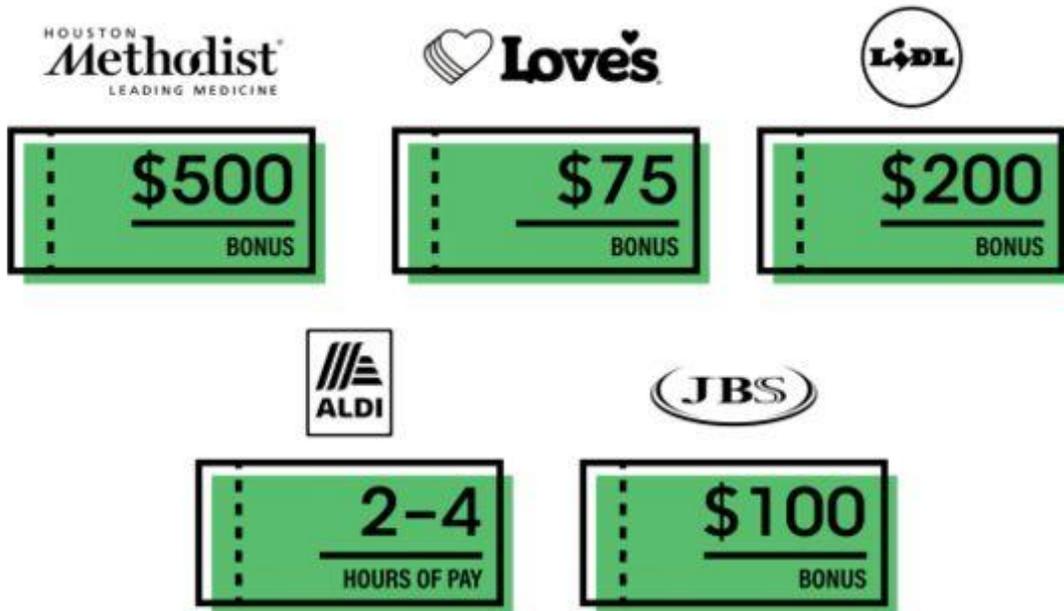
However, the CDC's strategy has not, by itself, driven employees to get vaccinated, and some employers are turning to incentives.

Employer Incentives Grow in Popularity

In a recent report by Perceptyx based upon a [survey](#) of more than 1,000 workers, 56% would get the vaccine if encouraged to do so by their employer. Of those surveyed, 60% would get the vaccine if their employers offered a monetary incentive of \$100 to do so.

Consistent with the survey results, a number of offers to encourage employees to get vaccinated. Those incentives include offers of paid time off and bonus payments ranging from \$75 to \$500.

Vaccine Incentives Offered



Source: Company announcements

Bloomberg Law

In a Feb. 1, letter, [a number of business groups](#) asked EEOC Chair Charlotte Burrows “to 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 enforced by the EEOC.”

The letter further stated, “Employer-provided incentives can assist governments in quickly and efficiently distributing vaccines. Legal uncertainty about providing such incentives however has many employers concerned over liability and has made them hesitant to act. We, therefore, urge the EEOC to issue guidance providing clarification on the extent to which employers may offer their employees incentives to vaccinate. To ensure the guidance is as effective and efficient as possible, we also encourage the EEOC to define what qualifies as a permissible incentive as broadly as possible.”

Specific Guidance Is Lacking

To date, the EEOC has not provided any additional guidance, nor has it identified a date by which it will do so. However, on Jan. 7, the EEOC provided [proposed Wellness Rules](#) for review to address what level of incentives employers may lawfully offer to encourage employee participation in wellness programs.

These proposed rules could go into effect as early as March. The proposed rules will allow for “de minimis” incentives (e.g., water bottle or gift card of modest value) to encourage employee participation in wellness programs and for now, can reasonably be interpreted as the EEOC’s current view with respect to vaccination incentives.

Absent additional guidance from the EEOC, employers considering offering incentives to employees to get vaccinated will have to consider incentives that arguably are de minimis in nature.

In addition to the de minimis incentive issue, employers offering incentives may also open themselves up to claims of discrimination from employees exempted from vaccines. For example, an employee with a disability that precludes receipt of the vaccine and thus, denied the incentive could argue that he/she is being discriminated against because of a disability.

Under these proposed rules, employers have two options to consider for offering incentives to employees to get vaccinated and the difference between the two options is premised on the employer's aversion to risk. For those employers with high levels of risk aversion, offering de minimis incentives both eliminates the argument that the value of the incentive is coercive and thus illegal and discourages arguments that the incentive is a form of discrimination. However, such incentives are less likely to incentivize employees to get vaccinated.

For those employers with lower levels of risk aversion, offering paid time off and bonus payments will more likely incentivize employees to get vaccinated while, at the same time, putting these employers at risk of claims that the incentives were both too coercive and discriminatory.

As a result of the practical and legal issues associated with both options, employers are faced with the necessity of accepting one of two equally objectionable alternatives to incentivize employees to get vaccinated.

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