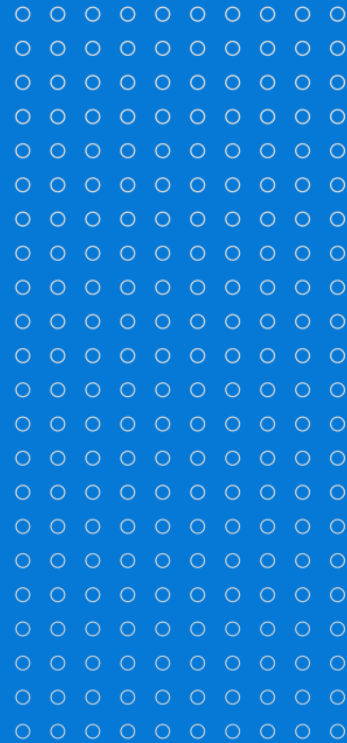


Beyond COVID-19: Vaccines and the Workplace

Employer Guide to Vaccine Incentive Programs

September 2021



Contents

Vaccines and Employer Incentive Programs	3
Foundational Legal Considerations	3
Americans with Disabilities Act	3
ADA, Accommodations, and the Interactive Process	4
ADA and COVID-19 Vaccine Medical Inquiries	5
Title VII of the Civil Rights Act of 1964 – Religion	6
“Sincerely Held”	7
Title VII (Religion) Reasonable Accommodation and the Interactive Process	7
Pregnancy Discrimination Act	8
National Labor Relations Act	8
Workers’ Compensation	8
Confidentiality and Employee Medical Information	9
Americans with Disabilities Act	9
Health Insurance Portability Accountability Act (HIPAA) Requirements	9
Title II of the Genetic Information Nondiscrimination Act (GINA) and Vaccinations	10
Vaccine Incentive Programs: Practical Considerations and Program Design	11
Strategy and Approach	12
<i>ONSITE OR EMPLOYEE VOLUNTARY CHOICE?</i>	12
Carrot or Stick?	13
Who will be Eligible for the Incentive?	14
<i>ENTIRE EMPLOYEE POPULATION INCENTIVE</i>	14
<i>INDEPENDENT CONTRACTORS</i>	15
<i>FAMILY MEMBERS</i>	15
<i>HEALTH PLAN PARTICIPANTS</i>	16
The Vaccine Conversation	21
SAMPLE Voluntary Employee Vaccination Policy	22

Vaccines and Employer Incentive Programs

Today's headlines seem filled with a myriad employer-directed vaccination programs. We have developed this eBook to assist employers with navigating the vast and complex employment and employee benefits laws that apply to employer vaccine incentive programs. We've also written extensively (separately) on employer mandatory vaccine programs in our Employer Mandatory Vaccine Programs eBook. We recommend that you review both eBooks for a more complete review of the benefits, risks, and requirements of implementing an employer vaccination program.

Building a compliant vaccination program is complex and filled with several legal risks and pitfalls. While we have provided this information to help employers better understand the legal rules and considerations, **we strongly recommend that employers work with outside counsel when building an employer vaccination program.** It is important to note that this eBook only addresses federal law. Other state law limitations may apply. **NOTE: This eBook contains information from the [EEOC COVID Vaccine Updates](#) published on May 28, 2021.**

How to use this document. We've organized this document into two significant sections: (1) foundational legal considerations; and (2) Practical Considerations and Program Design. As a general rule, employers, under certain circumstances, may incentivize employees to receive the COVID-19 vaccine. However, there are specific and certain limitations. Employer vaccination policies are subject to significant federal laws, including: (1) the Americans with Disabilities Act; (2) Title VII of the Civil Rights act of 1964 – Religious Discrimination; and (3) Pregnancy Discrimination Act. Moreover, employers sponsoring group health plans and that seek to use their health plan to promote employee vaccinations will encounter additional compliance burdens and considerations.

Foundational Legal Considerations

Americans with Disabilities Act¹

The Americans with Disabilities Act ("ADA") protects qualified individuals with disabilities from employment discrimination. Under the ADA, a person has a disability if he or she has a physical or mental impairment that substantially limits a major life activity. The ADA also protects individuals who have a record of a substantially limiting impairment, and people who are "regarded as" having a substantially limiting impairment. A substantial impairment is one that significantly limits or restricts a major life activity such as hearing, seeing, speaking, breathing, performing manual tasks, walking, caring for oneself, learning or working. The ADA generally prohibits an employer from requiring a medical examination or making inquiries of an applicant employee regarding: (1) whether that employee is an individual with a

¹ [The Job Accommodation Network \(JAN\)](#) is a free consultant service that helps employers make individualized accommodations — telephone number is 1-800-526-7234.

disability; and/or (2) to the nature and severity of a disability, unless such examination or inquiries are “job-related and consistent with business necessity.”

An individual with a disability must also be qualified to perform the essential functions of the job with or without reasonable accommodation. This means that the applicant or employee must:

- Satisfy your job requirements for educational background, employment experience, skills, licenses, and any other qualification standards that are job related; and
- Be able to perform those tasks that are essential to the job, with or without reasonable accommodation.

Employers may require that applicants and employees provide documentation from a licensed healthcare provider to establish they have a disability under the ADA.

ADA, Accommodations, and the Interactive Process

While an individual with a disability may request an accommodation due to a medical condition, this request does not necessarily mean that the employer is required to provide it. A request for a reasonable accommodation is the first step in an informal, interactive process between the individual and the employer. Employers and employees (and applicants) should engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship (significant difficulty or expense). With respect to COVID vaccines, the prevalence in the workplace of employees who have received a COVID-19 vaccination and the amount of contact with others with an unknown vaccination status may impact the undue hardship consideration.

Generally, the employer should initiate the interactive process with the employee (or applicant) immediately following an individual’s accommodation request, or after the employer becomes aware that an accommodation may be required. The employer may have the obligation to initiate the reasonable accommodation interactive process without being asked by the individual if the employer:

- Knows that the applicant or employee has a disability
- Knows, or has reason to know, that the applicant or employee is experiencing workplace problems because of the disability
- Knows, or has reason to know, that the disability prevents the applicant or employee from requesting a reasonable accommodation

The interactive process is “at the heart of the ADA’s process” and is critical for enabling individuals with disabilities to fully integrate into the workplace. The goals for the employer and qualified individual with a disability are to:

- Identify the precise limitations caused by the disability
- Explore potential reasonable accommodations that could overcome those limitations

As part of the interactive process, the employer should determine whether it is necessary to obtain supporting documentation about the applicant or employee’s disability. Additionally, during the interactive process the employer may offer accommodation alternatives and discuss their effectiveness in removing

the workplace barrier that is impeding the individual with a disability. If the individual with a disability states that she/he does not need a reasonable accommodation, the employer will have fulfilled its obligation. (NOTE: HUB recommends that the employer always memorialize an employee's verbal confirmation in writing.)

It's important to note that even after employees are vaccinated the [CDC recommends](#) that employers continue to enforce COVID-19 safety protocols including wearing masks, regular hand washing and sanitizing, one-way hallways, social distancing, well ventilated air systems, and other safety measures (see our employer safety self-inventory [here](#)).

ADA and COVID-19 Vaccine Medical Inquiries

In addition to the requirement to provide an accommodation to applicants and employees with a qualified condition, the ADA also governs the nature and extent of medical inquiries by employers. An employer may obtain applicant or employee medical information only when it is "job-related and consistent with business necessity". According to the EEOC, the vaccine itself is not considered a "medical examination" (under the ADA). However, pre-screening vaccination questions may trigger the ADA inquiry limits if the questionnaires are likely to elicit information about a disability. The likelihood that medical information obtained through the vaccination may trigger an ADA obligation will depend (in part) on the nature of the program:

- **Voluntary Onsite Vaccination Program:** If the employer offers the vaccine onsite (either through the employer or a third-party) and the individual may voluntarily choose to receive the vaccine (and is not required to do so), the employer must likewise make the medical questionnaires voluntary. If an individual chooses not to answer the medical questions, the employer (or its vendor) may decline to administer the vaccine but may not retaliate against, intimidate, or threaten the employee for refusing to answer any questions.
- **Voluntary Third-Party (off-site) Vaccinations:** Individuals who receive the vaccine from third-party vendors that do not have a contract with the employer, such as their local pharmacy, clinic, or other health care provider, the ADA "job-related and consistent with business necessity" restrictions on disability-related inquiries would not apply to the pre-vaccination medical screening questions even if the vaccine is required by the employer. This could offer an appealing design flexibility option for some employers.

Finally, merely requiring the applicant or employee to provide the proof or receipt of the COVID-19 vaccine is not a disability related inquiry. However, proof of vaccine (i.e., the COVID-19 Vaccine Card) is considered confidential medical information under the ADA (see Confidentiality and Employee Medical Information). Employers should likewise avoid follow-up medical questions to its employees. If an employer poses any follow-up questions such "why didn't you receive the vaccine?", "what medical side-effects did you experience?", or "do you have any underlying health conditions that contributed to side effects?" they may tread into ADA prohibited medical inquiry territory.

Title VII of the Civil Rights Act of 1964² – Religion

Title VII protects workers from employment discrimination based on their race, color, religion, sex, national origin, or protected activity (see [EEOC manual on Title VII and religion](#)). Title VII also prohibits employers from developing otherwise neutral policies that have a disparate impact. Like the ADA, Title VII also contemplates accommodating individuals in certain situations. Employers must be sure that their vaccine program includes a path to request an accommodation and does not negatively impact any particular protected classes. For example, some demographic groups may have less access or encounter great obstacles to the vaccine than others and, as a result, may be negatively impacted.

Employees and applicants are entitled to an accommodation when a person identifies a sincerely held religious, ethical, or moral belief that conflicts with a specific task or requirement of the position or an application process. More specifically, a religious accommodation is any adjustment to the work environment that will allow an employee or applicant to practice his or her religion, so long as it does not cause an undue hardship to the employer.

The Supreme Court has defined Title VII's "undue hardship" defense to providing religious accommodation. The Court ruled that an employer is excused from providing an accommodation if it can show that the proposed religious accommodation posed "more than a de minimis" cost or burden. Notably, this is a much easier standard for an employer to satisfy than ADA's "undue hardship" standard which is statutorily defined as "an action requiring significant difficulty or expense." **Definition of Religion³**

Title VII defines "religion" very broadly. It includes traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism. It likewise includes religious beliefs that are new, uncommon, not part of a formal church or sect, or only held by a small number of people.

The EEOC instructs:

Because the definition of religion is broad and protects beliefs and practices with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely-held religious belief. If, however, an employee requests religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief or practice, the employer would be justified in seeking additional supporting information.

Under Title VII, a practice is religious if the worker's reason for the practice is religious. Social, political, or economic philosophies, or personal preferences, are not "religious" beliefs under Title VII. More

² Title 42 U.S.C. § 2000e-2(a) applies to employers with fifteen or more employees. See 42 U.S.C. § 2000e(b).

³ Specially defined "religious organizations" and "religious educational institutions" are exempt from certain religious discrimination provisions, and the ministerial exception bars EEO claims by employees of religious institutions who perform vital religious duties at the core of the mission of the religious institution.

specifically, the EEOC addresses an employer's obligation to accommodate an applicant and employee's sincerely held religious belief in its [FAQ Question K12](#)

“Sincerely Held”

Like the “religious” nature of a belief or practice, the “sincerity” of an employee's stated religious belief is usually not in dispute. Nevertheless, there are some circumstances in which an employer may assert that the employee's claimed religious belief was not sincerely held. Although no single factor is dispositive, an employer may consider whether:

1. the employee has behaved consistently with the belief;
2. the employee is seeking the accommodation for secular reasons;
3. the timing of the request is suspect; and
4. the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

For example, although prior inconsistent conduct may be relevant to the question of sincerity, an individual's beliefs – or degree of adherence – may change over time, and therefore an employee's newly adopted or inconsistently observed religious practice may nevertheless be sincerely held. An employer should not assume that an employee is insincere simply because some of his or her practices deviate from the commonly followed tenets of his or her religion.

Title VII (Religion) Reasonable Accommodation and the Interactive Process

An applicant or employee who seeks religious accommodation must make the employer aware of the need for accommodation and that it is being requested due to a conflict between religion and work. This is different than the ADA where an employer's obligation may be triggered by its knowledge (rather than the employee's specific request). However, there are “no magic words.” To request an accommodation, an employee may use “plain language” and need not mention any particular terms such as “Title VII” or “religious accommodation.” However, the applicant or employee must provide enough information to make the employer aware that there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job.

Although Title VII does not directly require an employer to discuss with an applicant or employee before deciding an accommodation request, as a practical matter it can be important to do so. Both the employer and the applicant and employee have roles to play in resolving an accommodation request. In addition to placing the employer on notice of the need for accommodation, much like the ADA interactive process, the employer and the worker should engage in a cooperative effort to address the conflict between the religious belief or practice and work. The employer may request, and the individual should provide any information and documentation necessary to determine whether an accommodation is available that would eliminate the religious conflict without posing an undue hardship on the employer. Likewise, when the employer does not have enough information or a bona-fide doubt regarding the sincerity of the religious belief, it may ask about the facts and circumstances of the individual's claim that the belief or practice at issue is religious, sincerely held, and it gives rise to the need for the accommodation.

Pregnancy Discrimination Act

There are two significant considerations with respect to the Pregnancy Discrimination Act (PDA) and the request for an accommodation.

1. While the PDA does not contain an obligation to provide an accommodation (like the ADA), employers must be sure that they act consistently. This means if the employer has provided an accommodation to an applicant or employee on the basis of his/her disability or religion, they likewise should provide the same accommodation to a pregnant applicant or employee. Failure to act consistently may result in a claim of pregnancy discrimination. More specifically, a pregnant worker may allege disparate treatment under the PDA and/or Title VII if an employer refused to excuse the pregnant applicant or employee from a vaccination requirement but permitted non-pregnant or male employees to be excused from the requirement on other grounds (such as ADA or religion). See [EEOC FAQ K13](#).
2. Additionally, some pregnancy related impairments (for example, gestational diabetes or preeclampsia, a condition characterized by pregnancy-induced hypertension and protein in the urine) may be disabilities under the ADA (see [Americans with Disabilities Act](#)).

However, employers should note that on August 11, 2021 the [CDC released its research and findings regarding pregnant and breast feeding women and the COVID-19 vaccine safety](#). The CDC has stated that the vaccine is safe for both pregnant and breast-feeding individuals. Vaccine recipients should always consult with their physicians regarding any risks or concerns regarding the COVID-19 vaccine.

National Labor Relations Act

Vaccines can be a controversial issue and as such, may be included or addressed in an employer's Collective Bargaining Agreement (CBA). Similarly, it is possible that a vaccine incentive program may be a subject to mandatory bargaining with the union. Employers with a union population and considering a vaccine incentive policy should carefully review the CBA and discuss their vaccination program with outside counsel.

Workers' Compensation

What happens if an employee experiences a medical complication from the vaccine that was offered by the employer? Under certain circumstances, an employee's medical complications associated with the vaccine may be deemed compensable and covered by the employer's workers' compensation insurance.

Generally, an injury may be compensable when a claimant can demonstrate that the injury can be attributed to some event or circumstances connected with work. For example, one Florida court held that "to be compensable, an injury must arise out of employment in the sense of causation and be in the course of employment in the sense of continuity of time, space, and circumstances." Another Florida court stated that an injury arises out of and in the course of employment if it occurs "within the period of employment, at a place where the employee may reasonably be, and while he is reasonably fulfilling the duties of employment or engaging in something incidental to it." An employee who receives the vaccine while at work may be able to demonstrate that the medical complications were "in the course of employment in the sense of continuity of time, space, and circumstances."

For example, a healthcare employee that chooses to protect patients and him/herself from exposure to COVID-19 and suffers an adverse reaction to the vaccine may have a compensable workers' compensation claim.

It is important to note that workers' compensation is regulated individually and separately by each state. Therefore, the legal standards described above may not apply in every state. Employers should check with their workers' compensation broker and/or carrier to better understand the compensability of medical complications associated with the COVID-19 vaccine in their state.

Confidentiality and Employee Medical Information

Americans with Disabilities Act

As employers begin to learn about an employee's individual medical concerns and conditions, it is important to remember that several laws have specific and stringent confidentiality requirements. For example, HIPAA (discussed below) FMLA, ADA, and Workers' Compensation laws all contain a mix of distinct and overlapping provisions that protect the confidentiality of an employee's medical information. Specifically, under the ADA employers have the obligation to ensure that all medical information obtained about an employee remains private and confidential. This means, that only those who "need to know" may know both the identity and nature of the medical condition of the employee. "Need to know" is construed very narrowly. Employers should ask themselves why someone "needs to know" both identity and medical condition before disclosing either or both. The EEOC explains that those who "need to know" may include:

- Supervisors (to implement necessary work restrictions and accommodations)
- First aid and safety personnel (if the disability requires emergency treatment)
- Workers' compensation state offices and insurance carriers
- Government officials investigating ADA compliance

The ADA, among other laws, requires employers to protect employees' privacy by: (1) keeping the names of employees who participate in a vaccination program private; and (2) ensuring that the location of the clinic offers a degree of privacy to employees receiving vaccinations. Additionally, the employer must keep the employee's medical information received from or about an employee in a confidential, secured medical file separate from the employee's personnel file.

Health Insurance Portability Accountability Act (HIPAA) Requirements

In the context of COVID-19 vaccination, HIPAA protections surface as a compliance consideration in two ways: (1) as a safeguard against employer discrimination based on a medical condition; and (2) in the context of medical privacy.

Although HIPAA is certainly the most well-known medical privacy law, specific compliance requirements depend on the type of entity subject and other highly specific local factors. Moreover, from an employer-perspective, HIPAA duties are generally limited to the group health plan (especially if the GHP is self-funded). This means that although still confidential, medical information gathered as part of an employer's FMLA, ADA, disability insurance, workers compensation, or other sick-leave law obligations is

generally not HIPAA-protected. While HIPAA can be a complex law, in a nutshell, if the employer learns of the employee's medical information, condition, diagnosis etc. through the health plan, then that information is likely protected under HIPAA.

Generally, HIPAA obligations manifest themselves most frequently in employers with a self-funded group health program that have access to claims information. For HIPAA purposes, group health plans health insurance, health flexible spending arrangements (FSA), and health reimbursement arrangements (HRA). However, employers that receive employee's Explanation of Benefits (even if fully insured) may unintentionally subject themselves to HIPAA. HIPAA also generally prohibits an employer from discriminating against an employee who has a medical condition.

Title II of the Genetic Information Nondiscrimination Act (GINA) and Vaccinations

[The Genetic Information Nondiscrimination Act \(GINA\)](#) is a federal statute prohibiting discrimination on the basis of genetic information.⁴ GINA also prohibits employers from (among other things) asking for information about an employee's current health status in a manner that is likely to result in the employer obtaining genetic information.

GINA defines "genetic information" to mean:

- Information about an individual's genetic tests;
- Information about the genetic tests of a family member;
- Information about the manifestation of disease or disorder in a family member (i.e., family medical history);
- Information about requests for, or receipt of, genetic services or the participation in clinical research that includes genetic services by an individual or a family member of the individual; and
- Genetic information about a fetus carried by an individual or family member or of an embryo legally held by an individual or family member using assisted reproductive technology.

Generally, vaccination programs include a pre-vaccination medical questionnaire to assess the individual's ability and/or eligibility for the vaccine. Sometimes, pre-vaccination medical screening questions may elicit information about genetic information, such as questions regarding the immune systems of family members. For example, if genetic information revealed an individual's propensity to become diagnosed with cancer in the future, such information could not be used to discriminate against the person.

The three vaccines in the U.S. currently do not require genetic information as part of the pre-screening process. Therefore, an employer that administers a COVID-19 vaccine to employees or requires employees to provide proof that they have received a COVID-19 vaccination does not implicate GINA.

⁴ Employers covered by GINA may also be subject to state laws prohibiting discrimination based on genetic information or regulating the collection and storage of genetic information.

Administering the vaccine and/or requiring proof of the vaccine does not involve the use of genetic information to make employment decisions, or the acquisition or disclosure of “genetic information” as defined by the statute. However, if an employer requires employees to provide proof that they have received a COVID-19 vaccination from their own health care provider, the employer should proactively warn the employee⁵ (see model “Gina Warning” language in footnote) not to provide genetic information as part of the proof. As long as this warning is provided, any genetic information the employer receives in response to its request for proof of vaccination will be considered inadvertent and therefore not unlawful under GINA concerns.

Likewise, GINA does not prohibit an individual employee’s own health care provider from asking questions about genetic information. However, it does prohibit an employer or a doctor working for the employer from asking questions about genetic information.

As vaccines advance and evolve, a vaccine’s particular structure could intensify GINA compliance challenges. For example, there is some concern that GINA’s broad “genetic information” definition might prohibit certain COVID-19 vaccine candidates that use messenger RNA technology (mRNA). For now, the CDC has explained that mRNA vaccines “do not interact with our DNA in any way,” the EEOC expressed that requiring employees to receive an mRNA vaccination is not prohibited or governed by GINA. (See the [CDC Understanding mRNA COVID-19 Vaccines](#) for a detailed discussion about how mRNA vaccines work).

Vaccine Incentive Programs: Practical Considerations and Program Design

Employers that choose to offer vaccination incentives⁶ to employees have a number of plan design decisions to make – each of these decisions may make the incentive program particularly complicated or more streamlined and straightforward. Employers should ensure that they memorialize their vaccine program in a written policy that they distribute to all employees.

As threshold matter, employees with a health condition that is considered a “disability” under the ADA may not be able to receive the vaccine and may require an accommodation to “remain whole” and receive the employer’s incentive. For example:

⁵ “The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits [employers](#) and other entities covered by GINA Title II from requesting or requiring [genetic information](#) of an individual or [family member](#) of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any [genetic information](#) when responding to this request for medical information. ‘Genetic information’ as defined by GINA, includes an individual’s [family medical history](#), the results of an individual’s or [family member’s](#) genetic tests, the fact that an individual or an individual’s [family member](#) sought or received [genetic services](#), and [genetic information](#) of a fetus carried by an individual or an individual’s [family member](#) or an embryo lawfully held by an individual or [family member](#) receiving assistive reproductive services.” See 29 CFR 1635.8(b)(1)(i)

⁶ This section assumes that the employer’s incentive plan is voluntary – that employees may opt out. Employers interested in a mandatory vaccination program may review our [mandatory vaccines eBook](#).

- Individuals with severe (i.e. life-threatening) allergies to eggs or to other components of the influenza vaccine
- Adults who have immunosuppression (including immunosuppression caused by HIV or medications)
- Adults and children who have chronic pulmonary, cardiovascular (except isolated hypertension), renal, hepatic, neurologic/neuromuscular, hematologic or metabolic disorders

If an employer learns that an employee may have a qualified medical condition that interferes with his/her ability to receive the vaccine, it should engage in the interactive process to determine a reasonable accommodation (see above: **ADA, Accommodations, and the Interactive Process**). An example of a reasonable accommodation may include requiring the employee to complete a special COVID-19 safety course to earn the incentive.

Strategy and Approach

ONSITE OR EMPLOYEE VOLUNTARY CHOICE?

Employers must decide how the vaccine will be administered.

Onsite: Employers may make the vaccine available onsite and administered either directly by the employer (if the employer is a healthcare provider) or through a contracted vendor. Employers that offer employee vaccinations on-site must limit the value of the incentive. The [EEOC instructs](#):

K.17. Under the ADA, may an employer offer an incentive to employees for voluntarily receiving a vaccination administered by the employer or its agent? (5/28/21)

Yes, if any incentive (which includes both rewards and penalties) **is not so substantial as to be coercive. [Emphasis added]**. Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information. As explained in K.16., however, this incentive limitation does not apply if an employer offers an incentive to employees to voluntarily provide documentation or other confirmation that they received a COVID-19 vaccination on their own from a third-party provider that is not their employer or an agent of their employer.

The EEOC has not provided guidance regarding what qualifies as “substantial” or “coercive”. Previously, the EEOC had issued guidance regarding the acceptable threshold for incentives. However, the EEOC has since rescinded that guidance and employers. Employers offering onsite vaccines should proceed with caution with respect to the size of the incentive and should confer with employment counsel.

Offsite: Conversely, an employer may offer an incentive of any value and not limited by the ADA if:

- the employer vaccination program is voluntary;
- the employee may opt-out; and
- the employee may receive the vaccine at a provider of his or her choice (offsite).

An example of an offsite, voluntary, incentive program:

Bob's widgets offers its employees a \$150 taxable payment upon proof of full vaccination status. Additionally, Bob holds a raffle at the end of the month for a fully paid, five-star vacation. All vaccinated employees may enter the raffle. Employees are not required to be vaccinated and may opt out. However, those who opt out will not receive the incentive payment and may not enter the raffle. Employees that choose to participate in the incentive program may receive the vaccine from any healthcare provider of their choice.

Moreover, employers may request (and require) employees to provide proof of vaccination status. [The EEOC instructs:](#)

***K.16.** Under the ADA, may an employer offer an incentive to employees to voluntarily provide documentation or other confirmation that they received a vaccination on their own from a pharmacy, public health department, or other health care provider in the community? (5/28/21)*

Yes. Requesting documentation or other confirmation showing that an employee received a COVID-19 vaccination in the community is not a disability-related inquiry covered by the ADA. Therefore, an employer may offer an incentive to employees to voluntarily provide documentation or other confirmation of a vaccination received in the community. As noted elsewhere, the employer is required to keep vaccination information confidential pursuant to the ADA.

Carrot or Stick?

Employers must decide if they will use their program as a carrot or a stick. In other words, will the program reward employees that become vaccinated or will it punish employees who remain unvaccinated. Generally, despite some large employers announcing high-profile surcharge initiatives, many of the surcharge programs are not advisable or recommended for a variety of reasons. Most fundamentally, we urge caution with surcharge programs because employers cannot vary employee benefits on the basis of a qualified health condition under the ADA and FMLA. Moreover, employers may inadvertently create an outcomes-based wellness program which is subject to significant compliance complexity (see **HEALTH PLAN PARTICIPANTS**).

Incentive Examples from the Headlines

- A one-time payment of \$100 to all employees who receive the full manufacturer-recommended doses of the COVID-19 vaccine. Employees who can't receive the COVID-19 vaccination for medical or religious reasons may earn the \$100 bonus by completing an educational course.
- Allowing excused absences for employees receiving vaccinations during their regularly scheduled work hours and paying employees an allowance equivalent to two hours of straight-time pay when they submit documentation of receiving the vaccine. In addition, employees who miss work due to vaccine side effects have that absence excused and pay protected for up to 48 hours after vaccination
- Providing a total of two hours of pay for each dose of the vaccine — up to four hours of total pay for complete vaccination.
- One additional day of paid vacation in 2022 along with \$50 in rewards points.
- A \$125 gift card from the company after showing proof of vaccination.
- A \$1,000 bonus for getting vaccinated.

Surcharge Examples

- Employer charges unvaccinated employees a higher health insurance premium (not a recommended approach – see below)
- Employer does not provide COVID-RELATED illness pay for unvaccinated workers who become sick with COVID-19 (also not a recommended approach). This **may** violate various **applicable state/municipal** laws regarding sick leave. For example, in California, employers (with 26 or more employees) are required to provide COVID-19 Supplemental Paid Sick Leave to “covered employees” who are “unable to work or telework for an employer” for specified COVID-19 related reasons, irrespective of vaccination status. Additionally, employers are generally prohibited from varying employee benefits on the basis of an employee’s disabling condition (under the ADA).

For example, Bob’s Widgets offers its vaccinated employees that become sick with COVID-19 and miss work “COVID Sick Pay.” Unvaccinated employees who become sick with COVID-19 and miss work are not eligible for the special COVID Sick Pay. Instead, they must use their regular PTO, and if their PTO is exhausted, they must go without wage replacement benefits. Setting aside the potential limitations at the state/municipal level regarding sick leave, this approach is risky because as soon as an employee misses work for personal illness his/her rights under both the ADA and FMLA may be triggered. If these unvaccinated employees are in-fact deemed disabled under the ADA and/or eligible for FMLA, they would receive a lesser benefit than other similarly situated employees (i.e., vaccinated employees who are absent from work for the same reason). Moreover, Bob’s Widgets COVID Sick Pay policy may have a disparate impact under Title VII. Disparate impact discrimination occurs when a policy or practice has a significant negative impact on members of a Title VII-protected group (such as an individual with a disability or of a particular class). Bob’s Widgets would have to prove that COVID Sick Pay policy is “job related and consistent with business necessity.”

Who will be Eligible for the Incentive?

Once the employer identifies its general approach, it must decide which population may be eligible for the vaccine incentive.

- Incentive for entire employee population (and not part of the health insurance or wellness program)?
- Contractors and agency workers (1099 independent contractors and staffing agency employees)?
- Family members?
- Incentive for health plan participants?

ENTIRE EMPLOYEE POPULATION INCENTIVE

Offering a vaccine incentive to all employees (outside of and separate from the health plan) requires that an employer follow some specific rules:

- While the EEOC and some courts seem to disagree, the EEOC has been clear that it deems vaccination information confidential medical information under the ADA.

K.4. Is information about an employee's COVID-19 vaccination confidential medical information under the ADA? (5/28/21)

Yes. The ADA requires an employer to maintain the confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination. This ADA confidentiality requirement applies regardless of where the employee gets the vaccination. Although the EEO laws themselves do not prevent employers from requiring employees to bring in documentation or other confirmation of vaccination, this information, like all medical information, must be kept confidential and stored separately from the employee's personnel files under the ADA.

Therefore, out of an abundance of caution, employers should be prepared to treat medical information provided by the employee (both proof of vaccine and information substantiating the need for an accommodation) as confidential under the ADA confidentiality rules (see above).

While the EEOC did not address the obligation to accommodate employees in an incentive program, the ADA obligations to accommodate employees is inherent the regulations. Therefore, employers should be prepared to provide an avenue for employees to request an accommodation under ADA and Title VII (religion). Employees who have a medical condition or sincerely held religious belief that conflicts with receiving the vaccine should be provided with an alternate way to earn the incentive. Likewise, employees with certain allergies and other medical conditions that are not ADA qualified disabilities may not be able to receive the vaccine and may also be eligible for an accommodation.

INDEPENDENT CONTRACTORS

Generally, most employment lawyers will advise employers not to provide the same programs and benefits to employees and independent contractors. When doing so, employers face the risk of unintentionally converting an independent contractor (1099 worker) into an employee. In substance, employers must avoid treating the independent contractor like an employee. However, the viral nature of COVID-19 has necessitated that employers apply the same safety rules to all individuals that enter the workspace regardless of the individual's employment status. Likewise, in an effort to reach a majority vaccinated (or even 100%) employers that utilize independent contractors may often offer the same vaccination program to independent contractors as employees.

Employers taking this approach should proceed with some caution and speak with employment counsel. Generally, merely offering a vaccine incentive alone is unlikely to compromise independent contractor status. However, if an organization also extends other "employee-like" policies and practices to the independent contractor, the vaccine incentive could become the "final straw" conferring common-law employment status. For example, if an independent contractor has a long-standing relationship with a particular company, must work onsite, uses the company's equipment, maintains a company email address, bears no financial risk, is paid through a payroll cycle, does not support other clients, and also receives the vaccine incentive, then independent contractor status may at least be reasonably questioned. Importantly, nullification of independent contractor status immediately raises the specter of payroll taxes, employee benefits, ACA and a host of related compliance problems for the newly deemed common-law employer.

FAMILY MEMBERS

GINA prohibits employers from offering vaccine incentives to employee family members.

Specifically, the [EEOC provides](#):

K.20. Under GINA, may an employer offer an incentive to an employee in return for an employee's family member getting vaccinated by the employer or its agent? (5/28/21)

No. Under GINA's Title II health and genetic services provision, an employer may not offer any incentives to an employee in exchange for a family member's receipt of a vaccination from an employer or its agent. Providing such an incentive to an employee because a family member was vaccinated by the employer or its agent would require the vaccinator to ask the family member the pre-vaccination medical screening questions, which include medical questions about the family member. Asking these medical questions would lead to the employer's receipt of genetic information in the form of family medical history of the employee. The regulations implementing Title II of GINA prohibit employers from providing incentives in exchange for genetic information. Therefore, the employer may not offer incentives in exchange for the family member getting vaccinated. However, employers may still offer an employee's family member the opportunity to be vaccinated by the employer or its agent, if they take certain steps to ensure GINA compliance.

Employers that want to implement a family vaccine incentive program must follow very stringent and specific rules under GINA. Employers cannot require employees to have their family members get vaccinated and cannot not penalize employees if their family members decide not to get vaccinated. Employers must also ensure that all medical information obtained from family members during the screening process is only used for the purpose of providing the vaccination, is kept confidential, and is not provided to any managers, supervisors, or others who make employment decisions for the employees. In addition, employers need to ensure that they obtain prior, knowing, voluntary, and written authorization from the family member before the family member is asked any questions about his or her medical conditions. If these requirements are met, GINA permits the collection of genetic information.

HEALTH PLAN PARTICIPANTS

Another potential option for employers is to offer a vaccine incentive as part of the employer's group health plan. The main disadvantage of these programs is that they impact only those employees who participate in the employer's health plan. Unvaccinated employees who do not enroll in the employer's health plan are not incentivized or impacted by this type of program. Therefore, the value and impact of such a program is entirely dependent on (and limited to) the size of the enrolled population.

Tying vaccine status to the health plan also creates a wellness program and additional compliance complexities. Wellness programs are highly regulated and subject to numerous rules. Broadly speaking, wellness programs are programs designed to help employees improve health and reduce health care costs. Programs may focus on general health, such as an exercise program or they may focus on providing health information to the participant, such as via a biometric screening. Other programs might be focused on a specific behavior, such as not using tobacco or receiving the annual flu shot. Above all, employers must understand what type of wellness program they may be creating and plan accordingly.

The HIPAA wellness regulations divide wellness programs into two categories: (1) participation only programs; and (2) health-contingent programs. Health contingent programs are further divided into activity only programs and outcomes-based programs.

Participation Only Programs are programs that are available without regard to health status. These programs may or may not include an incentive for participating in the program. However, if an incentive is included, it cannot be based on an individual satisfying a health standard. Examples of this type of program include a gym membership reimbursement and a health risk assessment (not tied to achieving any particular outcome). Participation only programs must be made available to all similarly situated individuals.

Health Contingent Programs on the other hand require an individual to meet a certain goals or criteria related to a health factor. A health contingent program may be either an: (1) activity-only program; or an (2) outcomes-based program. Activity-only programs typically require individuals to perform or complete an activity related to a health factor to earn the incentive. Examples include walking and exercise programs or giving an incentive for employees getting a physical, regardless of the results. Outcomes-based programs require individuals to attain or maintain a specific health outcome. Examples include programs requiring individuals to attain certain blood pressure, cholesterol or BMI results. No matter the type of program, the following conditions must be met by any health contingent program:

- Individuals must have the opportunity to qualify for the incentive at least once per year
- The total incentive for all health-contingent wellness programs must not exceed 30% of the total cost of employee only coverage (noting however that the maximum incentive may increase to 50% when tied to tobacco use and the plan relies solely on an affidavit (i.e., no testing for nicotine or cotinine) stating whether the individual is a tobacco user)
- The program must be reasonably designed to promote health and prevent disease
- All similarly situated individuals must be eligible for the full incentive, which means the plan must allow for a reasonable alternative standard (i.e., an opportunity for individuals to earn the incentive via alternative means)
- The plan must disclose all terms of the program, including the availability of a reasonable alternative standard.

It is likely that a vaccine incentive program tied to the health plan is most likely a “health contingent → activity-only” wellness plan. Therefore, employers adopting vaccine health plan incentives should design their program to comport with the above five requirements.

Reasonable Alternative Standard (RAS). Of these requirements, the reasonable alternative standard and designing a wellness program to promote health and prevent disease are arguably the most complex. Both activity-only and outcomes-based programs are considered reasonably designed to promote health or prevent disease: (1) if the program has a reasonable chance of improving the health of, or preventing disease in, participants; (2) is not overly burdensome to participants; (3) is not used to discriminate based on a health factor; and (4) is not highly suspect in the method chosen to promote health or prevent disease.

The threshold for when a reasonable alternative standard must be provided depends on whether the program is activity-only or outcomes-based. For activity-only programs, a reasonable alternative standard must be available when the applicable standard is unreasonably difficult due to a medical condition, or it is medically inadvisable to attempt to satisfy the applicable standard. For outcomes-based programs an

employer must offer a reasonable alternative standard to individuals who don't meet the initial wellness program criteria.

Application to Vaccines. How do vaccine incentives fit within these rules? A vaccine incentive wellness program's status generally remains murky. However, it's most likely that an employer's vaccine incentive program (built inside of the health plan) is a health contingent, activity-based program. Such a program would merely require the person to be vaccinated (i.e., complete a specified activity). In addition, such a program is designed to promote health and prevent disease.

While a less likely characterization, a vaccine incentive program could be considered a health contingent, outcomes-based program. Obtaining the vaccine seems more like an activity that must be completed *in hopes of achieving an outcome*, namely not having COVID-19. If an employer treats a vaccine incentive program as an outcomes-based program, the program would have a lower threshold for offering a reasonable alternative standard (as described above). This requires more administration and may result in fewer employees actually getting the vaccine.

Determining the reasonable alternative standard. Determining the reasonable alternative standard is a challenge. For example, many employers are offering weekly COVID-19 testing as a reasonable alternative. However, regular testing will increase costs. Generally, most carriers decline to cover regular testing because they view it as part of an employment requirement or public health surveillance rather than part of the health plan. Health plans are not required to cover testing for employment or public health surveillance purposes. Therefore, employers should consult with their insurance carriers or TPAs prior to adopting a reasonable alternative standard that involves regular testing.

If the carrier or TPA will not pay for the tests, the employer will have to provide the testing at no cost to employees in some other fashion. Other reasonable alternatives may include mask wearing, social distancing, staggered shifts, adjusting workspaces, or working from home. The HIPAA rules do not allow the employer to charge for the reasonable alternative standard.

Structuring the Incentive. Most commonly, the incentives provided by employers with wellness programs take the form of premium differentials. For example, an employer may offer employee-only coverage for \$150 per month to all employees and offer this same coverage for \$100 per month to employees who participate in the wellness program. In this example, the wellness program incentive is \$50 each month. In some cases, incentives may be structured as plan design changes (e.g., a higher deductible for employees who are not vaccinated).

Employers may offer incentives or impose surcharges. Incentive may take the form of a discount allowing employees who participate in the wellness program pay lower rates for coverage. Surcharges may be added to the cost of coverage for those who do not participate in the wellness program. Either option is viable, and the result is the same, except that certain individuals respond more positively to the "carrot" while others respond more positively to the "stick".

Incentives and the ACA's Employer Mandate. No matter the approach the employer may take, employers must remember that incentives related to premium costs impact the affordability of the plan for purposes of the Affordable Care Act's (ACA) employer shared responsibility provisions (sometimes called

the “employer mandate”). Since a wellness program must be voluntary, employers must use the higher, non-incentive rate when calculating affordability under the ACA.

The ACA affordability requirement essentially acts as another limit on incentives. Because of this limitation, most employers frequently offer incentives of less than 30% of the employee only cost to ensure they meet the ACA affordability requirement.⁷

Incentives related to plan design may also have an impact on whether the plan provides minimum value for ACA purposes. In general, a plan provides minimum value if it covers at least 60% of the medical costs of a typical individual. Increasing the unvaccinated employee cost may dilute the plan’s overall value. However, employers usually enjoy greater flexibility with minimum value design thresholds than with varying premium contributions and possibly muddling affordability. Regardless, employers pursuing this route will need to confirm that their insurance carriers or TPAs can handle this change in plan design.

Bottom Line. While providing the incentive through the health plan is technically possible, for the reasons stated above, we do not recommend it. Key reasons for this include:

- If the employer’s primary concern is workplace safety, a health plan incentive will not reach all employees since it excludes employees not enrolled in the health plan.
- It adds otherwise avoidable regulatory requirements and complexities to the group health plan on top of the (previously discussed) ADA, Title VII, and GINA requirements.
- It may be difficult to appropriately structure a reasonable alternative standard.
- For employers subject to the ACA’s employer mandate, a vaccination incentive's dollar value requires on-going attention to ensure the plan is still affordable and/or providing minimum value under the ACA.

Operations and Logistics

When it comes to implementing the vaccine incentive plan, employers should proactively consider a number of operational logistics. Specifically:

- **Documenting Vaccination Status:** Will employees be required to provide hard or electronic copies of their vaccine card? If so, the employer must be prepared to secure those documents in a secure medical file – whether hard-copy or electronic.
- **Designated Custodian:** Who will be authorized to receive the proof of vaccination? If anyone other than HR is authorized to receive proof of the vaccine (such as local or onsite managers), be sure to provide training to those individuals so they know and understand the applicable ADA confidentiality requirements. Managers should also be trained not to ask employees any follow-up medical questions.

⁷ Note, employers can use lower non-tobacco rates to determine affordability. This however adds complexity if a wellness program includes both a tobacco component and a vaccine (or other) cost element.

- **Employee Communications:** Who will communicate the vaccine incentive program with employees? Be sure that these individuals understand both the ADA and GINA limitations (and HIPAA and ACA, if the program is being offered as part of the group health plan). They must understand that any medical information shared by the employee remains confidential. They likewise should be familiar with the critical GINA warning requirement (see **Title II of the Genetic Information Nondiscrimination Act (GINA) and Vaccinations**). They must also be sure not to ask any follow-up questions about the employee's vaccination decisions and status. For example, asking an employee about his/her vaccine side effects or why he/she chose not to get vaccinated treads into prohibited medical inquiry territory (see ADA and COVID-19 Vaccine Medical Inquiries).

- **Tax Issues:** How will the incentive be paid? Generally, incentives that are not part of the group health plan should be treated as taxable wages. The IRS deems anything greater than a de-minimus value (usually \$20 or \$25) to be taxable wages to an employee.

- **Policy Development⁸ :** Employers that launch any form of vaccine program should provide a written policy that memorializes the terms of the program (see **SAMPLE Voluntary Employee Vaccination Policy**). Included in the policy should be, among other things:
 - The incentive plan and criteria to qualify including any relevant deadlines
 - The process to request an accommodation (both ADA and Title VII Religion, along with other health conditions such as allergies etc.)
 - The process to submit proof of full vaccination status and confidentiality assurances
 - The ongoing COVID-19 health and safety rules or reference to the existing COVID-19 health and safety policy
 - If the program is part of the group health plan, the reasonable alternative standard the employer will offer
 - The appropriate person or department to ask questions and seek more information
 - Third-party resources and sources of vaccine information such as local health department and CDC materials and websites

⁸ Note that the sample policy included with this eBook does not include the group health plan related features due to the challenges of such a program and the multiplicity of design choices that could be used for both the incentives and the reasonable alternative standards.

The Vaccine Conversation

Employers that take an incentive approach to vaccines (versus a mandate) are often doing so to increase the percentage of vaccinated employees in the workplace. Along with an incentive program, employers may also consider additional approaches to the vaccine conversation in the workplace.

As employers develop their workplace vaccine plan, be sure to proactively engage employee populations that may have unique needs, concerns, and/or questions about the COVID-19 vaccine. This isn't necessarily about convincing people to trust the vaccine; it's about understanding employees concerns and questions and working together to find and reach a common goal. Below are strategies employers may consider:

- **Workplace taskforce:** Form a COVID-19 vaccine, health and safety task force comprised of employees from across the organization (not just management or leadership) who can help mold and shape a program most suited to your employee population and culture.
- **Cultivate internal leadership:** Identify company leaders and influencers in your employee population, who come from the same communities as your employees, to discuss the importance of vaccinations or share their personal experience with the vaccine.
- **Paying attention:** Listen. Really listen to your employees and their concerns and identify resources, programs, subject matter experts, and other measures that may be responsive to their concerns.
- **Employee Resource Groups:** If you have employee resource groups (ERGs), invite those leaders and members to participate in your company's COVID-19 vaccine task force.
- **Identify concerns:** Pay attention to discussions on company message boards and other communication channels, and in interpersonal communications between managers and their teams. Listen for questions, concerns, and rumors and quickly provide facts.
- **Utilize Local Resources:** Reach out to local community organizations, healthcare provider networks, faith leaders or other trusted individuals particularly those within diverse populations to seek their counsel and feedback on your company's plan. Invite them to speak to your employees through recorded messages or town halls.
- **Incorporate Public Resources:** Invite your local public health department to send a representative who can speak with employees/workers, help answer questions, and provide clarity around COVID-19 vaccines.

SAMPLE Voluntary Employee Vaccination Policy

[[As you [return/continue] to work in the [midst/wake/era] of the COVID-19 pandemic,] [EMPLOYER NAME] wants to assure you of its continued commitment to maintaining a safe and healthy workplace and that we are taking additional measures to protect you, your coworkers, and your families from contracting and spreading COVID-19.

Now that COVID-19 vaccines have been approved [for Emergency Use Authorization] by the US Food and Drug Administration (FDA) and are readily available to all adults in the US, we are implementing a vaccination policy to encourage [and incentivize] our employees to get vaccinated against COVID-19. This policy is based on guidance from the Centers for Disease Control and Prevention (CDC) [,/and] the Equal Employment Opportunity Commission[, and [OTHER ADMINISTRATIVE OR GOVERNMENTAL AGENCY]] and is designed to comply with all applicable federal, state, and local laws.]

Please read this policy carefully.

VOLUNTARY POLICY

The CDC has found that COVID-19 vaccines are highly effective at preventing individuals from getting sick with COVID-19 and experiencing the most severe consequence of the disease[, and may also prevent virus transmission to others]. Consistent with CDC guidance [and the [guidance/requirements] of [STATE/OTHER JURISDICTION]], to prevent the infection and spread of COVID-19 and as an integral part of its public health and safety measures, [EMPLOYER NAME] strongly encourages all employees [and independent contractors] [who are eligible to receive a COVID-19 vaccine and can safely do so] to get vaccinated against COVID-19.

While [EMPLOYER NAME] strongly encourages you to get vaccinated [and take advantage of the incentives offered by this policy], **this is a voluntary policy** and the decision whether to get vaccinated is entirely yours. [If you do not get vaccinated for any reason, you will be required to submit proof of a negative COVID-19 test to [EMPLOYER NAME] on a [weekly/[OTHER TIME PERIOD]] basis by [DETAILS ABOUT HOW TO SUBMIT INFORMATION].]

[[EMPLOYER NAME] will [host a question and answer session with [MEDICAL PROFESSIONAL OR PUBLIC HEALTH OFFICIAL]/[MEANS OF PROVIDING ADDITIONAL INFORMATION] on [DATE/TIME]]. All employees are invited to attend.]

Information About COVID-19 Vaccines

The CDC has promoted the benefits and safety of approved and Emergency Use Authorization approved COVID-19 vaccines. [In addition, [JURISDICTION] recommends that all individuals who can safely do so get vaccinated against COVID-19.] [According to the CDC:

COVID-19 vaccines currently approved or in development in the US do not contain the COVID-19 virus and will not make you sick with COVID-19.

Getting the COVID-19 vaccine will not make you test positive for the COVID-19 virus.

COVID-19 vaccinations have been shown to be highly effective at preventing you from getting sick with COVID-19 and experiencing the most severe consequence of the disease.

[COVID-19 vaccines [may] reduce the risk of spreading COVID-19.]

COVID-19 vaccines do not change your DNA.

COVID-19 vaccinations are an important tool in helping to stop the pandemic.

COVID-19 vaccines will be free to you, though some charges may be billed to your insurance company.]

For information about what you can expect when getting the vaccine, see the [CDC: Vaccine What to Expect Handout](#) [attached to this policy].

You can find more information about COVID-19 vaccines on the CDC's website, which is frequently updated, at: <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/>.

Vaccination Not a Substitute for Other COVID-19 Prevention Measures

This Voluntary Vaccination Policy is a key part of our overall strategy and commitment to maintaining a safe and healthy workplace in light of the COVID-19 pandemic. This policy is designed for use together with, and not as a substitute for, other COVID-19 prevention measures[, including [EMPLOYER NAME]'s:

[Face Mask Policy.]

[Social Distancing Policy.]

[Temperature Check and Health Screening Protocols.]

[Cleaning and Sanitation Policy.]

[Health and Safety Policy.]

[OTHER COVID-19 PREVENTION POLICIES OR PROTOCOLS].]

[However, fully vaccinated individuals may be exempt from complying with certain COVID-19 prevention measures[, such as face mask and social distancing requirements]. For more on those exemptions, see [EMPLOYER NAME]'s [SPECIFIC RELEVANT POLICIES].]

We need your full cooperation and compliance with this and other health and safety workplace policies to make them effective and to protect you and your coworkers by preventing the spread of COVID-19.

Vaccination Administration

[[EMPLOYER NAME] [will make/has contracted with [VACCINE ADMINSTRATOR NAME] to provide] the [NAME OF VACCINE OR VACCINES] available to all employees at [LOCATION] [during regular business hours] on [SCHEDULED DATES AND TIMES]. You may schedule [the first dose of] your vaccine by [PROCEDURE FOR SCHEDULING] [and will receive a date for your second dose during the first appointment]. [The vaccine will be provided to you at no cost.]

OR

You may schedule your vaccination during your regularly scheduled work hours. [All [non-exempt] employees will be paid your regular rate of pay for the time spent getting vaccinated, up to [NUMBER] hours [per dosage]]. Alternatively, you may schedule your vaccination at another time at your convenience. If you schedule your vaccination during a time when you are not scheduled to work, you will [not be paid for the time spent getting vaccinated/be paid [[DEFINED PAY AMOUNT BY HOURS OR DOLLARS]/your regular rate of pay for the time spent getting vaccinated [up to a maximum of [NUMBER] hours]]].

OR

You may schedule your vaccination during your regularly scheduled work hours or at any other time at your convenience. If you get vaccinated during the work day, you may use your accrued [vacation/PTO/sick] time to cover your time away from work. [[EMPLOYER NAME] will advance you up to [NUMBER] hours [vacation/PTO/sick] time if you do not have sufficient time available in your leave bank.]]

[In addition, [EMPLOYER NAME] will [grant you an additional [NUMBER] days of paid [vacation/PTO/sick] time which you may use to recover from the vaccine and any side effects [or for any other purpose]]. If side effects that prevent you from working last longer than [ADDITIONAL PAID LEAVE AMOUNT], you may use your accrued [vacation/PTO/sick] time to cover additional time away from work.]

[For information about where to get vaccinated and how to schedule an appointment, see [LOCAL PUBLIC HEALTH WEBSITE/EMPLOYER DEPARTMENT OR INTRANET LINK WHERE INFORMATION IS AVAILABLE].]

[Reimbursement of Other Vaccination Costs]

[EMPLOYER NAME] will reimburse you for out-of-pocket costs or incidental expenses incurred getting vaccinated if not fully covered by your insurance[, including, but not limited to, hospital or health care provider administrative charges, parking at vaccination sites, and reasonable travel costs.]

To get [paid for your time and] reimbursed for any vaccination costs, you must submit written proof of vaccination (see Record of Vaccination below).]

[Incentive[s] for Getting Vaccinated]

[In addition to the pay for time [and reimbursement of expenses]] for getting vaccinated/As an incentive for getting vaccinated,] [EMPLOYER NAME] will provide you with:

[A one-time bonus [of \$[NUMBER]/calculated as [NUMBER] hours additional pay].]

[[NUMBER] hours of additional [vacation time/paid time off/paid sick leave] to be used for any reason [during the current benefit year].]

[A [MERCHANT NAME] gift card valued at \$[NUMBER].]

[[[NUMBER] Appreciate Points/[NAME OF EMPLOYEE APPRECIATION PROGRAM]] that can be redeemed for select gifts.]

To qualify for the incentive[s], you must provide written proof of vaccination (see Record of Vaccination below).

Record of Vaccination

After you get vaccinated, or if you already have received a vaccine [from another health care provider], [EMPLOYER NAME] requests that you provide proof of vaccination (such as a CDC-issued vaccination card), including the vaccination date(s) and vaccine name, to [EMPLOYER NAME]'s [DEPARTMENT NAME] Department. Do not include any medical or genetic information with your proof of vaccination. [Alternatively, you may provide a written self-certification that you have been vaccinated, including the vaccination date(s) and vaccine name.]

This information will help [EMPLOYER NAME] track the percentage of individuals vaccinated as part of its health and safety measures [and to determine when its workforce has reached community immunity (also known as herd immunity) and the degree to which unvaccinated individuals pose a direct threat to themselves or others in the workplace]. [EMPLOYER NAME] will keep any vaccination information provided confidential.

[Providing this information is strongly encouraged but it is voluntary[and [EMPLOYER NAME] prohibits harassment of or retaliation against any employee who does not provide proof of vaccination]./While providing this information is voluntary, you must provide proof of vaccination to claim any [compensation/reimbursement/employee benefits/incentives] under this policy[or to be exempt from any other COVID-19 prevention policies or protocols based on vaccination status.].] [If you do not provide proof of vaccination status, [EMPLOYER NAME] will treat you as if you are unvaccinated for purposes of any workplace policies or protocols based on vaccination status.]

Policy Administration and Questions

The [DESIGNATED DEPARTMENT OR PERSON] is responsible for administering and enforcing this policy. If you have any questions about this policy or about health and safety issues that are not addressed in this policy, please contact the [DESIGNATED DEPARTMENT OR PERSON'S EMAIL OR PHONE CONTACT INFORMATION].

Policy Modification

Government and public health guidelines and restrictions and business and industry best practices regarding COVID-19 and COVID-19 vaccines are changing rapidly as new information becomes available, further research is conducted, and additional vaccines are approved and distributed. [EMPLOYER NAME] reserves the right to modify this policy at any time in its sole discretion to adapt to changing circumstances and business needs, consistent with its commitment to maintaining a safe and healthy workplace.

No Harassment or Retaliation

The decision to get or not to get vaccinated belongs to you. While [EMPLOYER NAME] has legitimate reasons for encouraging vaccination and tracking how much of its workforce has been vaccinated, [EMPLOYER NAME] expressly prohibits any form of harassment, discipline, reprisal, intimidation, or retaliation based on an employee's decision to get or not get vaccinated [or provide proof of vaccination]. Employees also have the right to report violations of this policy, any other health or safety concern, and work-related injuries and illnesses, and [EMPLOYER NAME] will not discharge or discriminate or otherwise retaliate against employees for reporting these issues or incidents.

If you experience or witness any form of harassment or retaliation in violation of this policy, please report it immediately to [DESIGNATED PERSON OR DEPARTMENT].

[Employees Covered Under a Collective Bargaining Agreement]

The employment terms set out in this policy work in conjunction with, and do not replace, amend, or supplement any terms or conditions of employment stated in any collective bargaining agreement that a union has with [EMPLOYER NAME]. [Employees should consult the terms of their collective bargaining agreement./Wherever employment terms in this policy differ from the terms expressed in the applicable collective bargaining agreement with [EMPLOYER NAME], employees should refer to the specific terms of the collective bargaining agreement, which will control.]]

[Acknowledgment of Receipt and Review]

I, _____ (employee name), acknowledge that on _____ (date), I received a copy of [EMPLOYER NAME]'s [POLICY NAME] and that I read it, understood it, and agree to comply with it. [I also understand that if I choose to get vaccinated, at the time of vaccination I will be provided with information from the vaccine administrator about the benefits and risks of the COVID-19 vaccine, and that signing this policy acknowledgment does not constitute consent to receiving the vaccine.] I understand that [EMPLOYER NAME] has the maximum discretion permitted by law to interpret, administer, change, modify, or delete this policy at any time [with or without notice]. No statement or representation by a supervisor or manager or any other employee, whether oral or written, can supplement or modify this policy. Changes can only be made if approved in writing by the [POSITION] of [EMPLOYER NAME]. I also understand that any delay or failure by [EMPLOYER NAME] to enforce any work policy or rule will not constitute a waiver of [EMPLOYER NAME]'s right to do so in the future.

I understand that neither this [POLICY] nor any other communication by a management representative or any other employee, whether oral or written, is intended in any way to create a contract of employment. I understand that, unless I have a written employment agreement signed by an authorized [EMPLOYER NAME] representative, **I am employed at will and this policy does not modify my at-will employment status.** If I have a written employment agreement signed by an authorized [EMPLOYER NAME] representative and this policy conflicts with the terms of my employment agreement, I understand that the terms of my employment agreement will control.

[SIGNATURE PAGE FOLLOWS]

Signature

Printed Name

Date]

***Disclaimer:** Neither Hub International Limited nor any of its affiliated companies is a law or accounting firm, and therefore they cannot provide legal or tax advice. The information herein is provided for general information only, and is not intended to constitute legal or tax advice as to an organization's specific circumstances. It is based on Hub International's understanding of the law as it exists on the date of this publication. Subsequent developments may result in this information becoming outdated or incorrect and Hub International does not have an obligation to update this information. You should consult an attorney, accountant, or other legal or tax professional regarding the application of the general information provided here to your organization's specific situation in light of your organization's particular needs.*