

Professional Perspective

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The creation and maintenance of a safe and healthy workplace is more than just good business. Employers owe a [general duty](#) under the [Occupational Safety and Health Act of 1970](#) to provide a workplace free from recognized hazards.

In the current environment, however, employers and employees often disagree as to whether Covid-19 vaccination mandates achieve these various objectives and requirements. While [government guidance](#) issued in 2021 provides significant support for employer vaccine mandates and incentives, many employers are concerned that such programs may not be consistent with their workplace cultures. Employers seeking to increase employee vaccinations may also explore using their health care wellness programs to incentivize vaccinations, but this approach has limitations and introduces other considerations.

Religious Exemptions to Mandates

Employers are seeing this culture challenge play out in real time with increased employee reliance on religious exemption claims to avoid vaccination mandates. The [Equal Employment Opportunity Commission \(EEOC\)](#) cautions employers that the scope of the religious exemption under [Title VII of the Civil Rights Act](#) is very broad. Employers should generally endeavor to accept the sincerity of a claimed religious belief, unless they have objective evidence to the contrary. They must also accommodate workers' sincerely held religious beliefs and provide exemptions from work rules based on those beliefs, absent an undue hardship to the employer.

Under Title VII, the undue hardship analysis is more broadly applicable than under the [Americans with Disabilities Act \(ADA\)](#); it means "more than a *de minimis* cost." In January 2021, the [EEOC updated some guidance](#), in which it observed that courts have found "undue hardship" in situations where a religious exemption request infringes on coworkers' rights or benefits, imposes a higher share of hazardous or burdensome work on coworkers, conflicts with another law or regulation (i.e., stay tuned on the [Occupational Safety and Health Administration's expected rule](#) on vaccine mandates, or weekly negative tests, for employers with over 100 workers), and, most importantly to this issue, impairs safety in the workplace.

[Some case law supports](#) employers' denials of requests for religious exemptions from vaccine mandates with respect to flu vaccines in the healthcare industry. *Robinson v. Children's Hosp. Boston*, No. CV 14-10263-DJC, [2016 BL 107526](#) (D. Mass. Apr. 5, 2016), *appeal dismissed sub nom. Robinson v. Children's Hosp. Boston* (May 5, 2016). Similarly, the EEOC updated its [technical guidance](#) in October 2021 to say that the "[c]osts to be considered include not only direct monetary costs but also . . . in this instance, the risk of the spread of COVID-19 to other employees or the public." Employers therefore have defensible legal footing, depending on the particular facts and circumstances, to deny requests for religious exemptions from employer vaccine mandates.

Wellness Program Alternative

Nevertheless, employers are also cognizant of reports of the "[Great Resignation](#)" generally and are having to make difficult choices between letting otherwise good workers go or risk a Covid-19 outbreak in the workplace caused by unvaccinated workers. Accordingly, some employers have chosen instead to focus on addressing increased costs to the health plan by tying premium costs to vaccination status.

The rationale here is that unvaccinated individuals are expected to result in a higher rate of hospitalization and attendant medical costs. For employers that already implement wellness programs, a program that addresses vaccination status supports their existing workplace culture.

There are some drawbacks to implementing such a program though. Unlike an employer mandate, this type of program only affects those individuals who are covered by the health plan and not the employee population as a whole. Additionally, because such a program would result in a premium differential based on an individual's vaccination status, it would need to satisfy regulatory requirements related to wellness programs as prescribed under the portability rules of the [Health Insurance Portability and Accountability Act \(HIPAA\)](#) and the [Affordable Care Act \(ACA\)](#). Failure to satisfy these

requirements could cause the employer to be subject to excise taxes, reporting penalties, regulatory investigations, and participant lawsuits.

Program Requirements

To avoid a violation of these laws, the wellness program must satisfy the applicable requirements for an “activity-based” program. Namely, employers must: provide eligible individuals an opportunity to avoid the surcharge at least once per year, ensure that the surcharge (when added to all other wellness incentives) does not exceed 30% of cost of coverage (or 50% to the extent the additional percentage is in connection with a program designed to prevent or reduce tobacco use), be reasonably designed to promote health or prevent disease, provide that the full reward is available to all similarly situated individuals, and satisfy applicable disclosure requirements.

Most of these requirements are relatively easy to satisfy. However, in order for a reward to be “available” to all similarly-situated individuals, the program must allow a reasonable alternative standard (or waiver) for any individual for whom it is unreasonably difficult due to a medical condition to receive the vaccine or for whom it is medically inadvisable to receive the vaccine. Unfortunately, the ability of employees to qualify for the alternative can derail the employer's intentions in adopting the program.

Wellness programs can also implicate requirements under the ADA and the [Genetic Information Nondiscrimination Act \(GINA\)](#). Based on [EEOC guidance](#) provided in 2021, a wellness program that requires a participant to confirm only their vaccination status would not result in a disability-related inquiry or medical exam that could implicate the ADA, or the acquisition of genetic information that could violate GINA. Importantly though, various laws and requirements could be implicated if the vaccine is administered by the employer or its agent, so employers may want to avoid designing such a program.

The imposition or waiver of premium surcharges can affect cafeteria plan administration as well. If the program requires satisfaction of the standard prior to the beginning of the year, then issues related to mid-year changes in cafeteria plan elections can be avoided. But, even if a participant who obtains the vaccination during the year can avoid the surcharge for the year, the participant's cafeteria plan election could be modified mid-year based on current regulatory guidance. Note, however, a participant who achieves the standard during the year should receive a prompt refund of the prior surcharge paid.

Finally, employers should be mindful that wellness programs can affect the health plan's “affordability” analysis required to avoid the ACA penalty for certain larger employers. Specifically, wellness incentives unrelated to tobacco use—for example, for completing biometric testing, participating in an exercise program or obtaining a vaccination—are disregarded in determining the participant's cost to participate, even if the participant is eligible for the reduced cost.

Conclusion

At the end of the day, there are risks and benefits on either side of this analysis. Larger employers wanting to mandate or otherwise encourage vaccinations of all workers may get some help, so to speak, from OSHA in the near future. But, until then, employers should involve senior management, human resources, benefits managers, and appropriate legal professionals to make the right business decision based on the realities of particular workforces.