



## THE PITFALLS OF INCENTIVIZING EMPLOYEES TO GET VACCINATED

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This is a follow-up to my article about mandating vaccines.

The threshold question employers must ask is, “Do I really want to mandate vaccines?” My previous article discussed the few exceptions and cautions when an employer does mandate vaccinations. So, let us assume an employer wants to mandate the vaccine but does not want to appear Draconian. Should employers incentivize employees; and if so, what are the pitfalls? If employers offer cash bonuses or days off, is it truly a “voluntary” program? Does an incentive create pressure on those who do not want to be vaccinated? A recent survey found that 15% of Americans will not get the vaccine. Further, 17% say they are not sure they will be vaccinated. Therefore, potentially one-third of Americans will not get the vaccine.

To be truly voluntary, there should be no pressure or comments from supervisors that could be interpreted as coercive or a failure to get vaccinated may result in corrective action. Employees should not be treated differently because they choose not to be vaccinated. Supervisors must be told this in advance of the program rollout. Further, if employees feel coerced, they may have to disclose a medical condition or a sincerely held religious belief against vaccines. Forcing employees to reveal confidential medical conditions may run afoul of the Americans with Disabilities Act. Title VII prohibits religious discrimination; therefore again triggering more potential liability.

Finally, if employers give a cash incentive, it may potentially violate the Fair Labor Standards Act (FLSA) overtime provisions. For non-exempt employees subject to overtime, adding money in the week they incur overtime changes the overtime calculation upward. Under the FLSA, non-discretionary bonuses must be added to the employees’ pay for that week. That increases the hourly wage and the 1.5

overtime rate and creates an unexpected payroll increase. Moreover, if employers do not change the pay rate, they violate the Act. Employers may also wish to consider paying the employees' hourly rate for the time spent getting to and from the vaccination site and the time spent getting vaccinated. In other words, allow employees to get the vaccine during work time when they are on the clock.

There is much to think about if you want to have a "voluntary" vaccination program. Get advice from your MCR employment law team at MCR Employment Law.