

Worker Cash-for-Vaccine Incentives Boom Despite Legal Questions

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Written by: Paige Smith, Reporter & Paul Stinson Staff Correspondent

- Employees offered bonuses, paid time off to get Covid-19 shot
- Federal government weighing legality under discrimination laws

One of the largest hospital systems in Texas is offering \$500 “hope bonuses” to its 26,000 workers to get inoculated against Covid-19, joining businesses nationwide betting that they can sway vaccine-reluctant employees with incentives, and that their strategy passes legal muster.

But these companies are, in fact, gambling on a murky legal question, according to employment attorneys. The issue is quickly coming to a head as vaccines become available to [workers](#) outside of first-responders and teachers, and workplaces hit hard by the pandemic see an inoculated workforce as a means to get back on their feet. “The law is really unsettled here, and I haven’t seen any cases on it, but I could see that coming up,” said Valdi Licul, a partner at Wigdor LLP. “Even when we have the best of intentions, we have to be mindful that there are other people whose rights can be stepped on.”

One question is whether incentives could be deemed as so enticing as to be coercive, violating federal anti-discrimination law. Another is whether providing bonuses is a form of discrimination against workers who can’t get vaccinated for medical or other reasons.

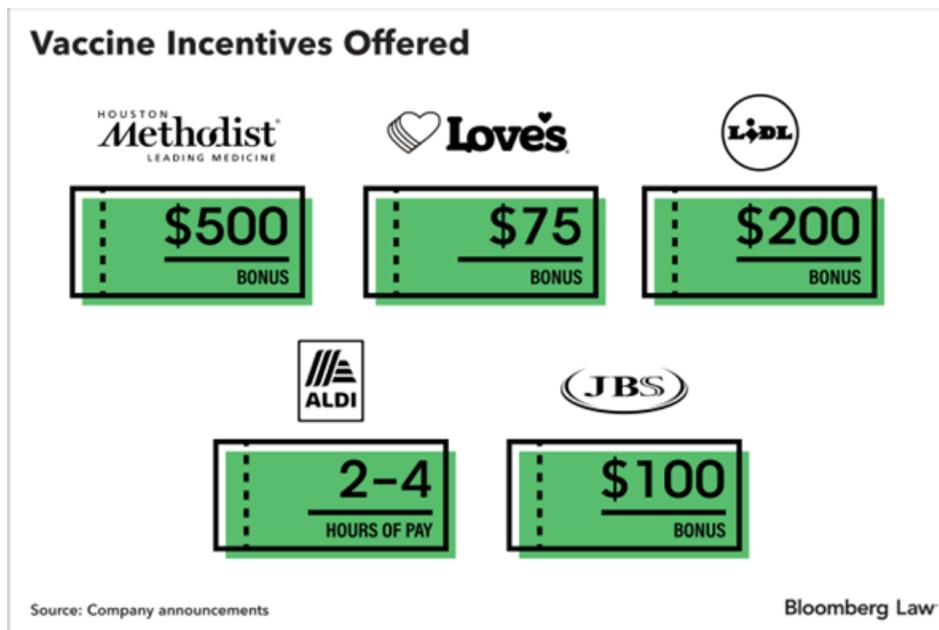
Last week, more than 40 major business groups [asked](#) the U.S. Equal Employment Opportunity Commission to weigh in on the matter.

An EEOC spokesperson said the agency is “considering the issue carefully and will provide additional guidance as necessary.”

‘Thank Them For Their Hard Work’

It's not known how many employers are offering incentives, but some big companies already have announced the strategy.

Tennessee-based Dollar General Corp., which has more than 140,000 variety store employees, is offering "frontline hourly team members" four hours pay; Colorado-based meat processor JBS USA is offering \$100 bonuses to its nearly 66,000 U.S. workers; Oklahoma-based Love's Travel Stops & Country Stores is offering \$75 to its 29,000 employees; Illinois-based grocery chain Aldi, with a workforce of more than 25,000, is offering two hours pay for each dose an hourly worker receives; and Lidl, the European grocer, is offering \$200 in extra pay for the 5,000 workers in its U.S. stores.



The 26,000-employee Houston Methodist hospital group, which is offering a \$500 bonus, already has administered a first-dose of the vaccine to roughly 75 percent of workers, CEO Marc Boom said.

"We're talking about giving people a bonus to thank them for their hard work they've done this past year, but also making that bonus contingent on them getting vaccinated," he said.

'Stem The Tide'

John McDonald, a partner with McGuireWoods who represents companies in employment matters, said prioritizing workplace safety is one justification for the

incentives: “We’re trying to stem the tide of a pandemic that’s wreaking havoc in all aspects of society.”

David Sanford, chairman and co-founder of worker-focused firm Sanford Heisler Sharp, agreed.

“Employers have an obligation to keep their workplace safe and keeping the workplace safe today means ensuring as much as possible people take all the necessary precautions to avoid having Covid in the workplace,” he said. “People can bring lawsuits for any number of reasons.”

Offering vaccine incentives, which potentially touch on worker health information, could trigger federal laws that ban discrimination. The Americans with Disabilities Act and the Genetic Information Nondiscrimination Act, for example, require “wellness” programs that mandate the disclosure of medical information to be voluntary.

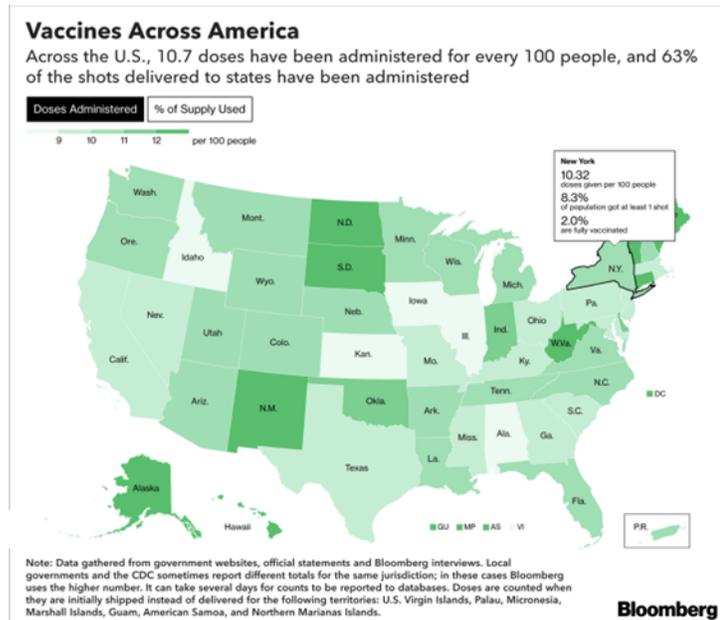
Employers might also be open to discrimination claims if a worker isn’t receiving a benefit available to coworkers, according to Licul. For example, if a worker receives a vaccine exemption because of a religious belief but misses out on a bonus, “you could argue that I’m being discriminated against on the basis of my religion.”

‘De Minimis’ Incentives

The EEOC previously attempted to clarify what kind of incentives can be offered by employers to encourage worker participation in company-sponsored wellness plans, and its first take was struck down by a federal judge. The agency [recently revisited](#) the question, proposing rules last month that say employers may offer no more than “de minimis” incentives, like a water bottle or “a gift card of modest value.”

Gym memberships or airline tickets, for example, wouldn’t qualify as “de minimis,” the agency said.

But in terms of vaccine incentives specifically, finding the line between what is voluntary and what is compelled is difficult, Licul said. “As the incentive becomes de minimis, it ceases to be an incentive, so what’s the point?”



If you are reading this on BGOV, [click here](#) for an interactive version of the graphic above.

Sharon Masling, a partner with Morgan Lewis and former EEOC official, said who administers the vaccine also could be a factor in whether ADA requirements apply.

“Where this becomes an issue is not in respect to the vaccine itself, but rather the screening questionnaires prior to getting a vaccine,” she said.

An employer could presumably avoid that issue if it provides an incentive for the employee to get the vaccine from an unrelated third party, like a local pharmacy, who would then pose the screening questions. “If that’s the case, then there are no limits on incentives,” Masling said.

Things get trickier if the employer is the one offering the vaccine, she said. “These are different ways you can analyze it legally, we don’t know how the EEOC is going to analyze it, and we don’t know how the courts are going to analyze it.”

The EEOC was sued after [attempting to weigh in](#) on what defines a “voluntary” wellness program, leaving workers with little guidance on what they can offer to entice workers to participate.

“When clients call and ask about incentives, we tell them it’s a little bit of an unsettled area,” said Karla Grossenbacher, a partner with management firm Seyfath Shaw in Washington, D.C. “It depends a little bit on how aggressive the employer wants to be, and how risk averse they are.”

‘Starting to Percolate’

Some unions and attorneys that represent workers want a green light for incentives, to ensure safe workplaces.

“I would tell an employee to take the money, get vaccinated, and go to work,” Sanford said.

The United Food and Commercial Workers president Marc Perrone supports the offer of bonuses, and said in an emailed statement that all food and retail workers “deserve free vaccinations for the risks they have faced.”

Kyle Bragg, the president of 32BJ SEIU, the largest property service workers union in the country, called incentives a more effective strategy than requiring vaccines.

“Once the vaccine is actually available to those who want it, we will need to assess the best way to get it to the most people possible,” he said in an email.

Texas AFL-CIO President Rick Levy hasn’t requested bargaining over vaccine incentives, he said.

“In talking to our affiliates it’s just starting to percolate now where folks are starting to navigate what that means in terms of vaccine and work and what the legalities are,” Levy said. “It looks like it’s still a very new developing area of the law.”

And Levy added that the important thing is to maintain a safe workplace during the pandemic.

“In a union workplace the employer will have to sit down with the employees and get their perspective,” Levy said. “In a non-union workplace it may just come down to what’s legal. We’ll have to wait and see on that.”

Looking Down the Road

Houston Methodist spokeswoman Patti Muck said the health network is confident employee incentives like its “hope bonus” are legal. “In fact this is the second major Covid-related bonus employees will receive.”

Employees meeting criteria also received a \$500 bonus around Thanksgiving as part of a “You Rock” bonus, saying that staff had been a “true blessing during the pandemic to our patients.”

In time, some of the questions about vaccine incentives may become less relevant as more companies turn to requiring inoculations, which has generally been [deemed legal](#). “We do anticipate we will eventually make this mandatory,” Boom said. “We’ve been signaling that to our employees since last summer. Once we are convinced that these are safe, effective, widely available, this will become mandatory, just as with the flu.”

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