Employee Benefits Report

FINANCIAL NETWORK
LIMITED

Employee Benefits, Investments & Insurance

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Compliance & Health January 2021 Volume 19 • Number 1

Are Employer-Mandated COVID-19 Vaccinations Legal?

When a COVID-19 vaccination is made available to the public, should employers require employees to get the vaccination?

The COVID-19 vaccination has been touted as the easiest way for our country to return to normalcy following the almost year-long pandemic. Such vaccinations will allow businesses to safely reopen and permit individuals and families to return to their routines.

Employers, in particular, are eager for business to return to pre-pandemic levels. While the 2019-20 influenza season cost employers $13.1 billion in lost productivity, according to outplacement firm Challenger, Gray & Christmas, the global COVID-19 pandemic is expected to be even more damaging.

It's not surprising, then, that many employers are wondering if they can require employees to get the COVID-19 vaccine. The answers are "maybe" and "it depends."

The Law

You want to protect your employees, and the COVID-19 vaccination might seem the simplest answer. But, before you decide to require every employee to get the vaccination when it's available, make sure your actions do not put you at a legal risk.

Theoretically, employers can mandate that employees receive vaccines for both the flu and COVID-19 as a condition of employment. Certain high-risk workplaces, such as hospitals and nursing homes, already do so, and they can legally require employees to get one or more existing vaccinations. Experts assume that the COVID-19 vaccination would be included in the list of approved vaccinations. In addition, many states also require students to receive certain vaccinations in order to attend public or private K-12 schools.

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The Importance of Educating Employees About Health Care Benefits

Researchers have historically believed that employees make poor choices when offered too many health care benefit options. Now a new analysis shows that even two choices can be confusing.

The Conversation, a nonprofit news organization, discovered that when employees were given two choices, one fourth chose the plan that was financially worse. Both plans offered the same non-cost benefits, but most chose the higher premiums and lower out-of-pocket expenses. The analysis found that 97 percent would have been better off with the plan that had lower premiums but higher cost-sharing because their health risk factors were low.

While experts recommend helping employees make better informed decisions by providing research and analysis tools, they also recommend employees be informed about:

- **Benefit and plan summaries: These explain in detail what the plan offers. Some plans include programs to help employees better manage their health such as case management or telemedicine.**
- **Member ID cards: Network, group and member numbers and the insurance company's phone numbers are on ID cards.**
- **Provider directories: Employees usually pay more if they go out of network; they must know where to find the directory, or how to check participation by their provider online.**
- **Discounts: Some health plans offer discounts. The carrier's website is a good resource.**

Health Care Benefit Trends for 2021

Health care in 2020 has been impacted by the pandemic and that trend is expected to continue next year.

Here are some of the cost and benefit trends we can expect to take center stage this year.

Costs

Health care premiums are expected to rise at higher rates than in recent years. Business Source Group on Health predicts that large employers will see premium increases ranging from 5.3 percent to 6.1 precent. Small employers may see increases as high as 20 percent.

Here are a few ways employers can counteract the increases:

Savings Accounts:

- The new individual coverage Health Reimbursement Arrangement (HRA) was established January 1, 2020, and allows businesses the option to offer full-time, part-time and seasonal employees a monthly allowance of tax-free money to buy health insurance that fits their unique needs.
- Health Savings Accounts (HSAs) and Flexible Spending Accounts (FSAs) are expected to be more popular because of the CARES Act, a coronavirus-targeted legislation passed in March 2020. The changes expand the use of these accounts by:
  - Protecting reimbursements for COVID-19 testing and treatment and telemedicine appointments — even before plan deductibles are met.
  - Extending election and payment periods for COBRA participants.
  - Making feminine hygiene products and over-the-counter drugs eligible for HSA and FSA reimbursement.

No Copays or Deductibles

- Zero copays and zero deductibles are not the norm, but they are gaining favor. High-deductible plans were previously seen as way to get employees to use their health care dollars more wisely. In theory, employees would have "skin in the game" and by realizing health care benefits aren't free, keep costs lower. That was not the outcome, however. As costs have continued to rise, so have deductibles associated with employer-sponsored health benefits, which now average more than $1,600 — more than most employees have saved. A radically different approach does away with most deductibles and copays.

Defined Contributions

- With a defined-contribution model, the employer sets aside a fixed amount of health benefits dollars for each employee. Employees are offered a variety of health plan options and can choose the one that fits their needs and budgets. With this model, employer budgets for benefits are predictable because they don't depend on the employees' enrollment choices or their health spending.

Increased cost-sharing

- Employers who are struggling financially may need to increase employees' premiums and cost sharing. It's helpful to pair these skinny plans with a health savings account and/or flexible spending account.

Benefits:

To help employees get the most out of their health plans, new or increased benefits are being added. Here are two of the more popular benefits:

Telemedicine

- Telemedicine is the use of smartphones, tablets or computers to visit with a doctor or health specialist and get a diagnosis and prescription. Experts expect that even after the pandemic is over, telemedicine will still be popular because of its convenience and lower costs. Some health plans charge members nothing for a telemedicine visit.

Mental Health

- The global pandemic has severely tested everyone's mental health. A recent Centers for Disease Control and Prevention study showed that the national rate of anxiety in the United States tripled in the second quarter compared to the same period in 2019. During the same time depression almost quadrupled. Health plans are adding increased mental health support — both in person and via telemedicine. Other programs that help ease stress include flexible work arrangements, mental wellness programs and access to health savings accounts and/or flexible spending accounts.

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While these practices suggest that schools and employers with traditionally high-risk workplaces might be able to mandate vaccinations, they are not common in schools or workplaces not associated with health care. Therefore, before pursuing similar requirements, check to see if federal or state laws support your actions.

2020 CARES Act

The federal CARES Act requires group health plans to pay for COVID-19 vaccines that are recommended by the U.S. Preventive Health Services Taskforce and the Center for Disease Control (CDC) Advisory Committee on Immunization Practices. If your health plan complies with this law, your employees will have access to the vaccine at no cost if they choose to take it.

EEOC Guidance

Although the Equal Employment Opportunity Commission (EEOC) has not addressed the issue of mandatory COVID-19 vaccinations in the workplace, it did address the issue during the H1N1 pandemic in 2009. The EEOC said that both the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 prohibited employers from compelling employees to be vaccinated for H1N1 regardless of their medical condition or religious beliefs even during a pandemic.

However, employers may be able to require COVID-19 vaccinations under the ADA or Title VII guidelines if they can demonstrate that the vaccine is "job-related and of business necessity" or prevents a "direct threat" to workplace safety. However, the EEOC says that under the ADA an employee with an underlying medical condition could be entitled to an exemption from mandatory vaccination for valid and supported medical reasons.

State Law

The U.S. Supreme Court says that states — not the federal government — can decide whether to enact legislation making vaccinations mandatory. If your state makes vaccinations mandatory, then the decision has been made for you.

Downsides

As wonderful as a vaccination sounds, not everyone is excited about taking a vaccine that was fast-tracked and has no performance record. Pharmaceutical companies were tasked with developing a drug in just a few months — a process that usually takes 10 years, according to the Wellcome Trust, a biomedical research charity in London. Many people wonder whether a vaccine developed so quickly can be safe for everyone. Individuals who have certain preexisting conditions could be at elevated risks. Others may have a religious objection to vaccinations in general.

Accommodations

If you decide that mandatory vaccinations are the best course for your company, you will need to make accommodations for employees who:

- Have certain health conditions
- May suffer negatively if taking certain medications
- Have religious objections

You may have to make accommodations so these employees can work from home.

A less controversial option would be to strongly encourage flu vaccinations or to hold an onsite clinic.

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What the Critics Say

There is concern about what a drastic change like this might do to a system that's been in place since the early 1980s. The retirement industry has long been against reform.

Industry groups representing workplace savings plan providers, mutual funds and other investment assets are interested in seeing studies. Some worry that richer households might save less, while those in favor of the tax credit say that the wealthy would save roughly the same amounts with or without the tax break.

Plus, lower-income earners might not gain that much more in their saving plans. The last study that was done on the impact of a tax credit on different income groups was in 2012. The Urban-Brookings Tax Policy Center estimated that the tax benefits would be enjoyed the most by the bottom 90 percent of households based on income, with tax increases falling disproportionately on the top 10 percent of earners. However, since the tax code and economic conditions have changed substantially since 2012, a new estimate is needed.

In addition, many lower-income individuals are living paycheck to paycheck and may not be interested in saving for retirement — regardless of the tax deferral benefit.

If this plan was put into practice, experts expect that some investors might forgo contributing to a traditional pre-tax 401(k) and receive the government contribution and instead switch to a Roth 401(k). With a Roth, the contributions are taxed upfront but funds built up over decades can be withdrawn tax-free in retirement.

One thing to consider with a Roth is that lower rates today make a Roth plan more attractive, because an investor is paying current rates in order to avoid paying higher rates when they retire. In contrast, higher rates today make the traditional 401(k) a more interesting option. Younger employees might be most interested in a Roth account because they currently are in lower tax brackets and have more years for their investment to increase.

Plans to overhaul tax deferrals have been tried before. In 2017, the House Republicans proposed to limit 401(k) plan deferrals to $2,400 annually, with any excess savings directed into Roth-style after-tax accounts. Both President Donald Trump and Democrats opposed the plan saying that it was a tax increase on middle-class savers.

Could Employer Retirement Accounts Change in a Biden Administration?

There's talk that tax-deferred retirement plans could be replaced by a system based on tax credits.

Everyone wants to know what changes we can expect with an incoming President Biden. One area Biden has expressed interest in on the campaign trail is updating the country's 401(k) retirement plans. According to Investopedia, 401(k)s are currently the most popular type of employer-sponsored retirement plan in the United States.

A 401(k) is eligible for special tax benefits under Internal Revenue Service guidelines. Employees can invest a portion of their salary up to an annual limit. Employers may or may not match some part of employees' contributions.

For 2021, the basic salary deferral limit for 401(k) and similar workplace plans remains flat at $19,500; the $6,500 catch-up amount for those 50 or older also remains the same, but the overall limit for these plans goes up from $57,000 to $58,000 in 2021, to include employer contributions. The overall limit helps employees whose employers allow special after-tax salary deferrals.

Biden's Proposal

While Biden's retirement plan would not end 401(k) accounts, it would flip the incentive structure of a retirement system based on deducting retirement savings from payroll taxes.

According to *Forbes* magazine, Biden's basic proposal is to repeal the tax deferral offered for traditional retirement plans, such as 401(k)s and individual retirement accounts, replacing it with a tax credit.

Biden's campaign website said that this action would equalize retirement saving tax breaks. The concern is that high earners get higher tax advantages than most people and Biden's hope is to provide benefits equally to all income groups.

For example, with a current 401(k), someone making $600,000 in the 37 percent bracket would get a $370 tax break for each $1,000 she or he contributes to a 401(k) plan. Someone earning $60,000 in the 22 percent bracket would only receive a $220 tax break for that same $1,000 contribution.

Under Biden's plan, when a $1,000 contribution is made, a person earning $600,000 would get the same $260 tax break as someone making $60,000. The credit would be refundable, so an employee who earns too little for the credit to fully offset their income tax liability would still get the full tax credit.

The idea may remain an idea or be scaled back depending on what a Republican-controlled Senate will approve.

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What You Need to Know About Disciplining Employees for Not Social Distancing

Social distancing and mask wearing are viewed as some of the best ways to protect yourself and others from COVID-19. That's why many employers insist their employees take these precautions on the job site.

But what about after hours? What steps can an employer take if there's evidence an employee is not taking precautions and is engaged in risky behavior when away from the workplace?

What You Lawfully Can Do

You can legally educate your employees about the risks when not following guidelines from the U.S. Centers for Disease Control and Prevention (CDC).

In states with an executive order or health order requiring mask wearing or prohibiting large gatherings, employers can require employees to sign a certificate stating that they will follow guidelines when away from the office. If evidence reveals that the employee wasn't following the guidelines, the employer could discipline the employee.

Employers who learn that employees have not been following safe practices may send employees home — particularly if social distancing is required by state or local order. They also may ask employees to fill out a daily health survey.

What You Can't Do

Employers who are considering disciplining their employees need to be aware of "lawful off-duty" statutes or anti-discrimination laws. For instance, California, Colorado, Illinois, Nevada, New York, North Dakota and South Carolina have laws protecting employees' lawful off-duty conduct. Disciplining an employee for not wearing a mask while off duty or for attending a large event could violate these laws.

Many state constitutions guarantee citizens the right to privacy within reasonable limits. For instance, Alaska courts have allowed lawsuits based on the claim that individual's privacy was invaded when an entity unreasonably intruded into their private affairs. This means that an employer needs to have justifiable and compelling reasons for asking intrusive questions about employees' off-duty behaviors.