

Delta Air Charges Unvaccinated Workers in Name of 'Wellness'

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News Story

- Airline to charge health plan surcharges to encourage jabs
- Companies get creative in hopes of vaccinated workforces

By Robert Lafolla

(Bloomberg Law) --

A plan by Delta Air Lines Inc. to penalize unvaccinated workers underscores the dilemma faced by employers that want inoculated workers without triggering the practical problems associated with absolute vaccinate-or-terminate mandates, such as firing employees who are both noncompliant and difficult to replace.

The Atlanta-based airline announced Wednesday that it plans to assess a \$200 monthly surcharge to unvaccinated workers who are part of the company's health-care plan. Imposing that type of penalty can have implications under laws governing wellness programs and anti-bias protections, legal observers said.

"Employers are trying to find ways to stay within the parameters of law to get their employees vaccinated," said Margo Wolf O'Donnell, co-chair of Benesch Friedlander Coplan & Aronoff LLP's labor and employment practice. "They're taking a myriad of approaches."

Workplace vaccine mandates remain uncommon but are gaining steam with the coronavirus's delta variant fueling a recent surge in infections, governments imposing inoculation requirements, and the vaccine made by Pfizer Inc. and BioNTech SE receiving full authorization from the federal Food and Drug Administration.

Delta Air imposed a vaccine mandate for new hires in May. The company's \$200 surcharge on its self-funded health-care plan—which it said was necessary to cover the expense of treating Covid-19—will be levied on workers who aren't inoculated by Nov. 1.

The company also said Wednesday that unvaccinated workers must wear masks indoors and, starting Sept. 12, submit to weekly testing while community case rates are high. Those steps fall in line with the "soft" mandates that the federal government, along with some cities and states, have imposed on workers.

"Delta is well within the plan and legal parameters to implement this change," the company said in a statement.

VIDEO

: We answer the question on the minds of CEOs, in-house lawyers, and rank and file employees - can employers make their employees take the vaccine?

Legal Complications

The airline's surcharge plan echoes the well-established policy of charging workers who smoke tobacco more for their health-care plans than workers who don't smoke.

Companies that base additional employee health-plan costs on Covid-19 vaccination status must consider the rules for employee wellness programs, said Kirsten Garcia, a Haynes and Boone LLP attorney who counsels employers on health plans.

Employers must provide reasonable alternatives—something that's achieved through smoking cessation programs in the tobacco context—but it isn't immediately clear how that would work when it comes to Covid-19 vaccines, Garcia said. Total surcharges are also capped, meaning that imposing costs for lack of vaccination could force an employer to dial back surcharges linked to other issues, she said.

Equal Employment Opportunity Commission guidance for incentives—which also covers penalties—implies that imposing a health-plan surcharge wouldn't violate the Americans with Disabilities Act, so long as the employer is asking for proof of vaccination, according to Sachin Pandya, a workplace law professor at the University of Connecticut.

That guidance also says employer measures can't be coercive, which has left some practitioners wondering what might cross the line and violate the ADA.

Employers would need a documented accommodation plan for workers who can't get vaccinated because of health conditions to avoid ADA liability, said Jennifer Bennett Shinall, a law professor at Vanderbilt University who focuses on disability and discrimination. Similar accommodations could be necessary for religious objections under Title VII of the 1964 Civil Rights Act, though employers have much more leeway to override those concerns compared to health-related reasons for not getting vaccinated, she said.

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