

EMPLOYEE BENEFITS LAW

INFORMATION MEMO

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Guidance Clarifies HIPAA Hurdle Regarding Group Health Plan Premium Vaccination Incentive Programs

As the open enrollment period for many employers draws near, the U.S. Departments of Labor, Health and Human Services, and Treasury issued joint agency guidance in the form of frequently asked questions (FAQs) addressing, among other things, whether a group health plan premium discount for individuals who receive a COVID-19 vaccination, or a surcharge for those who do not, is permissible under the Health Insurance Portability and Accountability Act (HIPAA) nondiscrimination and wellness plan rules. The FAQs were issued in response to questions raised by many employers regarding whether group health plans can provide incentives or impose surcharges to encourage individuals to receive the vaccine for COVID-19. The FAQs confirmed that employers can offer such programs in compliance with the rules that apply to “health-contingent, activity-only” wellness programs under HIPAA. The FAQs further confirmed that for purposes of determining the affordability of group health plan premiums under the employer shared responsibility rules of the Patient Protection and Affordable Care Act (ACA), the amount of any premium incentive that is applied pursuant to a COVID-19 vaccination incentive program is disregarded, but premium surcharges are included in the premium cost.

Background Regarding HIPAA Nondiscrimination Rules and Wellness Plan Exception

HIPAA generally prohibits group health plans from discriminating against participants, beneficiaries, and enrollees in eligibility, premiums or contributions based on a health factor. For this purpose, a health factor is broadly construed to include any factor related to an individual’s health status. An individual’s COVID-19 vaccination status is clearly a health factor under these rules. However, the regulations provide an exception to this nondiscrimination requirement for certain “wellness programs” that comply with HIPAA and ACA regulations. The FAQs address the interaction between the wellness program rules and premium incentive and surcharge programs that are based on an individual’s COVID-19 vaccination status.

Vaccine Incentives and Surcharges

The FAQs confirm that employers can offer group health plan participants a premium discount, or impose a surcharge, based on an individual’s COVID-19 vaccination status, provided the program complies with the HIPAA wellness program rules that apply to health-contingent, activity-only wellness programs. Those requirements include:

- The wellness program must be reasonably designed to promote health or prevent disease. As an example, the guidance indicates that providing a toll-free hotline to answer questions about receiving the vaccination and offering assistance to schedule appointments to receive the vaccination would be additional facts and circumstances indicating the program is reasonably designed to promote health or prevent disease as they help ensure the program is not overly burdensome
- The reward provided by the wellness program, together with the reward for other health-contingent wellness programs with respect to the group health plan, must not exceed 30 percent of the total cost of employee-only coverage for the group health plan.
- The full reward must be available to all similarly situated individuals.
- The wellness program must provide a reasonable alternative standard, or waiver of the otherwise applicable standard, to qualify for the discount for those individuals for whom the standard is unreasonably difficult to satisfy due to a medical condition or is medically inadvisable. As an example, the FAQs provide that an alternative may be an attestation by the individual that he or she will comply with the CDC’s mask guidelines for unvaccinated individuals.

- The wellness program must provide notice of the availability of the reasonable alternative standard under the wellness program.
- The opportunity to qualify for the reward under the wellness program must be offered at least once per year.

Conditioning Eligibility and Benefits on Vaccination Status

While an employer may offer a HIPAA-compliant wellness program that provides a premium discount for employees who receive the COVID-19 vaccine, or imposes a surcharge for unvaccinated employees, an employer may not: (1) exclude an otherwise eligible individual from participating in its group health plan based on the individual's COVID-19 vaccination status; or (2) provide that otherwise covered items or services under the group health plan are not covered expenses with respect to an unvaccinated individual. Accordingly, while different premiums may be charged to vaccinated and unvaccinated individuals pursuant to a HIPAA-compliant wellness plan, a group health plan is strictly prohibited from denying eligibility or benefits based on a health factor, including an individual's COVID-19 vaccination status.

Affordability Under the Affordable Care Act

The FAQs also address whether modifications to a group health plan premium pursuant to a vaccination incentive wellness program have an impact on the ACA's premium affordability analysis. In general, a large employer subject to the ACA's employer shared responsibility requirements must offer full-time employees "affordable" coverage in order to avoid a potential penalty. The FAQs confirmed that COVID-19 vaccination premium incentives are treated as "not earned," in other words they are disregarded, for purposes of determining whether coverage is affordable under the ACA. Conversely, premium surcharges are not disregarded in assessing affordability. Employers implementing a surcharge program should be mindful of this rule, as a significant surcharge may jeopardize the affordability status of a coverage offer (for premium incentive programs, disregarding the incentive likely should not have an impact on the affordability analysis as, presumably, the premium amount was compliant with the affordability rules prior to the discount).

Takeaways

The FAQs provide additional comfort to employers considering the implementation of a COVID-19 vaccination premium discount or surcharge wellness program that such programs can be lawfully offered, provided that they comply with the HIPAA wellness program rules and other applicable laws (e.g., the Americans with Disabilities Act). Employers considering significant premium surcharges for unvaccinated individuals should take steps to ensure that the surcharge both complies with the HIPAA limit (i.e., 30% of the employee-only premium) and to understand whether the surcharge would result in the premium offer becoming unaffordable under the ACA for impacted employees. Finally, the FAQs indicate that they are intended to apply to wellness program incentives provided by group health plans and health insurance issuers, and do not address incentives offered by employers as part of workplace policies that are unrelated to the employer's group health plan. The FAQs offered refer readers to Section K of the Equal Employment Opportunity Commission's [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws](#) for guidance on how these federal laws apply to COVID-related workplace policies.

If you have any questions about this information memo, please contact [John C. Godsoe](#), any [attorney](#) in our [Employee Benefits and Executive Compensation practice](#) or the attorney at the firm with whom you are regularly in contact.

