

What Employers Need to Consider When Implementing Vaccine Incentives or Surcharges Through a Wellness Program

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When the vaccines became widely available this past spring, employers contemplated offering incentives such as cash payments, extra paid time off and discounts on health insurance premiums to entice employees to get vaccinated. Now that the Delta variant has caused a significant increase in cases as well as an increase in hospitalizations of unvaccinated individuals, some employers, including Delta Airlines, have chosen to impose surcharges on the health insurance premiums of unvaccinated employees to encourage vaccines while offsetting the increased costs attributable to hospitalizations of unvaccinated employees.

Providing different premium contributions for vaccinated and unvaccinated employees is legally possible through a properly designed wellness program. This *Fast Laner* addresses the legal issues employers need to consider when implementing such a wellness program.

Complying with HIPAA Nondiscrimination Rules for Wellness Programs

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) generally prohibits group health plans and insurers from using health factors, such as vaccination status, to discriminate among similarly situated individuals, including the amount of premiums charged for coverage. However, HIPAA's nondiscrimination rules provide an exception that allows group health plans to establish different premium amounts pursuant to a

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qualifying wellness program.

Wellness programs may offer participants a “reward,” which may be in the form of a premium discount or a premium surcharge. HIPAA establishes two types of wellness programs- participatory wellness programs (i.e., the reward is not based on satisfying a health factor) and health-contingent wellness programs (i.e., a health factor must be achieved to receive the reward). HIPAA further provides for two types of health-contingent wellness programs – outcome-based programs and activity-only programs.

A wellness program conditioned on receiving the COVID-19 vaccine is an activity-only, health contingent wellness program because the vaccine implicates a health factor and no health outcome has to be maintained or achieved. An individual is simply required to engage in the activity of obtaining the vaccine to receive the reward. As such, the requirements for an activity-only wellness program must be met for an employer to offer a group health plan incentive or surcharge related to the vaccine. In general, a health-contingent activity-only wellness program related to a COVID-19 vaccine must meet the following requirements:

1. *Size of the reward:* The reward is limited to 30% of the cost of coverage. The limit is based on the overall cost of coverage (i.e., the COBRA rate) applicable to the value of coverage elected (i.e., self-only, family, etc.). This incentive would need to be combined with any other health-contingent wellness program offered under the plan when determining whether the incentives exceed the limit (except that if any incentive is linked to smoker status, the limit is increased to 50%).
2. *Regular opportunity to achieve the reward:* Participants must be able to have an opportunity to qualify for the reward at least once per year.
3. *Reasonable Design:* The program must be “reasonably designed” to promote health or prevent disease and is not overly burdensome or a subterfuge for discriminating based on a health factor. This determination is based on all relevant facts and circumstances.
4. *Uniform availability and reasonable alternatives:* The reward must be available to all similarly situated individuals which means that a reasonable alternative must be offered to persons who cannot get vaccinated because of a medical condition or if it is medically inadvisable. Employers may require proof of the medical condition, such as a medical certification, and have a wide latitude to determine reasonable alternatives. Reasonable alternatives can be anything from simply waiving the vaccine requirement to requiring an individual to attend a COVID-19 education class. Note that if the reasonable alternative implicates a health factor, then the alternative itself is subject to the health-contingent wellness program requirements. Also, even though HIPAA does not require a reasonable alternative

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based on a sincerely-held religious belief, Title VII does require such accommodations. As such, employers will need to consider reasonable accommodations due to medical and religious objections to getting the vaccine.

5. *Notice of the wellness program and the availability of a reasonable alternative:* The plan must disclose in all plan materials describing the activity-only wellness program the availability of a reasonable alternative standard to qualify for the reward (i.e., the possibility of waiver).

Applicable ADA Rules

The Equal Employment Opportunity Commission's (EEOC) position is that so long as an employer (or its paid agent) is not administering the vaccines, the Americans with Disabilities Act (ADA) does not impose a limit on the incentive being offered to receive the vaccine. This is because asking for proof that an employee received a COVID-19 vaccination is not a "disability-related inquiry" covered by the ADA. This offers employers great freedom to incentivize vaccines administered by an unrelated third party such as a local pharmacy.

If, however, the employer (or its paid agent) administers the vaccine, then the incentive or surcharge may "not be so substantial as to be coercive." This is because the employer (or agent) will be making a disability-related inquiry covered by the ADA during the pre-vaccination questionnaire process. No guidance has been issued defining "substantial" or "coercive," so employers should consult with counsel as to the size of the incentive or surcharge before implementing this program.

Regarding the above ADA guidance, employers need to keep in mind that regardless of the ADA guidance above related to the amount of the incentives, if the vaccine incentive (or surcharge) is offered through an activity-only wellness program, the 30% reward limit imposed by HIPAA will apply.

Miscellaneous Issues to Consider

Genetic Information Nondiscrimination Act of 2008 (GINA) Compliance

The EEOC has commented that GINA prohibits employers from offering any incentives to an employee in exchange for a family member's receipt of a vaccination from an employer or its agent. Providing such an incentive to an employee because a family member was vaccinated by the employer or its agent would require the vaccinator to ask the family member the pre-vaccination medical screening questions, which include medical questions about the family member and lead to the employer's receipt of genetic

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information. To avoid any possible violations of GINA, it is recommended that the COVID-19 vaccine be administered by an independent third party, and not the employer or its agent.

Affordable Care Act (ACA) Compliance

Under final IRS regulations, incentives under a nondiscriminatory wellness program that reduce the amount employees have to pay for group health coverage are not treated as reducing the employee's required contribution for purposes of affordability unless the incentive is related to tobacco use. Conversely, wellness incentives unrelated to tobacco use (for example, for completing biometric testing or getting a COVID-19 vaccine) are treated as not reducing an employee's required contribution even if the employee actually received the incentive. Accordingly, if a plan charges unvaccinated employees a higher rate than vaccinated employees, the rate charged to unvaccinated employees is the rate used for purposes of determining affordability under the ACA.

Impact of Section 125 Cafeteria Plans

If an employer decides to implement a vaccine incentive or surcharge mid-year, this change will likely be considered a significant increase or reduction to their health coverage under the cafeteria plan which would allow participants to make a change to their health coverage election. Employers may avoid this complication by aligning the wellness program with the upcoming open enrollment and plan year.

Privacy Considerations

Employers should note that a COVID-19 vaccine activity-only wellness program will also need to comply with the privacy rules of HIPAA and the ADA.

Wellness Program Design Considerations

In addition to the many legal issues to consider, employers will need to address many practical questions when implementing a COVID vaccine wellness program. Such questions include:

- What is the size of the reward, and it will be an incentive or surcharge (or possibly both)?
- Does the scope of the program cover just the employee or also spouses?
- Will the COVID-19 vaccine wellness program need to be coordinated with any existing wellness program?

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- What proof of vaccination will be required to qualify for the reward?
- If there is a collective bargaining agreement, then the employer will need to bargain over the implementation of the wellness program.
- What is the reasonable alternative if the employee is unable to get the vaccine?
- Do any plan documents need to be amended to provide for the wellness program

If you have any questions about implementing a COVID-19 vaccination wellness program, please contact your Laner Muchin servicing attorney.