



A Closer Look: COVID-19 Vaccine Premium Incentives



The renewed spread of the COVID-19 virus and increased hospitalization rates in various parts of the country, coupled with lagging vaccination rates, have prompted many employers to consider various ways to encourage employees to receive vaccinations. In this article, we will focus specifically on programs that provide incentives in the form of group health plan premium discounts to vaccinated employees (or the ability to avoid a premium surcharge to vaccinated employees). For further information on alternative programs that encourage employees to receive COVID-19 vaccinations, see our write-up [here](#).



Wellness Program Requirements

HIPAA

Although regulatory agencies have yet to address the issue, we believe incentives provided through/ in connection with employer-sponsored group health plans are likely subject to the HIPAA wellness program requirements. Additionally, we believe the program would be considered a health-contingent program under HIPAA's wellness rules because not all individuals can be vaccinated. To be HIPAA compliant, the program must therefore:

- + Allow participants at least an annual opportunity to qualify for the reward;
- + Have a maximum reward (or penalty) that does not exceed 30% of the total cost of coverage (the COBRA rate without adding the additional 2% administrative fee);
- + A total reward (or penalty) of 50% of the total cost of coverage is permitted only when the standard is related to reducing tobacco use (COVID-19 vaccination incentives are limited to 30%);
- + Be reasonably designed to promote health or prevent disease;
- + Make the reward available to all similarly situated individuals and to individuals who qualify by satisfying a reasonable alternative standard (if it is unreasonably difficult due to a medical condition to get the vaccination or it is medically inadvisable to get the vaccination); and
- + Disclose the availability of a reasonable alternative standard in all plan materials describing the details of the wellness plan.

Example 1 – Maximum Reward/Penalty (Multiple Incentives)

ABC Company offers a group health plan to employees with an employee-only rate (total cost/ COBRA rate without adding the additional 2% administrative fee) of \$300 per month. ABC Company currently offers health plan participants the opportunity to reduce their monthly premium contribution by \$50 if the employee receives a count under 200 on a total cholesterol test. ABC Company decides to offer health plan participants an additional opportunity to reduce their monthly premium contribution by \$50 if the employee receives the COVID-19 vaccination.

Both standards ABC Company offers as a part of its wellness program are health-contingent standards. Therefore, the total premium incentive for ABC Company's wellness program cannot exceed 30% of the total cost of coverage. ABC Company's incentives are not compliant with the HIPAA wellness plan nondiscrimination safe harbor because \$100 (the two incentives added together) is greater than 30% of \$300 (\$90).

Example 2 – Maximum Reward/Penalty

EFG Company offers a group health plan to employees with the following rate structure (total cost/ COBRA rate without adding the additional 2% administrative fee).

- + **Employee-only:** \$400 per month
- + **Family:** \$800 per month

EFG Company implements a \$100 per month surcharge to health plan participants who are not vaccinated. Since EFG Company is not tying the surcharge to vaccination of spouses or dependents, it is limited to 30% of the employee-only rate for its maximum surcharge. EFG Company's surcharge is compliant with the HIPAA wellness plan nondiscrimination safe harbor because \$100 is less than 30% of \$400 (\$120).



Wellness Program Requirements

HIPAA Cont.

Example 3 – Maximum Reward/Penalty

EFG Company, from the prior example, implements a \$100 per month surcharge to employees who are not vaccinated and who are enrolled in the employee-only tier. In addition, EFG Company implements a \$200 per month surcharge to employees who are enrolled in the family tier if every individual enrolled in coverage (employee, spouse, and dependents) do not receive the vaccination.

Since EFG Company ties the surcharge to spouse and dependent participation, it is permitted to implement a surcharge equal to up to 30% of the total cost of the family tier. EFG Company's surcharge is compliant with the HIPAA wellness plan nondiscrimination safe harbor because \$200 is less than 30% of \$800 (\$240). It is important to note that if an employee who is enrolled in EFG Company's family tier receives the vaccination, but the employee's spouse and/or dependents do not, the employee should avoid \$100 of the \$200 surcharge since employees should not be discriminated against based on marital status.

Example 4 – Reasonable Alternative Standard

John is an employee of EFG Company (from the prior two examples) and is enrolled in the employee-only tier of EFG Company's group health plan. John's medical provider advises that John should not receive the vaccination due to a medical condition. EFG Company waives the \$100 surcharge in John's case, even though he did not receive the vaccination. EFG Company's surcharge is compliant with the HIPAA wellness plan nondiscrimination safe harbor because John can avoid the surcharge without receiving the vaccination since it is medically inadvisable for John to receive the vaccination.

EFG Company could require John to complete a reasonable alternative standard before waiving the surcharge.

However, no guidance has been released outlining what would constitute a reasonable alternative standard specific to a COVID-19 vaccination premium surcharge. Employers should be aware that alternative standards are only considered reasonable if they do not require significant time or resources from the employee.

Therefore, weekly COVID-19 testing as an alternative standard to avoid the surcharge may not be considered reasonable, especially if the employee is required to receive the testing offsite at their own cost.

In addition, if an employee is advised by their personal physician that the alternative standard is not medically appropriate for the individual, the employer will need to either waive the surcharge or come up with a new alternative standard for the employee. Therefore, requiring employees to wear a mask if they are not vaccinated to avoid the surcharge could be problematic for employees with certain medical conditions.

If the alternative standard is also a health-contingent standard (satisfying a standard related to a health factor), the employer is required to provide additional time for the individual to meet the standard. In this case, if the individual meets the alternative standard by the extended deadline, the individual must receive the full incentive. In other words, the individual should be reimbursed if a surcharge is applied between the individual failing to meet the original standard and meeting the alternative standard.

ADA

Due to the EEOC's conclusion that a request for proof that an employee is vaccinated is not considered a disability-related inquiry or medical exam under the ADA, the ADA wellness rules should not apply here. However, employers must keep the vaccination information confidential pursuant to the ADA (i.e., it must be stored separately from the employee's personnel files).



ACA Affordability

Applicable large employers (employers with 50 or more full-time/full-time equivalent employees in the prior calendar year) are required to provide minimum essential coverage that provides minimum value at affordable rates to full-time employees or potentially pay an employer-shared responsibility penalty to the IRS. When determining whether the employer's coverage is considered affordable, it is important for employers to understand the implications of premium incentives through a wellness program. If an employer offers a premium incentive through a wellness program, the employer is required to use the rate that would be applied to an individual who did not earn the wellness incentive (the higher rate). The one exception to this rule is in the case of a wellness program designed to reduce tobacco use.

Therefore, if an employer offers a premium incentive to employees who receive the vaccine, the employer is required to use the rate charged to individuals who do not receive the vaccine when determining whether coverage is affordable. The higher rate is required to be used even for individuals who do, in fact, receive the vaccination and are charged the lower rate. The significance of this issue for employers will depend on the employer's premium rates and the incomes of the employee population. However, for employers who are already close to the affordability threshold, vaccination premium incentives should be examined carefully before implementation.

Example

HIJ Company's lowest cost single-only plan costs employees \$200 per month. HIJ Company decides to implement a \$50 per month surcharge for employees who are not vaccinated. Since the surcharge is not tied to reduction of tobacco use, HIJ Company must use \$250 as the lowest cost single-only rate when determining whether coverage is affordable for all employees, even those who are still charged \$200 per month due to receiving the vaccination.

Penalty Risk

When an employer offers coverage that does not meet the affordability threshold, this will typically result in risk of the employer owing a "subsection B penalty", which is assessed to individual full-time employees who are not offered affordable coverage which provides minimum value, and who receive coverage from the exchange with a subsidy. However, if the employer makes a change to the premiums required mid-year, and the change results in the coverage no longer being considered affordable, the employer risks owing the larger "subsection A penalty."

The subsection A penalty is assessed for every full-time employee during a month, where at least 95% of full-time employees do not receive an offer of minimum essential coverage, and at least one full-time employee receives coverage from the exchange with a subsidy. The ACA regulations provide that if employees do not have an effective opportunity to decline coverage and the coverage is unaffordable, there is no offer of coverage. Therefore, if coverage becomes unaffordable for employees as a result of the premium incentive, the employer would need to allow employees to cancel coverage mid-year to ensure an "offer" of coverage has been made for the full year in order to avoid the risk of the larger subsection A penalty.



Section 125

Under Section 125 of the tax code, employers are permitted to allow employees to pay for certain benefits on a pre-tax basis if employee elections are irrevocable for the duration of the plan year, with certain exceptions. Before an employer decides to implement a COVID-19 premium incentive midyear, it should be sure its Section 125 plan document recognizes cost-change as an event that will permit employees to change their elections midyear.

In most cases, Section 125 plan documents permit employers to automatically update employee elections if a cost-change is not considered “significant.” Whereas, in the case of a “significant” cost-change, most Section 125 plan documents give employees the option to make a midyear pre-tax election change to elect coverage midyear (in the case of a significant decrease) or terminate coverage midyear (in the case of a significant increase). There is no definition of “significant cost-change.” Employers should examine the facts and circumstances to determine whether a cost-change is significant, such as past plan experience (as to what was considered significant vs. insignificant), percentage of the total cost, and the incomes of the employee population (a \$50 per month increase in premiums would be more significant to lower wage earners).

Religious Exemptions

Another issue that arises for employers is whether to accommodate employees for whom obtaining the vaccination violates their religious beliefs. While to date EEOC guidance has failed to answer this question, employers who decline to accommodate an employee’s request for a religious exemption might risk legal challenge. Employers considering disregarding such requests should consult with their legal advisors.





Implementation Strategies

Employers will need to make several decisions when implementing a COVID-19 vaccination premium surcharge. For example, employers will need to decide whether to require employees to provide COVID-19 vaccination ID cards or require employees to sign an affidavit stating they are vaccinated, both of which are acceptable methods.

In addition, employers will need to determine how long they will give employees to provide proof of vaccination status before applying the surcharge. The rules permit employers to set a deadline, after which employees will no longer be eligible to avoid the surcharge, if the time frame provided to provide proof of vaccination is reasonable. However, employers could decide to permit employees to continue providing proof of vaccination even after the deadline has passed to receive the incentive on a go-forward basis. This strategy would result in additional ongoing administrative challenges. As mentioned above, if additional time is provided to satisfy the reasonable alternative standard, the individual must receive the full reward upon completion of the alternative standard. This could result in reimbursement of a surcharge applied before the reasonable alternative standard is completed.

Finally, employers need to be prepared to adequately communicate the terms of the wellness program details to employees. This will include updating plan materials that mention the wellness program/surcharge to include a statement that a reasonable alternative standard will be available if it is unreasonably difficult due to a medical condition to get the vaccination or it is medically inadvisable to get the vaccination. For the majority of wellness programs that are embedded in the major medical health plan, this will likely trigger a requirement to send out a Summary of Material Modification (SMM) for mid-year implementation of a surcharge if new Summary Plan Descriptions (SPDs) are not distributed.



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