

Incenting Employees to Get the COVID-19 Vaccine

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Employers are generally allowed to provide incentives to employees who obtain the COVID vaccine or impose a penalty/surcharge on those who choose not to be vaccinated so long as the employer is not overly aggressive with the amount of the incentive or penalty. It may also be necessary to provide an alternative or an accommodation to those who cannot participate due to health status or a disability.

Wellness program rules likely apply

Providing an incentive or imposing a penalty/surcharge to get the vaccine is a type of wellness program likely subject to the wellness rules set forth under HIPAA nondiscrimination rules. In addition, depending upon who administers the vaccination, the program may be subject to EEOC wellness rules as well.

Overview of relevant wellness program regulations:

- Under HIPAA wellness rules, whether the incentive is tied to the employer's group medical plan or not, the conservative approach is to follow HIPAA rules because the vaccine program itself is likely a group health plan. In addition, providing an incentive for obtaining a vaccine might be considered health-contingent, rather than merely participatory, since health status may prevent some individuals from participating and earning the incentive (e.g., immunocompromised, pregnancy, allergies, etc.).

However, so long as the employer:

- offers a reasonable alternative standard or waives the requirement for those who cannot participate due to health status and provides notice of the availability of a reasonable alternative standard; and
- limits the incentive to no more than 30% of the cost of health coverage, it should be okay under HIPAA wellness rules. NOTE: The 30% incentive limit would also need to take into account other wellness incentives provided by the employer.

Finally, keep in mind that if the vaccine program is itself a group health plan, then HIPAA privacy and security requirements may apply as well, which could limit how the information collected may be used or disclosed.

- Under EEOC wellness rules, the most recent EEOC guidance indicates that if the vaccine is obtained from a third party unrelated to the employer (which is how most individuals are obtaining a vaccination today), it may not be subject to the EEOC rules at all, in which case a reasonable accommodation is not required and there is broad flexibility for the employer to provide an incentive as desired. However, if the employer coordinates an onsite vaccination clinic, then it may be necessary to follow EEOC wellness rules, including providing confidentiality notices, limiting incentives to "voluntary" levels, and providing reasonable accommodations to those who cannot participate due to a disability.

HENDERSON BROTHERS UPDATE

NOTE: There are a few states which have passed regulations that prohibit discrimination in the workplace tied to vaccination status. In such states, an incentive (or surcharge) may not be acceptable.

Eligibility and Coverage Exclusions/Limitations are not advised

While incentives or surcharges tied to vaccination status in the form of a wellness program are generally permitted, we recommend that employers do not condition eligibility or group medical plan coverage levels based on vaccination status.

Why? The HIPAA nondiscrimination rules broadly prohibit discrimination based on health status or a health factor (see Treas. Reg. §54.9802-1(b)(1)). , will not allow a plan to deny eligibility for those who have not received the COVID vaccination. Under the HIPAA rules, “receipt of healthcare” is considered a health factor. Vaccinations are likely a health factor and subject to HIPAA nondiscrimination rules because the individual receives health care in the form of the vaccine. Therefore, we are highly recommending employers do not exclude individuals from participating in the employer’s group medical plan or limit coverage levels (e.g., for COVID-related treatment) for employees or their family members who are not vaccinated.

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