COMPLIANCE BULLETIN

Premium Surcharges for Nonvaccinated Individuals

On Aug. 23, 2021, the Food and Drug Administration (FDA) gave full approval to the Pfizer-BioNTech COVID-19 vaccine (now marketed as Comirnaty) for individuals 16 years of age and older. As a result, many employers are exploring options related to COVID-19 vaccination status within their workforce, including whether to charge a premium surcharge for nonvaccinated individuals.

There are a number of legal considerations to take into account when determining whether to impose a premium surcharge (or offer an incentive) based on vaccination status. Subject to any specific state laws prohibiting this practice, employers may generally provide incentives to employees for receiving the COVID-19 vaccine (or penalize employees for failing to get vaccinated). **However, this would likely need to be structured as a group health plan wellness program under existing law**.

This Compliance Bulletin provides an overview of the various compliance concerns for implementing a wellness program related to COVID-19 vaccination status.

Action Steps

Employers that wish to impose a premium surcharge (or offer an incentive) based on COVID-19 vaccination status should carefully consider the compliance obligations related to this strategy. Because this would likely need to be structured as a wellness program, employers should become familiar with the legal requirements for wellness programs.

Employers may need to make exceptions to an incentive or penalties for employees who are unable to get vaccinated due to a disability or a strongly held religious belief. Treating those employees differently because of their lack of vaccination could potentially be discriminatory under the Americans with Disabilities Act (ADA) or Title VII of the Civil Rights Act.

Highlights

Under federal law, employers generally may provide incentives to employees for receiving the COVID-19 vaccine (or penalize employees for failing to get vaccinated).

However, this type of strategy would likely need to be structured as a group health plan wellness program.

Employers may need to make exceptions for employees who are unable to get vaccinated due to a disability or a strongly held religious belief.

Important Dates

Aug. 23, 2021

The FDA gave full approval to the Pfizer-BioNTech COVID-19 vaccine (now marketed as Comirnaty) for individuals 16 years of age and older.

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Legal Background

There are several legal issues involved in designing workplace wellness programs. Wellness programs must be carefully structured to comply with both state and federal laws. The main federal laws that should be considered when designing a wellness program related to COVID-19 vaccination status are:

- The Health Insurance Portability and Accountability Act (HIPAA);
- The ADA;
- The Affordable Care Act (ACA); and
- Title VII of the Civil Rights Act of 1964 (Title VII).

These laws each have their own set of legal rules for acceptable wellness program design, which are not always consistent with one another.

HIPAA Nondiscrimination Rules

Under HIPAA, workplace wellness programs are divided into two categories: **participatory wellness programs and health-contingent wellness programs.** This distinction is important because participatory wellness programs are not subject to the same restrictions on incentives or rewards that apply to health-contingent wellness programs.

Note that federal agencies have not issued guidance addressing COVID-19 vaccination-related wellness programs, including which category this type of program would fall under.

- ***Participatory wellness programs***—Participatory wellness programs either do not require an individual to meet a health-related standard to obtain a reward or do not offer a reward at all. They also generally do not require an individual to complete a physical activity. Participatory wellness programs comply with the nondiscrimination requirements without having to satisfy any additional standards, as long as **participation is made available to all similarly situated individuals, regardless of health status**. There is **no limit on financial incentives or rewards** for participatory wellness programs.
- ***Health-contingent wellness programs***—Health-contingent wellness programs require individuals to satisfy a standard related to a health factor in order to obtain a reward. There are two types:
    - ***Activity-only wellness programs*** require an individual to perform or complete an activity related to a health factor to obtain a reward (for example, walking, diet or exercise programs). Activity-only wellness programs do not require an individual to attain or maintain a specific health outcome.
    - ***Outcome-based wellness programs*** require an individual to attain or maintain a certain health outcome to obtain a reward (for example, not smoking, attaining certain results on biometric screenings or meeting exercise targets).

To protect consumers from unfair practices, health-contingent wellness programs must follow certain standards related to nondiscrimination, including one that limits the maximum reward offered.

Nondiscrimination Standards for Health-Contingent Wellness Programs

Under HIPAA, group health plans and group health insurance issuers are prohibited from discriminating against individual participants and beneficiaries in eligibility, premiums or benefits based on a health factor. An exception to this rule allows

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benefits (including cost sharing), premiums or contributions to vary based on participation in a wellness program if the program complies with certain nondiscrimination standards.

A final rule issued by the Departments of Labor (DOL), Health and Human Services (HHS) and the Treasury (Departments) establish five nondiscrimination standards for health-contingent wellness programs.

1. ***Frequency of opportunity to qualify:*** Eligible individuals must have an opportunity to qualify for the reward **at least once per year**.
2. ***Size of reward***: The total reward offered to an individual under an employer's health-contingent wellness programs cannot exceed **30% of the total cost of employee-only coverage under the plan** (**50% for wellness programs designed to prevent or reduce tobacco use**). Total cost includes both employer and employee contributions towards the cost of coverage.
3. ***Reasonable design***: Health-contingent wellness programs must be reasonably designed to promote health or prevent disease.
4. ***Uniform availability and reasonable alternative standards***: The full reward must be available to all similarly situated individuals. To meet this requirement, all health-contingent wellness programs must provide a **reasonable alternative standard (or waiver of the otherwise applicable standard)** in certain circumstances. Many of the uniform availability and reasonable alternative standard requirements apply differently depending on whether the program is an activity-only or an outcome-based wellness program.

Reasonable Alternative Standard Requirements	
Activity-only wellness program	A reward under an activity-only wellness program is not available to all similarly situated individuals unless the program allows a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual for whom, for that period, it is: • Unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard; or • Medically inadvisable to attempt to satisfy the otherwise applicable standard. A plan or issuer may seek verification (such as a statement from an individual's personal physician) that a health factor makes it unreasonably difficult to satisfy, or medically inadvisable to attempt to satisfy, the otherwise applicable standard, as long as it is reasonable under the circumstances.
Outcome-based wellness program	A reward under an outcome-based wellness program is not available to all similarly situated individuals unless the program allows a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual who does not meet the initial standard based on the measurement, test or screening. It is not reasonable to seek verification (such as a statement from an individual's personal physician) that a health factor makes it unreasonably difficult to satisfy, or medically inadvisable to attempt to satisfy, the otherwise applicable standard as a condition of providing a reasonable alternative to the initial standard.

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5. ***Notice of other means of qualifying for the reward***: Plans and issuers must **disclose the availability of a reasonable alternative standard** to qualify for the reward (and, if applicable, the possibility of waiver of the otherwise applicable standard) in all plan materials describing the terms of a health-contingent wellness program.

ADA Requirements

The ADA prohibits employers with **15 or more employees** from discriminating against individuals with disabilities. As a general rule, to comply with the ADA, covered employers should structure their wellness plans to ensure that qualified individuals with disabilities:

- Have equal access to the program's benefits; and
- Are not required to complete additional requirements in order to obtain equal benefits under the wellness program.

Reasonable Accommodations

Employers must provide reasonable accommodations that enable employees with disabilities to fully participate in employee health programs and to earn any rewards or avoid any penalties offered as part of those programs. According to the EEOC, complying with HIPAA's reasonable alternative standard for a health-contingent program would generally fulfill an employer's obligation to provide a reasonable accommodation under the ADA. However, **under the ADA, an employer would have to provide a reasonable accommodation for a participatory program even though HIPAA does not require these programs to offer a reasonable alternative standard**, and reasonable alternative standards are not required at all under HIPAA if the program is not part of a group health plan.

Medical Exams or Health Inquiries

Under the ADA, an employer may make disability-related inquiries and require medical examinations after employment begins only if they are job-related and consistent with business necessity. However, these inquiries and exams are permitted if they are part of a **voluntary wellness program**.

For a wellness program to be considered voluntary under the ADA, a final rule issued by the U.S. Equal Employment Opportunity Commission (EEOC) provides that:

- Employees cannot be required to participate in the program;
- Employers cannot deny access to health coverage under any of their group health plans (or particular benefits packages within a group health plan) or limit the extent of benefits for employees who do not participate in the program; and
- Employers cannot take any other adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten employees who choose not to answer disability-related questions or undergo medical exams.

The EEOC's final rule also provides that, in order to comply with the ADA's voluntary requirement, the incentives for participating in a wellness program cannot be so substantial as to be coercive. The rule established a 30% limit on permissible incentives; however, that incentive limit has been removed from the final rule due to a court ruling that invalidated the limit. In January 2021, the EEOC issued a proposed rule that would have established a *de minimis* incentive limit under the ADA for wellness program participation. However, this proposed rule was withdrawn on Feb. 12, 2021,

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due to a White House memorandum requiring all agencies to immediately withdraw any proposed rules that had not been published as of President Joe Biden's inauguration date.

The EEOC has also released FAQ guidance in What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws regarding employer incentives for voluntary COVID-19 vaccination under the ADA. This guidance addresses whether employers may provide incentives to employees who voluntarily receive a COVID-19 vaccination (whether the employer provides the vaccine or the employee offers proof of vaccination from another source). However, it does not address incentives for COVID-19 vaccination in the context of group health plan coverage.

For now, due to this legal uncertainty, employers should carefully consider the level of incentives they use with their wellness programs that collect health information.

ACA Requirements

The ACA imposes "employer shared responsibility" requirements on applicable large employers (ALEs), also known as the "pay or play rules" or "employer mandate." Under these rules, ALEs that do not offer a certain level of health coverage to their full-time employees (and dependents) may be subject to a penalty. The affordability of any health coverage offered by an ALE is key in determining whether the ALE will be subject to an employer shared responsibility penalty.

The affordability of an employer-sponsored plan is determined by assuming that each employee fails to satisfy the wellness program's requirements (unless the wellness program is related to tobacco use). This means that the affordability of a plan that includes premium discounts for vaccinated individuals will generally be based on the higher premium amount charged to nonvaccinated individuals. As a result, premium incentives related to COVID-19 vaccination status may cause some employer-sponsored plans to be considered unaffordable for purposes of the ACA's employer shared responsibility penalties, potentially resulting in penalties for those employers in some cases.

Title VII Requirements

Title VII is a federal law that prohibits employers from discriminating against individuals based on race, color, religion, national origin or sex (known as "protected statuses" or "protected traits"). Title VII applies to employers with 15 or more employees on each working day in each of 20 or more calendar weeks in a current or prior calendar year. The law also applies to employment agencies and labor organizations.

For this purpose, Title VII specifies that the term "religion" includes all aspects of religious observance and practice.

As a general rule, Title VII prohibits discrimination based on an individual's protected trait with respect to compensation, terms, conditions or privileges of employment. However, Title VII allows employers to apply different standards of compensation or different terms, conditions or privileges of employment to individuals with protected traits than they provide to unprotected individuals under certain circumstances. This is permitted as long as the differences are:

- Not the result of an intention to discriminate because of a protected trait; and
- Applied either:
    - Under a bona fide seniority or merit system;
    - Under a system that measures earnings by quantity or quality of production; or
    - To employees who work in different locations.

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State Laws

A number of states have enacted state laws related to COVID-19 vaccination requirements that may impact an employer's ability to impose premium surcharges or incentives related to vaccination status. Many of these laws prohibit employers from coercing their employees to get vaccinated or discriminating against employees based on vaccination status. Employers should consult the laws in their particular states and carefully consider their options with respect to their employees' COVID-19 vaccination status.

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