INCENTIVIZING VACCINATION: FEDERAL AGENCIES ISSUE GUIDANCE ON USE OF HEALTH INSURANCE DISCOUNTS AND SURCHARGES AND THE IMPACT ON EMPLOYER MANDATE AFFORDABILITY

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INTRODUCTION

On 4 October 2021, the Departments of Labor, Treasury, and Health and Human Services (the Departments) jointly issued a set of Frequently Asked Questions (FAQs) governing employers' ability to provide discounts or surcharges on employees' group health insurance, based on participants' COVID-19 vaccination status. The FAQs generally permit employers to impose a surcharge on unvaccinated employees or to provide a discount to vaccinated employees, in an amount up to 30 percent of the total cost of the employee-only coverage.

The Departments' FAQs come just over four months after the U.S. Equal Employment Opportunity Commission (EEOC) updated its Technical Assistance Questions and Answers (discussed here) to permit employers to offer unlimited incentives to employees who voluntarily demonstrate that they received a COVID-19 vaccination. The Departments' decisions to cap the discount and to tie the vaccine-related benefit to the employee's group health insurance does not contradict the EEOC's guidance that, if the vaccine is administered to an employee by the employer or its agent, the incentive must not be "so substantial as to be coercive" and no incentive can be offered to an employee's family member in connection with an employer-administered vaccine.[1]

Additionally, the Departments' FAQs include an important disclaimer that states "[c]ompliance with the final wellness program regulations is not determinative of compliance with any other provision of the Public Health Service Act, Employee Retirement Income Security Act of 1974, the Internal Revenue Code (Code), or any other State or Federal law, including the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA)."[2] Indeed, the ADA and GINA contain additional requirements (discussed here) and have been the subject of contentious EEOC rulemaking (discussed here and here). Despite this disclaimer and although the EEOC did not join in the Departments' FAQs, with certain caveats discussed below (i.e., employers should offer an insurance discount only if their employees and dependents get vaccinated by an unaffiliated third-party), the FAQs are generally consistent with the EEOC's Technical Assistance Questions and Answers last updated in September 2021.[3]

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The new FAQs also clarify two other insurance-related points regarding vaccination. First, plans and issuers must now cover the cost of COVID-19 vaccinations and their administration, without cost sharing. Second, wellness incentives that relate to the receipt of COVID-19 vaccinations are treated as not earned for purposes of determining whether employer-sponsored health coverage is affordable under the Affordable Care Act (ACA).

EMPLOYERS MAY OFFER HEALTH PLAN PREMIUM SURCHARGES OR DISCOUNTS RELATED TO COVID-19 VACCINATION

Through the FAQs, the Departments answered a question on many employers' minds and confirmed that employers may offer participants in a group health plan a premium discount or surcharge contingent on a COVID-19 vaccination, subject to compliance with final wellness program regulations.[4]

Specifically, the FAQs provide that a COVID-19 vaccination-related premium discount or surcharge is an “activity-only” wellness program[5] because it is contingent upon an individual performing or completing an activity that is related to a health factor.[6] An activity-only wellness program complies with the wellness program regulations only if all of the following five requirements are satisfied:

1. The reward (or penalty) for the activity-only wellness program, together with the reward for other health-contingent wellness programs with respect to the plan, must not exceed 30 percent of the total cost of employee-only coverage under the plan;
2. Eligible individuals must be given an opportunity to qualify for a reward at least once per year;
3. A reasonable alternative standard (or waiver) to qualify for a reward must be given to any individual for whom it is unreasonably difficult or medically inadvisable to satisfy the standard due to a medical condition;
4. The program must be reasonably designed to promote health or prevent disease and not be overly burdensome, or a pretext for discriminating based on a health factor; and
5. The program must disclose a reasonable alternative standard to qualify for the reward in plan materials, and in the case of an outcome-based program, in any disclosure that an individual did not satisfy an initial outcome-based standard.[7]

For a premium discount contingent on obtaining a COVID-19 vaccination, the wellness program must afford individuals for “whom it is unreasonably difficult due to a medical condition or medically inadvisable to obtain the COVID-19 vaccination,” a reasonable alternative standard to qualify for the premium. Such alternatives could include allowing those individuals the ability to certify as to continued compliance with all COVID-19 health and safety guidelines issued by the Centers for Disease Control and Prevention or to attest that they will wear a face covering and socially distance as is recommended for unvaccinated individuals. Health plans must ensure that notice of any reasonable alternative standard is provided to individuals to satisfy the wellness plan regulations.

Although many employers may have considered excluding employees from eligibility or coverage under a group health plan on the basis of an employee's COVID-19 vaccination status, the FAQs clarify that such a practice would be impermissible as a violation of Health Insurance Portability and Accountability Act (HIPAA)

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nondiscrimination requirements.[8] Therefore, employers are limited to offering premium discounts, or applying surcharges contingent on COVID-19 vaccination, to employees who participate in a group health plan.

EMPLOYER MANDATE AFFORDABILITY AND COVID-19 VACCINE COVERAGE

The new FAQs also address how COVID-19 vaccination premium discounts/surcharges impact affordability of employer-sponsored coverage for purposes of the ACA employer mandate. Under section 4980H of the Code, covered large employers must either offer health coverage that is "affordable" and that provides "minimum value" to their full-time employees (and offer coverage to the full-time employees' dependents), or potentially be responsible for making an employer shared responsibility payment to the Internal Revenue Service (IRS), in the event at least one of their full-time employees receives a premium tax credit for purchasing individual coverage on a Health Insurance Marketplace.[9] Generally, the employee required contribution is the employee's cost of enrolling in the least expensive employee-only coverage offered by the employer that provides minimum value. It is considered affordable for an employee if it is no more than 9.5 percent (as adjusted) of that employee's household income.[10] As with other non-tobacco premium incentives, vaccination incentives increase the cost of coverage for ACA employer mandate purposes. This means that if the incentive is a premium discount, the affordability calculation does not take the discount into account. Further, if the incentive is a premium surcharge, the surcharge is treated as applying to everyone, and therefore, affordability is based on the premium cost including the surcharge.

Finally, the FAQs also clarify that plans and issuers must cover COVID-19 vaccines and their administration, without cost sharing, once a vaccine becomes authorized under an Emergency Use Authorization (EUA) or approved under a Biologics License Application (BLA). This coverage must be provided in a manner consistent with the scope of the EUA or BLA for the specific vaccine, which will include allowing for the administration of the vaccines to a larger age demographic, the administration of an additional dose to certain categories of individuals, and administration of booster doses, once approved or authorized.

EMPLOYER CONSIDERATIONS

While the FAQs provide much needed clarity on the subject, as noted above, employers must be mindful of other laws and guidance before implementing any premium surcharges or discounts as part of their wellness programs. For example, any wellness program must still comply with other federal nondiscrimination laws. Additionally, the wellness program must otherwise be "voluntary." That is, an employer is prohibited from: (1) requiring employees to participate in any health care plan, (2) denying coverage from any plan, or (3) taking any adverse action against any employee who declines participation in any medical examination[11] or wellness program. Further, as stated above, the FAQs are limited to compliance with wellness program regulations and do not provide guidance for employers regarding their obligations under the ADA or GINA. Therefore, employers who are considering implementing either a surcharge or discount should do so only if their employees get their vaccinations from third-party providers unaffiliated with the employer (e.g., personal physicians or pharmacies or a state-run vaccination center). Such an incentive program should constitute a permissible "documentation" incentive option. In contrast, employers that administer the vaccine themselves (or through their agent) may offer only "non-coercive" rewards or penalties, and a substantial health insurance surcharge could be construed as coercive.

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FOOTNOTES

[1] See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS SECTION K, (last visited 8 Oct., 2021).

[2] See U.S. DEP'T OF LABOR, EMP. BENEFITS SEC. ADMIN., FAQS ABOUT AFFORDABLE CARE ACT IMPLEMENTATION PART 50, HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT AND CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT IMPLEMENTATION N. 9 (4 Oct., 2021).

[3] See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS SECTION K, (last visited 8 Oct., 2021).

[4] See 26 CFR § 54.9802-1(h), 29 CFR § 2590.702(h), 45 CFR § 146.121(h), 29 CFR § 1630, and 29 CFR § 1635.

[5] As background, there are two types of wellness programs, "participatory" and "health-contingent." Participatory wellness programs are generally available without regard to a participant's health status (e.g., either no reward is offered, or none of the conditions for obtaining a reward are based on an individual satisfying a health-related standard). Health-contingent wellness programs, of which activity-only wellness programs are a subset, require participants to satisfy a standard related to a health factor to obtain a reward. See U.S. DEP'T OF LABOR, EMP. BENEFITS SEC. ADMIN., FAQS ON HIPAA PORTABILITY AND NONDISCRIMINATION REQUIREMENTS FOR EMPLOYERS AND ADVISERS Q26, (last visited 8 Oct., 2021).

[5] *Id*.

[6] Health factors include health status; medical condition, including both physical and mental illnesses; claims experience; receipt of health care; medical history; genetic information; evidence of insurability; and disability.

[7] *Id*. at Q27.

[8] Under HIPAA, individuals may not be denied eligibility or continued eligibility to enroll in a group health plan based on any health factors they may have. In addition, an individual may not be charged more for coverage than any similarly situated individual is being charged based on any health factor.

[9] 26 CFR § 1.36B2(c)(3)(v)(A)(4); see also U.S. INTERNAL REVENUE SERVICE QUESTIONS AND ANSWERS ON EMPLOYER SHARED RESPONSIBILITY PROVISIONS UNDER THE AFFORDABLE CARE ACT, (last visited 8 Oct., 2021).

[10] 26 CFR § 1.36B2(c)(3)(v)(A)(1).

[11] Pursuant to EEOC guidelines, requesting employees to provide proof of COVID-19 vaccination is not a medical examination under the ADA. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS SECTION K, (last visited 8 Oct., 2021).

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