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Employee Benefit Plan Review

What Employers Should Consider Before Charging Higher Group Medical Insurance Premiums for Unvaccinated Employees

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On August 23, 2021, the U.S. Food and Drug Administration approved the first COVID-19 vaccine for the prevention of COVID-19 disease in individuals 16 years of age and older. The vaccine, which has been referred to as the Pfizer-BioNTech COVID-19 Vaccine and has been available only under an emergency use authorization up to now, will be marketed under the brand name Comirnaty.

Upon the release of this news, attention immediately turned to whether employers in the U.S. can legally impose vaccine mandates on their workforces. One type of mandate that has received national attention is the assessment of higher premiums for health plan coverage on unvaccinated plan participants.

Such a premium penalty must be viewed through the compliance lens that is applied to employee wellness programs, which, up to now, have been primarily used to create incentives for healthy behaviors that may reduce a plan's exposure to high claims, such as smoking cessation, disease management, and improved body mass index. On October 4, 2021, the Departments of Labor, Health and Human Services, and the Treasury (collectively, the "Departments") issued new Frequently Asked Questions ("FAQs") that specifically address wellness plan compliance requirements for group health plan premium discounts or surcharges on vaccinated or unvaccinated employees, respectively.

Incentives and penalties under employee wellness programs implicate multiple federal statutes that prohibit discrimination on account of health status. These programs must meet specific requirements that are incorporated into the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), through the Affordable Care Act (the "ACA"), Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Americans with Disabilities Act (the "ADA"), and the Genetic Information Nondiscrimination Act ("GINA").

Before employers amend their group health plans that offer wellness programs to provide a premium discount to vaccinated employees or to impose a premium surcharge on unvaccinated employees, they must consider the following.

ACA AND HIPAA

The ACA and HIPAA generally prohibit group health plans from charging similarly

situated individuals different premiums or contributions or imposing different deductibles, copayment or other cost sharing requirements based on a health factor. However, an exception allows plans to offer health-contingent wellness programs, which are divided into two categories for compliance purposes: activity-only and outcome-based.

The FAQs focus on wellness plan compliance with the requirements under HIPAA. The Departments confirm in the guidance that a premium surcharge that applies when an employee fails to obtain a COVID-19 vaccination falls within the "activity-only" category of wellness programs under HIPAA. Since the focus of such a program is solely on the act of receiving the vaccination and no consideration is given to whether the individual later contracts or transmits the COVID-19 virus.

To comply with HIPAA, an activity-only wellness program must satisfy the following five criteria:

- The program must give individuals eligible to participate the opportunity to qualify for the reward at least once per year.
- Based on all facts and circumstances, the program must have a reasonable chance of improving the health of participating individuals, cannot be overly burdensome, and may not be a veiled attempt to discriminate based on a health factor. The FAQs provide an example of a plan that maintains a toll-free hotline to answer questions about COVID-19 vaccinations and offers assistance to schedule appointments to receive a COVID-19 vaccination. According to the Departments, these facts and circumstances would indicate that the wellness program is reasonably designed to promote health or prevent disease because they help ensure that the program is not overly burdensome.
- The total reward (or penalty), when combined with all other incentives under the plan's wellness programs that require satisfaction of a standard related to a health factor, must be limited and cannot exceed 30 percent of the cost of the coverage in which the applicable employee and any dependents are enrolled.
- The program must allow a reasonable alternative standard (or waiver of the otherwise applicable standard) for any employee for whom it is unreasonably difficult due to a medical condition to get the COVID-19 vaccine or for whom it is medically inadvisable to get the vaccine. In an example in the FAQs, the Departments state that providing an employee with the opportunity to attest to complying with the CDC's mask guidelines would be a reasonable alternative standard because it would not be overly burdensome and would also be designed to prevent infection with SARS-CoV-2, the virus that causes COVID-19.
- The plan must disclose in all materials describing the terms of the program the availability of a reasonable alternative standard (or the possibility of a waiver of the otherwise applicable standard).

While there is an exception to the general prohibition on discrimination based on a health factor for wellness programs that meet these federal standards, this exception is available only for premium discounts or rebates, or modifications to otherwise applicable cost-sharing mechanisms. The FAQs make clear that plans may not discriminate with respect to eligibility for benefits or coverage based on whether an individual obtains a COVID-19 vaccination.

Employers who prefer not to have to fit their vaccine mandate within these parameters, could instead offer a vaccine incentive through an employee assistance program ("EAP"). In other guidance that was released earlier this year, the Departments opined that such an EAP would be an "excepted benefit" for purposes of the ACA and HIPAA, and therefore, not be subject to the wellness plan rules. However, the EAP incentive must not be tied to participation in the group health plan (i.e., it must be made available to all employees). Rather than being tied to the otherwise applicable health plan premium, this EAP incentive could be designed as a set dollar amount incentive given to each employee who provides proof of vaccination.

ADA and GINA

The ADA and GINA protect against the disclosure of an employee's disability and genetic-related information. However, both laws contain an exception, permitting the collection of such information as part of employer wellness plans, as long as an employee provides such information voluntarily. Whether wellness programs that incentivize or penalize certain behaviors are in fact "voluntary" has been the subject of much scrutiny over the years.

The Equal Employment Opportunity Commission (the "EEOC"), which has governing authority over the ADA and GINA, previously issued regulations governing wellness programs. However, these regulations were vacated by the U.S. District Court for the District of Columbia and subsequently withdrawn by the EEOC effective January 1, 2019 after AARP filed suit contending that the scope of the incentive (or penalty) that was permitted by the EEOC effectively rendered any employee's disclosure of ADA- and GINA-protected information involuntary. Subsequently, new regulations that the EEOC proposed earlier this year were withdrawn by the Biden Administration.

Although the rules related to wellness plans' compliance with the

ADA and GINA are in flux and the October 4th FAQs do not address the application of the ADA and GINA to wellness programs, the EEOC issued guidance on May 28, 2021 that addressed offering an incentive to employees to be vaccinated. Under this guidance, which does not specifically address wellness programs, an employer may offer an incentive to employees for voluntarily providing confirmation that they were vaccinated on their own at a pharmacy, public health department, or other community health care provider. Requesting documentation showing that an employee received a COVID-19 vaccination is not a disability-related inquiry covered by the ADA. Further, if an employer asks an employee to show documentation or other confirmation that the employee or a family member has been vaccinated, it is not an unlawful request for genetic information under GINA. Therefore, such requests should not run afoul of the ADA or GINA.

Different rules apply if an employer or its agent will be administering the vaccine to their own employees (e.g., hosting a vaccination clinic). Under, the ADA, an employer may offer an incentive (which includes both rewards and penalties), so long as the incentive is not so substantial as to be coercive. "Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information." If the employer or its agent is administering the vaccine, GINA permits an incentive be offered to the employee, but not to the employee's family members.

This EEOC guidance does not discuss the nature or scope of the incentives that may be offered for proof of vaccination.

Practical Considerations

It is important to note that the guidance applicable to employee wellness programs does not render other equal employment laws, such as Title VII of the Civil Rights Act of 1964, inapplicable. Employers should be mindful that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees might be more likely to be negatively impacted by a vaccination requirement.

Disclosure is key. Plans 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. This disclosure must include contact information for obtaining the alternative and a statement that recommendations of an individual's personal physician will be accommodated.

Consideration must be given to whether there are any other wellness program surcharges or incentives applicable to the group health plan that must be considered along with the COVID-19 vaccine incentive in the aggregate to satisfy the 30 percent limit.

Compliance with the affordability requirements of the ACA must also be considered when implementing a discount or surcharge. Under Section 4980H of the Internal Revenue Code, added by the ACA, employers may be liable for employer-shared responsibility payments if they offer coverage that is not affordable. The FAQs provide that a premium discount that is earned by an employee for obtaining a COVID-19 vaccination must be disregarded for purposes of determining whether the offer of coverage is affordable for purposes of assessing liability for the employer shared responsibility payment. Conversely, if a premium surcharge is applied, that surcharge may not be disregarded when assessing affordability.

Finally, the strategy of applying wellness program surcharges or incentives applicable to the group health plan as an alternative to vaccine mandates is only effective with respect to employees who are covered by that employer's group health plan. This strategy will not have an impact on employees who are not enrolled in the employer's plan.

This is a rapidly developing area of the law, and we anticipate that the federal government will release new guidance affecting employee wellness programs before the end of 2021.

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