

New Tri-Agency Guidance on COVID-19 Vaccine-Related Premium Surcharges/Discounts

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With rising rates of COVID-19 cases in the past few months, employers have been increasingly interested in exploring incentives designed to increase COVID-19 vaccination rates among employees. One idea that has been gaining traction is to charge unvaccinated employees higher contributions for health coverage than vaccinated employees. Some employers also have been considering other options, such as excluding coverage for COVID-related illnesses, charging higher cost-sharing for COVID-related illnesses, and offering more generous plan options to employees who are vaccinated.

Yesterday, the Departments of Labor, Treasury, and Health and Human Services (the “Tri-Agencies”) issued guidance regarding the application of the HIPAA wellness rules to vaccine-related premium surcharges and discounts. In May, the EEOC issued guidance regarding the application of the ADA and GINA to vaccine incentive programs (see below). The Tri-Agencies, however, had not yet opined on the application of the HIPAA rules to such programs.

Because the Biden Administration has been so supportive of vaccine programs, e.g., by issuing two Executive Orders requiring federal contractors and employers with 100 or more employees to mandate their employees be vaccinated, it seemed likely that the Tri-Agencies would issue flexible rules regarding vaccine incentive programs. However, yesterday’s guidance places limits on the premium surcharge/discount amounts. Thus, employers that have begun implementing such programs should pay close attention to the guidance because it may require changes to some aspects of these programs, such as placing limits on the incentive amounts and mandating alternatives for employees who cannot get vaccinated due to a medical reason.

If you have any questions, please do not hesitate to contact your regular Groom attorney or the authors listed below:

Katie Bjornstad Amin
kamin@groom.com
(202) 861-2604

Christine Keller
ckeller@groom.com
(202) 861-9371

Seth Perretta
sperretta@groom.com
(202) 861-6335

Malcolm Slee
mslee@groom.com
(202) 861-6337

Christy Tinnes
ctinnes@groom.com
(202) 861-6603

Allison Ullman
aullman@groom.com
(202) 861-6336

Jessica Winslow
jwinslow@groom.com
(202) 861-0155

Tri-Agency Guidance

HIPAA generally prohibits a group health plan from discriminating among similarly situated individuals based on a health factor. However, there is an exception for wellness programs. The Tri-Agencies have distinguished between two types of wellness programs in prior guidance: participatory and health-contingent.

- A program is considered “participatory” if none of the conditions for obtaining a reward under the program is based on an individual satisfying a standard related to a health factor.
- A program is considered “health-contingent” if it requires an individual to satisfy a standard related to a health factor to obtain a reward (or requires an individual to undertake more than a similarly situated individual based on a health factor in order to obtain the same reward). Health-contingent programs are then broken down into two types of programs: activity-only and outcome-based.

No maximum dollar limits apply to participatory wellness programs; however, health-contingent wellness programs are subject to a 30% incentive limit (i.e., the reward cannot exceed 30% of the cost of coverage, which may go up to 50% when including tobacco programs). The wellness program also must provide a reasonable alternative standard to employees in certain circumstances (i.e., if it is unreasonably difficult for the individual to meet the standard due to a medical condition, or if it is medically inadvisable for the individual to attempt to satisfy the standard).

1. Premium Surcharge/Discount

In the new guidance, the Tri-Agencies take the position (without explanation) that vaccine premium incentive programs are “activity-only” health-contingent programs. The Tri-Agencies appear to believe that receipt of the vaccine is a “health factor” that triggers the more restrictive conditions in order to meet the HIPAA exception.

GROOM INSIGHT: The Tri-Agencies’ position is somewhat of a surprise in that the current HIPAA wellness rules define a participatory program to include a diagnostic testing program, as long as no part of the reward is based on results. So, providing an incentive to undergo a diagnostic test, such as biometric screening or blood test, on its own, would be considered participatory. We could see an incentive simply to receive a vaccine to be similar, which is why it wasn’t clear which position the Tri-Agencies would take.

Thus, the Tri-Agencies provide that a vaccine premium incentive can be permissible under HIPAA, but only if it complies with the five criteria in the HIPAA wellness regulations. The criteria include (among other things) that:

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- the program is reasonably designed to promote health or prevent disease (in an example in the new guidance, the employer provided a toll-free hotline to answer questions about the vaccine and provide assistance with scheduling appointments);
- a reasonable alternative must be provided to obtain the reward for those for whom it is unreasonably difficult due to a medical condition or medically inadvisable to receive the COVID-19 vaccine (in an example in the new guidance, the reasonable alternative is requiring the individual to provide an attestation that the individual will follow CDC masking guidelines for unvaccinated individuals); and
- the reward (when added to all other wellness incentives for health-contingent programs) must not exceed 30% of the total cost of employee-only coverage (or, if a dependent can earn the incentive too, the cost of the coverage in which the employee and dependent are enrolled).

Note that the HIPAA wellness rules allow the plan to require a doctor's note related to whether the COVID vaccine is medically inadvisable.

2. Denial of Benefits or Coverage

The new guidance provides that conditioning eligibility for benefits or coverage for otherwise covered items or services (including to treat COVID-19) on participants being vaccinated is not permissible under HIPAA, since it would be discrimination against these participants based on a health factor and the exception for wellness programs would not apply.

3. Impact on Employer Mandate Affordability

The new tri-agency guidance addresses how COVID-19 vaccine premium incentives impact affordability of an offer of employer-sponsored coverage for purposes of the ACA employer mandate. Similar to other non-tobacco premium incentives, vaccine incentives increase the cost of coverage for employer mandate purposes. This means that if the incentive is a premium discount, the discount is treated as not earned, and thus, affordability is based on the assumed increased premium cost for the participant. Similarly, if the incentive is a premium surcharge, the surcharge is treated as applying to everyone, and thus, affordability is based on the assumed increased premium cost.

Prior EEOC ADA and GINA Guidance

The EEOC has issued a [series of FAQs](#) on when employers can request or require COVID testing or vaccines. The EEOC's May 2021 FAQs provide that the ADA wellness rules do not apply where the employer merely requests proof of COVID-19 vaccination because that does not constitute a medical exam or a disability-related inquiry. However, an employer still must provide a reasonable accommodation to an employee who cannot get the vaccine due to a disability (or, under Title VII, because of a religious belief). But, if the employer is instead administering the vaccine directly or through an agent, the pre-screening questions constitute a disability-related inquiry subject to the ADA. In that case, incentives are only permitted if they are not so substantial as to be "coercive."

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With respect to GINA, the EEOC FAQs provide that an incentive for a family member getting vaccinated is generally permissible and no incentive limits apply, as long as the family member gets the vaccine from a third party and not the employer or its agent. An employer is not permitted to give an incentive to an employee for a family member getting the vaccine from the employer or its agent.

Federal Government Vaccine Mandates

On September 9, 2021, President Biden signed two executive orders related to vaccine mandates – one that applies to federal contractors and one that applies to employers with 100 or more employees. On September 24, 2021, the Safer Federal Workforce Task Force (“Task Force”) issued guidance on the federal contractor requirement, which generally requires employees of federal contractors to be fully vaccinated by December 8 unless they are eligible for a legal accommodation (e.g., due to disability or a sincerely held religious belief). DOL’s Occupational Safety and Health Administration (“OSHA”) is developing a rule regarding the provision that applies to employers with 100 or more employees, and we expect OSHA to issue this guidance soon.

Next Steps

1. Calculate incentive limits – Unless an employer administers the COVID-19 vaccine itself (or through its agent), the tri-agency HIPAA guidance will be more restrictive in terms of limits for vaccine premium incentives than the EEOC’s ADA and GINA guidance. If an employer wants to impose a surcharge on unvaccinated employees for group health plan coverage (or reduce the cost of coverage for vaccinated employees), it will need to ensure that the incentive, taken together with all other non-tobacco incentives, does not exceed the 30% HIPAA incentive limit. Some employers are considering replacing their existing incentives with the vaccine surcharges if they are close to the incentive limits already.
2. Ensure affordability standards are being met – As discussed above, a vaccine surcharge is considered to result in an increase of the employee’s share of the cost of coverage for affordability purposes under the ACA employer mandate rules. If an employer is using one of the affordability “safe harbors” under ACA regulations, it should take this into account if considering setting up a surcharge. At the very least, it will impact an employer’s ability to use the federal poverty line safe harbor (which requires an employee contribution of no more than \$105.51 for the lowest cost coverage in 2021).
3. Establish ways to earn incentive for reasonable alternatives/accommodations – An employer that establishes a vaccine incentive through its group health plan will need to make sure it provides reasonable alternatives/accommodations for those who cannot get vaccinated due to a medical reason, disability, or a religious exemption.
4. Ensure compliance with Executive Orders – Employers that are federal contractors should make sure they are in compliance with the Task Force’s guidance. All other employers with 100 or more employees should be on the lookout for the OSHA guidance. Employers may end up in a situation where they have more flexibility in their vaccine programs by complying with the

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Task Force/OSHA guidance and offering incentives outside the group health plan. However, depending on the state, there may be restrictions on the employer's ability to offer incentives outside of the group health plan.

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