

# CLIENT | ALERT



Client Alert Applies To: Self-Funded, Fully-Funded, Large Group, and Small Group

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## Can Employer Plans Charge Unvaccinated Employees a Surcharge for Health Plan Participation?

Since Delta Airlines announced that unvaccinated members of certain segments of the Delta workforce would be charged an increased premium for participation in Delta's group health plan, numerous employers have asked whether such surcharges are allowed. While there is currently not any guidance directly addressing this issue, previous guidance regarding group health plan wellness programs suggest that under federal law, the answer is probably yes<sup>1</sup>. However, such a program would be considered a wellness plan, which is subject to certain rules. Applicable requirements are highlighted below.

### HIPAA Wellness Rules

A reduction in premium (or premium surcharge – wellness differentials can be characterized either way) related to COVID vaccination status is a type of wellness program and is subject to the HIPAA wellness rules. The HIPAA wellness rules divide programs into two main categories:

- Participation only programs, i.e., programs that do not require any conditions other than participation for receiving a reward and which are subject to few requirements, except that the program must be available to all similarly situated participants; and
- Health contingent programs, i.e., programs that provide rewards based on satisfying a standard related to a health factor. (Health contingent programs can be further subdivided into activity-only or outcome-based programs.)

While a vaccination incentive program could arguably be characterized as a participation only program, it is probably safer to treat such a wellness program as a health contingent/activity only program, as there are some individuals who cannot receive vaccinations due to health conditions. Under HIPAA, an activity only wellness program is subject to the following requirements:

- An incentive limit of 30% (50% if a tobacco cessation component is included) of the total cost of the type of coverage in which the individual is enrolled (the limit applies to any vaccine discount/surcharge combined with any other health contingent program rewards);
- A reasonable alternative must be offered to persons for whom vaccination is not medically advisable, and all written materials describing the program must notify participants of the availability of a reasonable alternative;
- Participants must have an annual opportunity to qualify; and
- The program must be uniformly available to all similarly situated individuals.

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## EEOC/ADA Requirements

The EEOC's wellness rules under the Americans with Disabilities Act are currently in flux, particularly regarding incentive limits. In the past, EEOC/ADA concerns were met if the wellness program met HIPAA standards. Moreover, recent EEOC guidance provides that vaccine status alone is not considered a "medical exam or disability-related inquiry" under the ADA. Therefore, an employer vaccination incentive program that relies on proof of vaccination by an independent third party (rather than the employer or its agent) arguably falls entirely outside of the ADA wellness requirements. However, given the current lack of clarity, employers should continue to monitor developments in this area.

## Title VII Requirements

As with the HIPAA requirement that an alternative method of earning a reward be offered to individuals who cannot or choose not to be vaccinated due to health factors, Title VII requires that employers provide a reasonable accommodation or alternative way to earn the reward to persons who refuse vaccination based on sincerely held religious beliefs.

## Affordable Coverage Act (ACA)

Under the ACA, a wellness reward that is structured as a reduction in premium must be disregarded in determining whether the plan's cost is "affordable" for employees. Therefore, employers subject to the ACA's shared responsibility provisions must base affordability determinations on the amount of premium charged to non-vaccinated employees. Too large of a reduction (or surcharge) may increase the risk of a penalty for employers subject to the ACA's shared responsibility provisions. Depending on the type of plan, an employer can mitigate this risk by coupling a smaller reduction in premium with an accompanying reduction in deductible or coinsurance. An employer can also consider using the vaccination incentive only with higher level plans (as only one affordable plan option is required).

## Conclusion

While no definitive guidance has addressed a health plan premium discount or surcharge that hinges on vaccination status, general wellness principles suggest such a program (in some form) is allowed under federal law. (As always, an employer must check whether state law applies to such a program.) Moreton & Company will continue to monitor any developments in this area and provide further updates.

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<sup>1</sup>As noted above, while previous guidance from the Equal Employment Opportunity Commission (EEOC) is clear that under federal law, employers can require or incentivize its employees to be vaccinated (subject to accommodating those who are not vaccinated due to medical conditions or sincerely held religious beliefs), neither the EEOC nor the other relevant federal agencies (i.e., U.S. Departments of Labor (DOL) and Health and Human Services (HHS)) have specifically discussed using health plan premiums as incentives. The information provided in this communication piece is based on existing wellness plan principles. Moreton & Company will continue to monitor further developments in this area. You should also consider any state law limitations on health plan vaccine incentives.

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