

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

October 18<sup>th</sup>, 2021

## Agency FAQs (Part 50) Address COVID-19 Vaccine Coverage And Incentives

The DOL, IRS, and HHS have issued five new COVID-19-related FAQs—two addressing group health plan coverage requirements for qualifying coronavirus preventive services and three addressing vaccine incentives under group health plans and wellness programs. Here are highlights of the guidance:

**Plan Coverage of COVID-19 Vaccines (Q/As-1 and -2).** In previous FAQs, the agencies stated that non-grandfathered group health plans must cover COVID-19 vaccines without cost-sharing no later than 15 business days after a CDC recommendation making them a qualifying coronavirus preventive service. These latest FAQs clarify that, effective January 5, 2021, plans were required to cover without cost-sharing any COVID-19 vaccine authorized under an Emergency Use Authorization (EUA) or approved under a Biologics License Application (BLA) by the FDA immediately upon the vaccine becoming authorized or approved. This coverage must be provided consistent with the scope of the EUA or BLA for the particular vaccine, including amendments allowing for the administration of an additional dose to certain individuals, administration of booster doses, or the expansion of the age demographic for whom the vaccine is authorized or approved. Because plans may reasonably not have understood that recommended vaccines must be covered immediately, the agencies will enforce this requirement prospectively.

**Premium Discounts (Q/A-3).** Group health plans may offer participants a premium discount for receiving a COVID-19 vaccination, so long as the discount complies with the agencies' final (2013) HIPAA wellness program regulations for activity-only health-contingent wellness programs (i.e., discount of no more than 30% of the cost of coverage when added to any other wellness incentives for health-contingent programs, reasonably designed to promote health or prevent disease, annual qualification opportunity, available to all similarly situated individuals, and notice provided of alternative standards or waiver). The guidance provides an example of a compliant discount program that offers a 25% premium discount to all participants who receive a vaccination, maintains a toll-free hotline to answer questions and offer scheduling assistance, provides the same discount to individuals for whom it is medically inadvisable to obtain a vaccination if they attest to complying with CDC mask guidelines, provides notice of this available alternative, and offers an annual opportunity to qualify for the discount. The same principles would seem to apply to programs that impose premium surcharges on the unvaccinated. In addition, as noted by the agencies, the FAQ does not consider the ADA and GINA, which are addressed in earlier EEOC guidance.

**Plan Eligibility (Q/A-4).** Because the wellness program exception to HIPAA's prohibition against discrimination based on a health factor applies only to premium discounts, rebates, and cost-sharing mechanisms, plans may not deny eligibility for benefits or coverage based on whether or not an individual obtains a COVID-19 vaccination.

**Affordability/Employer Shared Responsibility (Q/A-5).** The guidance explains that wellness incentives that affect premiums (other than incentives relating exclusively to tobacco use) are treated as not earned when determining affordability of coverage under the ACA's employer shared responsibility rules. Thus, premium discounts for receiving COVID-19 vaccinations are disregarded in determining affordability, and surcharges for the unvaccinated are treated as imposed. For example, if a vaccinated individual's premium is reduced by 25%, the reduction is disregarded when determining whether the coverage is affordable, and if a non-vaccinated individual's premium is increased by 25%, the surcharge amount is counted when assessing affordability.

This guidance comes within days of OCR guidance noting that asking about vaccination status or requesting proof of vaccination is not governed by HIPAA. Employers interested in using health plan related COVID-19 vaccination incentives should review the guidance carefully.

FAQs available at: [www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/FAQs-Part-50.pdf](http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/FAQs-Part-50.pdf)

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