



Compliance Services Alert

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Can an employer make its unvaccinated employees pay more for health insurance?

Many employers are wondering about the extent to which they can incent employees and their dependents to receive the COVID-19 vaccine by adjusting medical plan eligibility, modifying medical plan premiums payable by employees, and/or excluding coverage of treatment of the coronavirus where a plan enrollee chooses not to receive the vaccine and then contracts the virus. Below we list our thoughts on what's permissible and what's not, and our view on best practices.

Don't tie medical plan eligibility to vaccination status

Do not condition outright medical plan *eligibility* based on an employee's vaccination status. HIPAA nondiscrimination rules prohibit discriminating against individuals as to eligibility based on health status factors or their receipt of healthcare. Variations in *employee contributions*, however, may occur within the boundaries of relevant wellness program rules.

It's possible to include vaccination status as part of a workplace wellness program affecting medical premiums

If you're inclined to install a medical premium differential based on vaccination status, treat the differential as occurring under an *activities-based* wellness program rather than a participation-based program, because some individuals may not be able to be vaccinated due to a health condition. Thus, the employer should offer up a reasonable alternative to those whose health status would make the vaccine inappropriate or unwise. To avoid *federal* employment discrimination claims, offer a reasonable alternative also to those who have some other protected objection, like a religious objection.

Add the differential to other incentives/penalties for activities- or outcomes-based standards when calculating the incentive limit for non-tobacco-related programs (30% of the total cost of single coverage, unless family members may participate in the program too, then it would be 30% of the total cost of the relevant coverage tier).

Also, to avoid having to retroactively provide an incentive or remove a surcharge for those who get vaccinated after the wellness program is implemented, give employees a reasonable opportunity to be vaccinated after announcing the program *and prior to applying the premium differential*. For example, announce now the

intention to impose the differential for the next plan year, giving employees a reasonable opportunity to get vaccinated before the next plan year begins. Give new hires a similar reasonable opportunity to obtain the vaccine *prior* to applying the differential.

For ACA affordability purposes, everyone is deemed to be unvaccinated and thus the surcharge is added to the cost of coverage reported on line 15 of the Form 1095-C. It's a moot point for individuals who enroll in the employer's plan anyway, are enrolled nowhere, or are enrolled in coverage elsewhere (other than an ACA marketplace), as they can't trigger an ACA penalty based on unaffordability of the employer's coverage offer.

The employer should not run the vaccine program, or at least not handle the prescreening questionnaires. The prescreening questionnaire amounts to a medical inquiry that might reveal an Americans with Disabilities Act-protected disability, and thus the best practice is to simply ask employees to produce evidence of vaccination received in the public domain, such as from a pharmacy or the employee's physician. Keep vaccine-related information confidential, of course.

Some states are prohibiting employment-based discrimination due to an employee's vaccination status (similar to smokers' rights laws). While we think such a state law would make it a problem to hinge employment, compensation, PTO and other non-ERISA terms and conditions of employment on vaccination status, we think it's likely such a state law would be preempted by ERISA, for ERISA employers using vaccination status to determine employee contribution rates under an ERISA plan. However, that matter is not settled, so you may wish to discuss it with legal counsel.

Don't exclude coverage of treatment of the coronavirus contracted by the unvaccinated

Excluding coverage for treatment (certainly inpatient treatment) of the coronavirus, contracted by the unvaccinated particularly, creates at least a couple of issues. Some might argue that the exclusion effects impermissible disabilities-based discrimination. Second, while the HIPAA nondiscrimination rules permit a plan to exclude coverage of treatment of injuries sustained in dangerous activities, the scope of that exception does not seem broad enough to embrace exclusion of treatment of an *illness*, even though some might argue that the decision to avoid a readily available vaccine is a dangerous activity that led to that illness.

Our recommendation: Avoid amending your medical plan to exclude coverage of treatment of the coronavirus.

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