

# compliance ALERT

## Agencies Issue Guidance on COVID-19 Vaccine-Related Premium Surcharges and Discounts

October 7, 2021

### Action Required:

- Review the latest guidance.

### If considering a vaccine premium incentive program:

- Examine the potential risks, benefits and logistics.
- Ensure any program complies with HIPAA wellness program regulations.

On October 4, the U.S. Departments of Labor, Treasury and Health and Human Services issued FAQ [guidance](#) confirming the permissibility of implementing COVID-19 vaccination discounts and surcharges under employer-provided group health plans to incentivize employees to become vaccinated.

This guidance clarifies that vaccine premium incentive programs (whether offering a premium discount or imposing a surcharge) are considered to be “activity-only” health-contingent wellness programs and must comply with HIPAA wellness program regulations.

From these requirements and other applicable guidance, employers and plan sponsors should consider taking the following next steps:

- Determine the Incentive Limits under the HIPAA Rules
- Develop Reasonable Alternatives and Reasonable Accommodations
- Ensure ACA Affordability Standards are Met
- Ensure Compliance with Federal and State Government Vaccine Mandates/ Executive Orders

Among other clarifications, the new guidance addresses how COVID-19 vaccine premium incentives impact affordability of an offer of employer-sponsored coverage for purposes of the ACA Employer Shared Responsibility rules.

Employers and plan sponsors that are considering implementing a premium surcharge or discount should examine all of the potential risks, cost savings and administrative hurdles that may come from such a program. While, on the one hand, implementing such a program can incentivize workers to get vaccinated and result in cost savings for the group health plan, if not properly implemented it can result in significant liabilities, including penalties under the ACA’s Employer Mandate for not offering affordable health insurance coverage. ■

↓ Full Explanation Follows ↓

# Agencies Issue Guidance on COVID-19 Vaccine-Related Premium Surcharges and Discounts

On October 4, the U.S. Departments of Labor (DOL), Treasury and Health and Human Services (the “Agencies”) issued FAQ [guidance](#) (the “Guidance”) regarding the application of the HIPAA wellness rules and ACA affordability rules to vaccine-related premium surcharges and discounts. The Agencies confirmed the permissibility of implementing COVID-19 vaccination discounts and surcharges under employer-provided group health plans to incentivize employees to become vaccinated.

## How does the Guidance change the Law?

While the new Guidance doesn’t change the law, it clarifies how HIPAA and ACA rules apply to vaccine-related premium surcharges and discounts—resolving questions that had not been answered by the EEOC’s May 28 [guidance](#) (the “EEOC Guidance”) pertaining to employers’ vaccine incentive programs under the ADA and GINA (discussed below).

In the new Guidance, the Agencies clarify that vaccine premium incentive programs (whether offering a premium discount or imposing a surcharge) are considered to be “activity-only” health-contingent wellness programs under HIPAA wellness program regulations issued in 2013 (the “HIPAA Rules”). Due to this determination by the Agencies, this triggers five restrictive conditions or requirements that plan sponsors must comply with in order for their premium incentive program to be considered a permissible wellness program under the HIPAA Rules.

- (1) The program must give individuals eligible for the program the opportunity to qualify for the incentive at least once per year;
- (2) The incentive (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);
- (3) The program must be reasonably designed to promote health or prevent disease (the Guidance gives the example of an employer providing a toll-free hotline to answer questions about the vaccine and provide assistance with scheduling appointments);
- (4) The program’s incentive must be available to all similarly situated individuals, which includes allowing a reasonable alternative standard (or waiver of such standard) for certain individuals. Specifically, a reasonable alternative must be provided to obtain the incentive 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 Guidance, the reasonable alternative is requiring the individual to provide an attestation that the individual will follow CDC masking guidelines for unvaccinated individuals); and
- (5) The plan or issuer must disclose in all plan materials describing the terms of an activity-only wellness program the availability of a reasonable alternative standard to qualify for the reward (and, if applicable, the possibility of waiver of the otherwise applicable standard), including contact information for obtaining a reasonable alternative standard and a statement that recommendations of an individual’s personal physician will be accommodated.

## Denial of Benefits or Coverage Due to Vaccination Status

The new Guidance further provides that conditioning eligibility for benefits or coverage for otherwise covered items or services (including to treat COVID-19) on participants being vaccinated (sometimes referred to as a “Gatekeeper Rule”) is not permissible under the HIPAA Rules since it would constitute discrimination against these participants based on a health factor.

### **Impact on ACA Employer Mandate Affordability**

The new Guidance further addresses how COVID-19 vaccine premium incentives impact affordability of an offer of employer-sponsored coverage for purposes of the ACA Employer Shared Responsibility rules (“Employer Mandate”). Similar to other non-tobacco premium incentives, vaccine incentives are treated as “not earned,” and thus, can increase the cost of coverage for Employer Mandate purposes. Specifically, 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, and 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.

### **Does Compliance with the HIPAA Rules Mean that the Premium Surcharge or Discount Complies with the ADA and GINA?**

No. The Guidance clarifies in a footnote that compliance with the HIPAA Rules is not determinative of compliance with any other provision of the PHS Act, ERISA, the Code, or any other State or Federal law, including the ADA and GINA. Specifically, the Agencies note that this Guidance addresses “wellness program incentives provided by group health plans and health insurance issuers” and does not address “incentives offered by employers as part of workplace policies and unrelated to their group health plan,” and further, with respect to such workplace policies recommends that employers consult with the EEOC Guidance for determining compliance.

### **Compliance with the ADA and GINA**

The EEOC Guidance provides 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, employers must still provide a reasonable accommodation to an employee who cannot get the vaccine due to a disability (or, under Title VII, because of a sincerely-held religious belief). If, instead, the employer is administering the vaccine directly or through an agent, then an employer’s 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.”

With respect to GINA, the EEOC Guidance provides 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 through 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.

### **Compliance with Federal and State Government Vaccine Mandates**

On September 9, President Biden signed two executive orders related to vaccine mandates – one that applies to federal contractors and one that applies to private sector employers with 100 or more employees. On September 24, 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 an accommodation based on disability or a sincerely-held religious belief. The DOL’s Occupational Safety and Health Administration (“OSHA”) is developing a rule regarding the order that applies to employers with 100 or more employees. We expect OSHA to be issuing this rule soon. At the state level, we expect several states to impose their own vaccine-related laws and mandates, and to challenge the federal government’s vaccine mandates.

### **What should employers and plan sponsors do next?**

Employers and plan sponsors that are considering implementing a premium surcharge or discount should examine all of the potential risks, cost savings and administrative hurdles that may come from such a program. While, on the one hand, implementing such a program can incentivize workers to get vaccinated and result in cost savings for the group health plan, if not properly implemented it can result in significant liabilities, including penalties under the ACA’s Employer Mandate for not offering affordable health insurance coverage.

The Guidance lays out the specific compliance requirements under HIPAA for employers and plan sponsors seeking to implement premium discounts or surcharges on its group health plans. From these requirements and other applicable guidance, employers and plan sponsors should consider taking the following next steps:

- **Determine the Incentive Limits under the HIPAA Rules:** 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% incentive limit under the HIPAA Rules.
- **Develop Reasonable Alternatives and Reasonable Accommodations:** Establish methods for employees and participants to earn incentives through the “reasonable alternative standard” and “reasonable accommodation” rules discussed above if such employees/participants cannot get vaccinated due to a medical reason, disability or sincerely held religious beliefs.
- **Ensure ACA Affordability Standards are Met:** As discussed above, a vaccine surcharge is considered to be “not earned” and can result in an increase of the employee’s share of the cost of coverage for affordability purposes under the ACA’s Employer Mandate rules.
- **Ensure Compliance with Federal and State Government Vaccine Mandates/Executive Orders:** Employers that are federal contractors should make sure that they are in compliance with recent executive orders and the Task Force’s recent guidance. Private sector employers with 100 or more employees should review the applicable OSHA guidance when it becomes available. Finally, all employers should review and take into account any applicable state laws or mandates that may impact their vaccination program. ■

**If you have any additional questions,  
please call your Corporate Synergies  
Account Manager or 866.CSG.1719.**

**What are your organization’s plans?  
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