

COVID-19 Vaccine Incentives Employer Guide

October 1, 2021

Quick Facts

- Generally, employers are allowed to provide incentives to employees who obtain the COVID-19 vaccine.
- Employers that implement vaccine incentives must comply with wellness program rules under the Health Insurance Portability and Accountability Act (HIPAA) and the Equal Employment Opportunity Commission (EEOC).
- Employers that implement vaccine incentives must make considerations on issues such as ACA affordability, grandfathered status and Title VII discrimination.

Overview

Now that COVID-19 vaccinations are readily available to all but young children, more employers are looking to encourage, and in some cases mandate, employees and their family members to get vaccinated. There is certainly flexibility for employers to do so, but employers need to be aware of certain compliance requirements that may apply depending upon what type of policy the employer implements. Previous guidance on vaccine incentives can be found in [employer strategies](#) and [EEOC updated guidance](#) alerts.

Incentives or Surcharges (Wellness Programs)

Employers are generally allowed to provide incentives to employees who obtain the COVID-19 vaccine or impose a penalty/surcharge on those who choose not to be vaccinated so long as the employer is not overly aggressive with the amount of the incentive or penalty and a reasonable alternative is provided to those who cannot participate because of health status.

While incentives or surcharges tied to vaccination status in the form of a wellness program are generally permitted, employers should not condition eligibility or coverage under the group medical plan on vaccination status. HIPAA nondiscrimination rules broadly prohibit discrimination based on health status or a health factor, and “receipt of healthcare” is considered a health factor. Vaccinations are likely a health factor and subject to HIPAA nondiscrimination rules because the individual receives health care in the form of the vaccine. HIPAA wellness rules provide an exception allowing the employer to differ employee contributions toward the group medical plan’s premium or cost-sharing (e.g., the plan deductible) based on health status, but do not allow the employer to exclude individuals from participating in the employer’s group medical plan or to limit coverage levels (e.g., for COVID-19-related treatment) for employees or their family members who are not vaccinated.

Some of the most common incentives include additional vacation or paid time off (PTO), gift cards or cash bonuses, medical plan premium or deductible differentials, and health flexible spending account (FSA), health reimbursement arrangement (HRA) or health savings account (HSA) contributions. If the incentive is PTO, gift cards or cash, it should be treated as taxable to the employee. If the incentive is

tied to the employer's group medical plan, health FSA, HRA or HSA it can be provided on a tax-favored basis.

Providing an incentive or imposing a penalty/surcharge tied to vaccination status is a type of wellness program likely subject to wellness rules set forth under HIPAA nondiscrimination rules. In addition, depending upon who administers the vaccination, the program may be subject to EEOC wellness rules. And finally, employers may also need to consider religious accommodations in accordance with Title VII. Each of these things is discussed in detail below.

NOTE: There are a few states which have passed regulations that prohibit discrimination in the workplace tied to vaccination status. In such states, an incentive (or surcharge) may not be allowed.

HIPAA Wellness Rules

HIPAA wellness rules apply when the incentive is tied to a group health plan, or if the wellness program itself may be considered a group health plan. A wellness program tied to vaccinations (a type of medical care) likely is a group health plan on its own, in which case it is best to follow HIPAA wellness rules even if the incentive does not affect other group health plans offered by the employer. In addition, because health status may prevent participation in the program (e.g., cannot receive a vaccination due to pregnancy or allergy), it is likely a health-contingent program and is not merely participatory.

A health-contingent wellness program must comply with the following requirements under HIPAA:

- Participants must be given an annual opportunity to qualify for the reward;
- The maximum reward (or penalty) cannot exceed 30% of the total cost of coverage, or 50% for tobacco-related programs;
- The program must be reasonably designed to promote health or prevent disease, and must not be overly burdensome or a subterfuge for violating discrimination laws;
- The reward must be available to all similarly situated individuals and to individuals who qualify by satisfying a reasonable alternative standard; and
- The program must disclose the availability of a reasonable alternative standard in all plan materials describing the terms of the wellness program.

Reasonable Alternative Standard

The reasonable alternative standard does not have to be determined in advance but instead may be determined on an employee-by-employee basis upon request. However, the availability of a reasonable alternative standard must be clearly communicated in all wellness program-related materials. There is a [model notice](#) available for this purpose. If a reasonable alternative standard is requested by an individual who cannot participate due to a medical reason, the employer could choose to waive the requirement and still provide the incentive or offer an alternative that best fits the individual's circumstances (e.g., wellness check, regular COVID-19 testing, masking or remote work).

30% Incentive Limit

The incentive limit (30%) is based on the total cost of coverage, including both the employer and employee contribution (i.e., the total premium). If only the employee is eligible for the incentive, the 30% limit should be calculated based on the single cost of coverage. If family members are also eligible to earn the incentive, the 30% limit may be calculated based on whatever tier of coverage the employee and family members enroll in. All health-contingent wellness incentives must be aggregated when determining whether the 30% incentive limit is met (or 50% if there are tobacco-

related incentives involved), so if the employer already offers other wellness incentives, that may limit the incentive available for vaccinated employees to something less than 30%.

For example, assuming the monthly medical premium is \$500 for single coverage and \$1,200 for family coverage:

- If only the employee may earn an incentive, the incentive may be up to \$150/month (30% of \$500).
- If family members may also earn an incentive, the incentive may be up to \$360/month (30% of \$1,200).

EEOC Wellness Rules

EEOC wellness rules apply when the program involves medical examinations, disability-related questions, or the collection of genetic information, in which case the program may be subject to the Americans with Disabilities Act (ADA) or the Genetic Information Nondiscrimination Act (GINA). The EEOC has clarified that a vaccination is not itself a medical examination, but the screening questions involved prior to vaccination are disability-related questions subject to the ADA. In addition, such information provided by family members receiving vaccines is genetic information about the employee subject to GINA.

If the vaccination is obtained from a third party unrelated to the employer (e.g., pharmacy, healthcare provider, community vaccination clinic) and the employer simply requests proof of vaccination status, the [latest EEOC](#) guidance indicates that the employer then does not have access to the disability-related questions involved in the process and the program would not have to follow EEOC wellness rules (as the ADA and GINA would not apply). This is how most individuals obtain the COVID vaccination today, in which case, the incentive could apply to the employee and the employee's family members without having to consider the EEOC wellness rules.

However, if the employer is involved in the vaccination process (perhaps coordinating an onsite vaccination clinic), then the program should follow EEOC wellness rules for any employees who may participate and an incentive or surcharge should not apply for the employee's family members.

You can see more guidance on this from the EEOC in [subsection K](#).

Under EEOC wellness rules, the following requirements must be met:

- Those choosing not to participate cannot be denied group health plan coverage or be subjected to adverse employment action, coercion or intimidation;
- Must be reasonably designed to promote health or prevent disease and must not be overly burdensome or a subterfuge for violating discrimination laws;
- Participants must be provided with a notice that includes a description of the medical information collected, who will have access to it and how it will be used and kept confidential;
- Information collected may generally be provided only in aggregate form unlikely to disclose the identity of specific individuals except as necessary to administer the plan.
- Information must be collected on separate forms, maintained in separate files and treated as a confidential medical record;
- Reasonable accommodation is required if disability or medical condition prevents individuals from participating or earning an incentive; and
- Participants may not be required to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information (except as permitted to carry out activities related to the

wellness program), or to waive confidentiality protections in place under the ADA as a condition for participating or receiving an incentive.

****It is not clear what level of incentive is permitted. Previous guidance indicated an incentive of up to 30% of the single cost of coverage was permissible (similar to what is permitted under HIPAA), but that guidance has been vacated. Additional proposed rules were then released indicating that only a de minimis incentive was permitted, but those rules were taken back as well. We recommend that employers with incentives subject to EEOC rules are not too aggressive with incentive amounts, making sure there are at least at 30% or less until we receive further clarification from the EEOC.****

Title VII Nondiscrimination

Under Title VII, employers are generally prohibited from discriminating based on race, color, religion, sex or national origin for any employment-related purpose, including the offering of employee benefits. A wellness program to which an employee has a religious-based objection may require the employer to offer a reasonable accommodation unless it poses an undue hardship on the employer (courts define “undue hardship” as having more than minimal cost or burden on the employer).

Grandfathered Status

If the incentive or surcharge is tied to the employee’s contribution toward medical coverage that has so far maintained grandfathered status, keep in mind that a decrease in the employer contribution by >5% causes a loss of grandfathered status.

Affordability (Applicable Large Employers – 50 or Greater Full-Time Equivalents)

For applicable large employers required to offer coverage in accordance with §4980H(b), if the incentive or surcharge is tied to the employee’s contribution toward medical coverage, the higher non-wellness rate (the rate for those who are unvaccinated) should be used for purposes of determining affordability.

Proving Vaccination Status

There are no specific rules about how the employer allows employees to prove vaccination status, leaving the employer with some flexibility to accept an attestation from the employee or ask for documentation proving vaccination status or a medical reason for not being able to be vaccinated. It seems likely that most employers will require a copy of vaccination cards or a healthcare provider’s letter rather than simply accepting an attestation, which is okay. This information, if collected as part of the wellness program, may be protected health information (PHI) subject to HIPAA privacy and security rules. Therefore, the employer should apply required HIPAA privacy and security requirements to the information, including limiting who has access to the information and using the information only for plan administration purposes (not for any other employment-related purposes). The employer should also make sure the information is safely stored in a confidential manner. In addition, such information is protected under the ADA and therefore must be kept confidential and stored separately from the employee’s personnel files under the ADA.

Timing of Implementation

Many employers may choose to implement a wellness program involving COVID vaccinations as they renew their plans for 2022. This may be the easiest transition, providing time to communicate the program, set a reasonable time for employees to obtain and provide proof of vaccination or request a reasonable alternative standard, and then provide the incentive accordingly.

It would also be possible to implement the program mid-plan year if desired. Employers are permitted to make mid-year plan coverage and contribution changes, but then employees may be able to make a mid-year election change. If the vaccine is tied to an adjustment of the monthly employee contribution toward group health plan coverage:

- If the change in contribution is “insignificant,” the employer can automatically make the adjustment without allowing employees an option to adjust their pre-tax elections.
- If the change in contribution is “significant,” employees may be able to make changes (e.g., revoking an election of coverage and reducing the pre-tax election accordingly).

If the employer implements the program mid-plan year, it is unlikely to affect Summary of Benefits and Coverage (SBC) content; therefore, 60 days of advance notice is not technically required. However, the recommendation would be for the employer to communicate the program details (including deadlines for obtaining and proving vaccination), the effective date of the incentive (or surcharge), election change flexibility (if any) and information about how to request a reasonable alternative standard for those who cannot participate due to a medical reason. Such notice should be provided within a reasonable time prior to the program going into effect.

EPIC Employee Benefits Compliance Services

For further information on this or any other topics, please contact your EPIC benefits consulting team.

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