

# Employee Benefit ■ Plan Review

## Agencies Clarify How Employers Can Charge COVID-19 Vaccine Premium Incentives

BY JUDITH WETHALL AND SARAH G. RAAH

The U.S. Departments of Labor, Treasury, and Health and Human Services (the “Tri-Agencies”) issued guidance regarding the application of the Health Insurance Portability and Accountability Act (“HIPAA”) wellness rules to vaccine-related premium surcharges and discounts, clarifying that employers may charge vaccine premium incentives if they adhere to the requirements of activity-only health-contingent programs.

Employers have grown more interested in exploring incentives designed to increase COVID-19 vaccination rates among employees. Some employers have announced plans to charge unvaccinated employees higher contributions for health coverage than vaccinated employees, while some have been considering other options, such as excluding coverage for COVID-related illnesses, charging higher cost-sharing for COVID-19-related illnesses and offering more generous plan options to employees who are vaccinated.

### TRI-AGENCY GUIDANCE

HIPAA generally prohibits a group health plan from discriminating among similarly situated individuals based on a health factor. However, there is an exception for “wellness programs.” The Tri-Agencies have distinguished between two types of wellness programs in prior guidance: participatory and health-contingent wellness programs.

- A program is considered “participatory” if none of the conditions for obtaining a reward under the program are based on an individual satisfying a standard related to a health factor.
- A program is considered “health-contingent” if it requires an individual to satisfy a standard related to a health factor to obtain a reward (or requires an individual to undertake more than a similarly situated individual based on a health factor in order to obtain the same reward). Health-contingent programs are broken down into two types of programs: activity-only and outcome-based.

No maximum dollar limits apply to participatory wellness programs; however, health-contingent wellness programs are subject to a 30 percent incentive limit (i.e., the reward cannot exceed 30 percent of the cost of coverage, which may go up to 50 percent when including tobacco-cessation programs). The wellness program also must provide a reasonable alternative standard (“RAS”) to employees in certain circumstances (i.e., if it is unreasonably difficult for the individual to meet the standard due to a medical condition, or if it is medically inadvisable for the individual to attempt to satisfy the standard). Some employers hypothesized that the premium surcharge on unvaccinated plan participants was a

participatory wellness program. The Tri-Agencies disagreed.

### Premium Surcharge/Discount

In the new guidance, the Tri-Agencies take the position that vaccine premium incentive programs are activity-only health-contingent programs. The Tri-Agencies indicate that receipt of the vaccine is a “health factor” that triggers the more restrictive conditions in order to meet the HIPAA exception.

Thus, the Tri-Agencies provide that a vaccine premium incentive can be permissible under HIPAA, but only if it complies with the five criteria in the HIPAA wellness regulations. The criteria include (among other things) that:

- The program is reasonably designed to promote health or prevent disease. (In an example in the new guidance, the employer provided a toll-free hotline to answer questions about the vaccine and provide assistance with scheduling appointments.)
- A reasonable alternative must be provided to obtain the reward 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 new guidance, the reasonable alternative is requiring the individual to provide an attestation that the individual will follow the Centers for Disease Control and Prevention (“CDC”) masking guidelines for unvaccinated individuals.)
- The reward (when added to all other wellness incentives for health-contingent programs) must not exceed 30 percent of the total cost of employee-only coverage (or, if a dependent also can earn the incentive, the cost of the coverage in which the employee and dependent are enrolled).

Note that the HIPAA wellness rules allow the plan to require a

doctor’s note related to whether the COVID-19 vaccine is medically inadvisable.

### Denial of Benefits or Coverage

The new guidance provides that conditioning eligibility for benefits or coverage for otherwise covered items or services (including to treat COVID-19) on participants being vaccinated is not permissible under HIPAA, since it would be discriminatory against these participants based on a health factor and the exception for wellness programs would not apply.

### Impact on Employer Mandate Affordability

The new guidance from the Tri-Agencies addresses how COVID-19 vaccine premium incentives impact affordability of an offer of employer-sponsored coverage for purposes of the Affordable Care Act (“ACA”) employer mandate. Similar to other non-tobacco premium incentives, vaccine incentives increase the cost of coverage for employer mandate purposes. This means that if the incentive is a premium discount, the discount is treated as not earned; thus, ACA affordability is based on the assumed increased premium cost for the participant. Similarly, if the incentive is a premium surcharge, the surcharge is treated as applying to everyone; thus, affordability is based on the assumed increased premium cost.

### PRIOR EEOC, ADA AND GINA GUIDANCE

The U.S. Equal Employment Opportunity Commission (“EEOC”) has issued a series of FAQs on when employers can request or require COVID-19 testing or vaccines. The EEOC’s FAQs provide 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, an employer still must provide a reasonable accommodation to an employee who cannot get the vaccine due to a disability (or, under Title VII,

because of a religious belief). But, if the employer is instead administering the vaccine directly or through an agent, the 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 the Genetic Information Nondiscrimination Act (“GINA”), the EEOC FAQs provide 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 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.

### PRACTICAL APPLICATION

The guidance from the Tri-Agencies answers a commonly asked question for employers, clarifying that they may charge vaccine premium incentives if they treat them as activity-only health-contingent programs. Employers and group health plan sponsors considering implementing vaccine premium incentives should ensure that they comply with all of the criteria for activity-only health-contingent programs in the HIPAA wellness regulations and account for vaccine premiums in their ACA affordability calculations. 🌟

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