

# Premium Surcharges for the Unvaccinated Are Lawful Within Limits

By Allen Smith, J.D.

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In Oct. 4 guidance, the Biden administration surprised plan administrators by announcing it would limit vaccine incentive or surcharge programs for unvaccinated health plan participants.

"The decision to treat a vaccine incentive or surcharge program as an activity-only program means that employers are now limited with respect to the level of surcharge [or incentive] that they can impose," said Christine Keller, an attorney with Groom Law Group in Washington, D.C.

Employers that wish to impose premium surcharges will "have to develop reasonable alternatives to vaccination, which may be administratively burdensome and unworkable in practice," she said.

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COVID-19 Vaccination Resources ([www.shrm.org/hr-today/news/hr-news/Pages/COVID-19-Vaccination-Resources.aspx](http://www.shrm.org/hr-today/news/hr-news/Pages/COVID-19-Vaccination-Resources.aspx))

## 'Activity-Only' Rules Applied

While premium surcharges are lawful under the guidance (<https://www.dol.gov/sites/dolgov/files/EBSA/about-ebbsa/our-activities/resource-center/faqs/aca-part-50.pdf>), they must comply with nondiscrimination rules under the Health Insurance Portability and Accountability Act (HIPAA), Keller said.

Regulations from the U.S. Department of Labor, the Department of Health and Human Services and the Department of the Treasury (the Tri-Agencies) in 2006 explained that the HIPAA nondiscrimination rules provide for two types of permissible wellness programs—participatory and health-contingent.

"Health-contingent programs are divided as well into activity-only and health outcomes," said Judith Wethall, an attorney with McDermott Will & Emery in Chicago.

If a vaccine surcharge or incentive program had been designated a participatory program, no maximum dollar limits would have applied to the amount of a vaccine surcharge or incentive, Keller noted. But if a program is health-contingent, the total incentives across all nontobacco wellness programs—including the vaccine surcharge—cannot exceed 30 percent of the total cost of the medical plan coverage in which the employee is enrolled.

There were good arguments that an incentive program is a participatory arrangement if participants simply need to show proof of vaccination to get an incentive or avoid a surcharge, Keller said. Classifying such an incentive program as participatory would have encouraged more employees to get vaccinated.

But in the Oct. 4 guidance, the Tri-Agencies said that incentives for getting a COVID-19 vaccination must comply with the five criteria for activity-only wellness programs:

- The program must give those eligible for the program the opportunity to qualify for the reward under the program at least once per year.
- The reward for the activity-only wellness program, together with the reward for other health-contingent wellness programs with respect to the plan, must not exceed 30 percent of the total cost of employee-only coverage under the plan. If the incentive or surcharge applies to the spouse and/or dependent, the "cost of coverage" is the employer-plus-employee share of family coverage that the family receives, Keller noted.
- The program must be reasonably designed to promote health.
- The full reward under the activity-only wellness program must be available to all similarly situated people. There must be a reasonable alternative standard—or waiver of the otherwise applicable standard—for obtaining the reward for anyone for whom, during that period, it is unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard.
- The plan or issuer must disclose—in all plan materials that describe the terms of an activity-only wellness program—any available and reasonable alternative standard that would qualify for the reward and, if applicable, the possibility of waiver of the otherwise applicable standard.

Suppose a group health plan offers a 25 percent premium discount for all participants who receive a COVID-19 vaccination and does not offer any other reward under other health-contingent wellness programs under the plan. The plan maintains a toll-free hotline to answer questions about vaccination and to help schedule appointments for vaccines. The plan provides the same premium discount to those for whom it is medically inadvisable to obtain a COVID-19 vaccine if the individual attests to complying with mask guidelines. The plan provides notice of the availability of this alternative to all plan participants. Participants may qualify annually for the premium discount.

Such a vaccine-incentive program meets the criteria to be an activity-only health-contingent wellness program, according to the Tri-Agencies. The reward does not exceed 30 percent of the total cost of employee-only coverage and provides a reasonable alternative standard that is not overly burdensome to qualify for the reward.

### Reasonable Accommodations

Employers need to offer reasonable accommodations to those employees who say they cannot be vaccinated because of a disability-related or religious objection. Keller said that the U.S. Equal Employment Opportunity Commission has outlined accommodation rules ([www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/if-workers-refuse-a-covid-19-vaccination.aspx](http://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/if-workers-refuse-a-covid-19-vaccination.aspx)) in the context of vaccine mandates—rules that "presumably also apply to incentives and surcharges."

In addition to wearing a face mask as a reasonable accommodation, an employee might "work at a social distance from co-workers or nonemployees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment," she said.

### Administrative Burden

Employers should evaluate whether a premium surcharge would motivate the company's employees to get the COVID-19 vaccine, said Nicole Bogard, an attorney with Barnes & Thornburg in Atlanta.

David Epstein, SHRM-SCP, director of domestic human resources at Doctors Without Borders in New York City, said "mandating vaccines is going to be the most effective method of getting people vaccinated." Research ([www.shrm.org/resourcesandtools/hr-topics/benefits/pages/premium-surcharges-can-motivate-vaccination-research-shows.aspx](http://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/premium-surcharges-can-motivate-vaccination-research-shows.aspx)) nonetheless indicates that premium surcharges can motivate vaccination.

"There is an administrative burden associated with implementing a compliant wellness program, including payroll, collecting vaccination status, implementing the reasonable alternative, handling claims and appeals by participants, and notifying employees of the reasonable alternative," Bogard said.

In addition, the incentive needs to be available for the entire 12-month period. "This means if a participant gets the COVID-19 vaccine or satisfies the reasonable alternative four months into the year and the plan charged the higher premium for those four months, the employer would need to stop the premium surcharge for the remaining eight months and refund the employee the premium surcharge for the four months," she said.

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