

Daily Labor Report ®

Red Tape, Legal Risk Douse Fervor for Surcharges on Unvaccinated

By Lydia Wheeler and Robert Iafolla

Sept. 3, 2021, 5:16 AM

- Delta Airlines' surcharge part of participatory wellness plan
- Fee similar to tobacco surcharge, attorneys say

Employers across the country are asking whether they can copy a major airline's plan to charge unvaccinated workers higher health-care premiums, but it may be more trouble than it's worth, legal observers said.

Delta Air Lines Inc. said last week that employees in the company's health plan who remain unvaccinated as of Nov. 1 will have to pay a \$200 monthly surcharge. The fee is a way to pressure workers to get vaccinated against the deadly coronavirus without making inoculation a condition of employment. It's a policy change, however, that comes with a multitude of regulatory requirements and can carry legal risks.

"I don't know that it will catch on like wildfire," said Judith Wethall, a partner at McDermott Will & Emery LLP who represents employer plans. "The compliance hurdles are tricky and kind of dilute the message."

There are fewer legal complexities in telling workers they have to be vaccinated to come back to the worksite, she said.

Wethall has had anywhere from 10 to 15 clients call since the Delta announcement was made, all asking what it would take to change their plans.

"As I'm talking to employers, once we discuss the nuances of complying with all those wellness regulations they're kind of like, 'Yeah, nah. Forget it,'" she said.

Regulatory Hoops

Under the Health Insurance Portability and Accountability Act's (HIPAA) antidiscrimination rules, employers are prohibited from charging someone higher premiums based on their health status, receipt of health care, or medical history.

But wellness programs are an exception, allowing employers to charge higher premiums or offer incentives to get employees to, for example, quit smoking or lose weight to be healthier. There are different requirements depending on whether that wellness program is “participatory” or “health contingent.”

If the program is health contingent, the surcharge would have to be capped at 30% of the employee-only premium cost. A reasonable alternative would have to be provided to anyone who can't get vaccinated due to a medical condition. Attorneys note employers would also have to refund the surcharges if an employee ultimately got vaccinated.

Reimbursements and rewards can't be contingent on a health outcome under a participation-only plan.

Delta's executive vice president and chief legal officer, Peter Carter, told Bloomberg Law its surcharge is part of a participatory wellness plan.

Gray Area

But federal regulators haven't said whether they consider vaccine incentives like Delta's surcharge participatory or health contingent.

“That area is sort of gray,” said Susan Nash, a partner at Winston & Strawn LLP who represents employers.

The Labor Department, which polices wellness program regulations, didn't provide a comment as to how it plans to classify vaccine incentives. The department has historically said smoking cessation programs are health contingent, lawyers said.

“I'd be very confused if the DOL now came out and said the vaccine program is participatory only,” Wethall said. “It seems to me like it's more analogous to the smoking cessation program.”

Coercion Question

Anti-discrimination laws also add another layer of uncertainty to mandates enforced through insurance surcharges. The Equal Employment Opportunity Commission's 2016 wellness plan regulations had allowed employers to offer incentives or penalties that would cover up to 30% of the cost of health coverage. But a court rolled that back in 2017, after AARP challenged whether a 30% wellness program incentive was actually voluntary.

The EEOC in January proposed new regulations that would limit employers to no more than “de minimis” incentives to encourage participation in wellness programs. Bottles of water would be acceptable, but gym memberships and airline tickets would not under the proposal, which is currently on hold.

The agency's May guidance on vaccine incentives said that they can't be coercive, though the lack of explanation about what counts as coercive left some employers wondering what would comply with anti-discrimination laws.

Additionally, employers must consider anti-bias requirements to accommodate workers who can't get vaccinated due to health conditions or religious beliefs, legal observers said.

Will It Work?

Aside from the regulatory requirements, it's unclear whether charging unvaccinated workers a higher premium will be effective in getting more of a company's workforce vaccinated.

"There's no evidence from other types of premium incentive programs that they change people's behavior," said Sabrina Corlette, co-director of the Center on Health Insurance Reforms at Georgetown University.

Yale University researchers found in 2016 that high to moderate surcharges for tobacco use didn't affect the likelihood of quitting smoking and those who faced low surcharges were less likely to quit. People facing high or moderate surcharges were also less likely to get health insurance, the study found.

"It is really unclear whether a health insurance surcharge is a good and effective policy," said Elizabeth Pendo, a health law professor at Saint Louis University School of Law.

'The Stick Approach'

One concern is that imposing surcharges basically puts an employer in the position of punishing its workers for not taking care of their health in the manner that it wants, Pendo said. Surcharges also carry the risk of nudging unvaccinated workers to drop their health insurance, she said.

Delta said it has seen "a five-fold increase" per day in the number of workers getting vaccinated against Covid-19 since its surcharge was announced. Carter, the company's chief legal officer, said worker vaccinations were averaging 11 per day, but that jumped to "55 in one day."

The airline's vaccination policy also includes requiring unvaccinated workers to wear masks and submit to regular testing, a "soft" mandate approach used by governments. But Delta's surcharge seems to give its mandate added heft.

"The philosophy behind the wellness plans is the carrot versus the stick," said Mark DeBofsky, principal shareholder of DeBofsky Sherman Casciari Reynolds P.C., who represents employees in benefit disputes. "The Delta plan, as I've read about it, seems to be the stick approach."

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