



Staff Recommendation

Utilizing Wellness Programs to Incentivize COVID-19 Vaccinations

Delta Airlines recently made headlines this month by announcing that it will charge employees on its group health plan a \$200 surcharge for failure to receive the COVID-19 vaccination. Although there is potential for conflict with a myriad of federal statutes this arrangement may be structured legally if done through a properly designed wellness program. This Staff Recommendation is intended to assist employers in identifying the legal issues needed to be addressed when considering whether to implement a similar incentive program in their own workplace.

Nondiscrimination Rules under the ACA and HIPAA

Both the Patient Protection and Affordable Care Act (“ACA”) and the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) generally prohibit group health plans and insurers from using health factors to discriminate among similarly situated individuals, including the amount of premiums charged for coverage. Stated otherwise, the statutes do not allow employers to charge employees different premium amounts for group health coverage based solely on a single health factor, such as vaccination status.

HIPAA’s nondiscrimination regulations, first issued in 2006, include an exception, however, that allows group health plans and health insurance issuers to establish different premium amounts if individuals adhere to the terms of a qualifying wellness program. Health care reform codified these HIPAA regulations into the provisions of the ACA and applied them to group health plans effective as of the first day of the plan year beginning on or after Jan. 1, 2014.

Wellness Programs

A wellness program is defined under the regulations as a “program of health promotion or disease prevention.” Wellness programs that comply with the regulations may offer participants a “reward,” which can be in the form of something affirmatively received (e.g., a discount or rebate of a premium or contribution), or something avoided (e.g., a penalty in the form of a premium surcharge).

There are two types of wellness programs.

- 1. Participatory wellness programs**, in which none of the conditions for obtaining the reward is based on the individual satisfying a standard relating to a health factor (e.g., a program reimbursing the cost of a gym membership).

2. Health-contingent wellness programs, in which the individual is required to satisfy a standard related to a health factor in order to obtain the reward. Health-contingent wellness programs are broken down further into two subcategories:

- **Activity-only wellness programs**, which require an individual to complete an activity related to a health factor in order to obtain the reward, but does not require the individual to attain or maintain a specific health outcome (e.g., program requiring participants to walk X amount of steps per day); or
- **Outcome-based wellness programs**, which require an individual to attain or maintain a specific health outcome (e.g., to participate in a program with the ultimate goal is quitting tobacco, where the reward is contingent upon tobacco cessation).

An employer adopting a wellness program with the reward based on the vaccination status of employees is a health-contingent wellness program and an activity-only wellness program. It is not a participatory wellness program, as the reward is conditioned upon the individual satisfying a standard relating to a health factor, but the individual is not required to attain or maintain a specific health outcome (it is possible that vaccinated individuals will still contract COVID-19).

Requirements for Activity-Only Wellness Programs

A health-contingent wellness program that is an activity-only wellness program qualifies for the exception to HIPAA and ACA's nondiscrimination requirement only if the following requirements are satisfied.

- 1. Frequency of Opportunity to Qualify.** The program must give individuals eligible for the program the opportunity to receive the reward under the wellness program at least once per year.
- 2. Size of Reward.** The reward for the wellness program, together with the reward for other health-contingent wellness program with respect to the applicable group health plan, must not exceed 30% of the total cost of coverage. The cost of coverage is determined based on the total amount of employer AND employee contributions toward the cost of coverage.

Example: The total cost of health coverage for an employee is \$6,000 per year, of which he pays \$2,000 (employer pays remaining \$4,000). Under an eligible activity-only wellness program, the total reward for receiving the COVID vaccination could be up to \$1,800 (30% * \$6,000 = \$1,800).

- 3. Reasonable Design.** The program must be "reasonably designed" to promote health or prevent disease. This requirement is satisfied if the program has a "reasonable chance of improving the health of, or preventing disease in, participating individuals, and it is not overly burdensome, is not a subterfuge for discriminating based on a health factor, and is not highly suspect in the method chosen to promote health or prevent disease." This determination is made based on all facts and circumstances.

4. Uniform Availability and Reasonable Alternative Standards. The full reward under the activity-only wellness program must be available to all similarly situated individuals. To achieve this, a wellness program must:

- Allow a reasonable alternative standard, or waiver of the standard, for obtaining the reward for any individual unable to achieve the standard due to a medical condition; and
- Allow a reasonable alternative standard, or waiver, for obtaining the reward for any individual for whom it is “medically inadvisable” to attempt to achieve the standard.

In the case of the COVID vaccine, this means waiving the requirement for individuals with a valid medical reason for bypassing the COVID vaccine, with such individual eligible to receive the reward regardless of vaccination status. If reasonable under the facts and circumstances, a plan may seek verification that a health factor makes it difficult or inadvisable for the individual to achieve the standard, such as a statement from the individual’s doctor.

5. Notice of Availability of Reasonable Alternative Standard. The plan must disclose in all plan materials describing the activity-only wellness program the availability of a reasonable alternative standard to qualify for the reward (i.e., the possibility of waiver).

ADA Compliance Considerations

To complicate matters further, in addition to the ACA and HIPAA, employers implementing a wellness program aimed at encouraging COVID vaccination amongst its employees must address the Americans with Disabilities Act (“ADA”). In particular, employers offering wellness programs need to consider the two rules under the ADA prohibiting (1) discrimination based on disability, and (2) disability-related medical examination and inquiries. Assuming a waiver option is offered to employees medically unable to receive the vaccine, only the second rule is implicated by a wellness program focused on vaccination status.

Although the ADA prohibits disability-related medical examinations and inquiries, such prohibition is subject to two exceptions:

- If the medical examination or inquiry is “job-related and consistent with business necessity”; or
- For voluntary medical examination part of an employee health program, but only if such information is maintained pursuant to the confidentiality requirements of the ADA (separate from HIPAA privacy rules, which will also apply).

The Equal Employment Opportunity Commission (“EEOC”), the federal agency tasked with enforcing the ADA, has published Q&As addressing this issue, explicitly stating that an employer may offer an incentive to employees to voluntarily provide documentation or other confirmation of a vaccination received; such a document request is “not a disability-related inquiry covered by the ADA.” Other requirements under the ADA for voluntary wellness programs include the following requirements:

- The program must be reasonably designed to promote health or prevent disease.
- The potential reward is capped at 30% of the total cost of coverage (based on both employer and employee contributions) — this is the same standard as under the ACA and HIPAA.
- The employer cannot coerce employees into participating in the program.
- Written notice of the program must be provided to all participants.
- Any information obtained by the employer through its administration of the program must be kept confidential per ADA regulations.

Other Compliance Considerations

Cafeteria Plans. In addition to the issues described above, attempting to roll out this program mid-plan year could trigger a number of related cafeteria plan issues (e.g., possible midyear election changes prompted by a significant reduction or increase in the cost of health care coverage due to a wellness reward). The easiest way to avoid any complications with respect to cafeteria plans is to structure the wellness program to align with the new plan year, with eligibility for the wellness benefit determined prior the new plan year (likely coinciding with open enrollment).

Privacy and Confidentiality. HIPAA's privacy rules and the ADA's confidentiality rules apply to participant information obtained through participation in the wellness program.

ACA Implications of Surcharge. As discussed above, wellness programs can be structured to offer a reward in the form of a premium surcharge or discount. If offered as a surcharge, however, employers should be aware that this will have the effect of increasing the cost of coverage for purposes of calculating affordability under the ACA.



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