Benefits BULLETIN

Incorporating the COVID-19 Vaccine into a Wellness Program: Critical Considerations for Employers

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On August 23, 2021, the U.S. Food and Drug Administration (FDA) granted full approval to the Pfizer/BioNTech COVID-19 vaccine – the first such approval of its kind. Along with expanded access to the vaccine, the FDA's announcement is likely to cause an increase in vaccine mandates in both the private and public sectors. In lieu of a mandate, though, some employers may instead prefer to incentivize employees to get vaccinated.

Applying a Premium Discount or Surcharge to Incentivize Vaccination

One of the most practical ways of incentivizing vaccinations is to apply either a discount or a surcharge on the portion of the medical insurance premium for which employees are responsible. Under such a program, an employee who gets vaccinated will receive a discount to their premium or, in the inverse, an employee who does not become vaccinated will be required to pay a surcharge on their medical insurance premium.

Commonly, a premium discount or surcharge program will apply to tobacco use, but the same approach can be extended to the COVID-19 vaccine. And like programs aimed at decreasing tobacco use, vaccine incentivization initiatives will necessarily take the form of a wellness program, which triggers a variety of critical compliance considerations.

HIPAA's Nondiscrimination Exception for Wellness Programs

The Health Insurance Portability and Accountability Act (HIPAA) generally restricts group health plans from using health factors (such as vaccination status) to discriminate among similarly situated individuals with regard to premiums and contributions. Importantly, HIPAA also contains an exception to this rule where individuals participate in a wellness program that meets specific design-based criteria.

For purposes of this exception, wellness programs are categorized as either participatory or health contingent. A program that incentivizes the COVID-19 vaccine would likely be deemed an activity-only health contingent program. This type of program needs to satisfy five criteria to qualify for HIPAA's nondiscrimination exception:

- **Reward Frequency**. The program must provide individuals an opportunity to qualify for the reward at least once per year.
- **Reward Size**. The reward cannot exceed 30% of the cost of coverage.
- **Reasonable Design**. The program must be reasonably designed to promote health and cannot be unduly burdensome.
- **Uniform Availability and Reasonable Alternative Standard**. The full reward must be available to all similarly situated individuals by allowing a reasonable alternative standard (or a waiver of standard) for any individual for whom it is unreasonably difficult or inadvisable due to a medical condition.
- **Notice of Availability**. In all materials that describe the terms of the program, the plan must disclose the availability of the reasonable alternative standard.

A wellness program that qualifies for the nondiscrimination exception is permitted to vary premium or contribution rates based on COVID-19 vaccination status.

The Evolving Voluntary Standard under the ADA

In addition to the nondiscrimination exception under HIPAA, a wellness program that provides or administers the vaccine to employees will need to comply with the Americans with Disabilities Act's (ADA's) voluntary standard. This rule requires any medical examination or inquiry (including those made in connection with administration of a vaccine) to be entirely voluntary.

One of the five criteria of this voluntary standard has been the subject of much back-and-forth within the Equal Employment Opportunity Commission (EEOC). In 2016, the EEOC imposed a limit on the size of rewards offered under a wellness program to no more than 30% of the cost of coverage. But following the release of this rule, a federal court found that the 30% reward limit was not a reasonable interpretation of the term "voluntary," and the rule was ultimately vacated.

In early 2021, the EEOC issued a new and dramatically different version of this rule. Instead of applying a 30% limit on the size of the reward, the EEOC instead proposed to limit the reward to nothing more than a de minimis incentive, such as a mug or t-shirt. This proposed revision of the ADA's voluntary standard was quickly withdrawn.

At present, there is no specific reward limit under the ADA's voluntary standard. But the EEOC's prior attempts at imposing a limit are instructive. In short, the greater the value of the reward, the less likely the program is to be deemed voluntary.

Next Steps

As employers continue to consider the impact of COVID-19 and vaccine availability on their workplace, they'll need to take into account the unique makeup of their workforce. Where a vaccine mandate may risk a negative impact on employee relations and morale, incentivization through a wellness program could be a preferable alternative.

In implementing a program, employers should determine the specific action to incentivize (e.g., receipt of one dose of the vaccine, the full dose, or any follow-up boosters) and the type of reward that will be most effective. Based on the chosen design, employers should then carefully review the related compliance obligations; these are not limited to HIPAA and the ADA, but also include requirements under ERISA, COBRA, GINA, and the ACA.

Finally, given the anticipated prevalence of vaccine incentivization initiatives, we can expect the Department of Labor and the EEOC to undertake more visible enforcement efforts. Employers, then, should be aware that new guidance could be issued by these agencies in the future, and will need to be prepared to make any necessary modifications to their wellness programs.

ADDITIONAL RESOURCES

Navigating the Complex Landscape of Wellness Programs
Webinar Presentation, September 17, 2020
Webinar Presentation Slides | Webinar Recording