

Departments Say HIPAA Permits Group Health Plan Surcharges, Discounts on COVID-19 Vaccinations

New FAQs Classify COVID Vaccination Incentives by Health Plans as Activity-Based Wellness Programs Under HIPAA

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The U.S. Departments of Labor, Treasury, and Health and Human Services (the Departments) issued frequently asked questions (FAQs) providing guidance for employer group health plans on practices regarding COVID-19 treatments and services.

Most significantly for employers contemplating vaccination incentives, the Departments stated that an employer group health plan may offer participants a premium discount – or, alternatively, impose a premium surcharge – regarding COVID-19 vaccinations, if the discount or surcharge meets the activity-based wellness program rules under HIPAA.

Classification of a health plan's COVID-19 vaccination program as an activity-based wellness program limits the conditions under which an employer must provide an employee who objects to the vaccination with an alternative method of avoiding the surcharge or receiving the discount. As an activity-based wellness program, the reasonable alternative must be provided only in situations where it is “unreasonably difficult” or “medically inadvisable” for an employee to be vaccinated. The incentives also are limited to 30 percent of the total cost of employee-only coverage. The Departments caution, however, that group health plans should consider compliance with other federal and state laws, such as the Americans with Disabilities Act, in structuring a program.

The FAQs also address the following issues:

- A group health plan may not condition eligibility for benefits or coverage for services to treat COVID-19 based on whether a participant is vaccinated.
- Premium discounts related to COVID-19 vaccination status are treated as not earned for purposes of determining affordability for the Affordable Care Act's employer shared responsibility (ESR) requirements.
- A group health plan must immediately cover COVID-19 vaccines and their administration without cost-sharing once a particular vaccine is authorized under an Emergency Use Approval (EUA) or approved under a Biologics License Application (BLA).

This Aon bulletin discusses this guidance below.

Premium Discounts and Surcharges Related to COVID-19 Vaccinations

Many employers have been considering or have implemented a premium surcharge or a premium discount for group health plan coverage based on whether a participant has received a COVID-19

vaccination. Up until now, the Departments have not addressed whether such a program would be required to comply with the HIPAA wellness rules as a participatory program, a health-contingent activity-only program, or a health-contingent outcomes-based program.

In the FAQs, the Departments state that a premium discount related to a COVID-19 vaccination is a program that requires an individual to perform or complete an activity related to a health factor. Therefore, a wellness program that provides a premium discount to individuals who obtain a COVID-19 vaccination must satisfy the following criteria:

- The program must be reasonably designed to promote health or prevent disease;
- The program must provide a reasonable alternative standard to qualify for the discount for individuals for whom it is unreasonably difficult due to a medical condition or medically inadvisable to obtain the COVID-19 vaccination (the reasonable alternative standard can include, e.g., a waiver of the initial standard or the right to attest to other COVID-19-related guidelines in order to earn the full reward);
- The plan must provide notice of availability of the reasonable alternative standard;
- The reward provided by the plan cannot exceed 30 percent of the total cost of employee-only coverage; and
- The plan must also give individuals eligible for the program the ability to qualify for the reward at least once per year.

Conditioning Eligibility for Benefits or Coverage for Otherwise Covered Items and Services on a Participant's Vaccination Status

The FAQs clarify that a group health plan cannot discriminate in eligibility for benefits or coverage based on whether an individual obtains a COVID-19 vaccination. The FAQs further clarify, that while HIPAA exempts compliant wellness programs from the general prohibition against discrimination based on a health factor, this exemption is available only for premium discounts, rebates, or modifications of cost-sharing mechanisms. It is not available for denying eligibility for benefits or coverage based on a health factor.

Impact on Affordability of Coverage Under 4980H(b) Related to the ESR Payment

The Departments reiterate that wellness incentives related to the receipt of COVID-19 vaccinations are treated as not earned for purposes of the 4980H(b) ESR affordability calculation. Although premium incentives are permissible as part of a nondiscriminatory wellness program, such premium incentives, including those encouraging COVID-19 vaccinations, are treated as unearned unless the incentive relates exclusively to tobacco use.

For example, when calculating a participant's contribution to determine affordability, the FAQs state that if a premium contribution is reduced by 25 percent based on whether an individual is vaccinated

against COVID-19, that reduction is disregarded when determining whether the coverage is affordable under the ESR provisions. Similarly, if an individual's premium contribution is increased by 25 percent if the individual is not vaccinated against COVID-19, that surcharge would be included (i.e., not disregarded) in assessing affordability.

When Plans Must Provide Coverage Without Cost-Sharing for COVID-19 Vaccines Under the CARES Act

The FAQs clarify that, effective January 5, 2021, a group health plan must cover, without cost-sharing, any COVID-19 vaccine authorized under an EUA or approved under a BLA immediately upon the vaccine's becoming authorized or approved. This coverage must be provided consistent with the scope of the EUA or BLA for the particular vaccine, including any EUA or BLA amendment, such as to allow for the administration of an additional dose to certain individuals, administration of booster doses, or the expansion of the age demographic for whom the vaccine is authorized or approved. The Departments note that group health plan sponsors may reasonably not have understood when coverage without cost-sharing was required to begin under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, given some confusion around the general recommendation for COVID-19 vaccines. Accordingly, the Departments will only enforce the timing requirement to cover without cost-sharing any COVID-19 vaccine authorized or amended under an EUA or approved under a BLA prospectively, to the extent additional coverage beyond prior guidance is required.

Resources

The FAQs can be found [here](#).



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