The Legal and Practical Implications of Charging Unvaccinated Employees More for Employer-Sponsored Medical Coverage

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Over the past few weeks, various news reports and opinion pieces have discussed whether employers can or should penalize employees who are not vaccinated against COVID-19 but participate in the employer's medical plan by charging those employees more for medical coverage.[1] The short answer to this question is that an employer group health plan that charges unvaccinated plan participants more for health coverage may do so only if the plan satisfies the HIPAA wellness program requirements. The longer answer is more problematic. In complying with the HIPAA wellness program rules, an employer not only might fail to increase the COVID-19 vaccination rate among plan participants but might end up paying incentives to unvaccinated employees.

This Aon bulletin discusses the following issues:

- How does HIPAA regulate health plan surcharges?
- What are the different types of wellness programs under HIPAA?
- How do the HIPAA wellness plan rules apply to COVID-19 vaccination programs?

How does HIPAA regulate health plan surcharges?

HIPAA became law in 1996 and prohibits group health plans from discriminating against participants in eligibility, benefits, or premiums based on a health factor. Under HIPAA, a "health factor" includes an individual's health status, medical condition, receipt of health care, and medical history. Any one of those factors is broad enough to include whether an individual has received a COVID-19 vaccination. So without some sort of exception, employer group health plans cannot treat unvaccinated individuals differently from vaccinated individuals.

However, there is an exception: HIPAA allows plans to charge different premium amounts to participants in return for that participant's complying with programs of health promotion and disease prevention—what we know as wellness programs.

What are the different types of wellness programs under HIPAA?

There are two: participatory programs and health-contingent programs. It's the latter type that we're concerned about, but let's talk about both.

HIPAA's wellness program rules set out specific requirements that plans must meet in order to offer wellness programs that provide incentives or impose surcharges[2] for completing certain activities or meeting certain outcomes related to health standards. The requirements differ depending on whether the program is a participatory wellness program or a health-contingent wellness program. For an employer that is considering

[1] See, e.g., "Can insurance companies charge unvaccinated patients higher premiums?" (cnbc.com); "Could Health Insurance Cost More for the Unvaccinated?" – NBC Boston; "Employers: Tie health insurance rates to vaccination status?" (BenefitsPRO); "Opinion | Don't Want a Vaccine? Be Prepared to Pay More for Insurance" - The New York Times (nytimes.com).

[2] Under HIPAA, these are two sides of the same coin—an incentive (reducing premiums for achieving a certain health status) is the same thing as a penalty (charging a surcharge for not achieving a certain health status).

charging higher premiums to unvaccinated participants, the HIPAA rules for health-contingent programs are the ones that apply.

Health-contingent programs are divided into two types—activity-based programs and outcomes-based programs. An activity-based program is a program where participants complete a specific activity related to a health factor to earn an incentive without requiring the participant to meet a specific health outcome. Examples of activity-based programs include meeting certain walking, dieting, or exercise goals. Outcomes-based programs are those that require participants to meet certain health outcomes, such as meeting a specific BMI target or non-smoking status.

Here's where it gets tricky: both types of programs must provide a participant with a reasonable alternative standard if the participant cannot meet the initial standard. But in the case of an outcomes-based program, that reasonable alternative standard must be provided to any participant who doesn't meet the initial standard.

How do the HIPAA Wellness Plan Rules apply to COVID-19 vaccination programs?

What does all this have to do with charging higher premiums to unvaccinated plan participants? Requiring a participant to pay a higher premium to obtain or maintain a particular health status (like being vaccinated against COVID-19) is an outcomes-based program under the HIPAA wellness rules. And since an outcomes-based program has to offer a reasonable alternative standard to any participant who doesn't meet the initial standard (in this case, being vaccinated), the plan will have to provide another way for an unvaccinated participant to avoid the surcharge and pay the same premium as a vaccinated person.[3]

So if the goal is to get more employees vaccinated, a wellness program is not guaranteed to produce that result, since a participant can pay the reduced rate even without being vaccinated, as long as they complete a reasonable alternative standard. Employers see this all the time with tobacco users. As any employer who has implemented a smoker surcharge knows, a plan can't actually require people to quit smoking—it has to offer a reasonable alternative standard to smokers to avoid the surcharge, such as attending and completing a tobacco cessation class.

A similar approach would be necessary for a program that requires participants to be vaccinated in order to avoid paying more for health care coverage. The plan would have to offer a reasonable alternative standard to those who did not meet the "health status" or "medical condition" of being vaccinated. This might include things such as listening to an education seminar about the effectiveness of the vaccine or attending a session on the dangers and transmission rates of COVID-19 and the variants.

But it can't require getting a vaccination. Just like the tobacco user who can't be forced to quit smoking, an unvaccinated participant would not have to get vaccinated in order to pay the same premium or to receive the same incentive as everyone else. At best, a wellness plan might persuade some unvaccinated individuals to become vaccinated, just not as many as the plan sponsor had hoped. At worst, however, the plan would end up subsidizing unvaccinated participants by providing an incentive to remain unvaccinated but complete the reasonable alternative standard.

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[3] Some practitioners may argue that a wellness program that requires an individual to be vaccinated against COVID-19 in order to pay a reduced premium amount is an activity-based wellness program because the program is requiring the participant to undertake a certain activity related to a health status (i.e., get vaccinated). However, we think the better argument is that the program requires the participant to obtain or maintain a certain status (i.e., being vaccinated) in order to receive the reduced premium amount. Therefore it is an outcomes-based program. This is similar to a program that provides for reduced premiums for non-tobacco users, which are outcomes-based programs, based on the participant's status as a non-tobacco user. As noted above, outcomes-based wellness programs must provide a reasonable alternative standard for anyone who does not meet the initial standard.

The same problem is present in wellness programs that operate on a "points" system, in which participants earn a certain number of "wellness points" based on completing several health activities, with each activity worth a certain number of points towards the total goal. Earning points by getting a COVID-19 vaccination could be a permissible option under such a points system, provided the same total goal could be earned by a participant who chose not to get vaccinated. The result is the same—under the HIPAA wellness rules, the program may not increase vaccination rates and could end up subsidizing unvaccinated participants.

Conclusion

Employers have taken other approaches to increasing vaccination rates that don't involve the medical plan. Some employers are offering incentives to get vaccinated or requiring employees to be vaccinated without regard to whether employees participate in the medical plan. While those approaches have the advantage of avoiding all the rules above, they implicate other laws like the Americans with Disabilities Act, Title VII of the Civil Rights Act, and state laws. Employers should review all these approaches with counsel to address legal issues, employee relations concerns, and hiring and retention strategies.

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