

Department of Labor Responds to COVID-Related Medical Premium Discounts and Surcharges

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Over the past few months, many employers have announced plans to encourage COVID-19 vaccination among their workforce by implementing either medical premium discounts for the vaccinated or surcharges for the unvaccinated. While most practitioners agreed there was a sound legal basis for such implementation with a wellness program, there were some unresolved issues and growing calls for additional guidance.

Last week, the U.S. Department of Labor (“Department” or “DOL”) provided much-welcomed guidance in the form of Frequently Asked Questions.

Wellness Program - Premium Discount for Vaccinated Employees

First, the Department confirmed that, for so long as it is done in compliance with the health-contingent wellness program regulations, a group health plan (or health insurance issuer offering coverage in connection with a group health plan) may offer participants in the plan a premium discount for receiving a COVID-19 vaccine and, conversely, may implement a surcharge for unvaccinated employees.

To satisfy the wellness program regulatory criteria, the discount or surcharge must meet the following:

- The program must be reasonably designed to promote health or prevent disease and must provide a reasonable alternative standard to qualify for the
- The plan must provide notice of the availability of the reasonable alternative standard under the wellness
- The reward the plan provides in connection with the vaccine incentive program must not exceed 30 percent of the total cost of employee-only coverage and must give individuals eligible for the program the opportunity to qualify for the reward under the program at least once per

The guidance clarified one point that had remained unanswered. Wellness programs are classified as either participatory or health-contingent. This distinction is important because participatory wellness programs satisfy HIPAA nondiscrimination rules if the program is made available to all similarly situated individuals—i.e., no need to satisfy the additional criteria above. By characterizing the discount-for-vaccine benefit as an activity-only, health-contingent benefit, the Department signaled the need to apply the more stringent criteria.

Note that while the Biden administration indicated in a recent Executive Order that one potential alternative to vaccination would be weekly testing, the Department's guidance uses a different "reasonable alternative standard" for purposes of this wellness program guidance. The standard approved in the FAQ merely requires that "the individual attest[] to complying with the CDC's mask guidelines for unvaccinated individuals."

Interestingly, note the Department has resurrected the 30 percent standard in this guidance. This limit was included in the 2016 final regulations but became the subject of litigation. At the end of 2017, a district court vacated the incentive provisions of the EEOC's 2016 final regulations, effective January 1, 2019, including the 30 percent standard.

Affordable Care Act – Affordability Threshold

Second, the guidance made clear that when determining whether employer-sponsored health coverage meets affordability standards under the Patient Protection and Affordable Care Act (PPACA), the employer must consider the undiscounted rate. This position is consistent with prior guidance. As a general rule, premium incentives *other than incentives relating exclusively to tobacco use* must be treated as not earned when determining the employee's required contribution for an offer of health coverage.

There are a number of methods employers may use to verify they are complying with the PPACA's affordability threshold. What this guidance makes clear is that despite an employer's intentions to encourage vaccination, its plan structure and employee premium obligations may limit the extent to which it can pursue a discount or surcharge.

Parting Thoughts

One thing that we've all come to expect since the onset of COVID-19 is that employers will have to stay nimble to react and implement a multi-layered response to the pandemic. Employers must stay engaged daily to adjust administrative practices supporting their benefit plans. The new guidance regarding vaccination wellness incentives is no exception. As the new year approaches and open enrollment programs are revised, these new DOL FAQs provide some helpful guidance.