



COVID-19 Vaccination Status and Group Health Plan Design Choices

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As the United States continues to battle the COVID-19 pandemic, vaccinations of Americans age 12 and older is underway with approximately half of the eligible population vaccinated against the virus. In the United States, there are currently three vaccines — one from Moderna, one from Pfizer and one from Johnson & Johnson — that are available, with distribution being handled at the state and local level.

To help combat the pandemic, many employers are implementing some level of a vaccine mandate at work, with some employers requiring all employees who return to the office to be vaccinated (e.g., Google, Facebook), requiring all new hires to show proof of vaccination (Delta Airlines) or merely requiring all their U.S.-based employee population to be vaccinated by a certain date (United Airlines). Members of the United States military will also be required to be vaccinated as a matter of national security to maintain military readiness.

As businesses are eager to return to the office and bring customers back on-site as applicable, many employers are wondering if *they can modify their group health plan design to provide richer benefits for employees who are vaccinated.*

Specifically, employers are wondering if:

- They can limit eligibility for their group health plan to only employees who have received the vaccine (or who have a medical or religious waiver);
- They can charge vaccinated employees lower premiums, co-pays, or deductible limits (or, conversely, charge non-vaccinated employees higher premiums, co-pays or deductibles);
- Exclude all COVID-19 treatment from group health plan coverage for employees who are not vaccinated (example: the plan would deny all claims for out-patient, in-patient or prescription drug treatment of COVID-19 for individuals who are not vaccinated);
- Provide larger HAS, HRA, or FSA contributions to individuals who are vaccinated.

At the most basic level, employers must remember that although HIPAA does not prevent an employer or business from asking an individual to share their vaccination status, it does prevent group health plans and insurers from discriminating against individuals with regard to eligibility and health status-related factors.

Under HIPAA, health factors are,

- Health status
- Medical condition (physical and mental)
- Claims experience
- Receipt of health care
- Medical history
- Genetic information
- Evidence of insurability
- Disability

Under these rules employers cannot exclude individuals from their health plan based on their health status or medical history (which would include COVID-19 vaccination status), or charge individuals different premiums based on the existence or absence of health factors.

The only time premium, co-pay or deductible differences based on health factors is permissible is when it is done in conjunction with a bona fide wellness program. Wellness programs can be complex, as they must comply with regulations beyond HIPAA, including the Patient Protection and Affordable Care Act (ACA), Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). These regulations form the basis of much of the Department of Labor and EEOC guidance on COVID-19 vaccines, including rules regarding vaccine requirements and incentives.

Under existing guidance, wellness programs subject to DOL rules are considered either participatory or health-contingent. A participatory program is one that either has no reward or penalty (such as providing free flu shots) or simply rewards participation (such as a program that reimburses the cost of a membership to a fitness facility or the cost of a seminar on nutrition). These programs have less regulatory oversight than health-contingent programs. Employers who simply wish to provide a free vaccine clinic on site would fall under these rules.

Health-contingent wellness programs are programs that base incentives or requirements in any way on an employee's health status and are either classified as "activity only" or "outcome-based." Health status includes vital statistics such as body mass index (BMI), blood glucose level, blood pressure, cholesterol level, fitness level, regularity of exercise and nicotine use.

If an employee wished to amend their group health plan to charge employees who are vaccinated lower premiums, co-pays, or deductible limits (or, conversely, charge non-vaccinated employees higher premiums, co-pays or deductibles), they would be subject to the rules for health-contingent wellness programs.

A wellness program with health-contingent requirements must meet all these basic requirements:

- Give employees a chance to qualify for the incentive at least once a year;
- Cap the incentive at 30% of the total cost of employee-only coverage under the plan, including both the employee and employer contributions, with a 50% cap for tobacco cessation or reduction (when wellness programs are also subject to ADA/GINA, incentives must not be so great as to compel participation, which is a fact-sensitive analysis);
- Be reasonably designed to promote health or prevent disease;
- Make the full reward available to all similarly situated individuals with a "reasonable alternative" method of qualifying for the incentive for some individuals (this would include employees who are unable to receive the vaccine due to a medical condition or who qualify for a religious exemption);
- Describe the availability of the alternative method of qualifying for the incentive in written program materials.

Wellness programs that are subject to the ADA must also be designed to be "voluntary." A wellness program is generally subject to the ADA if it involves a medical exam or disability-related inquiry. For example, if an employer's wellness program includes a COVID-19 vaccine requirement and the employer intends to ask why an employee did not receive the vaccine as a condition of providing the reasonable alternative, the program must be ADA-compliant.

For a wellness program to be voluntary it must not:

- Require employees to participate (in other words, the incentive or penalty must not be so great as to compel participation);
- Does not deny coverage under any of its group health plans or particular benefits packages within a group health plan for non-participation; and
- Does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten employees within the meaning of Section 503 of the ADA.

These rules would prevent any design in which an employer attempted use vaccinated status as a "gatekeeper" to richer or less expensive plans than those available to individuals who are not vaccinated. Wellness program rules also prohibit a plan design that

limits health plan eligibility to only vaccinated individuals, and they prohibit denying COVID-19 treatment claims for individuals who are not vaccinated.

Furthermore, for a program to be considered voluntary, employers must provide a notice that clearly explains what medical information will be obtained, who will receive that medical information, how the medical information will be used, the restrictions on its disclosure and the methods the covered entity will employ to prevent improper disclosure of the medical information.

HSA, HRA, or FSA Contribution Enhancements

Some employers are interested in providing vaccinated employees a greater FSA, HRA or HSA contribution than non-vaccinated individuals. Although this is a generally acceptable practice as long as all wellness program regulations are followed, employers should be sure that any contribution falls within the annual regulatory limits, meets the “uniform coverage rule” that requires employer FSA contributions to be available at the start of the coverage period, and assures that appropriate non-discrimination testing is being done depending on the plan’s design. Given the strict tax regulations around these account-based plans, employers might find it administratively simpler to provide vaccinated employees with one-time taxable spot bonuses.

Practical Considerations

If an employer wishes to move forward with a plan design that charges employees who are vaccinated lower premiums, co-pays or deductible limits (or, conversely, charges non-vaccinated employees higher premiums, co-pays or deductibles) the employer will need to confirm that their health insurance carrier (fully insured) or third-party administrator (self-funded plans) can practically administer the plan with three sets of participants and two different designs:

Those who are vaccinated	Richer benefit
Those who are not yet eligible for the vaccine (under age 12) have a religious exemption or have a medical reason that precludes them from receiving the vaccine	Richer benefit
Those who are unvaccinated	Lower benefit

This design feature might not be administratively feasible for all carriers and TPAs. Employers should also consider the impact on company culture if their employees object to vaccines for personal reasons and understand that some employees might not support this program.

Summary

Can an employer limit eligibility for its group health plan to only employees who have received the vaccine (or who have a medical or religious waiver)?	Prohibited under existing regulations (penalty of \$100/day per applicable individual).
Can an employer charge vaccinated employees lower premiums, co-pays or deductible limits (or, conversely, charge non-vaccinated employees higher premiums, co-pays or deductibles)?	Permissible if done in conjunction with a properly designed wellness program, including ensuring the program is voluntary and designed with incentive limits in place, along with a statement that those limits are subject to change.
Can an employer exclude all COVID-19 treatment from group health plan coverage for employees who are not vaccinated? (Example: The plan would deny all claims for out-patient, in-patient or prescription drug treatment of COVID-19 in individuals who refused to be vaccinated.)	Prohibited under existing regulations (penalty of \$100/day per applicable individual).
Can an employer provide larger HSA or FSA contributions to individuals who are vaccinated?	Permissible if done within existing regulatory guidance for wellness programs and additional applicable limitations and non-discrimination testing is considered.

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