



UBA  
Compliance Advisor

## What every HR leader should know about compliance



### Six Employer Questions to Answer Before Imposing a Surcharge on Unvaccinated Workers

**Read time: 5 minutes**

Many employers are struggling to increase COVID-19 vaccination rates among their workforce, concerned not only about both the safety of the workforce but also the costs of COVID-19 treatment that could be avoided through vaccination. Some are now turning to the possibility of a higher premium cost, or surcharge, for any group health plan participants who remain unvaccinated. What are the hurdles you would have to navigate if you want to impose such a surcharge on your unvaccinated workers? Here are the six questions you need to resolve before undertaking such a plan.

#### **HIPAA Violations Can Be Avoided**

Treating group health plan participants differently based upon a health factor – such as whether a participant received a vaccine – is generally prohibited by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). There is, however, a narrow exception for arrangements that comply with the wellness program rules in the HIPAA regulations. Under a compliant program, an employer may condition an incentive, offered in terms of the amount of employee premium contribution, on an employee's participation in a wellness program. Many employers are already familiar with such a system as it pertains to a smoking cessation program.

You can develop a properly designed wellness program that takes vaccine status into account. Such a program must comply with all HIPAA wellness program rules and also reflect compliance with recent EEOC guidance related to vaccine accommodations.



## The Six Key Questions

When considering implementing a program that imposes a surcharge on your unvaccinated workers, you should ask the following questions:

1. *Does the surcharge comply with wellness incentive limits, taking into account existing incentives (such as existing smoking cessation or biometric screen programs)?*

Incentives are limited to 30% (up to 50% for tobacco surcharges) of the total cost of employee-only coverage. Adding a new incentive could cause your plan to exceed the limit, which would require reducing or modifying other incentives to allow for a vaccine-related incentive.

2. *Does the surcharge allow you to maintain compliance with the ACA Employer Mandate affordability rules?*

Non-tobacco related wellness incentives must be treated as “not met” for purposes of determining ACA affordability. Adding a vaccine-related surcharge effectively increases the cost to employees and makes it more difficult to offer the coverage at an affordable contribution amount.

3. *Can this be implemented mid-plan year, and if so, may employees opt out if they experience a significant cost increase?*

4. *Does the reasonable alternative standard offered comply with the activity-only or outcome-based rules?*

These two types of health contingent wellness programs have different rules for the employees to whom the alternative must be offered – all employees, or just those that have a valid need for an accommodation.

5. *Do state laws prevent, or otherwise limit, such a program?*

6. *Will booster shots be required to earn the incentive, and if so, at what point will you conclude that booster shots are necessary for workers to be considered “fully vaccinated”?*

## Proceed with Caution

Some employers have considered limiting group health plan coverage to those that are vaccinated, or perhaps limiting health plan claims for COVID-19-related illnesses to only those that are vaccinated. However, these suggestions would clearly violate HIPAA non-discrimination rules, and therefore should be avoided.

We'll monitor the situation and provide updates as developments occur.

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