

# What to Consider Before Implementing a Health Insurance Surcharge for Unvaccinated Employees

## Labor & Employment Law Update

By Kelly Haab-Tallitsch on September 7, 2021



The recent announcement that Delta Airlines will begin imposing a \$200 per month health insurance surcharge on unvaccinated employees has prompted many employers to consider whether a similar surcharge may be an alternative to mandating COVID-19 vaccinations for employees.

But the myriad of laws governing group health plans require that employers tread carefully. This is an approach that comes with a multitude of regulatory requirements and may carry legal risks. Employers implementing a health insurance surcharge must comply with federal anti-discrimination laws requiring exceptions for medical conditions or a sincerely-held religious belief, and should consider the impact of a surcharge on the health plan's affordability under the Affordable Care Act (ACA).

### **Exceptions for Medical Conditions and Religious Beliefs**

Premium surcharges or other incentives tied to a group health insurance plan trigger the Health Insurance Portability and Accountability Act's (HIPAA) wellness program rules. HIPAA prohibits employers from charging employees different premiums based on a health factor; however, an exception exists for wellness programs, allowing employers to charge higher premiums or offer incentives to get employees to take certain actions or meet specific health-related goals, provided the wellness program meets certain requirements.

The requirements for wellness programs are different depending on whether a program is "participatory" or "health contingent." It is unclear whether a COVID-19 vaccination surcharge would be considered a "participatory" or "health

contingent” wellness program. In order to avoid potential penalties for noncompliance, an employer should assume it is a health-contingent wellness program, similar to smoking cessation programs that impose a surcharge on smokers. Under a health-contingent wellness program an employer must offer a “reasonable alternative standard” to employees that are unable to receive the COVID-19 vaccine due to a medical condition. This means that these employees must be allowed to avoid the surcharge by meeting a different requirement. One example would be allowing an employee to avoid the surcharge by undergoing weekly or biweekly COVID-19 testing or by watching a video on vaccine safety and the dangers of remaining unvaccinated.

Under Title VII, employers must also provide an accommodation to an employee that is unable to receive the COVID-19 vaccine due to a sincerely-held religious belief.

### **ACA Affordability and Surcharge Limits**

Under the HIPAA wellness plan rules, a surcharge cannot exceed 30 percent of the cost of employee-only coverage under the health plan. This is a fairly high limit and typically does not present an issue. But employers subject to the ACA employer mandate and considering surcharges should also confirm that the cost of the health plan including the surcharge still meets the ACA affordability requirements. In order to avoid triggering a penalty under the ACA, the cost for employee-only coverage under the lowest cost health plan option can be no more than 9.83% of the employee’s income. Depending on current health plan premiums, even a small surcharge can cause premiums to exceed the affordability threshold for lower wage employees.

### **Next Steps**

An employer considering implementing a vaccine surcharge should consider the alternative standard(s) the employer is willing and able to offer employees who cannot receive the vaccine due to a medical condition or sincerely-held religious belief, taking into account the administrative requirements of the alternative standard (i.e., monitoring of weekly COVID-19 test results), and analyze the impact of the proposed surcharge on the employer’s compliance with the ACA affordability requirements. Employers should consult with employee benefits counsel before implementing a health insurance surcharge to ensure compliance.

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