

COVID-19 Vaccination Status and Group Health Plan Design FAQs

The following FAQs were created in response to an uptick in questions about using benefit plan design options to encourage participants and their beneficiaries to obtain the COVID-19 vaccine.

Briefly:

- Excluding coverage for COVID-19 related claims for unvaccinated participants and beneficiaries while providing such coverage for vaccinated members may be problematic under the HIPAA nondiscrimination rules.
- If appropriately designed as a HIPAA health contingent wellness program, a plan may offer a reward, such as a premium discount, for employees who show proof of vaccination (or a surcharge for those who are unvaccinated). Any reward would be limited to no more than 30% of the total cost of coverage and an employer must provide a reasonable alternative to obtain the reward for any individual for whom it is unreasonably difficult due to a medical condition (or medically inadvisable) to obtain the vaccine (and possibly a reasonable accommodation under EEOC ADA/Title VII guidance).
 - If the employer (or the employer's agent) administers the COVID-19 vaccine, the amount of the reward is further limited.

Q1: Our group health plan currently provides coverage for medical care needed to treat COVID-19. To encourage employees (and their covered dependents) to get vaccinated, can we exclude coverage for COVID-19 related claims for unvaccinated members?

Perhaps not. Excluding coverage for COVID-19 claims of unvaccinated individuals may violate the HIPAA nondiscrimination rules and it is questionable whether this type of plan design could comply with HIPAA wellness rules, or at least the application of such rules may be administratively impractical.

HIPAA nondiscrimination rules¹ generally prohibit a group health plan from establishing any rule for eligibility (including continued eligibility) of any individual to enroll for benefits under the terms of the group health plan that discriminates based on any health factor that relates to that individual or a dependent of that individual. For this purpose, a rule for eligibility includes rules relating to benefits (including rules relating to covered benefits, benefit restrictions, and cost-sharing mechanisms such as coinsurance, copayments, and deductibles). A health factor may include a participant's (or beneficiary's) vaccination status.²

Benefits provided under a plan must be uniformly available to all similarly situated individuals.³ Any restriction on benefits must apply uniformly to all similarly situated individuals and must not be directed at individual participants or beneficiaries based on any health factor of the participants or beneficiaries (determined based on all the relevant facts and circumstances).

For example, a plan may limit or exclude benefits in relation to a specific disease or condition, limit or exclude benefits for certain types of treatments or drugs, or limit or exclude benefits based on a determination of whether the benefits are experimental or not medically necessary, but only if the benefit limitation or exclusion

¹ 54.9802-1(b).

² 54.9802-1(a). Health factors include:

- Health status
- Medical condition (physical or mental illness)
- Claims experience
- Receipt of health care
- Medical history
- Genetic information
- Evidence of insurability (including conditions arising out of acts of domestic violence)
- Disability
- Any other health status related factor determined by regulation.

³ "Similarly situated individuals" are essentially individuals grouped together based on a bona fide employment-based classification consistent with the employer's usual business practice. Creating separate groupings of employees as "Vaccinated" and "Unvaccinated" would not fit this criterion.

applies uniformly to all similarly situated individuals and is not directed at individual participants or beneficiaries based on any health factor of the participants or beneficiaries.

A benefit limitation or exclusion that targets unvaccinated individuals may be viewed as targeting individual participants or beneficiaries based on a health factor. There is an exception to this prohibition when the benefit change is made on the first day of the plan year versus mid-year so that a plan may exclude coverage for all COVID-19 related treatment, but that would need to be applied uniformly to all similarly situated individuals (vaccinated and unvaccinated). Any such change would need to be made effective no earlier the first day of the plan year versus mid-year.⁴ However, it is unlikely that a group health plan would want to exclude coverage for all COVID-19 related treatment, as such a design would exclude coverage for individuals who cannot be vaccinated (e.g., children under age 12) and “breakthrough cases” for vaccinated participants.

There is a question as to whether an employer could follow the wellness rules for HIPAA health contingent programs, as discussed in detail in Q2 below, to vary benefits offered under the plan for unvaccinated participants.⁵ While the existing HIPAA wellness regulations generally look to rewards impacting employee premiums or cost-sharing mechanisms (e.g., deductibles, copayments, or coinsurance), it is at least arguable that certain other benefit variations could apply to the extent they otherwise satisfied the wellness rules. However, practical administration of such limits would be challenging.⁶ Further guidance on this issue from the Departments would be helpful.

Employers should consult with counsel prior to adopting any strategy to exclude coverage for COVID-19 treatment under the terms of their group health plan.⁷

Other notes:

- Group health plans may not deny eligibility for group health plan coverage based on a health factor. Plans should not limit eligibility to participants who are vaccinated.
- All group health plans must cover COVID-19 tests and other services resulting in an order for a COVID-19 test without cost-sharing, prior authorization or medical management (both in-network and out-of-network). This requirement applies for the duration of the Public Health Emergency Period.⁸
- Non-grandfathered group health plans must cover, without cost-sharing (both in-network and out-of-network⁹), qualifying coronavirus preventive services (which include vaccinations). Grandfathered group health plans are encouraged (but not required) to comply.

Q2: Can we charge unvaccinated employees “more” for their coverage?

Yes, in the context of a voluntary wellness program, rewards may be used to encourage participation, subject to specific rules.

Under the HIPAA rules, a reward may be offered to participants who obtain their COVID-19 vaccine under the HIPAA wellness program rules. Such a reward may, for example, involve either a premium discount or avoidance of a surcharge, or a reduced deductible or avoidance of an increased deductible. This type of arrangement is considered a health contingent program, and therefore specific rules apply:

- Individuals must have the opportunity to qualify for the reward at least once per year.

⁴ If looking to exclude coverage related to COVID-19, a best practice would be to adopt a plan amendment prospectively with the next renewal. Under the regulations, a plan amendment applicable to all similarly situated individuals under the plan and made effective no earlier than the first day of the first plan year after the amendment is adopted is not considered to be directed at any individual participants or beneficiaries. 54.9802-1(b)(2)(i)(C)

⁵ 54.9802-1(b)(2)(ii).

⁶ For example, how would the plan value the omission or limitation of benefits as it relates to COVID-19 treatment under the 30% reward limitation.

⁷ There is also a question as to whether a plan could use a source of injury exclusion to exclude coverage for unvaccinated individuals. Absent guidance, this would be an aggressive strategy.

⁸ For the most recent Public Health Emergency Renewal, visit <https://www.phe.gov/emergency/news/healthactions/phe/Pages/COVID-19July2021.aspx>. Informally, HHS officials indicated the Public Health Emergency is expected to last for the duration of 2021.

⁹ Out-of-network coverage required for the duration of the Public Health Emergency.

- The reward cannot exceed 30% of the cost of coverage under the plan.¹⁰ Keep in mind, if the wellness program uses other health contingent incentives (e.g., rewards for maintaining certain cholesterol levels, BMI levels, etc.), the maximum total incentive is capped at 30% of the total cost of coverage under the plan. In other words, all available rewards in a health contingent program (including a reward tied to receiving the COVID-19 vaccine) cannot exceed 30% of the total cost of coverage.¹¹
- The program must be designed to promote health and prevent disease.
- The reward must be available to all similarly situated individuals and a reasonable alternative must be made available to individuals who cannot meet the standard due to a medical condition or for whom it is medically inadvisable to satisfy the standard (i.e., an alternative way to qualify for the reward without getting the COVID-19 vaccine).
 - **USI Note.** While the Departments have not specifically commented on this issue, it appears reasonable that this type of program may be an “activity-based” health contingent program. A more conservative approach would be to treat the program as an “outcomes based” wellness program and provide a reasonable alternative in all situations.¹²
- Disclosure regarding the availability of a reasonable alternative must be included in plan materials.

Under the ADA and Title VII, a reasonable accommodation due to medical or religious reasons may also be required.

If the employer (or the employer’s agent) is administering the COVID-19 vaccine to employees, the 30% reward is further limited. Under EEOC guidance the reward cannot be “substantial” as this may indicate some degree of coercion from the employer to participate in the vaccination program. Unfortunately, the EEOC did not define what it means by “substantial”. Also, GINA rules prohibit incentives related to a spouse or child who obtains the vaccine from the employer (or the employer’s agent).

When the employer merely asks for proof of COVID-19 vaccination status, the EEOC rules do not further restrict incentives for the employee or family member.

Other notes:

- **Employer mandate.**
 - Employers subject to the Affordable Care Act’s employer health coverage mandate should keep in mind that “affordability” of offered coverage would be based on the base employee rate, plus any surcharge under a non-tobacco wellness program. Thus, to the extent an employer adds a premium surcharge for unvaccinated health plan participating employees, it can impact whether offered coverage is affordable. With respect to an adjustment to a plan’s cost-sharing feature, such as an increased deductible for unvaccinated employees, that can impact a plan’s actuarial value, which must be at least 60% to meet “minimum value.”
- **Mid-year changes and cafeteria plan rules.**
 - Employers seeking to implement wellness program rewards in the middle of the plan year should be cognizant of cafeteria plan rules on mid-year election changes. For example, changes in premiums would constitute cost changes (which may be significant), and changes in deductibles may constitute a coverage curtailment or improvement of a benefit.
 - Notification of a mid-year changes may be required under ERISA and/or the SBC rules.

Q3: Are there other compliance issues we should consider?

- Under the ADA, an employer is required to “maintain the confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination.” Therefore, if an employer collects or

¹⁰ If dependents are eligible for the wellness program, the 30% will be determined based on the cost of the employee and dependent coverage.

¹¹ There is a different rule with respect to rewards tied to tobacco usage in a health contingent program. If there is a tobacco incentive, the rewards that are not related to tobacco use are capped at 30% and the total amount of all incentives (including tobacco-related) are capped at 50% of the total cost of coverage.

¹² The Departments may issue guidance on this point which could change the analysis of this issue. Further guidance would be helpful.

retains documentation of an employee's vaccination, this documentation must be kept confidential and stored separately from the employee's personnel files.

- The plan should not use claims data to identify the unvaccinated individuals. Federal law prohibits employers from using claims data or other information from a group health plan to identify employees who are not vaccinated.
- Consider providing the reward, or a waiver of any penalty, to employees who cannot be vaccinated due to disability and religious belief.
- Employers should review collective bargaining agreements to determine whether there are bargaining obligations before implementing any such program for a unionized population.
- State laws may also affect employer requirements regarding vaccines. Review with counsel.