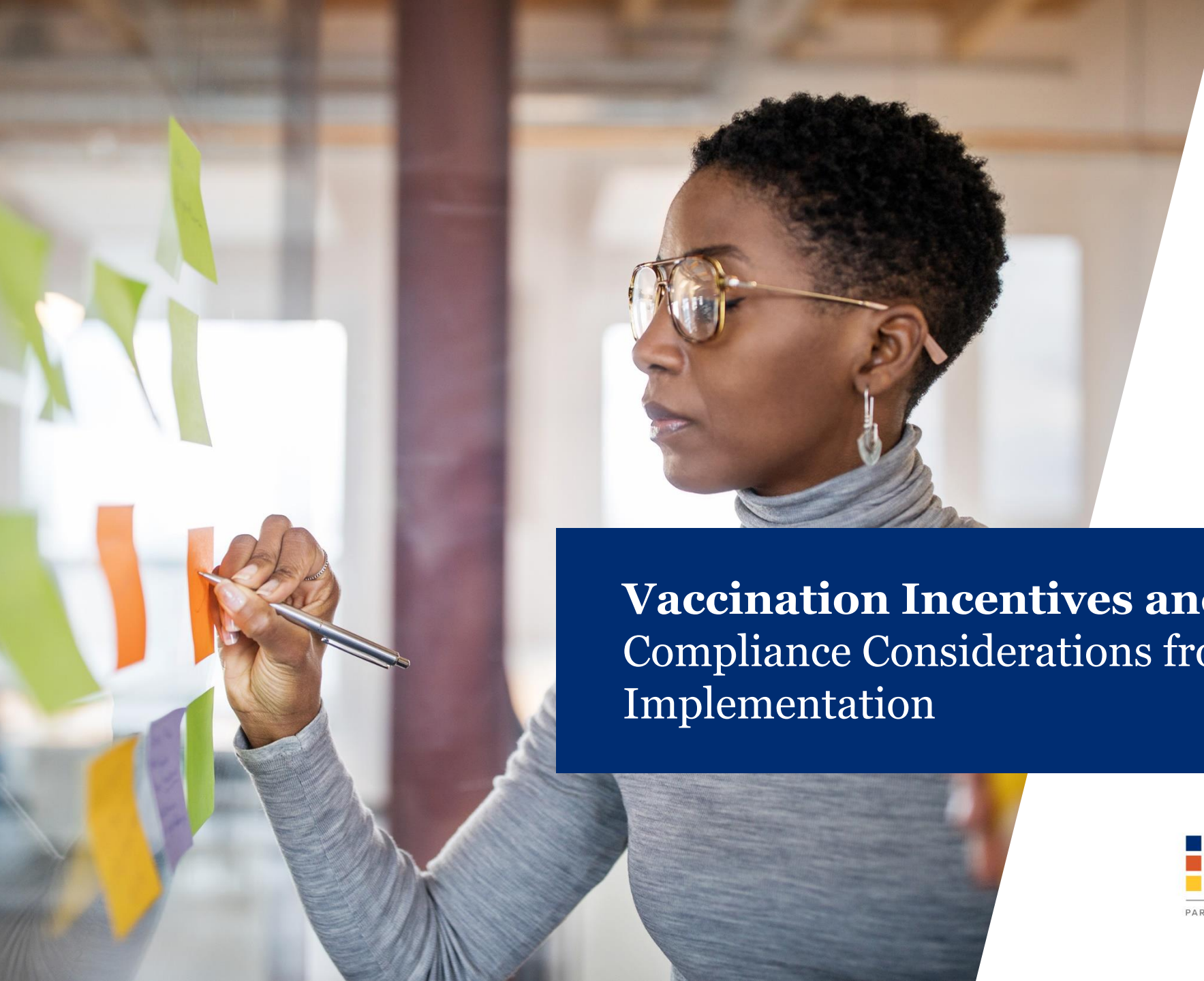


This Webinar Will Start Momentarily.
Thank you for joining us.



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September 15, 2021

Vaccination Incentives and Wellness Plans: Compliance Considerations from HIPAA Through Implementation



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Background

What are Vaccine Incentive Programs?

Any program implemented where an employer incentivizes employees to get a COVID vaccine

- Can be a reward or a penalty (e.g., surcharge)
- Can be tied to the employer's group health plan or unrelated
- Not addressing mandatory vaccine programs (i.e., all employees must be vaccinated to remain employed), vaccine testing programs, or employer-sponsored vaccine programs (e.g., employer hires a third party to come in and provide vaccines to employees)

EEOC Guidance Regarding Vaccines



Available at

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

- Addresses a variety of topics related to COVID that fall under EEOC jurisdiction
- Primarily addresses employment law issues arising under Title VII, ADA, and GINA
- Specific section on vaccinations with six FAQs on vaccine incentives under ADA and GINA

Application of ADA

Two Issues: Disability-related Inquiries & Reasonable Accommodation of Disabilities

1. Disability-related inquiries must be voluntary

- FAQ K.16: Requesting documentation or other confirmation showing that an employee received a COVID-19 vaccination in the community is not a disability-related inquiry covered by the ADA. Therefore, an employer may offer an incentive to employees to voluntarily provide documentation or other confirmation of a vaccination received in the community.
 - Vaccine-related documentation must be treated as confidential medical information
- FAQ K.17: Different result if employer or its agent administers vaccinations because that would involve a disability-related inquiry

2. Reasonable accommodations

- FAQs do not specifically address whether an employer must provide a reasonable accommodation to disabled employees to allow them to receive an incentive under a voluntary vaccine program

Application of GINA

- GINA does not prohibit employer from offering an incentive to employees to provide documentation or other confirmation from a third party that employees or their family members have been vaccinated (FAQ K.18)
- GINA does not prohibit employer from offering an incentive to employees to get vaccinated by the employer or its agent (FAQ K.19)
- GINA prohibits employer from offering an incentive to employees for an employee's family member to get vaccinated by the employer or its agent (FAQ K.20)

Application of HIPAA Nondiscrimination Rules

- No regulatory guidance to date regarding application of HIPAA nondiscrimination rules to vaccine incentive programs
- HIPAA nondiscrimination rules prohibit group health plans from using health factors with regard to eligibility (including rules relating to covered benefits, benefit restrictions, and cost-sharing provisions), premiums, or contributions among similarly situated individuals
 - Wellness plans that comply with the HIPAA wellness regulations are deemed to comply with the nondiscrimination requirements
 - Apply only if the wellness plan is a group health plan (i.e., the wellness plan itself provides medical care) or any wellness plan incentives are provided through or as part of a group health plan

Application of HIPAA Wellness Program Rules

- Participatory wellness programs (programs that are not health-contingent)
 - Only requirement is that reward must be available to all similarly situated employees
- Health-contingent wellness programs - program that requires an individual to satisfy a standard related to a health factor to obtain a reward
 - Activity-only program - individual must perform or complete an activity related to a health factor
 - Outcome-based program - individual must attain or maintain a specific health outcome
- Vaccine incentive programs likely are activity-only, health-contingent programs
 - Getting vaccinated is related to a health factor because individual's health impacts whether they can or should receive vaccine

Requirements for Activity-based, Health-contingent Wellness Programs

- Allow participants an annual opportunity to qualify for the reward
- Have a maximum reward (or penalty) that does not exceed 30% of the total cost of coverage (50% if a reward related to tobacco use is included) determined in the aggregate for all health-contingent programs
- Be reasonably designed to promote health or prevent disease
- Provide full reward available to all similarly situated individuals and to individuals who qualify by satisfying a reasonable alternative standard (if it is unreasonably difficult due to a medical condition to get the vaccination or it is medically inadvisable to get the vaccination)
 - Can require verification under rules for activity-based programs (cannot do so if program is outcome-based)
- Disclose the availability of a reasonable alternative standard in all plan materials describing the details of the wellness plan

Employer Mandate Issues

Employer Shared Responsibility Penalties

- If an employer offers a premium incentive through a wellness program, the employer is required to use the rate that would be applied to an individual who did not earn the wellness incentive (i.e., the higher rate).
 - The one exception to this rule is in the case of a wellness program designed to reduce tobacco use.
- If wellness incentive causes coverage to be unaffordable for some employees, might trigger a subsection B penalty
- Also creates risk of subsection A penalty unless employees for whom coverage is unaffordable are given opportunity to cancel coverage

Mid-year Implementation Issues

Section 125 Plan Issues

- Exception to irrevocable election rule for cost-changes
 - Insignificant increase/decrease – automatic election change
 - Significant decrease – decrease election (if enrolled) or enroll
 - Significant increase – increase election or elect another benefit package option providing similar coverage or terminate election if no such option is available
- Will allow changes to pre-tax premium elections if cafeteria plan includes this exception

Medical Plan Issues

- Does medical plan allow mid-year coverage changes (enrollment or cancellation of coverage) in this situation?

HIPAA Privacy Issues

If wellness program is a group health plan or part of a group health plan, information created or maintained by the wellness program regarding vaccination status will be protected health information (PHI)

- HIPAA allows a group health plan to share PHI with a plan sponsor only for plan administrator purposes; plan sponsor cannot use that information for employment purposes
- Plan sponsor can receive this type of PHI only if the plan document includes certain provisions required by HIPAA and has established a firewall to limit PHI to employees who perform plan administration functions
 - Could be an issue for fully insured plans

If wellness program is not a group health plan, health plan information likely cannot be used for purposes of administering the wellness program

Title VII Issues

- EEOC guidance does not address whether an employer's voluntary vaccine incentive program must include reasonable accommodations for employees who have religious objections to the vaccine
 - Guidance specific to vaccine incentives focused solely on ADA and GINA
- Guidance does indicate that employers must reasonably accommodate an employee's religious beliefs if employer has a mandatory vaccination program
- Employers should consult their employment law counsel

Examples

Example 1

- ABC Company offers a group health plan to employees with an employee-only rate (total cost/COBRA rate without adding the additional 2% administrative fee) of \$300 per month
- The active rate for employees (lowest cost single-only) is \$200 per month
- Health plan participants can reduce their monthly premium contribution by \$50 if the employee receives a count under 200 on a total cholesterol test; and an additional \$50 if the employee receives the COVID-19 vaccination (\$100 per month if both standards are met)



Example 1

- Both standards are health-contingent standards, therefore the total premium incentive cannot exceed 30% of the total cost of coverage (ABC Company must use the employee-only rate since spouses and dependents cannot participate in the wellness program)
- ABC Company's incentives are not compliant with the HIPAA wellness plan nondiscrimination safe harbor because \$100 (the two incentives added together) is greater than 30% of \$300 (\$90)
- Since neither requirement is related to reducing tobacco use, ABC Company must use \$200 as the lowest cost single-only rate when determining whether coverage is affordable for all employees (even those who are charged \$100 or \$150 per month due to receiving the vaccination and/ or meeting the requirements of the cholesterol test)

Example 2

- EFG Company offers a group health plan to employees with the following rate structure (total cost/COBRA rate without adding the additional 2% administrative fee)
 - Employee-only: \$400 per month;
 - Family: \$800 per month
- EFG Company implements a \$100 per month surcharge to employees who are not vaccinated and who are enrolled in the employee-only tier and a \$200 per month surcharge to employees who are enrolled in the family tier if any individual enrolled in coverage (employee, spouse, and dependents) does not receive the vaccination



Example 2

- EFG Company's surcharge for the employee-only tier is compliant with the HIPAA wellness plan nondiscrimination safe harbor because \$100 is less than 30% of \$400 (\$120)
- EFG Company's surcharge for the family tier is compliant with the HIPAA wellness plan nondiscrimination safe harbor because \$200 is less than 30% of \$800 (\$240)
- If an employee who is enrolled in EFG Company's family tier receives the vaccination, but the employee's spouse and/or dependents do not, the employee should avoid \$100 of the \$200 surcharge

Example 3

- John is an employee of EFG Company (from the prior example) and is enrolled in the employee-only tier of the group health plan
 - John's medical provider advises that John should not receive the vaccination due to a medical condition
 - EFG Company requires John to receive weekly COVID-19 testing at a hospital at his own cost as an alternative standard to avoid the \$100 surcharge
- EFG Company's surcharge is not clearly compliant with the HIPAA wellness plan nondiscrimination safe harbor
- The alternative standard to avoid the surcharge may not be considered reasonable since John is required to receive the testing offsite at his own cost (which may be considered unreasonably time consuming and costly)



Example 4

- HIJ Company offers a group health plan to employees and the active rate for employees (lowest cost single-only) is \$200 per month
- HIJ Company implements a \$100 per month surcharge for unvaccinated employees mid plan year during the 2021 calendar year
- HIJ Company determines that coverage is no longer considered affordable for at least 95% of its full-time employees when using \$300 as its lowest cost single-only option



Example 4

- HIJ Company determines that the cost increase is significant and permits employees to make a midyear pre-tax election change to terminate their coverage midyear due to the cost increase
- HIJ Company avoids a potential subsection A penalty (\$225 for 2021 per full-time employee) for the months the coverage is considered unaffordable since it gave employees the option to decline coverage once coverage was no longer affordable
- HIJ Company could potentially owe a subsection B penalty (\$338.33) for any specific full-time employee who waives coverage during the months that the coverage was unaffordable, if the employee goes to the exchange for coverage and receives a subsidy during these months

Example 5

- KLM Company offers a group health plan to employees with an annual employee only rate (total cost/COBRA rate without adding the additional 2% administrative fee) of \$3,600 (\$300 a month)
- KLM Company implements a plan design change so that individuals who are not vaccinated will not have coverage for hospitalization charges due to COVID-19
- Jane is an employee of KLM Company who was not vaccinated; Jane is hospitalized for COVID-19 and incurs \$2,500 worth of charges that are not covered by KLM's group health plan (which would have been covered if Jane was vaccinated)
- KLM Company's plan design change is not compliant with the HIPAA wellness plan nondiscrimination safe harbor because \$2,500 is more than 30% of \$3,600 (\$1,080)



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