



## FAQ: COVID-19 Vaccination Status & Benefit Plan Design

As the newest wave of COVID-19 continues to spread across the country, many employers are beginning to consider ways to encourage plan participants and their dependents to get the COVID-19 vaccine. Below we have summarized responses to frequently asked questions around vaccination status and benefit plan design strategies.

### Summary

- Under HIPAA nondiscrimination rules, excluding coverage for COVID-19 related claims for those unvaccinated participants and dependents while providing coverage for vaccinated members may be problematic.
- A plan may offer a reward such as a premium discount (or surcharge for those unvaccinated) for employees who show proof of vaccination if designed as a HIPAA health contingent wellness program.
  - Rewards must be limited to 30% of the total cost of coverage.
  - Employers must provide a reasonable alternative to obtain the reward (or avoid the surcharge) for any members for whom it is unreasonably difficult due to a medical condition (medically inadvisable) to get the vaccine.
  - Employers may also need to provide a reasonable accommodation under [EEOC ADA/Title VII](#) guidance.
  - The amount of the reward is further limited if the employer or the employer's agent administers the COVID-19 vaccine.
- Affordability under the Affordable Care Act's employer health mandate is calculated as the base employee rate, plus any surcharge under a non-tobacco wellness program. Adding any additional reward or surcharge for vaccination status could impact the affordability of plans.

### Can employers exclude coverage for COVID-19 related claims for unvaccinated members?

Probably not. Excluding coverage for COVID-19 claims of unvaccinated members may violate the HIPAA nondiscrimination rules. It is also questionable whether this type of plan design could comply with HIPAA wellness rules, or the application of these rules may be administratively impractical. Employers should consult with counsel prior to adopting any strategy to exclude coverage for COVID-19 treatment under the terms of their group health plans.

- 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.
- For the duration of this [Public Health Emergency Period](#), all group health plans must cover COVID-19 tests and services requiring a COVID-19 test without cost sharing, prior authorization or medical management (both in and out of network).
- Non-grandfathered group health plans must cover, without cost sharing (both in and out of network) qualifying COVID-19 preventive services (including vaccinations). Grandfathered group health plans are encouraged but not required to comply.

### Can employers surcharge, or charge more for coverage, for unvaccinated employees?

Yes. Provided it is structured as a health contingent wellness program, following all the applicable HIPAA, ACA, ADA and GINA guidelines for wellness programs as noted below. Rewards may include a premium discount or avoidance of a surcharge, reduced deductible, or avoidance of an increased deductible.

HIPAA guidelines note:

- Individuals must have the opportunity to qualify at least once per year.
- The reward cannot exceed 30% of the cost of coverage under the plan.
- Must be reasonably designed to promote health and prevent disease.

*This document is merely a summary of current guidance available and is subject to change. It is neither exhaustive nor meant to be construed as legal advice. It does not address all potential compliance issues with federal, state or local standards. Consult your licensed representative at AssuredPartners or legal counsel to address possible compliance requirements.*



- The reward must be available to all similarly situated individuals and a reasonable alternative must be made available to those who cannot meet the standard due to a medical condition or for whom it is medically inadvisable to satisfy the standard.
  - Departments have not specifically commented on whether this program would be considered “activity-based” or “outcomes based”. A safer, more conservative approach would be to offer reasonable alternatives to any individual who has requested it.
- Disclosure of availability of the reasonable alternative standard must be included in all plan materials.

#### ADA/GINA guidelines note:

- 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 threshold is further limited. Under [EEOC guidance](#), rewards may not be “substantial” as this may indicate some degree of coercion from the employer to participate in the vaccination program. The EEOC did not define what “substantial” means.
  - If the employer merely asks for proof of COVID-19 vaccination status, the EEOC rules do not further restrict incentives.
- GINA rules prohibit incentives related to a spouse or child who obtains the vaccine from the employer or the employers agent.

Under the Affordable Care Act’s employer health mandate, “affordability” would be based on the base employee rate, plus any surcharge under a non-tobacco wellness program. Thus, adding such a reward or surcharge could impact the affordability of plans. Employers seeking to implement wellness program rewards such as this in the middle of a plan year should consider cafeteria plan rules on mid-year election changes. Notification of mid-year changes may be required under ERISA and/or the SBC rules.

#### What other compliance issues or considerations exist for this type of strategy?

- State laws may also affect employer requirements regarding vaccines, so it is advised employers review with their counsel.
- Employers should review any collective bargaining agreements for applicable bargaining obligations before implementing such a program among unionized groups.
- Federal law prohibits employers from using claims data (or other info from group health plan) to identify those members that are not vaccinated.
- Consideration for employees who cannot be vaccinated due to disability and/or religious belief is advisable when providing reward or avoidance of surcharge.
- ADA requires that employers “maintain confidentiality of employee medical information such as documentation or other confirmation of COVID-19 vaccination.” Therefore, any collection or retention of such documentation must be kept confidential and stored separately from employee personnel files.
- Employers should consider what proof will be required to establish vaccination status and what will happen should they submit false records. The FBI has [issued a warning](#) that making or buying false vaccination cards is a crime.
- As noted above, employers must consider how much this reward or surcharge will be, how this aligns with any other wellness incentives or surcharges and how that impacts both limitations on rewards thresholds as well as plan affordability.

[Click here](#) for more information from your AssuredPartners compliance team. Departments may issue more guidance in this area which could change any analysis of this issue. Therefore, AssuredPartners recommends employers consult their legal counsel before moving forward with any vaccination strategy. In addition, please note that the decision to mandate vaccinations is an employment decision and employers should consult with legal counsel prior to implementing a vaccine mandate.