



FAQs Address COVID-19 Vaccine Group Health Plan Incentives

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On October 4, 2021, the Departments of Labor, Health and Human Services, and the Treasury (together, the “Departments”) issued FAQ Part 50 addressing several important issues concerning group health plans.

Notably, the guidance:

- Confirms incentives in a group health plan (such as premium discounts) are permissible under the HIPAA health-contingent wellness program rules provided the five criteria related to activity-only programs are met.
- Clarifies that group health plans are not permitted to deny eligibility for coverage or exclude coverage for otherwise covered items and services to treat COVID-19 based on an individual’s vaccination status.
- Requires immediate coverage for COVID-19 vaccines and their administration according to the applicable scope of the Emergency Use Authorization (“EUA”) or approval under a Biologics License Applications (“BLA”).

Below you will find details on the guidance.

■ Group Health Plans and Vaccination Status

The FAQs confirm much of what we thought to be true as it relates to the use of incentives in a group health plan to encourage COVID-19 vaccinations.

A wellness program that conditions a premium discount on an individual obtaining a COVID-19 vaccine is considered an activity-only wellness program, a type of health-contingent program, which must meet the following five requirements:

1. Be reasonably designed to promote health or prevent disease.
2. Provide a reasonable alternative standard to qualify for the discount, at least for individuals for whom it is unreasonably difficult due to a medical condition or medically inadvisable to obtain the COVID-19 vaccination.

For example, an individual shows it is unreasonably difficult due to a medical condition or medically inadvisable to obtain the COVID-19 vaccination; the wellness program must offer the individual a reasonable alternative standard to qualify for the full reward, which

may include offering the individual a waiver of obtaining the vaccination or the right to attest to following other COVID-19-related guidelines.

3. Provide notice of the availability of the reasonable alternative standard under the wellness program.
4. Limit the reward so it does not exceed 30% of the total cost of the group health plan coverage.
5. Give individuals eligible for the program the opportunity to qualify for the reward under the program at least once per year.

While the example specifically speaks to a “premium discount,” a reward in this context may also include a penalty. Therefore, premium surcharges or change in cost-sharing (such as an increased deductible for unvaccinated employees) remain viable options so long as the plan otherwise meets the five HIPAA criteria for activity-only programs.

In addition:

- **Plan Design.** The guidance makes clear that under the HIPAA nondiscrimination rules, a group health plan may not discriminate in eligibility for benefits or coverage based on whether or not an individual obtains a COVID-19 vaccination beyond what is permissible under the voluntary wellness program rules described above. Thus, a group health plan may not condition eligibility for benefits or coverage for otherwise covered items or services to treat COVID-19 on a participant’s or beneficiary’s status as vaccinated.
- **Affordability.** An FAQ confirms that wellness incentives that relate to the receipt of a COVID-19 vaccination are treated as “not earned” when determining whether the coverage is affordable for purposes of the ACA’s employer mandate. Therefore, affordability is determined based on the “unvaccinated” rate.

Finally, compliance with the HIPAA wellness rules is not determinative of compliance with any other law, including GINA, ADA, and state law. Importantly, these FAQs do not address incentives offered by employers as part of workplace policies and unrelated to their group health plan.

■ Timing and Scope of Coverage for COVID-19 Vaccines

According to the FAQs, effective as of January 5, 2021, non-grandfathered group health plans must cover COVID-19 vaccines and their administration, without cost sharing, immediately once the particular vaccine becomes authorized under an EUA or approved under a BLA and according to the scope of the applicable approval. This includes any EUA or BLA amendment, such as to allow for the administration of an additional dose to certain individuals, administration of booster doses, or the expansion of the age demographic for whom the vaccine is authorized or approved.

This is a change from the earlier rule which provided a 15-business day period after the approval of the Advisory Committee on Immunization Practices (“ACIP”) before implementation. The Departments note in the FAQ that they are aware plans and carriers may not have understood this change and will only enforce the timing and coverage requirement prospectively, consistent with the scope of the particular EUA or BLA, to the extent additional coverage beyond what was articulated in previous guidance is required.

■ Employer Action

If considering COVID-19-related incentives in a group health plan, employers should carefully review this guidance and prepare to comply with the five criteria for health-contingent, activity-only wellness programs.

Employers should not deny eligibility for coverage or otherwise limit/restrict coverage for certain COVID-19 related items and services to unvaccinated participants and dependents.

- Prepare to comply immediately with coverage recommendations on COVID-19 related vaccines, as adopted by ACIP. This will include booster shots and any announced expansion in the age of the population approved for COVID-19 shots.

Attached to this Update is an appendix to highlight additional FAQs and considerations when implementing a COVID-19 vaccination program as part of a wellness program.