

Imposing a Health Insurance Surcharge on the Unvaccinated

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Unvaccinated individuals are at far higher risk of death and hospitalization from COVID-19.¹ COVID-19 hospitalizations of unvaccinated adults in the United States cost \$13.8 billion from June to November 2021.² The monetary cost of treating unvaccinated individuals for COVID-19 is borne not only by patients but also by society more broadly, including taxpayer-funded public programs and private insurance premiums paid by workers, businesses, and individual purchasers. With the availability of effective COVID-19 vaccines, employers are evaluating options to encourage employee uptake of vaccines with 3 goals in mind: to minimize transmissions, to lower absence due to illness, and to reduce COVID-19–related health care expenditures. One such option is to impose higher premiums for unvaccinated employees under their group medical plans.³

Some argue that raising insurance premiums is a justifiable tool to promote COVID-19 vaccination because individuals who engage in riskier activities should pay higher premiums.⁴ This strategy in essence places unvaccinated employees in a higher-risk, higher-premium insurance pool and thereby more equitably redistributes health care savings and costs. Similar surcharges are imposed on tobacco users, for example. Theoretically, higher premiums can incentivize individuals to behave more safely, improve overall health, and reduce health care costs.⁵ Despite the potential benefits from this policy, however, employers assessing this option must ensure that they are in compliance with applicable federal and state laws and account for additional policy considerations, because such a premium surcharge has the potential to backfire.

Legal Issues

The Department of Labor, HHS, and the Department of the Treasury issued guidance affirming that employers can “incentivize employees by offering discounts on monthly insurance premiums for those who have been vaccinated” or “impose insurance ‘surcharges’ for those who choose not to be vaccinated.”⁶ However, these surcharges must comply with existing Health Insurance Portability and Accountability Act (HIPAA) wellness guidelines for activity-based wellness programs.

ABSTRACT

COVID-19 hospitalizations among unvaccinated individuals cost billions of dollars. More employers are considering imposing a premium surcharge on employees participating in the company’s health plan who are not vaccinated against COVID-19. These employers see this approach as similar to health premium surcharges for tobacco use, justifying the higher premiums on the basis that unvaccinated individuals could cause the plan to experience higher hospitalization and related costs. However, imposing a surcharge on unvaccinated employees will require employers to think through legal and policy implications and the interests of their employees and their businesses. Employers should weigh their vaccination goals against these interests and consider whether a legally compliant surcharge would further their goals. Employers should carefully consider the prevailing culture among their employees and assess whether the policy would be effective and noncoercive. Premium surcharges may be effective for some but not all employers.

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HIPAA prohibits employers from excluding employees from eligibility or coverage under a group health plan based on their health status.⁷ HIPAA also prevents employers from charging employees higher premiums based on health status. Under HIPAA, “health status” encompasses “any health status–related factor,” which could include vaccination status. However, HIPAA also provides an exception to offer employees financial incentives for participating in a “wellness program,” which must meet certain requirements under federal law.

Some believe it is possible that an insurance premium surcharge would meet the wellness program standards. However, insurers have never used vaccination status in setting premiums, so this novel approach may have unique implications. First, individuals may challenge surcharges for failure to make religious and other legally mandated accommodations. Second, employees may postpone getting vaccinated if the policy is implemented midyear, when there is no requirement that employees meet the vaccination criteria by a given time during the year. Rapid vaccination uptake is less likely under this scenario.

The Affordable Care Act (ACA) allows for wellness programs to be participatory or health contingent, but these 2 categories are regulated differently.⁸ A participatory program has no limit on financial incentives but must be open to any employee, and the reward for participation may not be contingent on a health outcome. Health-contingent programs, however, are outcome-based programs that reward participants only if they achieve a health-specific goal. These programs must provide reasonable accommodation due to a medical condition. HIPAA and the ACA limit the total financial incentives for such programs to no more than 30% of the total cost of health coverage.

On the other hand, the ACA also imposes health care affordability requirements that limit the amount that an employer can charge for health insurance. Experts warn that any premium surcharge or discount must be included in the ACA health care coverage affordability determinations. A substantial surcharge for unvaccinated employees may risk violating provisions of the ACA.

In addition, the Americans With Disabilities Act (ADA) protects individuals from discrimination on the basis of disability.⁹ Financial incentives—including penalties and surcharges—must not discriminate against workers who cannot get the vaccine due to a disability. Employee participation must also be voluntary, so employers requiring the vaccine for an incentive program must accommodate qualifying exemptions. Similarly, the Genetic Information Nondiscrimination Act requires that employee enrollment in wellness programs be voluntary, and employer incentives or penalties must not be coercive.¹⁰

State laws may also impose certain requirements on withholdings from employee paychecks. The Department of Labor takes the view that the Employee Retirement Income Security Act (ERISA)¹¹

TAKEAWAY POINTS

- ▶ Imposing a surcharge on unvaccinated employees will require employers to think through legal and policy implications and the interests of their employees and their businesses.
- ▶ Critics of surcharge policies point to data from other health-contingent premium programs showing that they fail to change individuals’ behavior.
- ▶ Employers should carefully consider the prevailing culture among their employees and assess whether the policy would be effective and noncoercive.

preempts these laws—but if an employer’s plan is not subject to ERISA, then the employer may need to consider whether these laws affect its ability to impose a new surcharge on employee contributions during the middle of a plan year.

Finally, Title II of the Civil Rights Act of 1964 may also apply.¹² Policies, including related surcharges, cannot discriminate against workers based on race, color, religion, sex, or national origin. Thus, an employer will need to evaluate any claim from an employee that the vaccination surcharge interferes with a civil right, such as a request for a religious accommodation.

Policy Considerations

Employers have a justified incentive to protect employees from the risk of COVID-19 and to mitigate the cost of COVID-19 hospitalizations. Premium surcharges would likely survive legal challenges if they follow the federal regulations, but it remains unclear whether surcharges actually encourage employees to get vaccinated quickly.

Critics of surcharge policies point to data from other health-contingent premium programs showing that they fail to change individuals’ behavior.¹³ For example, premium surcharges do not tend to increase cessation among tobacco smokers¹⁴ nor decrease weight among overweight individuals.¹⁵ Others disagree with this comparison. Behavior such as smoking cessation and weight loss requires long-term lifestyle changes, whereas getting vaccinated requires comparatively less discipline. However, no empirical research provides strong evidence that tying vaccination status to premiums increases vaccination rates.

Some also argue that, unlike smoking and obesity, COVID-19 is an infectious disease, and therefore vaccination should be treated differently. Chronic illnesses such as obesity and lung cancer also do not overwhelm hospitals in waves like COVID-19 does. On the other hand, premium surcharges may also pose a risk that individuals who cannot afford the surcharge may discontinue coverage entirely, cutting off their access to family physicians and other primary care providers who can be trusted sources of information about the vaccine’s benefits. Higher cost sharing alone cannot overcome any of the structural barriers that hinder vaccination.

Implications for Employers

Some employers are moving beyond surcharges to simply mandate COVID-19 vaccinations on the condition of employment. That approach comes with its own set of issues and risks. However,

organizations choosing a health plan premium surcharge wellness program approach must consider many legal and policy requirements. Yet employers are in a unique position to balance the financial burden of health care costs, the health and safety of their workforce and customers, the legal implications of imposing a surcharge, and the interests of their employees.

One employer, Delta Airlines, began charging \$200 in additional monthly health insurance premiums for unvaccinated employees. Delta has required all new employees to be vaccinated and now reports that 75% of its employees are vaccinated.¹⁶ Delta reported that after announcing the premium surcharge, daily vaccination requests have “increased 5-fold.” Although Delta’s self-reported results are encouraging, especially considering that neither tobacco surcharges nor wellness programs aimed at other behavior have been particularly successful at reversing bad habits, further investigation is warranted into how Delta’s premium surcharge directly contributes to COVID-19 vaccine uptake and whether the experience is generalizable to other organizations.

Other employers have hesitated to mandate COVID-19 vaccinations for all employees. Imposing a surcharge on health premiums for the unvaccinated appears less coercive, leaving the choice to employees. Still, employees may resist the policy, so employers facing staffing challenges may want to plan for potential consequences, such as employee resignations, difficulty in recruitment, or residual resentment that premium surcharges are also coercive. For the last point, employers must be careful not to engage in incentives “so substantial as to be coercive” for individuals with disabilities that would violate the ADA.

Employers who decide to impose a surcharge should also consider whom the surcharge would apply to. Many employees participating in employer-sponsored health plans pay for their spouses or other dependents to be covered under the plan. Employers will need to consider whether the surcharge will apply to everyone on the health plan or just their employees.

Conclusions

Imposing a surcharge on unvaccinated employees will require employers to think through legal and policy implications and the interests of their employees and their businesses. Employers should weigh their vaccination goals against these interests and consider whether a legally compliant surcharge would further their goals. Employers should carefully consider the prevailing culture among their employees and assess whether the policy would be effective and noncoercive. Premium surcharges may be effective for some but not all employers. ■

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