

# IMPORTANT COVID-19 UPDATE

## NEW GUIDANCE ISSUED ON COVID-19 VACCINES AND INCENTIVES

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The various federal agencies with oversight have recently issued several rules and guidance pieces addressing key issues for employers to consider as they develop and implement COVID-19 vaccine and testing policies. These include vaccine mandate plans and guidance from the Occupational Safety and Health Administration (OSHA), as well as agency guidance on the applicability of the Health Insurance Portability and Accountability Act (HIPAA) privacy rules to COVID-19 vaccination information and the legal status of COVID vaccine premium surcharges and incentives.

These key issues and updates are addressed below.

### Vaccine Mandate and OSHA Guidance

On September 9, 2021, President Biden released a [COVID-19 Action Plan](#), in addition to a previously announced [federal contractor vaccine mandate](#). As to the Action Plan, the Occupational Safety and Health Administration (OSHA) is developing an emergency temporary standard (ETS) to require private-sector employers with 100 or more employees to ensure their workforce is fully vaccinated or test negative for COVID-19 every week before coming to work. Employers will need to become familiar with the expected private sector ETS once it is published. The compliance and legal issues raised by this mandate (e.g., related to required accommodations, payment for testing, discipline for non-complying employees, and potential employer fines) are generally not employee benefits related, but rather are principally related to EEOC/employment law and OSHA safety rules. Note that OSHA has already issued one [COVID-19 ETS](#) for the health care and health care support workers, and has also issued [guidance](#) related to COVID-19 to help employers and workers not covered by the health care ETS who are in areas of substantial or high community transmission.

## HIPAA and Sharing COVID Vaccination Information

On September 30, 2021, the federal Department of Health and Human Services (HHS) issued very helpful Q&A [guidance](#) on the applicability of HIPAA to COVID-19 vaccination information, directly addressing a number of misconceptions about when HIPAA does, or does not, regulate disclosures of an individual's vaccination status. The main takeaways from the guidance is that "The Privacy Rule does not prohibit any person (e.g., an individual or an entity such as a business), including HIPAA covered entities and business associates, from asking whether an individual has received a particular vaccine, including COVID-19 vaccines."

## COVID Vaccine Premium Surcharges and Incentives

On October 4, 2021, the agencies issued [guidance in the form of frequently asked questions \(FAQs\)](#) clarifying the legal status of COVID-19 vaccine premium surcharges and incentives. The guidance also addresses the related issues of determining affordability for purposes of the employer mandate if an employer offers a premium discount or surcharge and the permissibility of coverage exclusions for those who are not vaccinated. In addition, the guidance addresses the requirement under the Coronavirus Aid, Relief, and Economic Security (CARES) Act that plans cover authorized or approved COVID-19 vaccines without cost-sharing.

- **COVID Vaccine Incentives/Surcharges** – The guidance at [FAQ 3](#) provides that a group health plan may offer participants in the plan a premium discount for receiving a COVID-19 vaccination as long as the premium discount complies with the final HIPAA/ACA wellness program regulations. A premium discount that requires an individual to perform or complete an activity related to a health factor, in this case obtaining a COVID-19 vaccination, to obtain a reward would be considered a wellness program that must comply with the five criteria for activity-only wellness programs. The FAQ focuses on premium discounts, but obtaining a "reward" is considered to refer to both a plan providing a discount or a plan offering a way to avoid a penalty (e.g., a surcharge). The FAQs note that the guidance only addresses the HIPAA non-discrimination rules, and does not address other employment laws or incentives offered by employers as part of workplace policies. So plan sponsors should note that a surcharge that complies with the HIPAA/ACA wellness program rules does not necessarily guarantee compliance with the EEOC/ADA provisions governing voluntary wellness programs.
- **COVID Coverage Eligibility Issues** – The guidance at [FAQ 4](#) provides that a group health plan may not condition eligibility for benefits or coverage for otherwise covered items or services to treat COVID-19 on participants, beneficiaries, or enrollees being vaccinated. The HIPAA wellness regulations generally prohibit plans and issuers from discriminating against participants, beneficiaries, and enrollees in eligibility, premiums, or contributions based on a health factor, so plans may not condition eligibility for benefits or coverage for otherwise covered items or services (including to treat COVID-19) on participants or beneficiaries being vaccinated.

- **Employer Mandate - Affordability** – The guidance at [FAQ 5](#) confirms that wellness incentives that relate to the receipt of COVID-19 vaccinations are treated as not earned for purposes of affordability calculations under the ACA employer mandate, which could subject some employers to penalties. Nondiscriminatory wellness program incentives that affect premiums (whether through discounts, rebates, or surcharges) are treated as earned only if they relate exclusively to tobacco use. This means the affordability of a plan that charges a higher initial premium for tobacco users will be determined based on the premium charged to non-tobacco users (including tobacco users who complete the related wellness program, such as attending smoking cessation classes.) But if a wellness incentive is unrelated to tobacco use (such as a surcharge for non-vaccinated), the incentive is treated as unearned (premium will be determined assuming that each employee fails to get a vaccine).
- **Vaccine Coverage Without Cost Sharing** – The guidance at [FAQ 1](#) provides that plans and issuers must now cover COVID-19 vaccines and their administration, without cost sharing, immediately once the particular vaccine becomes authorized under an Emergency Use Authorization (EUA) or approved under a Biologics License Application (BLA) for the particular vaccine. The guidance also notes that the coverage must be provided consistent with the scope of the authorization or approval of the particular vaccine, including any amendment regarding a booster dose or expansion of the covered age demographic for whom the vaccine is authorized or approved.

Conner Strong & Buckelew will continue to provide alerts and updates related to COVID vaccines and employer group health plans as new information becomes available. Please contact your Conner Strong & Buckelew account representative toll-free at 1-877-861-3220. For a complete list of Legislative Updates issued by Conner Strong & Buckelew, visit our online [Resource Center](#).

