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Blog Post

Should You Consider Offering Cheaper Health Plan Coverage in 2022 for Vaccinated Employees?

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If you still have unvaccinated workers in January, might you provide a financial incentive for employees to be vaccinated, by charging them higher healthcare insurance premiums? That is the question facing exhausted but dedicated corporate Human Resources leaders as they approach annual open enrollment season, in which employees are asked to lock in their 2022 benefit plan year's elections. As the price for 2022 health plan and other coverages come into sharper focus around this time of year, final decisions on what portion of plan costs should be borne by the company and what portion should be passed along to employees loom on the horizon.

Motivated by a variety of factors, including reducing their companies' self-funded health plan expenses related to COVID-19 treatment over time, many companies are considering charging two different prices for employees' portion of health plan coverage in 2022 – one for vaccinated employees and a higher price point for their unvaccinated colleagues.

The FDA's approval of certain vaccines last week presumably will raise citizens' comfort with the vaccines, and Delta Airline's well-

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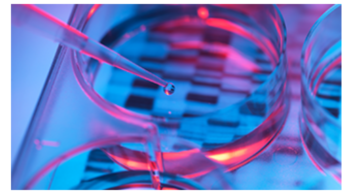
publicized announcement of a $200 premium surcharge for certain unvaccinated staff presumably will raise employers' practical comfort level with a two-tier premium structure, even in the absence of express approval under relevant disability laws.

Experienced Human Resources leaders may have a visceral negative reaction to the concept, and for good reason. For years, disability protection laws have led us to caution against treating individuals differently based on differing health factors. On the other hand, the Affordable Care Act has given us a solid decade of comfort with the existing "tobacco surcharge" guardrails – under which a medical plan's costs and a plan participant's life decision on whether or not to smoke are seen as so undeniably linked as to permit differing premiums. The argument made by creative employers this fall is that, even without official regulatory guidance, a similar analysis could potentially be approved in the near future for vaccine status, and it is reasonable to roll out this approach in good faith in the meantime.

Should you be considering differentiated premiums for vaccinated and unvaccinated employees, we suggest discussing the following points with your benefit plan legal advisors in the near future:

- *Carrot vs. Stick Approach*. Consider that a two-tiered premium pricing structure could be phrased in one of two ways – as a penalty for unvaccinated workers, or as a discount for vaccinated workers. Depending on the overall tone and messaging strategy related to employee vaccinations, it is likely that a company may prefer one over the other. There is an argument to be made that the more conservative approach – particularly before we have definitive regulatory guidance approving surcharges for unvaccinated status – is to tout the availability of a discounted premium for vaccinated employees. The shift in rhetoric may be more palatable to decisionmakers and employees alike.



- *Cost Differential*. Companies that consider a two-tiered pricing structure should be mindful to not have too large a gap between the two price points. A wild markup for unvaccinated staff could run afoul of the "voluntary" nature of wellness program incentives, in the same way that paying an astronomical bonus to be vaccinated begins to feel less voluntary and more mandatory. In general, a 30 percent differential is as large as should be considered. To be clear, as we have previously noted the Equal Employment Opportunity Commission has issued guidance noting that there are circumstances under which employers can require employees to get a COVID-19 vaccine, so long as they make reasonable accommodations for those with disabilities or sincerely held religious beliefs. But companies are wise to either openly and clearly move in that direction, or try to thoughtfully layer a series of true incentives that may encourage vaccinations but won't unduly pressure or coerce behavior through health plan design decisions.
- *Permitting Medical and Religious Accommodations*. Just as vaccine policies in other employment settings require accommodations for approved medical or religious belief reasons, we advise employer plan sponsors to allow for the lower premium in cases where an exception from vaccination is documented as warranted. While it is fine to generally message the two-tier structure as hinging on vaccination status, a clear announcement of the availability of reasonable accommodations should be added to open enrollment or plan pricing summary materials.
- *HIPAA Privacy and Security Considerations.* Vaccine substantiation, storage, and accommodation forms fall outside the scope of HIPAA. That said, absent HIPAA advice to the contrary, we would caution employer health plans that are covered entities under HIPAA to carefully consider separating the health plan enrollment forms and any vaccine medical exemption

documentation from the general employment files. HIPAA privacy considerations should be top of mind on any plan premium documentation that includes protected health information, and HIPAA authorizations should be evaluated before any open enrollment materials are published or any election forms are returned. A review of the plan's own HIPAA Privacy Policies may be prudent, in order to sync the plan documents and new operational practices.

- *Mid-Year Premium Changes vs. Full Year Enactment*. Due to complicated and notoriously inflexible Code Section 125 cafeteria plan mid-year change rules, many employer health plan sponsors, in general, are not considering a mid-year adjustment in the premiums they have in place today. Rather, they are only focused on the 2022 plan year, and would ask employees to lock in their elections on that 12-month prospective basis, to avoid IRS concerns.
- *Collective Bargaining Nuances.* For unionized employers, careful consideration should be given to whether a bifurcated premium must first be subject to the bargaining process prior to being imposed on that segment of the population. Advice from labor counsel should be sought before any broad messaging is issued to unionized workers.

The pandemic has brought employer health plans to the forefront of corporate consciousness as never before. COVID testing, treatment, and vaccination coverage provisions within employer health plans have been the subject of voluminous regulatory and statutory developments. This latest angle for employers to evaluate – at least employers without mandatory vaccination policies – relates to the pricing of the coverage itself. Completely aside from the quality or design of the health coverage afforded by the plans, we are seeing that the price tag for any single health plan may now differ based on COVID vaccination status.

Employers with plan years beginning on January 1, 2022, should move expeditiously and work with their advisors and employee benefits counsel in evaluating whether, given their particular workforce and culture, the benefits of a premium differential incentive outweigh the current unknowns.
