SEPTEMBER 2, 2021

FDA gives the ok on Pfizer vaccine — time to get tough on employees?

Recently, the Food and Drug Administration took an important step when it gave permanent approval to the Pfizer-BioNTech covid-19 vaccine. This will hopefully be enough of a motivator to get employees who were concerned about the emergency authorization off the vaccination fence.

But it may not. Some may still say the entire process was too rushed, which only goes to prove you can't make everyone happy. Employers, on the other hand, are becoming very unhappy. And some are turning from the carrot to the stick to get employees to roll up their sleeves.

Health insurance premium surcharges

Can group health plans slap monthly premium surcharges on unvaccinated employees? The answer appears to be "Yes," but you'll need a HIPAA-approved wellness plan to do it.

IRS regulations covering HIPAA's wellness provisions specifically cite the example of an employer's group health plan imposing premium surcharges on employees who don't certify they are nonsmokers during the open enrollment process. The rationale here is that employees who smoke will add to employers' health costs.

It seems equally valid for employees who won't get covid vaccinations.

Elements of a wellness program

What isn't legal under HIPAA, however, would be for a health plan to slap surcharges on unvaccinated employees without offering a wellness program. Otherwise, making deductions from unvaxxed employees' pay would violate state wage-payment laws.

Both the EEOC and the IRS have issued final regulations covering wellness plans. Let's look at the IRS' regs first.

Under HIPAA, group health plans can't discriminate against employees based on a health factor. Health factors include participation in activities such as motorcycling, snowmobiling, all-terrain vehicle riding, horseback riding, skiing and other similar activities. It's not much of a stretch to include covid vaccinations among these health factors.

The IRS' regs split wellness plans into activity-only plans and outcome-based plans.

- **Activity-only plans**, such as encouraging staff to walk, don't require employees to attain or maintain a health outcome. Plans must provide reasonable alternatives (or waive an applicable standard) to those for whom participating is unreasonably difficult due to a medical condition or is medically inadvisable.
- **Outcome-based plans** require employees to attain or maintain a specific health outcome in order to obtain a reward or avoid a surcharge. Plans must provide a reasonable alternative standard (or waive a standard) to all participants who don't meet the plan's initial standard.

The maximum reward is a 30% reduction in employees' monthly premiums; rewards to quit smoking can climb as high as 50%.

Unlike the IRS, the EEOC's final wellness regulations have been the subject of a lawsuit filed by AARP. As a result, the EEOC withdrew the portion of the final regs covering incentives. And this is all about the flip side of incentives: surcharges.

The EEOC's regs cover how wellness plans interact with the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act. They apply when wellness plans ask disability-related questions or require employees to undergo medical exams.

Considerations for open enrollment

Since open enrollment is coming in the fall, now is the time to talk to your group health insurer about designing a wellness program aimed at unvaccinated employees. You should discuss the following issues:

- The amount or percentage of the surcharge.
- The length of time employees will have to get fully vaccinated.
- What proof they must present, keeping in mind that forging vax cards is now a cottage industry.

- The penalty for presenting a forged vax card.
- The reasonable alternatives available to employees who can't get shots, either because of a religious conviction or a health condition.
- Whether the program will cover booster shots.

Surcharges are certainly an aggressive measure. Of the employers contemplating surcharges, the amount ranges between $20 and $50 a month.

Bottom line: You'd need to consider the impact on employee morale, whether surcharges are really necessary and how you're going to communicate this policy to employees.

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