

Labor and Employment Alert: Employee Premium Surcharges for the Unvaccinated...Make Sure to Read the Fine Print

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The federal government recently published guidance that employers can require the unvaccinated to pay up to 30% more for the cost of their employer-provided health coverage. [FAQs About Affordable Care Act Implementation Part 50, Health Insurance Portability and Accountability Act and Coronavirus Aid, Relief, and Economic Security Act Implementation](#) (Oct. 4, 2021). For employers seeking to encourage staff to get vaccinated against COVID-19 this guidance probably was welcome news and potentially the cornerstone for a policy requiring unvaccinated employees to pay more for their health insurance premiums. Before implementing such a policy, you should read the fine print. In footnote 9 to the recent federal guidance is the following lawyerly-like disclaimer:

Compliance with the final wellness program regulations is not determinative of compliance with any other provision of the PHS Act, ERISA, the Code, or any other State or Federal law, including the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). See 26 CFR 54.9802-1(h), 29 CFR 2590.702(h), 45 CFR 146.121(h), 29 CFR 1630, and 29 CFR 1635.

The “fine print” means that your plan to implement an insurance surcharge on the unvaccinated has to comply with all of the above-stated laws. The 30% surcharge may not comply with two of those laws, the ADA and GINA. That is because your proposed policy essentially provides a 30% discount in insurance premiums for getting vaccinated and, as such, most likely constitutes a wellness program for purposes of the ADA and GINA. Under these laws wellness programs must be “voluntary” and since 2019 there have been no formally adopted federal regulations elaborating on what types of incentives, if any, are “voluntary.” Instead, the Equal Employment Opportunity Commission (EEOC) issued COVID-related guidance that, under the ADA and GINA, “the value of the incentive” – meaning in this case, the contemplated 30% surcharge – “may not be so substantial as to be coercive.” There are also issues relating to whether the EEOC guidance can be relied upon and whether the administration of the vaccine is by the employer or an agent of the employer.

So, is a proposed 30% surcharge so substantial as to be coercive under the ADA and GINA? Perhaps. Even if you conclude that the incentive is not coercive, your policy would have to make exceptions for employees who cannot medically obtain the vaccine. Further, if you employ at least 100 employees, the Occupational Safety and Health Administration (OSHA) will soon be issuing rules requiring vaccination or weekly testing for all staff, which may include other requirements impacting the contemplated 30% surcharge policy.

What’s the bottom line? Based upon the above federal guidance employers can begin looking into the possibility of imposing an insurance premium surcharge on unvaccinated employees; however, it is highly recommended that they consult with experienced employment counsel to ensure such policy complies with **all** obligations under the law including the ADA and GINA.

For more information on this topic, please contact any member of the Brach Eichler Labor and Employment Law team.

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