

# Employee Benefit Compliance Issues for Various Vaccine-Related Wellness Programs

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With parts of the country facing rising COVID-19 case numbers and hospitalization rates, the renewed spread of the virus coupled with lagging vaccination rates have prompted many employers to consider various ways to encourage employees to receive vaccinations.

On May 28, 2021, the Equal Employment Opportunity Commission (EEOC) updated and expanded their [technical assistance Q&A](#) addressing various COVID-19-related workplace issues to aid employers in making decisions about return-to-work and vaccine-related programs. The guidance addresses topics including vaccine mandates, vaccine incentives, vaccine-related accommodations, and related confidentiality issues. Previously, we issued an article on this guidance, available [here](#).

Unfortunately, the guidance does not fully delve into the employee benefit considerations implicated by vaccine programs and vaccine incentives. These programs raise significant employee benefits and employment law questions.

In the discussion below, we identify the employee benefit compliance issues for various types of vaccine and vaccine incentive programs about which we have been receiving questions. For those interested in a more detailed discussion of the relevant legal framework, we also have provided a more comprehensive overview after the examples.

**NOTE:** A key issue we have reviewed is the status of incentive programs under the HIPAA wellness program regulations. Although the regulatory agencies have yet to address this issue, we believe programs that reward or penalize an employee based on vaccination status will be subject to the HIPAA wellness program requirements if the reward or penalty is provided through or in connection with a group health plan sponsored by the employer. Furthermore, we believe such programs likely will be treated as health-contingent programs, given the fact that some individuals are unable to receive the vaccination due to health concerns.





## SECTION 1: EXAMPLES – Specific Considerations for Various Vaccine-Related Wellness Programs

### 1. Employer Offers Cash or Gift Card as an Incentive for Employees Who Have Been Vaccinated *(No Employer Vaccine Program)*

This type of voluntary wellness program would not be subject to the HIPAA wellness regulations. Furthermore, requesting confirmation of an individual's vaccine status from the employee would not be considered a "disability-related inquiry" under the ADA. Therefore, the ADA does not apply, and there is no limit on the incentive limit.

However, employers must keep the vaccination information confidential pursuant to the ADA (i.e., it must be stored separately from the employee's personnel files). In addition, the cash or gift card provided to employees would be taxable wages.

There will be no HIPAA privacy issues so long as the employer does not obtain vaccination status information from its group health plan.

### 2. Employer Provides a Premium Discount for Vaccinated Employees or a Premium Surcharge for Unvaccinated Employees *(No Employer Vaccine Program)*

Although regulatory agencies have yet to address the issue, we believe these types of programs would be subject to the HIPAA wellness program requirements as they are provided through/in connection with an employer-sponsored group health plan. Additionally, we believe the program would be considered a health-contingent program under HIPAA's wellness rules because not all individuals can be vaccinated. To be HIPAA compliant, the program must, therefore:

- Allow participants an annual opportunity to qualify for the reward;
- Have a maximum reward (or penalty) that does not exceed 30% of the total cost of coverage;
- Be reasonably designed to promote health or prevent disease;
- Provide a reward available to all similarly situated individuals and to individuals who qualify by satisfying a reasonable alternative standard (if it is unreasonably difficult due to a medical condition to get the vaccination or it is medically inadvisable to get the vaccination); and
- Disclose the availability of a reasonable alternative standard in all plan materials describing the details of the wellness plan.

Due to the EEOC's conclusion that a request for proof that an employee is vaccinated is not considered a disability-related inquiry or medical exam under the ADA, the ADA wellness rules would not apply here. However, employers must keep the vaccination information confidential pursuant to the ADA (i.e., it must be stored separately from the employee's personnel files).

### 3. Employer Amends its Health Plan to Exclude Coverage for COVID-19 Treatment for Unvaccinated Participants *(No Employer Vaccine Program)*

While there is no current Federal coverage mandate for COVID-19 treatment for plans that are not subject to the essential health benefit requirements (e.g., self-insured plans and large group insured plans), state insurance requirements may mandate COVID-19 treatment coverage if applicable. Furthermore, specifically excluding benefits for the treatment of COVID-19 could raise issues under the ADA.

As we discussed with respect to Example 2 above, we believe this incentive program would need to comply with the HIPAA wellness requirements for health contingent programs. Those requirements are identified in the discussion of Example 2.

Due to the EEOC's conclusion that a request for proof that an employee is vaccinated is not considered a disability-related inquiry or medical exam under the ADA, the ADA wellness rules would not apply here. However, employers must keep the vaccination information confidential pursuant to the ADA (i.e., it must be stored separately from the employee's personnel files).

**CAUTION:** We believe it will be very difficult for this type of program to comply with the HIPAA requirements. As mentioned above, the amount of the penalty generally cannot exceed 30% of the cost of coverage. The penalty, in this case, is the amount of coverage charges that are excluded from coverage. That amount could easily exceed 30% of the cost of coverage and will be unknown until after the fact.

#### 4. Employer Sponsors a Vaccination Program and Provides Incentives for Employee Participation

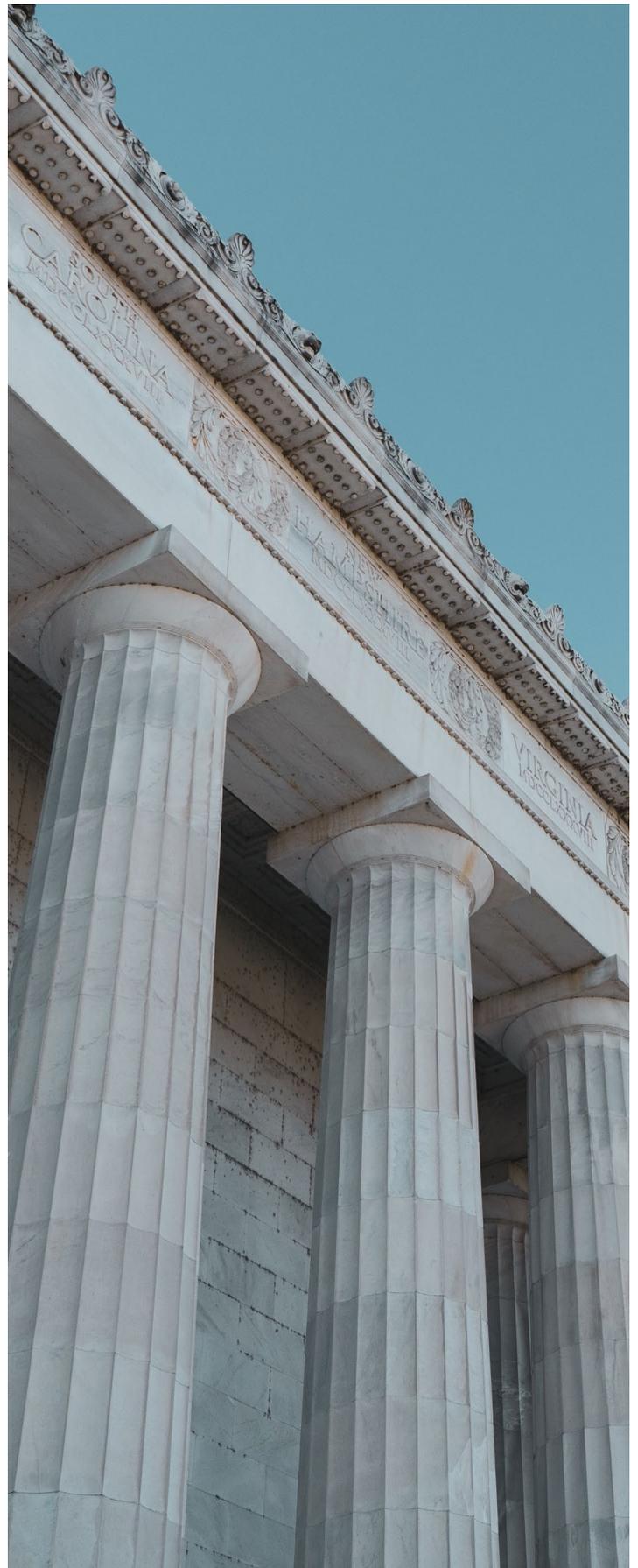
This type of program would be considered a group health plan. Accordingly, it would be subject to ERISA, HIPAA, and the ADA.

The general ERISA requirements for group health plans would apply to the program, such as the written plan document, SPD, and Form 5500 requirements.

As we discussed with respect to Example 2 above, we believe this incentive program would need to comply with the HIPAA wellness requirements for health contingent programs. Those requirements are identified in the discussion of Example 2.

Additionally, under the ADA wellness rules, any incentive in connection with the employer-sponsored vaccination program must not be "so substantial as to be coercive" to remain compliant, and the additional EEOC wellness requirements would need to be followed (e.g., the notice requirement).

**CAUTION:** Because all of the programs discussed above also implicate the anti-discrimination requirements under various federal and state employment laws and those laws are outside of the Brown & Brown Research and Compliance Team's scope of expertise, we strongly recommend any employer interested in implementing any vaccine-related programs work with its employment law attorneys to address any employment law issues under the ADA, Title VII, and other applicable state nondiscrimination laws.





## SECTION 2: Comprehensive Overview of Legal Framework for Understanding Compliance Issues of Various Vaccine-Related Wellness Programs

### Health Plan Coverage Issues – COVID-19 Testing, Treatment, and Vaccines

We previously authored an [article](#) on COVID-19 testing and vaccination coverage requirements. As we have received renewed questions about this and whether a plan may exclude COVID-19 treatment coverage for unvaccinated individuals, we are reiterating the current rules around these coverage issues.

#### COVID-19 Testing Coverage

Section 6001 of the FFCRA and section 3201 of the CARES Act establishes that health insurers and group health plans, including grandfathered plans, must generally provide coverage for items and services related to COVID-19 diagnostic testing without cost-sharing or pre-authorization for covered individuals when the purpose of the testing is for individualized diagnosis or treatment of COVID-19. On the other hand, COVID-19 diagnostic testing for employment purposes or public health screening is not required to be covered by a group health plan under the FFCRA (see [FFCRA Q&A Part 43](#), Q5).

#### COVID-19 Vaccination Coverage

Section 3203 of the CARES Act provides that plans and issuers must provide coverage without cost sharing for all qualifying COVID-19 preventive services – including officially recommended COVID-19 vaccines – and costs associated with their administration. Plans and issuers are not permitted to exclude coverage for (or impose cost-sharing on) any qualifying coronavirus preventive services.

### COVID-19 Treatment Coverage

The FFCRA and the CARES Act do not contain any requirement that health plans provide coverage for COVID-19 treatment without cost-sharing. Additionally, there is no current Federal coverage mandate for COVID-19 treatment for plans that are not subject to the essential health benefit (EHB) requirements, such as self-insured plans and large group insured plans. However, state insurance requirements may mandate COVID-19 treatment coverage for plans that are not subject to the EHB requirements but are subject to state insurance requirements (e.g., large group insured plans). Furthermore, specific exclusions for treatment of COVID-19 could raise issues under the ADA.

### HIPAA Wellness Rules

Wellness programs that are health plans (i.e., they provide or pay for medical/health benefits) or are connected to a group health plan (i.e., they offer an incentive related to a group health plan in exchange for participation) will be subject to HIPAA's wellness program rules. Wellness plans that are not health plans, and are unconnected to a group health plan, will not be subject to HIPAA. Examples of this last category of wellness programs include stand-alone programs that pay for health club dues or programs that offer awards unconnected to a group health plan, such as bonuses or additional vacation days, to employees who engage in a wellness-related behavior (e.g., to employees who walk a certain number of miles, refrain from smoking, etc.).

HIPAA generally prohibits group health plans from using health factors with regard to eligibility, premiums, or contributions among similarly situated individuals. Wellness programs that comply with the HIPAA wellness regulations are deemed to comply with this HIPAA requirement.

The HIPAA wellness regulations provide that “participatory wellness programs” – that is, employee wellness programs that do not provide a reward or that do not condition eligibility for a reward on a participant’s satisfaction of a standard related to a health factor (but relate to health factors), satisfy the nondiscrimination exemption so long as participation in the program is available to all similarly situated individuals.

Additionally, the 2013 regulations provide that “health-contingent wellness programs” (i.e., wellness programs require the satisfaction of a health factor-related standard to earn a reward) can meet the nondiscrimination exemption provided they satisfy additional criteria.

The regulations prescribe that “health-contingent wellness programs” must:

- Allow participants an annual opportunity to qualify for the reward;
- Have a maximum reward (or penalty) that does not exceed 30% of the total cost of coverage (50% if there is both a reward and a tobacco surcharge);
- Be reasonably designed to promote health or prevent disease;
- Provide a reward available to all similarly situated individuals and to individuals who qualify by satisfying a reasonable alternative standard; and
- Disclose the availability of a reasonable alternative standard in all plan materials describing the details of the wellness plan.

Although the regulatory agencies have yet to address this issue, we believe programs that reward or penalize an employee based on vaccination status will be subject to the HIPAA wellness program requirements if the reward or penalty is provided through or in connection with a group health plan sponsored by the employer. Furthermore, we believe such programs likely will be treated as health-contingent programs given the fact that some individuals are unable to receive the vaccination due to health concerns.

## ADA Concerns

The EEOC guidance makes clear that ADA considerations will come into play when designing any vaccine-related wellness program.

### The ADA’s Prohibition on Disability-Related Medical Examinations and Inquiries

Title I of the ADA prohibits employers from making disability-related inquiries and medical examinations except where the medical examinations or inquiries are “job-related and consistent with business necessity” or are “**voluntary**” medical examinations, including medical histories, which are part of an employee health program.” The information obtained must not be used to discriminate against employees and must be properly maintained under the ADA’s confidentiality rules.

The EEOC’s 2016 final regulations under the ADA imposed limitations (in addition to the limitations imposed by HIPAA) on incentives provided through wellness programs that involve disability-related inquiries or medical exams to ensure they are voluntary. While the 2016 regulations were removed in 2019, the EEOC announced new proposed regulations in January 2021. The new regulations provided in part that wellness plans that were not health-contingent wellness programs or part of a group health plan (or themselves group health plans) could not provide more than a de minimis incentive. This meant that participatory wellness programs could no longer provide more than a de minimis reward. For wellness plans that were part of a group health plan, or themselves group health plans, the EEOC stated that compliance with the HIPAA nondiscrimination rules for health-contingent wellness plans would constitute compliance with the ADA wellness plan requirements.

The 2021 proposed regulations were removed prior to publication in the Federal Register, leaving open the question regarding incentive limits for wellness programs that involve disability-related inquiries and medical examinations.

### EEOC Guidance Regarding the ADA and Vaccination Incentive Programs

The EEOC’s expanded technical assistance referenced above provides guidance on how the ADA rules apply in certain vaccine-related workplace scenarios and suggest that incentives to some degree would be allowed under the ADA.

The guidance clarifies that, under the ADA, employers may offer incentives (without any limit on the amount) to employees who confirm they have been vaccinated on their own (i.e., through a third-party health care provider, pharmacy, etc.). When an employer requests confirmation that an employee has received a vaccine on their own, that is not a disability-related inquiry under the ADA (EEOC Technical Assistance K.9).

Employers may also offer incentives in the case where an employer or its agent administers the vaccine. However, in this situation, the ADA's restrictions on disability-related inquiries apply due to the health screening questions that are answered in connection with receiving the vaccine (EEOC Technical Assistance K.7). As a result, the incentive cannot be "so substantial as to be coercive," and the other EEOC wellness requirements should be followed.

## Confidentiality Issues Related to Vaccinated Status

HIPAA and the ADA raise confidentiality concerns regarding a vaccine-related wellness program.

Despite the EEOC's conclusion that a request for proof that an employee is vaccinated is not considered a disability-related inquiry under the ADA, the guidance makes clear that the ADA requires employers to treat employees' vaccine-related documentation/confirmation as confidential medical information under the statute. Accordingly, such information must be kept confidential and stored separately from an employee's personnel files (EEOC Technical Assistance K.4).

Vaccination-related information in the hands of a group health plan is considered Protected Health Information ("PHI") under HIPAA. If an employer asks an employee to provide proof of vaccination, HIPAA's privacy and security rules are not implicated. However, if an employer obtains vaccination

information from its health plan, the HIPAA privacy rules will apply to that information, which generally means the employer will be able to use that information solely for plan administration purposes. If the wellness plan is not connected to the health plan, HIPAA may prevent the employer from using PHI to administer the wellness plan.

## Considerations for Employer-Sponsored Vaccine Programs

Certain employer vaccine programs may be considered "group health plans" under ERISA. Examples of these plans include where an employer arranges for a health care provider to provide a vaccine, or an employer hosts an on-site vaccine drive or provides vaccines through an on-site clinic. Vaccine programs that constitute "group health plans" under ERISA will have to satisfy ERISA's applicable compliance requirements unless a specific exception applies.



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