



Are Surcharges an Option for Unvaccinated Employees?

With the recent FDA approval of the Pfizer COVID-19 vaccine, more companies have announced plans to mandate the vaccine. However, given today's extremely competitive labor market, some organizations believe a vaccine mandate would further hinder their ability to hire and retain employees. Would imposing a surcharge on health plan premiums for unvaccinated employees be an alternative solution? Before exploring this option, employers need to know the percentage of employees on their health plan to determine the impact.

Legality

Implementing a surcharge on health plan premiums for unvaccinated employees through a wellness program comes with some legal complexities. The design and administration of the program must be carefully considered and reviewed by legal counsel. Some important issues to be considered include:

- Is the program considered participatory or health-contingent under the EEOC regulations?
 - How will vaccination data and the medical data supporting a Reasonable Alternative Standard (RAS) will be handled?
- How will a surcharge interact with other wellness incentives?
- How will boosters be incorporated?

There is no clear guidance from the Equal Employment Opportunity Commission (EEOC) or case law on the legal implications of charging health plan premium surcharges for unvaccinated employees. The ADA, HIPAA non-discrimination rules and EEOC wellness plan regulations may be implicated when designing and administering such surcharges. In addition, state law restrictions related to vaccines must also be considered.

Unintended Impacts

While a surcharge may seem less impactful than a mandate, employers still run the risk of negatively impacting their brand, losing employees to competitors that have no disincentive for the unvaccinated, and possibly subjecting their business to litigation. Additionally, if a surcharge is put into place outside of the open enrollment period, employees must be given the opportunity to change their benefit elections.

Alternatives

Unfortunately, there is no one-size-fits-all approach to setting workplace vaccination policies, but there are options, including the following:

- **Incentives:** In May, the EEOC announced that employers may offer their employees an unlimited incentive if vaccinated by the employee's own pharmacy, a public health department or other health care provider. If the vaccine was administered by the employer or an agent, employers may offer an incentive, as long as it is not so substantial as to be coercive.
- **Mandate:** From a legal perspective, mandates have survived multiple challenges. Under guidance from the EEOC, employers generally can mandate COVID-19 vaccinations for employees who physically enter the workplace without running afoul of the federal anti-discrimination laws the EEOC enforces. However, businesses that require employees to get vaccinated need to consider religious and disability-related objections and explore reasonable accommodations, which can include regular testing, social distancing or working remotely. State law restrictions related to vaccines must also be considered.

Final Thought

Before making any changes to your current COVID-19 risk mitigation strategy – whether mandates, surcharges or incentives – make sure you consider the associated impacts on your business and employees, including legal ramifications, human capital management, culture

and brand. Reach out to a member of your Scott team if you have any questions about your organization's strategic response.

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