



SLEVIN & HART, P.C.

Benefits Update

Recent Guidance on COVID-19 Vaccination Incentives and Disclosures under HIPAA

October 14, 2021

On October 4, 2021, the Departments of Labor, Health and Human Services (“HHS”), and Treasury issued [Frequently Asked Questions](#) (“FAQs”) regarding COVID-19 vaccinations under the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) the Health Insurance Portability and Accountability Act (“HIPAA”) and the Affordable Care Act (“ACA”). The FAQs clarify the parameters of COVID-19 vaccination incentives and the effective date for COVID-19 vaccine coverage mandates for non-grandfathered health plans. In addition, HHS issued guidance on “[HIPAA, COVID-19 Vaccination and the Workplace](#)” confirming that employers are not prohibited under HIPAA’s privacy rule from requiring employees to disclose their vaccination status.

Permissible Incentives for COVID-19 Vaccination

The FAQs clarify that group health plans may not condition eligibility for benefits, including treatment for COVID-19, on participants being vaccinated for COVID. However, plans may offer incentives to become vaccinated, provided the incentives satisfy the rules for activity-based wellness programs. Specifically, incentives such as premium discounts (taken together with any other health-contingent wellness incentives under the plan) must be capped at no more than 30 percent of the cost of employee-only coverage under the plan. The plan also must provide a reasonable alternative standard under which participants can qualify for the incentive. The plan must provide individuals an opportunity to qualify for the incentive at least once annually.

Additionally, the FAQs explain how any vaccine-related premium modifications factor into a health plan’s affordability analysis under the ACA, which is used to determine whether the employer is subject to a shared responsibility payment. Specifically, while an employer that imposes a premium surcharge based on COVID-19 vaccination status must include the surcharge amount in calculating the cost of coverage, the cost of coverage does not take into account any premium reductions provided in connection with COVID vaccination.

COVID-19 Vaccination Coverage Requirement for Non-grandfathered Health Plans

As described in our [May 27, 2020 Benefits Update](#), the CARES Act requires non-grandfathered health plans to cover certain COVID-19 prevention without cost-sharing fifteen business days

after a recommendation from the U.S. Preventive Services Task Force or the Advisory Committee on Immunization Practices (“ACIP”) of the Centers for Disease Control and Prevention is adopted by CDC. The FAQs clarify that, with respect to COVID-19 vaccines, this requirement became effective January 5, 2021, based on ACIP’s December 12, 2021 recommendation, which was adopted by CDC on the same day, and that the same timetable will apply to any subsequently authorized COVID-19 vaccines, expansions of existing emergency use authorizations, approvals for boosters or expansion to additional age groups.

COVID-19 Vaccination Disclosures under HIPAA’s Privacy Rule

Recent HHS guidance, issued separately from the FAQs described above, clarifies that HIPAA’s Privacy Rule does not prohibit businesses or employers, including entities that may themselves be covered entities or business associates under HIPAA, from asking questions regarding the vaccination status of patients, visitors, employees, and other individuals. (Individuals are, of course, permitted under the Privacy Rule to discuss their own vaccination status.) The guidance clarifies that the Privacy Rule does not prohibit employers from requiring proof of vaccination or mask-wearing at work, though vaccination data must be kept confidential and stored separately from the employee’s personnel files under the Americans with Disabilities Act (ADA). The guidance notes that a covered entity such as a doctor’s office generally would be required to obtain an individual’s authorization before disclosing information on their vaccination status to an employer or another entity.

Please contact Slevin & Hart if you have questions about this guidance.

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