

Government Confirms that Health Premium Surcharges on the Unvaccinated are Okay

By: Lyndsey Barnett on October 7, 2021 on graydon.law

This week the DOL, IRS and HHS jointly issued [FAQs](#) regarding the rules surrounding when an employer can charge an unvaccinated worker more in its health plan. This guidance doesn't provide new information, but only confirms what most practitioners (including those at Graydon) have been advising - to charge a surcharge you must follow the HIPAA nondiscrimination rules for activity-only health contingent wellness programs. Last month, we outlined those rules in this [post](#).

If you have followed the advice from our earlier post on how to set up your surcharge, no change should be necessary to your program. If you had taken the approach that this was a participatory only wellness program for which different rules apply or you weren't aware the wellness program rules applied at all, you should immediately evaluate your program to determine if anything needs to be changed to be compliant with the HIPAA wellness rules.

The guidance also confirms that while an employer can charge a surcharge to the unvaccinated, an employer cannot condition eligibility for the health plan on whether someone is vaccinated. Basing eligibility on vaccination status would be discrimination based on a health factor, which is impermissible under HIPAA. Again this is not a new rule, but now the Departments have explicitly stated it so that no employer can claim it was grey whether this rule applied to vaccination status.

Finally, the guidance confirmed that vaccine premium surcharges or incentives would impact ACA affordability for large employers subject to the shared responsibility mandate. We also discussed the impact of the surcharges in more detail in our prior post.