

# COVID VACCINE SURCHARGE

## THE HIPAA WELLNESS PROGRAM DECISION TREE

### 1. IS IT PARTICIPATORY OR HEALTH-CONTINGENT?

**DON'T FORGET!** Title VII still requires reasonable accommodation for sincerely held religious belief.

**a. Participatory:** not based on standard related to health factor, e.g., get \$10 off premiums for attending nutrition seminar, complete health risk assessment form

A few have argued vaccine surcharge fits here; would mean no limit on surcharge.

**b. Health-Contingent:** must satisfy standard related to a health factor

Most agree vaccine surcharge fits here.

### 3. BOTH ACTIVITY ONLY AND OUTCOME BASED WELLNESS PROGRAMS HAVE TO MEET 5 RULES:

- a. Frequency of award: have to be able to earn at least once/year
- b. Size of award: generally can't exceed 30% of cost of single coverage full premium
- c. Reasonable design: can't be overly burdensome, subterfuge for discrimination
- d. Reasonable Alternative Standard: have to waive the surcharge if employee completes alternative.
  - Not many examples of what alternative to vaccine surcharge would be.
  - If activity only, only have to offer alternative if participant verifies that standard is unreasonably difficult due to medical condition.
- e. Notice of Availability: disclosure requirements

### 2. IF HEALTH-CONTINGENT, IS IT ACTIVITY ONLY OR OUTCOME BASED?

**a. Activity Only:** e.g., complete walking exercise program if your BMI is high

Most agree vaccine surcharge fits here.

**b. Outcome Based:** e.g., lower your BMI to target level

A few have argued vaccine surcharge fits here. DOL has said this is where tobacco surcharge fits.