**Question: If an employee refuses to get vaccinated, am I able to prevent them from enrolling in our health plan?**

Answer: HIPAA nondiscrimination rules prohibit discriminating with respect to eligibility or coverage based on health factors (which includes the receipt of health care). Vaccines are likely health factors and therefore subject to these nondiscrimination rules. The health factor is the employee’s receipt of health care in the form of the vaccine. Therefore, it would not be permissible for an employer to exclude an individual from coverage under the health plan or to exclude coverage for COVID-19 treatment based on the individual’s failure to receive a COVID vaccine. (Note – we don’t believe a “source of injury” exception would work as a basis for this type of exclusion.)

While it is likely impermissible to tie eligibility or coverage levels to vaccinations, there may be room to impose premium differentials or different cost-sharing for such individuals who enroll in the plan if the employer follows the HIPAA wellness rules for a health-contingent plan. HIPAA’s nondiscrimination rules include an exception allowing group health plans to offer different premium, contribution, and cost-sharing amounts in accordance with a compliant wellness program (Treas. Reg. §54.9802-1(f)). For example, there could be a surcharge on their monthly employee contribution, a higher deductible, or higher coinsurance/copays so long as the employer offers a reasonable alternative standard to individuals who cannot receive the vaccine due to a health status factor and the penalty is limited to no more than 30% of the total cost of coverage. For more information on wellness plan considerations with respect to this type of incentive, please see our employer alert on this topic here: <https://www.benefitcomply.com/resources/2021/09/08/covid-vaccination-incentives/>.