



## Episode 9:

# Common goal, different paths: Considerations for employers regarding COVID-19 vaccinations

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**Announcer:** You're listening to Benefits, with Purpose! a Willis Towers Watson podcast where benefits delivery experts help employers navigate the world of health and wealth benefits and deliver purpose to their people in the moments that matter most.

**Holly Murphy:** Hello, my name is Holly Murphy. I'm a consulting attorney and compliance lead for Willis Towers Watson's Benefits Outsourcing practice. I'll be your host on today's episode of Benefits, with Purpose! Our episode today is entitled, "Common goal, different paths: Considerations for employers regarding COVID-19 vaccinations." Joining me today is Julie Stone, Managing Director and Leader of Intellectual Capital for our Health and Benefits business.

**Julie Stone:** Hi, Holly. Thank you so much for inviting me to join the podcast today.

**Holly Murphy:** Just delighted to have you. Now, Julie, you've been speaking with many employers about how to maximize the number of employees who are vaccinated. What are the primary areas that employers are focusing on?

**Julie Stone:** Holly, there are really four main levers, or pathways, that we're seeing employers consider. And they're not exclusive. Employers may be taking actions in multiple of these paths.

And they include mandating the vaccine, really focusing on educating employees and their family members on the benefits of getting vaccinated. Thirdly, incentives. So, what are the carrots and positive ways to encourage behavior, including money, time, access, and so on — and we'll talk more about that — as well as potentially imposing a surcharge.

And as we go through this, we'll cover all of them. But I do want to make a comment at the beginning that I'll be pulling in data from a survey we conducted in August around vaccine policies, and procedures, and reopening the workplace, with more than 1,000 employers who participated.

And at that time, which was before the administration's most recent guidance, more than 40% of employers who responded had already imposed a mandate or were planning to do that by the fourth quarter of this year.

And so, I think the mandate is an important starting point in our conversation here. So maybe, I'll pass it back to you to talk a bit more about what the Biden Administration put out in early September, relative to their six-point plan.

**Holly Murphy:** Right, so you're talking about on September 9th, when President Biden announced the six-point Path out of the Pandemic. And I would focus on just one point that's relevant — one of those six-points that's relevant to employers. And that's a requirement that employers that have 100 or more employees.

And I'm going to quote here, "ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work." It's a lot of words, there.

This requirement, when it was announced and since then, has garnered a lot of attention. There seems to be an expectation that this mandate is going to prompt a lot more people to get vaccinated. And it might. But I think we have to acknowledge that there are some limitations to the mandate.

The important thing here is that the mandate is to be implemented by the Occupational Safety and Health Administration, or what we call OSHA. And it's going to be done through something called an Emergency Temporary Standard, or an ETS. So, an ETS is, by definition, just a stopgap measure. An ETS is good for only six months. So, it's not a permanent thing.

Now when OSHA issues an ETS, they have to simultaneously begin rulemaking for a permanent standard. But rulemaking — the process of writing a rule, publishing it, accepting comments, revising it, and then republishing it, generally takes more than six months. So that would leave a gap between when the ETS expires and when the final rule takes effect.

It's also important to understand that an ETS could be struck down by the courts. OSHA has only issued about 10 ETS's over the years, since OSHA has been in existence, and only about half of those have withstood legal challenge.

**Julie Stone:** So, it's interesting. There's a lot here for us to be monitoring very closely. One of the questions I've gotten since the September 9th announcement was whether or not the OSHA rules are likely to apply to people working from home remotely or will really apply only to the workplace specifically? What are your thoughts on that, Holly?

**Holly Murphy:** That's a really good question. Because I'm not sure that OSHA can require individuals who work from home to be vaccinated if they don't have work related contact with other people, like if they're not salespeople who go out in the field or something like that. Remember, OSHA is the Occupational Safety and Health Administration. So, they're tasked with occupational health and safety, not home health and safety. So, there's only so far that OSHA can reach into the home.

To be clear, employers are responsible for ensuring that employees have a safe and healthy workplace, even when they work from home. But there's a line between activities in the home that are work related. and those that aren't. So, for example, OSHA can, and does, require employers to consider ergonomics of home workspaces, keyboards, chairs, desk heights, things like that.

But OSHA can't tell you that you have to use — that just because you work from home, you have to use fall protection when you clean out your gutters. Or that you have to wear sunscreen when you grill on the back deck

on the weekend. Or that you have to wear a helmet when you ride your bike to the store to pick up baby formula. That's home stuff. That's personal stuff.

So how do we find that distinction when we're dealing with COVID-19? And I think the distinction is, if an employee who works from home contracts a communicable disease, that's not the employer's responsibility unless the employee is exposed to the disease in the performance of their work duties, rather than in the general home environment.

So, I think that that is really going to be a challenge. How much can OSHA get into the home and restrict what employees who work from home can do? The other thing that we have to think about is that OSHA can't require that members of the employees' household be vaccinated. So, this vaccine mandate is not going to reach spouses, children, domestic partners, and other people who live in the same household. OSHA just doesn't have jurisdiction to do this.

**Julie Stone:** So, Holly, as you're explaining this, and this is something for us to absolutely keep our eyes on because it will be interesting to see if OSHA tests the boundaries in this or sticks within the most traditional definition of workplace safety.

But there are two critical paths here from an employer perspective or considerations. One is my workplace itself and the safety, and particularly, if I'm in an industry where there are customers and other people that my employees are exposed to and exposing.

And the other is the employee productivity. The health of my people to do their jobs every day, irrespective of whether they're working from home or onsite and interfacing with others.

And while these are interconnected, there also are different of the considerations that we'll talk about, depending on whether or not your priority is the workplace — that you hold that higher than the others — or it is business continuity and your workforce being present and productive.

**Holly Murphy:** Yeah, that's a really good point, a really good point. Let's also talk a little bit about the weekly testing requirements. Because remember, the Executive Order says employees have to be fully vaccinated, or they have to submit to testing at least once a week. What's not clear is whether the employee gets to choose. Whether the employee gets to say, I want what's behind door a, which is being vaccinated. Or I want what's behind door b, which is being tested.

And one question we have is OSHA going to say that the employee can elect testing only if they qualify for a medical or religious exemption or is that something that they get to decide? And I think this is kind of an important point because the Kaiser Family Foundation just released a survey about attitudes toward workplace vaccinations.

And according to that survey, the testing option is very appealing to unvaccinated workers. More than half of those surveyed who were not vaccinated said that they would submit to weekly testing if their employer adopted a vaccine mandate, versus 12% who said that they would go get the vaccine.

**Julie Stone:** This is a really interesting topic because I do think another adjacent conversation is who will pay for the testing? And as I've had conversations, just in the last several days, with employers about the cost over time, let's say you have 30% or 35% of your workforce unvaccinated. That can get pretty expensive pretty quickly. And I know there are efforts to reduce the cost of the actual tests.

But weekly testing — and I think it will be nuanced. It may be weekly testing for only essential workers that have to be onsite. Or maybe there will be industries that shift that cost to employees or try. I think that's ripe for lots of friction points. What are your thoughts on the cost of testing and what you see happening?

**Holly Murphy:** I don't think we know. That is a big concern is whether the employer will have to pay for the testing. And as you said, that could get pretty expensive. And keep in mind, too, that the testing requirement is going to apply to all employees and not just those who are enrolled in medical benefits. And even if they're

enrolled in medical benefits, I think most plans will pay for testing only if it's ordered by a physician, not if the employee is getting it sua sponte, as we say.

**Julie Stone:** Absolutely. If ordered by physician or symptomatic so I don't think it necessarily needs to have a physician order. But I'm presenting symptoms versus the weekly testing, that's the alternative to being vaccinated.

**Holly Murphy:** Yeah, excellent, excellent point. And then you have to think about all of the administrative headaches. The employer is going to have to track weekly compliance. And I think that employees who initially opt into testing, that they may start resenting the inconvenience as this situation drags on. If it continues into winter, if it continues into spring, they've got this inconvenience of constantly going for weekly tests.

And the employer also has to plan for — what are they going to do if an employee has a positive test? I mean, I think we'd all agree that the employee would be excluded from the workplace. But is the employer going to put them on leave? Will the leave be paid? Will it be unpaid? All of these are factors that they're going to have to think through.

**Julie Stone:** Let's talk more about the operational. I think, Holly, you were going to talk next about some of the recording and documentation?

**Holly Murphy:** Right, yes, absolutely. The president's Executive Order doesn't have it — say anything about whether the employer can just ask the employee to certify that they're vaccinated or whether the employer actually has to collect documentation. But let's look at some other guidance that came out recently.

So, on September 24th, the Safer Federal Workforce Task Force, which is a task force that's responsible for the safety and health of federal employees, issued guidance for federal contractors and subcontractors.

And that guidance requires that employees of federal contractors be vaccinated. And that they provide supporting documentation. So, a certification is not enough. And the documentation could be an immunization record, a copy of a CDC COVID-19 vaccination card, or other medical records.

And I am going to guess that OSHA will include similar requirements in the ETS. But keep in mind in all of this, that the OSHA guidance is going to set the floor. That's the minimum that employers must do. Employers can already set higher standards. And I think — haven't you said that you've already seen that happen?

**Julie Stone:** We have. In our survey data, there are some really interesting findings. I mentioned a few minutes ago, the percentage of employers that are planning to mandate, either have or plan to by the end of Q2, we also asked questions about time off for people to go get vaccinated, or to recover if they've had side effects, the evidence requested relative to validation that they've been vaccinated, so a broad range of topics.

And one of the more macro level themes I would mention is that employers are really looking at this as a broad HR issue and not as a benefits issue. And that applies from the standpoint of hiring and implementing whatever plans are in place for new hires, so there's equity across existing employees and new hires coming into the workforce.

It applies to thinking about the tracking, and the tracing, and the broad HR implications of policies put in place. There also is thought that emerges in the data around, with respect to reopening the workplace, access to the workplace itself, but also communal spaces.

So, imposing a mandate or requiring vaccine for employees to come onsite and use the cafeteria, use fitness centers, those kinds of things. And they're all aimed at making it really difficult to be unvaccinated. Again, we know there are people who have religious or medical exemptions.

But for the majority of the population — wanting to set the stage for people who have not yet been vaccinated to want to for social reasons, for being able to use all of their employee perks and benefits. And we see as a condition of employment going forward.

Prior to the Biden plans that were announced, as I mentioned, 44% of employers were expecting to have a mandate that applied to all or portions of their workforce by the end of the year. In terms of documentation, coming back to the operational issues that you mentioned, Holly, we saw a trend between when we asked these questions in the spring and in August. We've seen a trend that more and more employers are requiring the CDC card, not self-attestation.

So, it's not just checking a box, and saying, yes, I'm vaccinated, but asking for a copy of and validating the person has the CDC card. And as of August, nearly 2/3 of employers who were tracking, were asking for that validation. So, I think that's a really important point here.

In the past, or earlier on, I think we saw a reticence about asking for documentation. There's lots of myths around HIPAA, and what's private, what's not. And I know you'll touch on that in a few minutes. But we've seen that shift to a test and show me your document.

I also think, in terms of validation, we are seeing about 11% of the employers in August, that they would require vaccine as a condition of employment. We're expecting that to go up, as we continue to trend and reissue this survey.

Holly, what are some of the other ways that employers have a role to play beyond the mandate? So, we've talked a lot about mandating but interested in your thoughts on some of these other opportunities?

**Holly Murphy:** Well, as to the mandate is, to use your term, kind of a stick approach. What we're seeing employers do, as an alternative, is more of a carrot approach or a facilitative approach. So, looking at information, education, time off to get vaccinated, making it easier for the employee to get vaccinated. And what's interesting to me is OSHA has cited the lack of paid leave and scheduling flexibility as the biggest barrier to getting vaccinated, so not vaccination hesitancy so much as vaccination barriers.

**Julie Stone:** And that's so interesting. Because nearly 90% of the employers in our survey said they were providing employees with the flexibility on their work schedules to be able to get vaccinated. And then 70% of those were giving employee time without docking pay.

So, it's the flexibility. And it's knowing I'm not going to lose pay, particularly, if I'm an hourly worker to go get vaccinated. So, I think that's interesting that OSHA citation that you made and employer actions really align here.

I also would say that in the survey, we saw 60% who will give people additional leave if they need to recover from side effects. So not charge it to their sick time, but just take the time you need to recover if you've had side effects from the vaccine.

And in the category of facilitating access, half of them have, or are planning to provide, on-site or near-site access. It could be physically on the grounds in a manufacturing location or in an arrangement with a local health clinic but really taking that step of making it as easy as possible for people to get vaccinated. For those employers that are doing on-site vaccinations, Holly, what are some of the compliance considerations?

**Holly Murphy:** So that's a really good question. And I think before we answer that, we have to draw a distinction between the employer providing access to, say, a public health authority that has a vaccination program, providing them access to the premises and to the employees. But really, it's the public agency that's running the program. That is different from the employer actually sponsoring, hiring, and having people come in.

Because at that point, you have a question whether the employer gets access to information about the employee's medical conditions. And it's kind of a subtle point. But before you can vaccinate someone, you need a little bit of baseline medical information about them.

And so, if the employer is too much involved in the process, it's like the employer is asking you about your health history and that has potential complications under the Genetic Information Nondiscrimination Act and the Americans with Disabilities Act.

Because both of those laws limit an employer's ability to collect medical information from employees. So, if an employer is considering some sort of on-site process, they really need to work with their legal counsel to make sure that they are appropriately hands-off. Or if they can't be hands-off, that they're staying within the limitations of these federal anti-discrimination laws.

But I think that the key there, what you hit on, is the idea of making employees feel comfortable and feel safe in submitting to the vaccine if it's something that the employer is involved in.

The other area that I'm kind of interested in, the other softer or more carrot approach, is incentives. What are you hearing about incentives? And by — I should explain by incentives we mean cash payments or non-cash payments to employees who are vaccinated.

**Julie Stone:** We know from a behavioral economics perspective that people respond better to short-term gains than longer term takeaways. So, in that spirit, we certainly have seen a number of employers consider incentives in the form of cash payments to employees who are willing to be vaccinated. And about 20% of the employers in our survey were providing a cash incentive, another 20% were thinking about it. So, we may be at nearly half of employers who would do an incentive. And most of those were looking at something \$300 or less. So, this is not extravagant.

But it's meaningful enough to get people's attention, in terms of a one time, whether it's \$100, \$200, but something to say, if you go — if you're on the fence, and you're really not sure or you haven't made the effort, I'm going to give you the time. I'm going to be flexible at when. And I'm going to give you \$100 to go get vaccinated. So that's definitely one of the carrots that we're seeing out there.

We've seen a smaller percentage offer items of nominal value. And it may be parking privileges for some time in the company's parking lot, company logo items, or things like that. It's a matter of what's culturally appropriate to the organization.

But it's definitely one of the levers to think about using in the spirit of moving the remaining unvaccinated population towards taking that action.

**Holly Murphy:** It's funny when you talk about those items of nominal value. The University of Texas, my alma mater, Hook 'Em, is offering to students to be entered into a raffle to get a free football ticket to Longhorn football game. And that's going to be a motivator for a lot of students, right there.

But it's very interesting to hear that employers are considering incentives, though, especially with all of the attention, all the press, that's being paid to mandates and surcharges. It sounds like more employers are actually going the other direction. And you do think that from a behavioral perspective that will have an impact, that it will change behavior?

**Julie Stone:** I think for some. I mean none of these, individually, will move everyone. But I think there's a portion of the population that may be impacted by incentives. And that's just what's needed to move 10%. Another really important behavioral econ precept here is that people respond more to storytelling than statistics.

And so, if we think about who's messaging within organizations and some of the reticence in some underserved populations, is the messenger in my employer someone who looks like me, from a race and ethnicity perspective? What are the storytelling features we can weave in about why to someone?

So, the education and the knowledge, coupled with the incentive and the access — when you package it together, I think you have a higher probability of making people to reconsider, who haven't been vaccinated, than looking at each of these in their own swim lane.



**Holly Murphy:** That's really interesting. And the compliance considerations for incentives are fairly limited. And I want to point that out because we're going to talk about surcharges in a few minutes. And there are a lot of compliance concerns around surcharges. But if you want to just pay a cash incentive, or a non-cash incentive, as long as it's not tied to medical premiums or benefit premiums, there really is very little to be concerned about.

The employer should keep in mind that cash payments are always taxable. So, the incentive is going to have to be reported as compensation. Non-cash incentives, your parking spaces and stuff, that's not going to be taxable as long as the value is de minimis, to use an IRS term.

One consideration, though, that I would have if an employer wants to have an incentive program is that they think about confidentiality. Because again, you're collecting medical information from someone. And the Americans with Disabilities Act says you have to treat medical information as confidential. And you have to maintain it separate from other personnel information.

But that's not a huge hurdle to get over, compared to some of the other compliance considerations we have for things like surcharges. So, I feel like there's maybe more pros than cons for incentive payments. What do you think?

**Julie Stone:** I agree with you, although, I pause and say, it's important to look at what percentage of your population remains unvaccinated. So, before you take any of these steps, do you have 30% you're trying to move or 10%? And how much effort you put in because — I agree with you, the incentive administration is a fairly straightforward — it is taxable. It's a one and done. It's not every biweekly paycheck that you need to adjust.

But it still takes some work. So, I think it's a trade-off of how many people and what's the likelihood in your population this will generate the movement? I also think one of the considerations is that this applies to all of your employees, not just those enrolled in your medical benefit. So, we'll come to the surcharge in a moment.

But you can incentivize everyone. And you could conceivably incent spouses, or partners, or other eligible adults in the household, which gets to the workplace or home safety, whether this someone is in the workplace or they're working from home, exposure if both adults in a household, if the person has a partner, are vaccinated.

So, you could decide if you wanted, to add that to your incentive. I'm not saying that one has to do that. But it's an option with an incentive program that you can reach more people.

**Holly Murphy:** I think that gets to your point about productivity, earlier. That if one of the goals is to maintain productivity, then every additional step you can take to limit how much that employee is going to be exposed, either at work or at home, to the virus is going to advance that goal.

One question I have about incentives is — from a behavioral perspective, is it going to create an expectation for future incentives? Oh, you gave me an incentive this year for COVID-19 vaccination. Am I going to get one for the booster? What about the next year? If I get a flu shot, are you going to give me \$100? Is this going to be Christmas money for me from now on?

**Julie Stone:** And that's a possibility. I would be remiss to say no, no, no. I think that's a valid question. I'm not sure I think it's a valid reason not to take this action if, on all other levels, it's likely to generate the desired outcome of increasing the percentage of your workforce.

We see, over time, there are programs that employers put in place, and then evaluate, and then take out, and put something else in, and changes a part of active benefit program management. And so yes, will people ask? And be prepared for the question but I don't see that as a showstopper.

**Holly Murphy:** So, we previewed a little bit that we're going to talk about surcharges. So, let's go ahead and move on to the stick approach. And just to level set on what we're talking about is — and there has been a lot of

this in the press — is that some employers are considering charging a higher premium to employees who enroll in medical benefits and who have not been vaccinated. And do we see any information on this in that survey?

**Julie Stone:** We did ask. And we asked this two ways — whether or not an employer was considering implementing a surcharge on premiums for employees who are unvaccinated or providing a discount for employees who were vaccinated. So, two sides of the same question.

And on a combined basis, only 5% of the employers were planning to offer one or the other, a discount or a surcharge, so very low numbers. And 4% were considering. So maximum, we're at 9% if everybody considering actually implements and we know from prior experience with surveys that's not typically what happens. So, it's a very small percentage.

And I understand the rationale of thinking about it, what's attractive about a surcharge at the high level. And that is, OK, I have a cohort of my population that haven't requested a medical exemption, don't have a religious exemption, and they are not getting vaccinated. They're likely to cost me more money. I should implement a surcharge.

So, I can see, conceptually or philosophically, why that's interesting to some employers. But on the flip side, I think there are so many counterpoints, from both an operational and strategic perspective, that we should go into for a few minutes here before anyone listening thinks about taking that action. So, Holly, why don't you start with some of the compliance considerations?

**Holly Murphy:** I will. And there are a lot. First and foremost, in order to have a premium surcharge, that surcharge has to be offered as part of a compliant wellness program. And that is a concept — it, actually, is under HIPAA. It's not a privacy rule. It's just a wellness rule. And there are several elements of a compliant wellness program. I just want to focus on a couple.

The first one is that the total of all surcharges may not exceed 30% of the monthly premium, both the employer and employee share. If you also have a tobacco surcharge, that number goes up to 50%. The other requirement that's important to focus on is that the surcharge program has to include a waiver process or a reasonable alternative standard for those who are not vaccinated.

Let's talk about that reasonable alternative standard. And we're accustomed to this in the context of tobacco surcharges. Many health insurance plans charge employees who use tobacco a higher premium because they know that, on average, that employee is going to cost them more to insure. I should also add that there are laws that specifically allow plans to charge higher premiums for tobacco users, not for any other health risk, just for tobacco.

If you have a tobacco surcharge, you have to have one of these reasonable alternative standards. And the one that most plans have is that you have to complete a tobacco cessation program. So that's an example of a reasonable alternative standard.

So, what would be a reasonable alternative standard for a vaccine requirement? Well, the one that I've heard most frequently cited is weekly testing. So, if an employer adopts weekly testing as a reasonable alternative standard, employees who agree to submit to weekly testing cannot be charged the surcharge.

So, employees can be vaccinated, they can get weekly testing, or they can pay higher premiums. That's how that framework would work. Whether that would work under the new vaccine mandate, I'm just going to put aside for a minute. Just want to point out right now, though, that the employer has to identify some kind of reasonable alternative standard. I've also heard thrown around the idea of educational programs. That the employee has to complete an educational program if they won't get the vaccine.

So, let's talk about the waiver component. Remember, I said either a waiver or a reasonable alternative standard. Because there are some employees who are going to request a waiver. The first and most common one is one under the Americans with Disabilities Act, which says that employers have to accommodate an employee who's unable to get the vaccine due to a disability, pregnancy, or another medical issue.



And that, I think, we're going to see happen in fairly low numbers, just based on what I'm reading on the internet. I'm not a doctor, but I've heard that there are very few medical reasons not to get the vaccine.

The other type of waiver is a religious accommodation. Under Title VII, employers have to accommodate an employees' religious belief, observance, or practice. I want to spend a little time on talking about religious accommodations. Because I think this is an area that's kind of misunderstood.

Many people think that employee has to get a letter from their pastor, or the principal, or whoever. Or they have to bring in a religious text that says they can't have a vaccine. And in fact, the standards are much simpler for the employee to meet.

First and foremost, the employee doesn't have to belong to one of the traditional religions or to any organized religion at all. So, under Title VII, religious belief means a sincerely held religious, ethical, or moral belief as to what is right or wrong if that belief is held with the strength of traditional religious views. So, it's a religious, ethical, or moral code.

The second thing to know is that the employee's religious objection to vaccination does not have to be mandated by the religious group with which the employee is affiliated. It may be that the employee attends a church, or a temple, or a mosque, and the leader of the congregation has taken the position that everyone has a religious duty to be vaccinated. The employee may not subscribe to that interpretation. And they can assert a request to religious waiver based on their personal religious beliefs.

So basically, religious exemptions are determined on a case-by-case basis. And there has to be an interactive process between the employer and the employee. The good news, if you're in the benefits department, is that HR departments have processes in place for accepting and working through requests for religious waivers. And that is a good place to send an employee who is objecting to a vaccine mandate on the basis of religion.

So, moving on from waivers and from compliant wellness program requirements, another compliance concern is HIPAA privacy. If the plan is collecting vaccine status as part of enrollment, that information cannot be shared broadly. And it can't be used to make employment decisions. So protected health information collected by the plan must stay with the plan.

If you, through a vaccine surcharge process, are collecting information, you can't use that to enforce a vaccine mandate. You can't say, oh, you said when you enrolled in coverage that you're not vaccinated. We're going to put you on unpaid leave because you're not complying with their vaccine mandate. They have to be separate processes.

The last compliance complication that I want to mention is the Affordable Care Act. Under the ACA, a premium surcharge is added to the lowest cost monthly premium to determine whether coverage is affordable. I'm going to give an example on this one. Let's say an employee's contribution for the lowest cost self-only coverage is \$95 a month. That's how much the employee has to pay out of pocket for that coverage.

That meets the affordability test under the Federal poverty level safe harbor. Now if the employer then decides to charge a \$100 vaccine surcharge, that surcharge has to be added to the lowest cost premium for all employees, not just those who are unvaccinated. That's really counterintuitive.

But you have to add the \$100 surcharge to everyone's lowest cost monthly premium, for purposes of determining affordability. I'm not saying you're charging them the extra \$100. But that's what you're reporting on the 1095C. Because the IRS says we have to assume that everyone is subject to the surcharge when we're assessing whether or not that coverage is affordable.

So now, instead of a \$95 monthly premium on the 1095C, we have \$195. That no longer meets the Federal poverty level safe harbor. And I can tell you in my practice, I've seen at least one employer decide we're not going to implement a surcharge. They were all in on the surcharge until we looked at this affordability

component. And they said, you know what, we're not going to implement the surcharge. Because the risk under the affordability rules is higher.

**Julie Stone:** And Holly, I've seen exactly the same thing with an employer going down the path of the surcharge, and getting to this check, and realizing that this was a barrier to moving forward. So, I actually think, while you covered it last, it should be at the beginning of the process for anyone who is thinking about a surcharge. Don't lose sight of this affordability testing.

**Holly Murphy:** Yeah, I think that's a good point. So definitely the affordability and all of these other factors — they make a surcharge much more complicated. And again, a lot of employers have started down that road. And then when they look into the details and how complicated they are, we've seen quite a few employers back off and change their mind.

I think it's also important to recognize that there are some drawbacks to surcharge even if you meet all of these compliance requirements. First of all, it's only going to reach employees who enroll in medical coverage. So, if an employee is not eligible for benefits, or if they decide that they're not going to enroll in your medical, you're not ever going to be able to apply a surcharge. And if your goal is to promote vaccination, the surcharge isn't going to get you there.

There's also a risk of litigation under state laws. There is a growing list of states that are considering a law that would prohibit employers from requiring employees to be vaccinated. There's obviously going to be a conflict between that and this OSHA guidance requiring a mandate. I don't know how it's going to come out.

But it's important to recognize, at least, that there's a risk of litigation. And litigation is time consuming and expensive. So, I would factor that into the calculus. But what I really want to ask you, Julie, is what are your thoughts on the surcharge from a behavioral perspective? Is a surcharge likely to move the needle?

**Julie Stone:** So, I think it's very unlikely to move the needle. It's disconnected. It's the opposite of the comment I made earlier about incentives, where I get a real-time reward for taking action. It's very tangible.

In the arena of considering a surcharge, I go through annual enrollment. Maybe say I'm not vaccinated. I know there's going to be a surcharge. Maybe I have really focused or not on that in the enrollment process. But then it doesn't affect me til my payroll deduction starts. And I'm actually — a higher amount is being taken out of my payroll.

But that's so far removed from my actions that I took at annual enrollment that in terms of impacting my behavior — and that's also a deduction that is buried within my other deductions, my tax, if I have state tax, federal tax. And so, I think it's least likely of all the things we've talked about to prompt behavior change and the action we want — for people to take vaccines.

One last item on the surcharge from a con perspective is that I am also worried it will disproportionately impact lower income employees. If we would look at broad national data where vaccine uptake is lowest, it is in certain underserved populations.

And so, we're now thinking about — we have many employers that are focused on wage equity, diversity equity and inclusion, and building up and addressing underserved needs. And then on the other side over here, we may put in a surcharge that unintentionally and disproportionately impacts those lower wage workers that you're doing other things to try to elevate.

I think it's the least likely to achieve both the near-term objective of increasing the vaccination rate, as well as the implications that are important to consider and the unintended consequences for portions of your population.

**Holly Murphy:** It's interesting that you cite the impact on lower income employees. I talked earlier about how OSHA has said that the inability to get time off work and the risk of losing pay is one of the biggest barriers to employees getting the vaccine.

And OSHA cited several studies. And those studies focused, in particular, on lower income employees and how, for those employees, it could be a choice between putting food on the table and getting the vaccine. That's not the choice we want employees to have. So, if we can take care of one of those, we can solve a lot of problems.

We've talked through a lot in talking through the compliance issues. And listening to myself talking and listening to you talk about these behavioral issues, I'm thinking about what a challenging dilemma this is for employers. So, if you're an employer if you're advising an employer, what should they do? Where do they start on solving for this problem?

**Julie Stone:** I think we start with what's the current state? So, understanding, as best an employer can, what percentage of employees are vaccinated and what percentage or not. So where am I at today? And how far do I need to go?

And then, within that, am I solving for the workplace safety? Am I solving for employee productivity, the issues of physical location, work from home, the makeup of my workforce? And am I also solving for direct cost versus indirect, in terms of lost time and coverage for people not at work?

So, problem assessment and then I move to what's the cultural fit? Knowing what the gap is — is the cultural fit around education, and promoting the storytelling, and the value — is it the incentivizing people depending on the workforce, and the numbers, and where you are?

What have you already tried already? Would you consider employee pulsing? Do you do a quick pulse survey to determine for those of you unvaccinated, what would be most helpful? To your point about the OSHA study, is it that people don't think they have the right to take time away from work to do it?

It may be a perception, not a reality. But reminding people or asking what the barriers are to your workforce and then solving for those, specifically, to determine what will be most effective in your population. And then balancing the considerations around incentive or on-site vaccine clinics with the administration costs and operationalizing them.

So, there's no singular answer. But those are the places I would sit down and walk through with an employer who's thinking about what's next. I've done a lot of things already, but what else can I do to get from 70% to 90% vaccination rate in my population? So, Holly, back to you on — are there some final legal concerns that you want to share with people today?

**Holly Murphy:** My legal concerns are all around the sticks versus the carrots. First, the vaccine mandate, we just don't have enough information yet. We need the OSHA guidance. But you don't have to wait for the OSHA guidance.

Again, OSHA's guidance is going to set the floor, not the ceiling. And employers can enact stricter workplace vaccine rules. Like an employer can enact or adopt a vaccine mandate without waiting for OSHA to act. They are going to have to worry about state laws, though. Because there are these states that are moving toward prohibiting employers from requiring a vaccine.

The other stick that we talked about was the premium surcharge. And if you are an employer and you're considering a premium surcharge, or you've been asked to look into it, again, you need to understand all of their legal restrictions. We talked about the ACA affordability testing and how challenging that was. We talked about wellness program requirements and reasonable alternative standards, also, think about medical accommodations and religious accommodations.

And I think it may help to make sure that everyone internally, who's looking at this decision, understands what is involved in a religious accommodation. Because that is an area that's not very well understood. The last thought that I have. And this is not a legal thought. It's just a general thought — is to think about timing.

There has been a lot going on lately in this area. We've had vaccine surcharges in the news. We had the administration just announce the vaccine mandate. All of this is coming to a head, as plans are going into annual enrollment.

And this creates a temptation to combine vaccine strategies with annual enrollment. And it feels like we're being pressured to do something when we don't quite have all of the information. So, I would say, if you can, and not everyone can, but if you can, maybe hit pause. And let the situation develop a little bit more. So that, as you said, you're thinking about what is the best solution for your workplace, not just what are the employers doing who already have been in the news a lot.

**Julie Stone:** And maybe it's not a hit pause, per se. The benefits enrollment actions have to take place for January 1. But it's creating a separate stream of thought, which going back to my earlier comment, this is an employment issue and not a benefits issue.

So, thinking about it in that vein — yes, it's about employee health. But that's a different conversation than it's the benefit programs, per se. So that's another way to maybe — another thought to leave people with, of looking at this through the lens of your talent strategy employee productivity.

**Holly Murphy:** That's a really good distinction. I like that a lot. Well, Julie, thank you so much for joining us today. This has been just such a very interesting conversation, so timely. And we really appreciate your making the time to visit with us.

**Julie Stone:** Thank you so much for having me. As you can tell, I'm really passionate about the topic and glad to share insights from our research and thoughts on how employers can navigate this really tricky situation.

[MUSIC PLAYING]

**Holly Murphy:** And thank you, to our Benefits, with Purpose! listeners for joining us. Be sure to subscribe to join us for future episodes. And we look forward to seeing you next time.

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