Vaccine Incentive Guidance
On October 4, 2021, the U.S. Department of Health and Human Services, U.S. Department of Labor and U.S. Department of the Treasury jointly issued FAQs relating to COVID-19 vaccine incentives and surcharges. Under the guidance, employers may provide incentives such as premium discounts or surcharges through group health plans to incentivize COVID-19 vaccines, provided the incentive complies with the activity-only wellness program regulations. An activity-only wellness program must meet the following requirements:

- The program must give individuals eligible for the program the opportunity to qualify for the reward at least once per year.
- The reward, along with all other wellness incentives for health-contingent programs under the plan, must not exceed 30% of the total cost of employee-only coverage.
- The program must be reasonably designed to promote health or prevent disease.
- The full reward must be available to all similarly-situated individuals, including providing a reasonable alternative standard.
- The plan must disclose the availability of a reasonable alternative standard in all plan materials describing the wellness program.
- The guidance provides examples of ways for employers to meet the five requirements above. For example, to meet the reasonable alternative standard requirement, the wellness program may offer a waiver or a right to attest to following other COVID-19 guidelines (e.g., masking requirements), to individuals for whom it is unreasonably difficult due to a medical condition or is medically inadvisable to receive the COVID-19 vaccine.

The guidance also clarifies how rewards are treated in determining affordability with respect to employer-shared responsibility payments under the Affordable Care Act (ACA). Premium discounts are treated as "not earned" for purposes of determining an employee's required contribution. Therefore, if a program provides premium discounts for receiving a vaccination, those discounts are disregarded in determining affordability. On the other hand, if a program provides for surcharges to those who do not receive a vaccine, the employer must assume that the surcharge applies. As a result, employers will need to carefully consider how any such program is implemented to appropriately manage potential ACA liability.

Finally, employers should note that the FAQs do not address other wellness program requirements like the Americans with Disabilities Act and Genetic Information Nondiscrimination Act.

Yes, You Can Charge Lower Health Premiums to the Vaxed
Employer group health plans cannot deny benefits to customers who have not gotten the COVID-19 vaccine but can offer premium discounts to customers who decide to get the shot, new guidance from the Centers for Medicare & Medicaid Services (CMS) said.

Florida Contractor Reporting

Effective October 1, 2021, Florida businesses are required to submit new hire information for their independent contractors to the Florida Department of Revenue. This is a significant change for business in Florida as previously reporting of independent contractors by a business was optional.

Specifically, Florida businesses that have paid an independent contractor $600 or more in a calendar year must submit new hire information within 20 days after their first payment to the independent contractor or the date on which the business and independent contractor entered into the contract, whichever is earlier.

California Bill Allows Required Notices and Postings to Be Emailed to Employees

California Gov. Gavin Newsom signed a bill in July that makes a small change to assist employers with remote workers. Senate Bill 657 allows that in any instance in which an employer is required to physically post information, an employer also may distribute that information to employees by email with the document or documents attached.
SB 657 does not remove an employer's obligation to physically display postings as required. This statute takes effect on Jan. 1, 2022.

Massachusetts Department of Revenue Stops Applying Covid-19 Telecommuting Policy, Returns to Location of Work Performed

The Massachusetts Department of Revenue issued guidance indicating that its emergency telecommuting rules implemented during the state's Covid-19 state of emergency would end Sept. 13, 2021. Under the rules, which went into effect March 10, 2020, wages paid to a nonresident employee who worked remotely due to the pandemic were sourced based on where the employee worked prior to the state of emergency. As of Sept. 13, wages generally will be sourced based on where the employee's work actually is performed.

New York Minimum Wage Increases for 2022

The New York state Division of the Budget recently issued its report on the minimum wage rates scheduled to take effect on Dec. 31. Nassau, Suffolk, and Westchester counties will join New York City and large fast-food companies with a minimum wage of $15 per hour, which is an increase from the current rate of $14 per hour. For companies upstate (outside of fast food), the minimum wage will increase to $13.20, which is an increase from $12.50 per hour.

Under the New York state Minimum Wage Act, minimum wage rates in New York increase each year on Dec. 31 until reaching $15 per hour. In New York City and for large fast-food companies throughout the state, the minimum wage has already reached its $15 maximum.

Ohio's Minimum Wage to Increase in 2022

Ohio's minimum wage will increase on Jan. 1, 2022, to $9.30 per hour from $8.80 currently because of inflation. The change applies to employees of employers with annual gross receipts of more than $342,000. For employees at smaller employers the state minimum wage is the same as the federal minimum wage, $7.25 per hour.

HIPPA Rules as Related to COVID Clarified
The Office for Civil Rights (OCR), the agency responsible for enforcing the HIPAA privacy and security rules (the "HIPAA rules"), issued this guidance. A summary is below.

Do the HIPAA rules prohibit businesses or individuals from asking whether their customers or clients have received a COVID-19 vaccine?
No.

"The HIPAA Privacy Rule does not prohibit any person (e.g., an individual or an entity such as a business), including HIPAA covered entities and business associates, from asking whether an individual has received a particular vaccine, including COVID-19 vaccines.
HIPAA rules apply only to covered entities and business associates. In general, covered entities include health plans, health care clearinghouses, and health care providers that conduct standard electronic transactions. But, HIPAA does not apply to entities functioning in their role as employers or to employment records.

The OCR also reminds organizations that even if HIPAA applies, it regulates the use and disclosure of protected health information (PHI), not the ability to request information. Thus, the HIPAA rules do not prohibit a covered entity from receiving COVID-19 vaccination information about an individual. Of course, organizations that receive such information, including employers, still may have a duty to safeguard that information and keep it confidential.

Do the HIPAA rules prohibit an employer from requiring a workforce member to disclose whether they have received a COVID-19 vaccine to the employer, clients, or other parties?
No. OCR reminds readers that the HIPAA rules do not apply to employment records:
"including employment records held by covered entities or business associates in their capacity as employers.

The OCR said: ***"federal anti-discrimination laws do not prevent an employer from choosing to require that all employees physically entering the workplace be vaccinated against COVID-19 and provide documentation or other confirmation that they have met this requirement, subject to reasonable accommodation provisions and other equal employment opportunity considerations.***
But once collected, vaccination information must be kept confidential and stored separately from the employee's personnel files under the ADA.

Do the HIPAA rules prohibit a covered entity or business associate from requiring its workforce members to disclose to their employers or other parties whether the workforce members have received a COVID-19 vaccine?
No.
The HIPAA rules generally do not regulate what information can be requested from employees as part of the terms and conditions of employment. The following examples from OCR make

clear that HIPAA does not prohibit a covered entity or business associate from requiring or requesting each workforce member to:

- Provide documentation of their COVID-19 or flu vaccination to their current or prospective employer.
- Sign a HIPAA authorization for a covered health care provider to disclose the workforce member's COVID-19 or varicella vaccination record to their employer.
- Wear a mask–while in the employer's facility, on the employer's property, or in the normal course of performing their duties at another location.
- Disclose whether they have received a COVID-19 vaccine in response to queries from current or prospective patients.

Do the HIPAA rules prohibit a doctor's office from disclosing an individual's PHI, including whether they have received a COVID-19 vaccine, to the individual's employer or other parties?
Generally, yes. The doctor's office is a HIPAA covered entity and the HIPAA rules prohibit covered entities from using or disclosing an individual's (patient's) PHI except with the individual's authorization, unless an exception applies. Exceptions include, for example, disclosures made for treatment, payment, or health care operations. Absent an exception, the doctor's office will need a written authorization in order to disclosure the records.
Note, however, if the physician that owns the practice, while functioning as an employer, has COVID-19 vaccination information about an employee of the practice, the HIPAA rules generally would not apply to prohibit the physician from disclosing that information. But, other laws could apply, such as the ADA.

The OCR additional examples:

- A covered physician is permitted to disclose PHI relating to an individual's vaccination to the individual's health plan as necessary to obtain payment for the administration of a COVID-19 vaccine.
- A covered hospital is permitted to disclose PHI relating to an individual's vaccination status to the individual's employer so that the employer may conduct an evaluation relating to medical surveillance of the workplace (e.g., surveillance of the spread of COVID-19 within the workforce) or to evaluate whether the individual has a work-related illness, provided all of the following conditions are met:
    - The covered hospital is providing the health care service to the individual at the request of the individual's employer or as a member of the employer's workforce.
    - The PHI that is disclosed consists of findings concerning work-related illness or workplace-related medical surveillance.
    - The employer needs the findings in order to comply with its obligations under the legal authorities of the Occupational Safety and Health Administration (OSHA), the Mine Safety and Health Administration (MSHA), or state laws having a similar purpose
    - The covered health care provider provides written notice to the individual that the PHI related to the medical surveillance of the workplace and work-related illnesses will be disclosed to the employer.

California Court of Appeal Broadens Test For Joint Employer Liability
On September 10, 2021, the California Court of Appeal broadened the test for joint employment in California, lowering the bar for what constitutes sufficient control by business over its vendor's employees' wages and working conditions and opening these businesses up to potential liability.

Departing from the prior decisions, the Court of Appeal found that "[i]f the putative joint employer instead exercises enough control over the intermediary entity to indirectly dictate the wages, hours, or working conditions of the employee, that is a sufficient showing of joint employment."

Impact on Employers
Employers should be mindful of the many factors that go into the analysis to evaluate the risk of being deemed a joint employer of a contractor's employees. That evaluation should include reassessing the provisions of their contracts and need for training employees who interact with a contractor's workers to remind them of their lack of authority and control over such workers. A business found to be a joint employer runs a significant risk of liability for costly litigation, including but not limited to defending against what could be financially significant claims of unpaid wages and hefty penalties.

DOL Can Bring Lawsuit Even When Employee Signed Valid Arbitration Agreement
The DOL recently highlighted a federal court ruling that private arbitration agreements will not prevent the federal Secretary of Labor from bringing suit against an employer for violation of the FLSA (and presumably other federal laws within the DOL's jurisdiction, like the FMLA).

In *Scalia v. CE Security LLC*, there was a DOL investigation into the employer's alleged misclassification of employees as independent contractors, with the resulting failure to pay overtime in violation of the FLSA. The Secretary of Labor then filed suit against the employer seeking damages on behalf of 292 individuals. The employer moved to compel arbitration based on arbitration agreements that each of these individuals had signed.

The federal court, however, rejected the employer's argument that the DOL simply "acts on behalf" of employees in bringing suit. Rather, the court found that the DOL is not bound by individual agreements to which it is not a party. Moreover, the court cited a federal appellate court decision finding the Equal Employment Opportunity Commission's ability to bring suit unhampered by a private employer-employee arbitration agreement for the principle that "agreements of private parties cannot frustrate the power of a federal agency to pursue the public's interests in litigation."

The Regional Solicitor of Labor Jeffrey Rogoff is quoted in the DOL's press release as stating, "This is a significant and favorable decision regarding the U.S. Department of Labor's ability to pursue legal actions and relief for employees in the name of the public interest…. The Office of the Solicitor of Labor prioritizes its pursuit of cases where employees do not have other

avenues of relief when they are forced to arbitrate claims against their employers out of court. This decision affirms the Secretary of Labor's independent authority to bring claims as the Secretary deems appropriate, even where employees may not because of forced arbitration agreements."

Washington State Minimum Wage Increase
Washington's minimum wage will increase by 80 cents, to $14.49 per hour from $13.69, starting Jan. 1, 2022. The 5.83% increase was based on the U.S. Bureau of Labor Statistics' Consumer Price Index for Urban Wage Earners and Clerical Workers. Washington also is increasing the minimum salary that an employee must earn in 2022 to be exempt from overtime pay. To be exempt from overtime, an employee in 2022 must earn at least $52,743.60 a year, or 1.75 times the minimum wage.

DC Leave Law
DC enacted emergency legislation on Oct. 1 expanding the District's Universal Paid Leave Act, and the mayor also signed legislation to make these changes permanent and expand eligibility for leave under the District's Family and Medical Leave Act. As amended, the UPLA will provide paid leave for prenatal medical care, at least through Oct. 1, 2022. Further, the UPLA for the first time expressly provides paid leave to recover from miscarriage or stillbirth. Among other things, the law expands the number of weeks of paid leave available to eligible employees, at least for the fiscal year ending on Oct. 1, 2022.

Under an amendment to the DC FMLA, DC employees will be entitled to DC FMLA leave if they have worked 1,000 hours during their prior 12 months of employment with the employer, which may be nonconsecutive months as long as all periods of employment occurred within the past seven years. This change represents a departure from the federal Family and Medical Leave Act, which requires 1,250 hours during the prior 12-month period, rather than 1,250 hours during nonconsecutive periods of employment with the company.

FUTA Loan Issue
FUTA reduction credits are going into effect January 1, 2022. As you may be aware, the gross FUTA tax rate is 6% and is paid on the first $7000 of wages. Each state is afforded a 5.4% FUTA tax credit when they file their Form 940, resulting in a net FUTA tax rate of .6%. Any state that has an outstanding FUTA loan balance on January 1 for two consecutive years that does not repay the balance by November 10th of the 2nd year, will be subject to a credit reduction of .3% for that year and an additional credit reduction of .3% for each year thereafter. Currently, there are 11 states plus the Virgin Islands with Federal Trust Fund loan balances (also known as Title XII loans) that will be outstanding 2 years come January 1, 2022.

FUTA reduction credits cause a bit of an issue for PEOs. You may wish to collect FUTA from clients with Title XII loans that will not be paid off for any state (client and PEO reporting) with outstanding loan balances as close to 12/31/21 as possible to:

Avoid lost revenue for clients who terminate throughout the year (prior to 11/10/22) who were charged the FUTA tax rate (.60%) without considering any FUTA reductions. These amounts could be quite material.
Eliminate calculations after the fact to bill clients retroactively for the FUTA reduction amounts should the Title XII loans remain outstanding along with the questions that go along with any retroactive billing (especially late in the year).
Lost revenue should you decide not to bill clients retroactively.
Set systems in the first year FUTA reductions become effective. With the state of unemployment the past few years due to COVID, FUTA reductions will not be going away and will most likely grow annually. If they are not addressed form the start, it will be harder to explain to clients and the amounts will continue to compound.

Of course, the states could pay off their loans before November 10th (2022) but historically, most take multiple years to pay back the loans. Beginning back in the late 2000s, states like CA and NY had Title XII loans outstanding for 5+ years and their balances were substantially lower than they are now. Historically, states have paid back these loans close to the November deadline, so you will be behind in billing should you not collect up front.

You may wish to send clients communication regarding a possible higher FUTA cost. It is important to stress to your clients that they would be subject to the FUTA reduction credits even if they were not with a PEO.