



# EMPLOYERS COUNCIL ON FLEXIBLE COMPENSATION

927 15th Street, NW • Suite 1000 • Washington, DC 20005 • (202) 659-4300

## ECFC PRIORITY ISSUES: HOUSE AND SENATE HEALTH CARE REFORM LEGISLATION

As work gets underway to reach agreement on health care reform legislation, the Employers Council on Flexible Compensation (ECFC) calls on the House and Senate to modify two specific provisions that, if left unchanged, will negatively affect the availability of health benefits currently received by millions of Americans. The provisions of most concern to ECFC are the limitations on Flexible Spending Accounts and the overly expansive reach of the High Cost Health Plan Excise Tax. ECFC's views and recommendations for consideration during negotiations on the final legislation are presented below.

1. **Flexible Spending Accounts (FSAs):** Both the House and Senate legislation would: (1) impose a \$2,500 on FSA contributions and (2) index the cap to CPI. The House version begins the FSA cap in 2013; the Senate, in 2011. In addition, the House bill prohibits FSA reimbursement for over the counter (OTC) medicines, effective 2011. The Senate legislation would require individuals to obtain a prescription in order to be reimbursed for OTC medicines through their FSA beginning January 1, 2011.

**ECFC Views:** Approximately 35 million Americans rely on FSAs to obtain the health care services they need. Each year, prior to the beginning of the plan year, these participants review their health care needs and choose amounts to place into their medical FSAs from their own salaries to pay for qualified medical expenses that are not covered by their insurance policies. FSAs are particularly important for patients with chronic conditions, who even with comprehensive coverage can face thousands of dollars in out of pocket costs. FSAs also help patients pay for services not covered by insurance. For example, parents of children with autism often rely on FSAs to help pay for therapies. These types of out of pocket costs will remain even in a reformed health care system.

The proposed \$2,500 FSA cap is too low, particularly for patients with a chronic illness who, even with comprehensive coverage, can face very high out of pocket costs. The cap also will have a tremendous impact on federal employees, who currently can set aside \$5,000 in a health FSA. In addition, state employees in more than forty-six states currently have FSA contribution limits set at \$3,000 or more a year. Finally, the provision calling for a doctor's prescription to receive FSA reimbursement for OTCs will increase costs by requiring individuals to have a physician visit to obtain medication (e.g., an OTC for allergy or reflux) that is otherwise available as an OTC.

Finally, unless changed, FSAs are doubly affected because they are taken into account for purposes of the High Cost Health Plan Excise Tax and are subject to a separate cap, as well. These provisions, operating in tandem, could effectively eliminate FSAs in the very near future.

### Recommendations:

- ECFC strongly urges House and Senate negotiators to reconsider imposing any cap on FSA contributions. If one is adopted, however, it should be set at a higher more reasonable level

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(e.g., the federal employee plan as well as many state governmental plans use a \$5,000 limit) and must be indexed to health care inflation.

- In addition, the cap's effective date should be later and synchronized with the broader changes included in the legislation related to employers' offering of health benefits. These broader changes will affect the design and delivery of benefits, including FSAs to employees and their families. Coordinating the effective dates of the cap and broader changes will help minimize the number of times that employees and their families may face modifications in their health benefits. Moreover, since the limits on cost-sharing do not become effective immediately, it is imperative that patients – particularly those with a chronic condition – can continue to fund their FSAs to the maximum extent possible until that financial protection begins.
- If the High Cost Health Plan Excise Tax (discussed below) is retained, employee salary reduction contributions to FSAs must not apply toward the threshold for the tax.
- The proposed change to require a prescription for tax-free reimbursement of OTC drugs should be removed or replaced with a provision allowing FSA reimbursement for OTC drugs that required a prescription at any time on or after January 1, 1978.

2. **High Cost Health Plan Excise Tax:** The Senate legislation imposes a 40 percent excise tax on high-cost health plans defined to exceed \$23,000 for a family and \$8,500 for an individual as of January 1, 2013. In determining whether a health plan triggers the tax, the Senate bill calls for including the value of many employee benefits *other than primary health coverage* including FSAs, health savings accounts (HSAs), health reimbursement arrangements and fixed indemnity coverage, such as accident, vision, dental and cancer policies, among others. The bill makes no distinction between medical insurance premium payments and amounts that employees elect to take from their own take home pay to pay for amounts not covered by their insurance.

**ECFC Views:** While nominally imposed on insurers and employers, the burden of this tax will be felt by employees and their families. In order to avoid the tax and its onerous administrative burdens, many employers will reduce the health care options currently made available to employees or drop coverage altogether in order to avoid the cap. As a result, the significant tax increase will be felt largely by the middle class.

The proposed tax, as currently drafted, is overly broad in that it applies to all health care coverage made available to employees, and not just primary health coverage. This approach will have the unintended consequence of causing employers to eliminate coverage other than primary coverage, such as FSAs and supplemental coverage, including vision, dental and specified disease coverage. While this may occur immediately in some cases, it will certainly increase over time, because the

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thresholds for the tax are increased at a rate much slower than medical inflation. Non-primary health benefits are critical to many Americans today in order to help finance their health care needs and fill critical coverage gaps inherent in primary health care plans.

**Recommendations:** If the High Cost Health Plan Excise Tax is retained, we urge the House and Senate to consider the following modifications, which will make the tax more equitable and better ensure a continuing role for employer provided coverage of all types:

- Only include the value of primary health coverage in determining the application of the High Cost Health Plan Excise Tax. Do not take into account contributions to FSAs, health savings accounts or supplemental benefits in determining the amount subject to the High Cost Health Plan Excise Tax cap. Including these contributions in the cap will seriously erode the ability of those with chronic diseases to continue to meet their health care needs.
- Increase the tax threshold to a higher initial level so that fewer plans (and employees) are initially subject to the tax, and index the threshold for medical inflation.
- Do not take into account plans paid for with employee contributions (whether pre-tax or after-tax) in determining the amount subject to the High Cost Health Plan Excise Tax.