



FSA's Could End Up On Chopping Block in Hunt for Health Overhaul Money

Source: Kaiser Health News

FSA's which allow consumers to put aside before-tax dollars to pay for medical expenses, are getting close scrutiny as Congress scours the health system for money to finance an ambitious expansion of insurance.

The Joint Committee on Taxation told Senate leaders recently they could collect \$68.6 billion over 10 years by abolishing the accounts, along with separate ones in which employees contribute money for workers to use for health care expenses. Eliminating both types of accounts would pay for four percent or more of the estimated \$1 trillion to \$1.5 trillion cost of expanding coverage to the 46 million uninsured.

The search for revenue is renewing debate over FSA's, long controversial in some health policy circles. Critics say the accounts are a tax shelter for the affluent that encourages spending on unnecessary tests or frivolous items, such as an extra pair of glasses. Proponents say FSA's help people pay for high medical expenses that aren't covered by insurance.

Complicating the debate: The government doesn't track even basic details on how the accounts are used, how much money is involved and what happens to the unspent funds. The only data available comes from the industry—the companies that administer the programs for employers. Even that information is incomplete.

"We're very concerned there are misconceptions out there," says Jody Dietel, an executive with WageWorks, a San Mateo, CA company that administers accounts for more than one million people. "There's this wild notion that people are using it for off-the-wall treatments and that's not what we're seeing."

The IRS doesn't know how many people have flexible spending accounts, but the industry estimates the number at about 30 million, Karen Frost, an executive with Hewitt Associates, which administers eight million of the accounts, says that, on average, employees using FSA's, earn about \$60,000 a year and put aside about \$1200.

Some economists and health policy analysts favor abolishing FSA's, which they say are bureaucratic and paperwork headaches that force people to cobble together dozens of small receipts to win reimbursement, and leave them scurrying around to buy extraneous items to use up the money. They also say accounts are of little use for people in lower tax brackets, and can end up costing them as much or more in lost Social Security benefits, which are based on payroll-tax contributions.

It's not clear how much FSA money is left on the table each year. Mercer, a consulting firm, says its survey of employers last year found that the average employee forfeited 4% of the money put aside in 2008, while Aetna Inc. says that workers in the plans it administers failed to spend 14% of their accounts in 2007.

Also unclear is what happens to the forfeited money. The IRS doesn't tell employers what to do with it, aside from barring them from returning it to the workers who contributed it. Many companies use the leftover money to pay the fees charged by the corporations that administer the accounts, says John Hickman, who heads the health benefits practice at the law firm Alston & Bird. He says administrative fees usually range from \$4 to \$10 per month per participating employee.

Companies are permitted to use the leftover money to cover losses incurred when workers spend all the money designated for their accounts early in a year but quit before they have fully paid into the accounts.

But some of the other changes Congress is considering may make it hard to keep flexible spending accounts as they are, according to the Center on Budget and Policy Priorities. If Congress decides to tax employer-provided health insurance, as the Senate Finance Committee is considering, employers and workers might shift more money into flexible spending accounts—thus depriving the Treasury of some of the money that lawmakers were hoping to raise.

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Target Pays for Healthy Behaviors

Target Corporation, the No. 2 U.S. discount retailer, is testing a program it hopes will lower healthcare costs by paying employees to undergo a health screening and follow recommended steps, reports Reuters.

“WE’RE WILLING TO MAKE THE BET THAT IF WE SEE THOSE (CHOLESTEROL & BLOOD PRESSURE) NUMBERS IMPROVE, WE WILL SEE THE FINANCIAL BENEFIT OF THAT TO OUR TEAM MEMBERS AND TO TARGET. BOTH OF US WILL SHARE THE COST SAVINGS,” SAID JOHN MULLIGAN, VICE PRESIDENT OF TARGET PAY & BENEFITS.

Under Target’s pilot program, participants were paid \$25 to undergo a biometrics screening that included measuring cholesterol, glucose and triglyceride levels, as well as blood pressure, height and weight. They also needed to fill out a health risk assessment and register for the program online. Once those three steps were completed, participants received a personalized health plan and were paid \$50 a quarter if they followed recommendations on that plan, such as talking to a nutritionist. Employees could also earn \$25 for visiting a doctor for annual preventive care.

Interested in developing a Wellness Program at your company? Our Wellness Coordinator will be happy to meet with you, just give us a call at 270.793.0367 to learn more.



COBRA Subsidy: What Is An “Involuntary Termination?”

On March 31, the IRS issued Notice 2009-27 providing additional guidance on the new COBRA subsidy under the American Recovery & Reinvestment Act. Of particular interest is language saying that the government will consider a resignation to be an involuntary termination (entitling persons to the premium subsidy) if the resignation is “due to employer action that causes a material negative change in the employment relationship for the employee.”

This opens the door for some interesting possible disputes, according to Employer Law Report from Porter Wright Morris & Arthur LLP. Among the examples given of termination issues:

- An employee with performance problems is confronted by the employer with an option: either quit or we will terminate you (The IRS guidance says this is considered an involuntary termination, regardless of whether it is called “resignation.” The same is true even if the resignation comes with a severance agreement.)
- An employer institutes a voluntary retirement incentive program. (The guidance states that an involuntary termination includes a resignation in return for a severance package — “buy out” — where the employer indicates that after the offer period for the severance package a certain number of persons will be terminated.)
- For economic reasons, an employer reduces an employee’s hours so that he becomes part-time and loses medical coverage. (In a somewhat ironic result, the guidance makes clear that reduction in hours that does not take an employee to zero hours is not an involuntary termination, even if it results in loss of coverage.) Therefore, the employee in this example will have a COBRA-qualifying event, but will not be entitled to the subsidy.

Supreme Court Makes It Harder to Prove Age Bias

Source: SHRM

The U.S. Supreme Court June 18, 2009 made it more difficult for workers to prove in court their claims that they were the targets of workplace discrimination because of their age. In a 5-4 decision written by Justice Clarence Thomas, the high court ruled that, in a case alleging disparate treatment in violation of the Age Discrimination in Employment Act (ADEA), it is up to the worker to prove that age was the decisive factor in the action taken by the employer, even if there is evidence that age played some role in the employer's decision.

Juries in ADEA cases, the majority stated, may never be told that, if there is some evidence of age bias, the burden of persuasion then shifts to the employer to prove that the action would have been taken anyway. This is a different rule than that applicable in discrimination claims brought under Title VII, where the burden may shift to the employer once a worker shows there is some reason to believe a decision was made for improper reasons. (*Gross v. FBL Financial Services*, No. 08-441).

Rule is Different for Title VII

Jack Gross, an FBL vice president, filed a lawsuit in April 2004 claiming that a change of his responsibilities in 2003 when he was 53 years old was a demotion and that the employer acted because of Gross' age. After a trial in federal court in Iowa, a jury found in favor of Gross and awarded him \$46,945 in lost compensation. FBL appealed to the 8th Circuit, arguing in part that the trial court gave the jury improper instructions on Gross' burdens of proof under the ADEA. The 8th Circuit reversed the trial court's judgment, and the Supreme Court subsequently decided to hear the case.

In an opinion joined by Chief Justice Roberts and Justices Scalia, Kennedy and Alito, Thomas first noted that although Gross relied on decisions construing Title VII for his interpretation of ADEA, "Title VII is

materially different with respect to the relevant burden of persuasion," and Title VII cases do not "control our construction of ADEA." Further, although Congress amended Title VII to explicitly authorize discrimination claims where an improper consideration was "a motivating factor" for the adverse action, Congress neglected to add a similar provision to the ADEA, even though it did amend the latter statute in several ways.

Further, the court said, the ADEA's text does not authorize an alleged mixed-motive age discrimination claim. "The ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act," the majority asserted.

It followed then, the court continued, that under the ADEA, "the plaintiff retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action. Hence, the burden of persuasion necessary to establish employer liability is the same in alleged mixed-motives cases as in any other ADEA disparate treatment action."

Dissent Disagrees with Interpretation of 'Because of' Age

In a dissenting opinion, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, took issue with the majority's assertion that the words "because of" in the ADEA serve as "colloquial shorthand for "but-for" causation." The relevant language is the same in both Title VII and the ADEA, the dissent noted, "and we have long recognized that our interpretations of Title VII's language apply with equal force in the context of age discrimination." The words "because of" an individuals age in the ADEA mean that "age was a motivating factor in an employment decision," the dissenting justices stated.

Larry Lorber, an attorney with Proskauer Rose in Washington, D.C., and former deputy assistant secretary of labor and director of the Office of



Federal Contract Compliance Programs, said that he was somewhat surprised by the 5-4 decision because previous Supreme Court cases had indicated that substantive ADEA law follows Title VII precedent, Congress might act soon to overturn the decision in *Gross*, he added.

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Wellness At Work For You

Study suggests that by the year 2015, 75 percent of U.S. adults will be overweight or obese and 41 percent will be considered obese.

Source: Johns Hopkins Bloomberg School of Public Health

More Americans are getting fat, fat Americans are getting fatter, and the prognosis is shocking. Only smoking causes more deaths and disease, and if the rate of obesity keeps rising as expected, obesity will soon overtake tobacco as the number one preventable killer of Americans.

Genetics have been found to play some role in a person's weight, but they don't explain why the obesity epidemic is skyrocketing. "The simply answer is that we're eating more and we're less physically active," says Lawrence Cheskin, MD, director of the Johns Hopkins Weight Management Center. "Our food supply is composed of eating out and a lot of snack foods." And with computers, video games and an automobile-centric culture, American simply don't move enough to burn the extra calories.

So what's to be done? Benjamin Caballero, MD, PhD, professor of International Health and former director of the Center for Human Nutrition, recommends a national task force that would give the epidemic visibility and use TV spots regularly to educate people, much like the campaign against tobacco. Government policies can also influence the epidemic. Healthy food is often more expensive than unhealthy food, and both Wang and Cheskin advocate government support for producing fruits and vegetables to make them cheaper at the grocery store.

One-third of American kids are overweight, and overweight children are far more likely to become heavy adults.



Setting better standards for the National School Lunch Program—which feeds millions of poor kids in lower socioeconomic groups already disproportionately impacted by the epidemic—is one way to help curb childhood obesity. Another is controlling advertising. In August, Dina Borzekowski, EdD, assistant professor of Health, Behavior and Society, co-authored a study showing that preschoolers preferred the taste of food and drinks in McDonald's packages to the same foods in unbranded packaging. The study results support prohibiting or regulating the advertising of high-calorie, low-nutrient food to kids.

All these are national measures. "But a lot of ways to change obesity at the community level," says Caballero, "because environmental factors such as access to healthy food and places to exercise are local problems."

Incorporating parks, sidewalks and bike trails into urban planning can help get Americans moving.

How We've Grown...

66% of adults are overweight
32% of adults are obese
16% of children are overweight

By 2015,

- 24% of children will be overweight.
- **Three-fourths** of adults will be overweight.

Obesity increases risk for high blood pressure, diabetes and heart disease.

Each year, **300,000** American die from causes related to obesity.

Would you like that Super Sized?

Over the past 20 years:

- The average size of a cheeseburger has nearly doubled.
- The average size of a soda has tripled.
- The average number of calories in a chocolate chip cookie has quintupled.

25% of adults get little or no regular exercise.

40% of adults spend most of their day sitting.

Almost one-fourth of children do not engage in any free time physical activity.

Less than 40% of children participate in organized physical activity after school hours.