EMPLOYERS COUNCIL
ON FLEXIBLE COMPENSATION

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The Honorable Diane Black, Chair
Education and Family Benefits
Tax Reform Working Group
Committee on Ways & Means
United States House of Representatives
Washington, DC 20515

The Honorable Danny Davis, Vice Chair
Education and Family Benefits
Tax Reform Working Group
Committee on Ways & Means
United States House of Representatives
Washington, DC 20515

Dear Representative Black and Representative Davis:

The Employers Council on Flexible Compensation (ECFC) appreciates the opportunity to submit comments to the Education and Family Benefits Tax Reform Working Group. ECFC's more than 100 members include employers who sponsor employee benefit plans as well as insurance, accounting, consulting, and actuarial companies that design or administer employee benefit plans throughout the nation.

More than 30 years ago, Congress created Section 125 of the Internal Revenue Code, which enabled employers across the nation to offer a choice of benefits to their employees through so-called "cafeteria plans." Today, the majority of private employers, the federal government, and all state governments offer cafeteria plan benefits and health flexible spending arrangements – also known as flexible spending arrangements (FSAs) – as an integral component of their benefit programs. These plans help stretch benefit dollars and increase employee spendable income. Unlike traditional "one-size fits all" plans, cafeteria (or flexible benefit) plans and account based plans, such as health savings accounts (HSAs), health reimbursement arrangements (HRAs), dependent care FSAs, and commuter benefits, promote efficient choices by empowering employees to direct their dollars to the benefits that are most meaningful to them. Account-based and cafeteria plans help millions of Americans: (1) improve the affordability of benefits they need, including healthcare, child/dependent care, and work-related transportation and parking expenses; (2) pay for life, disability, accident and supplemental health insurance; and (3) better plan for and manage these expenses.

As the Working Group continues to examine education and family benefits tax policies, we strongly encourage you ensure that account-based plans remain a strong benefit option for employers and employees. ECFC believes that additional steps can be taken to further enhance their value for employers and employees and has outlined below a series of recommendations for the working group's consideration.

Again, ECFC is grateful for the opportunity to offer these recommendations to the Working Group. Should you have any questions, please contact me at (202) 659-4300 or nrankin@ecfc.org.

Sincerely,

Natasha L. Rankin

Natasha L. Rankin
Executive Director

cc: The Honorable Lynn Jenkins, Chair, Income and Tax Distribution Tax Reform Working Group
The Honorable Joseph Crowley, Vice Chair, Income and Tax Distribution Tax Reform Working Group

ECFC Policy Recommendations

- **Eliminate "use-it-or-lose-it" (UOL) rule that applies to health flexible spending arrangements (FSAs).**

  Background: Health FSAs allow individuals to set aside their dollars to pay for eligible healthcare expenses, including cost-sharing, as well as services often not covered by a health plan, such as braces or autism treatments. These accounts are particularly important for individuals with a chronic illness, such as diabetes or congestive heart failure, for whom even nominal cost sharing can quickly add up. An estimated 35 million Americans – most with middle class incomes – rely on health FSAs to make the healthcare they need more affordable. Under UOL, health FSA participants must use all of their FSA dollars or forfeit them at the end of the plan year or grace period. A rule that exposes employees to loss of their hard-earned dollars is inherently unfair, and because healthcare expenses often vary from year to year, this risk is all too real. UOL also creates perverse incentives for health FSA participants to spend dollars on unnecessary services and items at a year's end, which contributes to inefficient healthcare spending – a chief concern of policy makers.

  Recommendation: ECFC strongly supports eliminating UOL.

- **Preserve stand-alone health reimbursement arrangements (HRAs).**

  Background: HRAs are employer-funded arrangements that help employees pay out-of-pocket healthcare expenses. To implement the current law provision on annual and lifetime limits prohibitions, the Administration issued sub-regulatory guidance that would prohibit stand-alone HRAs. Employers have long used HRAs to provide employees with affordable coverage; eliminating them will cause millions of Americans to lose an employer-funded coverage option.

  Recommendation: The sub-regulatory guidance should be reversed in statute, which would create a more definitive environment for employers seeking to offer or to continue to offer HRAs.

- **Rescind the statutory requirement to obtain a prescription in order to receive reimbursement for over-the-counter (OTC) medicines through a FSA, HSA, or HRA.**

  Background: Current law requires individuals to obtain a prescription for an OTC medicine to be reimbursed through an account-based plan. This requirement has created a number of perverse incentives that impact healthcare spending. First, individuals often have to schedule a doctor's visit, for which they pay cost-sharing and the insurer pays the provider, to get the prescription. The requirement also incentivizes individuals to purchase more costly brand drugs covered by insurance, rather than a more cost-effective OTC drug. Finally, the requirement has increased the administrative burden faced by providers.

  Recommendation: The requirement to obtain a prescription in order to receive reimbursements for an OTC medicine through a FSA, HSA, or HRA should be rescinded.

- **Equalize the transit and parking portion of the commuter benefit on a permanent basis.**

  Background: The commuter benefit allows individuals to use pre-tax dollars to defray their commuting costs. Until 2009, the parking benefit far exceeded the transit benefit. At that time, Congress equalized the benefits at $230/month until the end of 2011. For 2012, the monthly transit benefit fell to $125, while parking increased to $240. Parity was restored for 2012, and through 2013. Without additional action, the transit benefit will again be significantly reduced in 2014.

  Recommendation: With transportation costs representing the second largest household expense, the transit benefit has become increasingly important to working Americans.[1] In addition to helping offset commuting costs, parity will further promote the use of public transportation, help reduce traffic congestion, conserve energy, and improve air quality. Extending parity on a permanent basis will offer employers and employees an important sense of stability and ensure that individuals who prefer transit services are not penalized.

- **Modify HSAs to make them a stronger benefit tool.**

  Background: Employers and employees increasingly are relying on HSAs to meet their healthcare coverage needs. Nearly 25 percent of small employers offer a HSA or HRA to their employees; more than 13 million Americans have an HSA qualified high-deductible health plan (HDHP) – up by more than 100 percent since 2008.

  Recommendations: The following statutory changes to further enhance the value of HSAs:

  - **Allow individuals over age 65 to contribute to an HSA.** Current law prohibits active employees from contributing to their HSA upon Medicare enrollment. Enrollment in Medicare Part A (Hospital Insurance) occurs automatically for most beneficiaries even though their employer may continue health coverage until they retire. The law should be changed to permit active employees automatically enrolled in Medicare Part A to continue to make HSA contributions.

  - **Allow early retirees to use their HSA funds to pay for health insurance coverage.** Current law allows individuals over 65 to use their HSA funds to pay the premium costs for retiree coverage. Early retirees – those under age 65 – do not have this option. The law should be changed to permit retirees, regardless of age, to use their HSA funds for retiree coverage.

  - **Revise the statute to include high-deductible health plans (HDHPs) in plan types that meet minimum essential health benefits (EHB) coverage requirements.** The ACA requires that individuals obtain health coverage that meets minimum EHB coverage requirements. If a plan does not meet those requirements, the individual will not satisfy the requirement to have health coverage and will be subject to financial penalties. HDHPs offered in concert with an HSA – regardless of the employer contribution – should be considered as meeting the minimum EHB requirement.

  - **Allow HSA funds to be used for adult children's medical expenses.** Current law requires that plans offering dependent coverage, offer coverage to dependents up to age 26. Department of Treasury guidance permits health FSA and HRA funds, but not HSA funds, to

[1] www.commuterbenefitsworkforus.com

pay for medical care expenses incurred by adult dependents through the underlying plan. There is no reason to differentiate between health FSAs/HRAs and HSAs.

- **Increase dependent care FSA contribution amounts and apply an inflation adjuster.**

  Background: Dependent care FSAs are pre-tax dollars individuals set aside to offset work-related dependent care costs. The statutory $5,000 contribution limit was set more than 20 years ago and has never been adjusted for inflation. The amount falls far below dependent care costs in most parts of the nation. In fact, the average annual cost for center-based care for an infant was higher than a year's in-state tuition and related fees at a four-year public college in 35 states and Washington, D.C.[2]

  Recommendation: The cap should be increased to $10,000 in 2014, and adjusted on an annual basis for inflation by the Consumer Price Index (CPI).

- **Increase the amount of compensation that can be disregarded when conducting the average benefits test for a dependent care FSA.**

  Background: IRC Section 129 requires that average benefits provided to employees not highly compensated be at least 55 percent of the average benefits provided to highly compensated employees. For benefits provided through a salary reduction agreement, a plan may disregard any employees with compensation less than $25,000. This provision worked well originally because employees earning less than $25,000 typically elect the child care tax credit, rather than a salary reduction arrangement.

  Recommendation: When Congress increased the child care tax credit to $6,000, the $25,000 amount in Section 129 was not adjusted, causing many dependent care FSAs to fail the average benefit test. The amount in Section 129 should be increased to $30,000 to restore the original balance of the law.

[2] Child Care Aware® of America "Parents and the High Cost of Child Care," August 2012