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- **DEMOCRATS JOIN REPUBLICANS ON A BILL TO REPEAL THE BAN ON THE USE OF HEALTH ACCOUNTS FOR OTC MEDICATIONS WITHOUT PRESCRIPTIONS**

This week, Senator Ben Nelson (D-NE) and Representative Shelley Berkley (D-NV) joined Senator Pat Roberts (R-KS) and Representative Lynn Jenkins (R-KS) to introduce a bill that would remove the health care law's current ban on using flexible spending accounts (FSAs), health reimbursement arrangements (HRAs), or health savings accounts (HSAs) to pay for OTC medications unless they have prescriptions.

IMPACT ON EMPLOYERS AND EMPLOYEES: Removing the prescription requirement for OTC drug purchases would encourage more employers to offer health accounts to their employees, remove an administrative burden and lower employees' out-of-pocket costs.

OUTLOOK: *The Senate and House may pass the bill.*

BACKGROUND: Beginning January 1, 2011, under the Affordable Care Act, people can no longer use FSAs, HRAs or HSAs to pay for OTC medications, unless prescribed by physicians.

Senators Kay Bailey Hutchison (R-TX) and Jon Kyl (R-AZ) both introduced separate, similar bills to repeal the OTC prescription requirement for health accounts.

The National Business Group on Health sent a support letter for Senator Hutchison's bill.

Link to the letter:

<http://www.businessgrouphealth.org/pdfs/021611%20Support%20Letter%20to%20Senator%20Hutchison%20and%20Rep%20Paulsen.pdf>

NATIONAL BUSINESS GROUP ON HEALTH VIEW ON THESE ISSUES: The National Business Group on Health supports eliminating the barriers to using health accounts to offer affordable, effective benefits that help to lower employees' out-of-pocket health care costs.

➤ **EEOC REACHES ITS LARGEST SETTLEMENT OVER CERTAIN LEAVE POLICIES FOR ABSENCES DUE TO EMPLOYEES' DISABILITIES**

Recently, the EEOC reached its largest disability settlement requiring an employer to provide an exception in its "no fault" attendance policy for absences due to employees' disabilities. The employer placed employees on a disciplinary step that could ultimately lead to more serious disciplinary consequences, including termination, if they accumulated a designated number of "chargeable absences". The EEOC *alleged* that the company did not provide "reasonable accommodations" under the Americans with Disabilities Act (ADA) for disabled employees' absences.

The company settled for \$20 million; and agreed to:

- Revise its attendance plans, policies and ADA policy to include reasonable accommodations for persons with disabilities, including excusing certain absences;
- Provide mandatory periodic training on the ADA to employees primarily responsible for administering the attendance plans;
- Report to the EEOC about all employee complaints of disability discrimination relating to the attendance policy;
- Post a notice about the settlement; and
- Appoint an internal consent decree monitor to ensure compliance.

IMPACT ON EMPLOYERS AND EMPLOYEES: Employers could see a significant increase in ADA claims, administrative burdens, workplace accommodations, and related litigation costs to reevaluate and possibly revise their current attendance and paid or unpaid leave policies (summary plan descriptions, employment agreements, employee handbooks), particularly if they allow only fixed periods of leave, to ensure they provide "reasonable accommodations" for employees' absences caused by disabilities.

Employees claiming a disability may find it easier to do so. However, this result might lower morale and productivity for fellow employees who experience increased workloads or workplace adjustments.

OUTLOOK: *The EEOC will likely issue additional guidance on ADA standards for leave as a "reasonable accommodation" for employees with disabilities.*

BACKGROUND: In June, the EEOC held a public meeting on the issue of leave as a "reasonable accommodation" for people with disabilities under the Americans with

Disabilities Act (ADA). At this meeting, EEOC attorneys stressed that “no-fault” leave policies (i.e., policies that provide only fixed periods of leave regardless of the nature of employees’ disabilities) may result in ADA violations. The attorneys also emphasized that if employees, due to their disabilities, require more leave than employers’ leave policies allow, their employers should determine on a case-by-case, or individual basis, whether or not they need to offer additional leave as an appropriate accommodation.

In recent years, the EEOC has filed suits against several large employers for ADA violations because leave policies *allegedly* did not provide “reasonable accommodations” for employees with disabilities. The lawsuits have resulted in multimillion dollar settlements and consent decrees requiring substantial changes to company leave policies and procedures.

The ADA requires that covered employers provide “reasonable accommodations” for qualified employees with disabilities, provided that the accommodations do not present an undue burden on the employers.

In March 2011, the EEOC issued its final rule broadening the definition of disability and lowering the bar for claims under the ADA.

Link to the National Business Group on Health’s Public Policy Alert on the EEOC’s final rule implementing the ADA:

<http://www.businessgrouphealth.org/members/secureDocument.cfm?docID=3076>

NATIONAL BUSINESS GROUP ON HEALTH VIEW ON THESE ISSUES: The National Business Group on Health believes that the ADA is an important law that works to protect those whom Congress originally intended from discrimination. However, expanding “reasonable accommodation” requirements under the ADA could increase costs, administrative burdens, and litigation.

➤ **SENATE COMMITTEE PASSES TRADE BILL REVIVING HEALTH CARE TAX CREDIT FOR EMPLOYEES WHO LOSE THEIR JOBS TO FOREIGN COMPETITION AND RETIREES WHOSE PENSION PLANS FAIL**

Recently, the Senate Finance Committee passed a South Korea trade bill, authored by Senator Max Baucus (D-MT), that would give employees who lose their jobs due to foreign competition and older retirees (at least 55 and older) in failed pension plans a tax credit that would pay 72.5% of their health insurance premiums, including COBRA coverage, until December 31, 2013. The Finance Committee failed to consider several amendments during the hearing from Senate Democrats to increase the tax credit to 80% and from Senate Republicans to repeal various provisions of the new health care law including the employer mandate; medical device tax; Medicaid expansion; the Independent Payment Advisory Board (IPAB); the proposed Accountable Care Organization (ACO) rule; the OTC prescription requirement for health accounts; and the long-term care benefit CLASS Act program.

The House Ways and Means Committee also passed a similar South Korea trade bill, but without the tax credit renewal.

IMPACT ON EMPLOYERS AND EMPLOYEES: Renewing the health care tax credit will help employees who lose their jobs due to foreign competition and older employees in failed pension plans afford COBRA, retiree medical and other health care premiums.

OUTLOOK: *House Speaker John Boehner (R-OH) plans to consider separate bills on the health care tax credit and the South Korea trade agreement soon. The Senate will likely pass the House's separate bill to reauthorize the tax credit after they defeat a number of expected Republican amendments to repeal various provisions of the new health care law.*

BACKGROUND: A 2002 law created a health coverage tax credit for employees who lose their jobs due to foreign competition as part of the Trade Adjustment Assistance (TAA) program. The law set the credit to 65% of the affected workers' premiums. In 2009, the economic stimulus law raised the credit to 80% through December 31, 2010. Last year, Congress approved a temporary extension of the tax credit through February 13, 2011.

NATIONAL BUSINESS GROUP ON HEALTH VIEW AND ACTION ON THESE ISSUES: The National Business Group on Health believes that COBRA plays an important role in providing temporary health care coverage to former employees. We also support temporary assistance for trade affected workers and retirees in failed pension plans.

➤ **POTENTIAL FEDERAL DEBT DEAL MAY INCLUDE \$300 BILLION IN HEALTH CARE CUTS**

This week, the President and House and Senate leaders met almost daily to work on a potential deal to increase the current \$14.3 trillion debt ceiling after major negotiations broke down between House Majority Leader Eric Cantor (R-VA) and Vice President Joe Biden over whether or not any potential agreement would raise taxes as well as cut government spending on entitlement programs like Medicare.

The negotiators may base the deal on:

- A proposal from Senate Minority Leader Mitch McConnell (R-KY) that would allow the President to authorize three partial debt limit increases along with offsetting federal spending cuts. Congress could disapprove of the President's proposed debt limit increases, but it would take a two-thirds majority in both the House and the Senate to override an expected presidential veto; or
- A \$4 trillion deficit reduction package proposal from the following Senators including Richard Durbin (D-IL), Kent Conrad (D-ND), Mark Warner (D-VA), Mike Crapo (R-ID), Saxby Chambliss (R-GA) and Mark Kirk (R-IL).

Any deal will likely include up to \$300 billion in additional agreed upon federal health care expenditure cuts over 10 years, likely through Medicare and Medicaid payments to:

- Hospitals (payments for services and medical education);
- Clinical labs;

- Skilled nursing facilities;
- Home health care agencies;
- Durable medical equipment (DME) companies (wheel chairs, etc.); and
- Medigap plans.

Next week, House Republicans also plan to pass a largely symbolic constitutional amendment that would require Congress to pass a balanced budget each fiscal year while capping federal spending, including Medicare and Medicaid, at 18 percent of the Gross Domestic Product (GDP). Under the amendment, Congress would need a two-thirds vote to increase taxes, and a three-fifths majority vote to increase the debt limit.

IMPACT ON EMPLOYERS AND EMPLOYEES: Congress and the President need to come to an agreement to reform our nation's expensive entitlement programs (Medicare and Social Security) and the state-federal Medicaid program to save the federal government from fiscal ruin and our economy too, before the Medicaid expansion begins in 2014, and both Medicare and Social Security run out of money, respectively, beginning in [2020](#) and 2036.

OUTLOOK: *The President and Congress will likely reach an agreement to raise the nation's debt ceiling before August 2. Hospitals, skilled nursing facilities and home health care agencies will likely face additional cuts in the final agreement.*

BACKGROUND: This week, hundreds of CEOs sent a [letter](#) to the President and the Congress to adopt a plan to reduce long term budget deficits and avoid even a technical default on the nation's debt.

Meanwhile, hundreds of labor organizations and consumer advocacy groups also sent a [letter](#) opposing the House's balanced budget amendment.

In June, the House rejected a bill that would raise the debt ceiling by the \$2.4 trillion requested by the President without any spending cuts.

In May, the Senate rejected Representative Paul Ryan's (R-WI) House-passed budget bill that would cut about \$4 trillion in federal spending over 10 years and convert Medicare into a health insurance subsidy program (\$8,000 for individuals; \$11,000 for families) with a choice of plans for people who are currently 55 or younger, beginning in 2022.

The federal government reached the debt ceiling on May 16, 2011 and has taken administrative measures to delay a default until August 2 when the federal government will exhaust its borrowing authority. Defaulting on the U.S. debt would cause interest rates to increase dramatically and damage America's economic recovery.

The federal government's debt is \$13.5 trillion and rising. The U.S. currently borrows \$125 billion per month to pay for all of commitments, including Medicare. In January, the CBO raised its estimate for the annual deficit (spending more than it takes in on revenues) from \$1.1 trillion to \$1.5 trillion. Spending on the government's major mandatory health care programs—Medicare, Medicaid, the State Children's Health Insurance Program (SCHIP), and future health insurance subsidies provided through the

insurance exchanges in 2014—along with Social Security will increase from roughly 10% of Gross Domestic Product (GDP) in 2011 to about 16% over the next 25 years. Medicare, Medicaid, and SCHIP together account for 21% of total federal spending.

In April, the President signed legislation that cut \$41 billion across a variety of government programs while funding the federal government for the rest of the congressional fiscal year (September 30, 2011). The President also made a [speech](#) calling for up to \$4 trillion in savings over 12 years, but did not release many details.

NATIONAL BUSINESS GROUP ON HEALTH VIEW AND ACTION ON THESE ISSUES: The National Business Group on Health believes that we need to put our government's fiscal house in order and invest in high value services and programs in order to strengthen our economy. We also believe that we need a long term solution to the country's unsustainable entitlement spending.

Based on work by the Institute of Medicine (IOM), hundreds of billions of dollars can be saved annually in the health care system without hurting quality and safety of health care. Any reductions in avoidable medical errors, overuse or patient safety problems would reduce harm and risk to patients.

Link to the IOM's list of excess cost domains:

http://books.nap.edu/openbook.php?record_id=12750&page=52

If you would like more details on these or other issues or would like a phone briefing on legislation, or want to express concerns about specific issues, please contact Steven Wojcik, Vice President, Public Policy at wojcik@businessgrouphealth.org or 202-558-3012. **Also, as part of our "Ask a Benefits Question" service, we are happy to respond within 24 hours to any health benefits question on policy, regulations or legislation.**

This material is provided for information purposes only and is not a substitute for legal advice.

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