

FLIMFLAM PLAN > SCOTT SINDER, KATE JENSEN

Magic or Snake Oil?

Preventive-care-only plans make bold promises that leave me wondering.

Many of you are hearing from clients and colleagues about a new category of products in the marketplace that promise employers they can save money by offering their employees a skinny, preventive-care-only health plan coupled with a very rudimentary wellness program. The vendors assert that employers who sign up with them can avoid any exposure to the Affordable Care Act’s \$2,000-per-employee penalty because their preventive-care-only plan satisfies the basic ACA minimum essential coverage (MEC) requirements. Plus, employees who participate can still have the same amount of cash in their paychecks. It sounds like a lot of something for essentially nothing. Is it magic? Or is it snake oil?

The vendors all claim they have legal opinions verifying the permissibility

of their programs but, unfortunately, those are available only to those who have bought their service. I have more questions than opinions at this juncture, but the programs seem suspicious to me. Here are the basics on how these programs purport to work, followed by questions that seem to make these propositions more snake oil than magic.

THE PROMISE

The three programs I reviewed have the same basic components:

1. The employee purchases a preventive-care-only plan with pre-tax dollars.
2. The pre-tax income subject to employment taxes therefore is reduced, saving the employer its share of those

tax obligations (offset in part by a fee paid to the insurer for administering the program).

3. The “insurer” then repays the employee the entire amount of the plan premium, less an administrative fee, based on the employee’s participation in a wellness program.

4. The repayment is divided into two parts. Some goes into a “Benefit Bank” (they all have “Benefit Banks”) to be used to purchase voluntary benefit products from the vendor.

The balance goes back to the employee in cash.

So, using the montly pay example in the chart, here's how this purportedly works. The employer would have

a gross monthly savings (from avoided employment taxes) of \$97.54 (\$1,275 x 7.65%) or a net monthly savings of \$64.59 after payment of the administrative fee, for an annual savings of \$775.08 for this one employee. When you couple that with the avoidance of the minimum

Monthly Pay

CURRENT PAY		MAGICAL PROGRAM PAY
\$3,000	Gross	\$3,000
\$0	Magical Program Premium	\$1,275
\$3,000	Taxable Income	\$1,725
(\$593.31)	Taxes	(\$270.10)
\$2406.69	Post-Tax Income	\$1454.90
\$0	Wellness Reward	\$1,224
\$2,406.69	Subtotal	\$2,678.90
\$0	Benefit Bank	(\$272.21)
\$2,406.69	Net Pay	\$2,406.69

essential coverage penalty then you consider the employee gets the same amount of take-home pay along with some new benefits, everyone should win. Does it sound too good to be true?

THE QUESTIONS

Here are some questions that interested clients should be asking the promoters of these magical programs.

Why isn’t the non-benefit-bank component of the wellness reward subject to taxation?

My tax colleagues at Steptoe inform me that, under Treasury Regulation



REGULATORY NEWS TICKER

representative to Financial Stability Oversight Council, replacing Adam Hamm, North Dakota’s commissioner, whose term expired in September. www.state.nj.us/dobi/insmnu.shtml

NEW YORK Attorney General Eric Schneiderman’s office files first indictment over Superstorm Sandy documents allegedly doctored by engineers in favor of insurers and NFIP. Authorities charged Long Island engineering firm and former executive with falsifying damage reports on homes

in a 50-count indictment that includes claims the executive directed staff to delete descriptions of flood damage to homes submitted by subcontractors who inspected the properties. Executive pled not guilty at arraignment. www.dfs.ny.gov

NORTH CAROLINA Passes HB 287 omnibus insurance law. Includes five laws reforming Captive Insurance Act, affecting currently licensed captives and those in application phase. Top changes include permission for business entities in state to be licensed as a captive even if

incorporated, formed or organized under laws of another state. Minimum capital and surplus requirements for protected cell captive now under discretion of insurance commissioner. > HB 287 also permits setup of state-based private flood market. www.ncdoi.com

OKLAHOMA Geological Survey now studying seismic activity as related to wastewater injection in Arbuckle formation using sensors placed into certain injection wells, which will gather information from roughly August through

February from about 9,000 feet below the earth’s surface. The state had more than 900 earthquakes of magnitude 3.0 or greater last year. State Corporation Commission particularly concerned about activity in Perry, Luther and Fairview. www.oid.ok.gov

SOUTH CAROLINA State Supreme Court rules private property damaged by law enforcement in the course of duty doesn’t constitute “compensable taking” and state is not liable to pay for damages. Case concerned convenience

Section 1.132-6(c), wellness rewards paid in cash must be reported as W-2 wages and are fully subject to both income and employment taxes. A recent IRS Chief Counsel Advice Memorandum confirmed the agency's position that an employer may not exclude from an employee's gross income premium reimbursements received for participating in a wellness program if the premiums were paid on a pre-tax basis. This would, of course, eviscerate the promise of the magical program.

I have seen at least one program that purports to pay the entire wellness reward into the Benefit Bank, which would solve the tax issue, but that would dramatically reduce the employee's actual take-home pay.

Why isn't the wellness reward subject to the Equal Employment Opportunity Commission's Americans with Disabilities Act 30% wellness reward cap?

Under the EEOC's recent ADA wellness regulations, any wellness program that asks employees to respond to disabilities-related questions and/or that includes any actual medical testing will be subject

to a cap of 30% of the premium on any wellness reward or penalty. The programs outlined here obviously include a reward that greatly exceeds the cap. The answer might be that the programs have been carefully modulated to elude the EEOC rules. If that is indeed the case, ACA regulators might at some point consider them to be illegitimate wellness programs.

What happens to these programs when the ACA non-discrimination rules are put into place?

The Affordable Care Act requires the Department of Treasury to issue rules prohibiting an employer from offering higher-paid full-time employees different benefits or benefits under better terms than lower-paid employees. Treasury officials have indicated they intend to issue rules that will employ an actual participation test. In other words, if an employer has a disproportionate percentage of higher- or lower-paid employees participating in a particular plan, regulators will deem that a violation.

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Treasury also intends to include a safe harbor that will be satisfied if all the employer's plan options satisfy the ACA minimum value rules.

Preventive-care-only plans do not satisfy those rules.

If an employer were to put one of these plans in place and the non-discrimination rules are as we expect them to be, the employer would be forced to select among unsavory choices: terminate the magical plan; terminate any other group plans they may offer (I believe that if an employer offers only a single plan that should not run afoul of the non-discrimination rules when they are implemented); or pay (exorbitant) penalties.

Flimflam or legitimate plan? I don't know for sure, but I definitely have some questions.

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Texas Scrutinized Over Flood-Related Oil Leaks

Texas state Sen. Jose Rodriguez wants to know why flood-related oil spills from May storms were so poorly handled. Civil Air Patrol photos show large crude slicks on waterways, and an internal email from a Texas Railroad Commission geoscientist tells recipients the oil had flowed downstream into Lake Houston and would spread over the land once floodwaters receded. The *El Paso Times* ran a series of stories exposing failures in state documentation of the oil spills, including missing or inaccurate information and no record of follow-up, cleanup or fines for sites whose oil tanks leak. Rodriguez is pressing for improvements in how the state handles oil leaks.

store damaged by police bulldozer, tear gas canisters and other police actions in hostage standoff. City demolished building completely after owners refused to tear it down. www.doi.sc.gov

TENNESSEE Abbie Hudgens, Bureau of Workers Compensation administrator, named president of Southern Association of Workers Compensation Administrators. <http://state.tn.us/commerce>

TEXAS Workers compensation commissioner Ryan Brannan says state's

closed pharmacy formulary is reducing use of opioids and lowering costs in the workers comp system. The formulary requires prior approval before doctors can prescribe N drugs—25 brands of opioids, muscle relaxants, antidepressants and cannabinoids. Total drug costs have fallen 15% since closed formulary was implemented. Cost for N drugs dropped 80%. Prescriptions for opioids on the N-drug list fell 81%. www.tdi.state.tx.us

UTAH Travis Wegkamp named director of captive division in Insurance

Department. Replaces David Snowball, who retired in August. Internal move. www.insurance.utah.gov

VERMONT Consumer litigation-funding companies need license and surety bond or letter of credit to operate legally as of July 1 under HB 84. Security must be \$50,000 or twice the largest funding amount they've provided in past three years, whichever is larger. www.bishca.state.vt.us

WASHINGTON Fines New York-based pet insurer American Pet Insurance, also

using the name Trupanion. Says insurer charged unapproved rates, failed to cancel policies in timely manner after pets' deaths, change of pet ownership or policy cancelation. www.insurance.wa.gov

WISCONSIN Medical Examining Board adopts opioid prescription guidelines based on standards from Centers for Disease Control and Prevention. Guidelines include treating pain initially without drugs, prescribing lowest dose possible and in limited quantities, among other protocols. www.oci.wi.gov