It Saves To Be Healthy: Using the Tax Code To Incentivize Employer-Provided Wellness Benefits

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INTRODUCTION

Health and wellness have recently become increasingly popular in America.[1] It is hard to avoid this fitness frenzy when the magazine racks are filled with toned models and fitness-related headlines, a "Health and Fitness" tab appears on almost every media website,[2] and even basic cable channels tout America's favorite weight-loss show, *The Biggest Loser*.[3] But perhaps this growing obsession with health and fitness is occurring for good reason—since 1960, "obesity rates have more than doubled."[4] Current estimates are that sixty-eight percent of adults[5] and more than fifty percent of full-time workers are either overweight or obese.[6] And obesity is not just plaguing adults; according to the Centers for Disease Control and Prevention, approximately seventeen percent of children and adolescents aged two to nineteen are obese.[7]

Because obesity is strongly correlated with increased risk for health conditions, such as hypertension, type 2 diabetes, coronary heart disease, stroke, asthma, and arthritis, direct medical spending on diagnosis and treatment of these health conditions is likely to increase with rising obesity levels.[8] Furthermore, numerous more indirect costs are part of the overall economic impact of obesity.[9] Significant productivity costs are linked with obesity including absenteeism, presenteeism (the productivity of employees while at work), disability, and premature mortality.[10]

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1. *See Health and Wellness in America: The Consumer Perspective,* NIELSEN (Aug. 14, 2014), http://www.nielsen.com/us/en/insights/reports/2014/health-and-wellness-in-america-the-consumer-perspective.html [http://perma.cc/SFV5-65MY].

2. *See, e.g.*, MSN.COM, http://msn.com [http://perma.cc/2HYL-DG4B]; YAHOO!, http://yahoo.com [http://perma.cc/NBV6-M3TZ]; CNN, http://cnn.com [http://perma.cc/LE2T-J2HJ]; FOX NEWS, http://foxnews.com [http://perma.cc/RJ2Y-AY3C].

3. *The Biggest Loser*, (NBC 2014), *available at* http://www.biggestloser.com/ [http://perma.cc/74B7-7Z8X].

4. *Obesity Rates & Trends Overview*, ST. OBESITY, http://stateofobesity.org/obesity-rates-trends-overview/ [http://perma.cc/3K99-W8QH].

5. *Id.*

6. Eric Finkelstein, Ian C. Fiebelkorn & Guijing Wang, *The Costs of Obesity Among Full-Time Employees*, 20 AM. J. HEALTH PROMOTION 45, 48 (2005); *see also Defining Adult Overweight and Obesity*, CENTERS FOR DISEASE CONTROL & PREVENTION (Apr. 27, 2012), http://www.cdc.gov/obesity/adult/defining.html [http://perma.cc/U8AP-3W5C] (stating that "overweight" and "obesity" are both labels for ranges of weight that are "higher than what is considered as a healthy weight for a given height.").

7. *Childhood Obesity Facts*, CENTERS FOR DISEASE CONTROL & PREVENTION (June 19, 2015), http://www.cdc.gov/obesity/data/childhood.html [http://perma.cc/G8WV-JXUE].

8. Ross A. Hammond & Ruth Levine, *The Economic Impact of Obesity in the United States*, 3 DIABETES, METABOLIC SYNDROME & OBESITY: TARGETS & THERAPY 285, 286 (2010).

9. *Id.* at 294.

10. *Id*. Studies have shown a positive and statistically significant correlation between

Fortunately, according to the U.S. Department of Health and Human Services, an active lifestyle and regular physical activity can reduce the risk of obesity and lower the risk of developing or dying from heart disease, type 2 diabetes, stroke, osteoporosis, and certain forms of cancer.[11] As research increases on the importance of healthy lifestyles, and more information becomes available, more people are struggling to determine the best way to practice healthier behavior, including how to afford healthier options.[12]

With lifestyle-related disease on the rise[13] and an increasing number of employers being held responsible for providing health insurance to their employees,[14] we as a society have incentives to promote wellness, even if only to cut health care costs. Part I of this Note outlines a brief history of employer-provided wellness benefits and provides a concise summary of the employer-provided wellness benefits available. Part I also explores what motivates employers to offer wellness benefits—specifically subsidized gym memberships—and the impact these benefits have on employees. Part II analyzes the relevant federal income tax law, specifically, the fringe benefits provision of the Internal Revenue Code,[15] and concludes that under existing tax law, on-premises gym facilities do not yield any taxable income to employees, but employer-subsidized, off-premises gym memberships do. Finally, Part III outlines the benefits of using the tax code[16] to incentivize behavior and advocates that, in order to incentivize the distribution and use of employer-provided wellness benefits—specifically, subsidized health club memberships—these benefits should not be included in gross income, as it is used to calculate federal income tax consequences.

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obesity and measures of absenteeism; for example, 3.73 additional days of work were lost per year for each obese employee relative to their normal-weight coworkers, producing $11.2 million per year in productivity losses (costs incurred because the employee is paid while not at work). *Id.* at 289. Furthermore, even controlling for variables such as education, marital status, race, gender, and children in a household, for men, being obese raises the probability of receiving disability income by 6.92 percentage points (the equivalent of losing 15.9 years of education). *Id.* For women, the increased probability of receiving disability is 5.64 percentage points (the equivalent of losing 16.7 years of education). *Id.* at 289–90.

11. U.S. DEP'T HEALTH & HUMAN SERVS., PHYSICAL ACTIVITY FUNDAMENTAL TO PREVENTING DISEASE (2002), *available at* http://aspe.hhs.gov/sites/default/files/pdf/72836/physicalactivity.pdf [http://perma.cc/6XS7-J7DS].

12. *See* Katey Troutman, *Who Can Really Afford to Eat Healthy in the U.S.?*, CULTURE CHEAT SHEET (Nov. 22, 2014), http://www.cheatsheet.com/business/who-can-really-afford-to-eat-healthy-in-the-u-s.html/?a=viewall [http://perma.cc/RD7M-UZSA].

13. Finkelstein et al., *supra* note 6, at 45.

14. The Employer Shared Responsibility provision of the Affordable Care Act includes the "employer mandate," which is a requirement that all businesses with over fifty full-time equivalent employees provide health insurance for their full-time employees or pay a per month "Employer Shared Responsibility Payment" on their federal tax return. *ObamaCare Employer Mandate*, OBAMACARE FACTS, http://obamacarefacts.com/Obamacare-employer-mandate [http://perma.cc/Z9XV-HM5R].

15. *See generally* I.R.C. § 132 (2012 & Supp. 2015).

16. The phrase "tax code" refers to the Internal Revenue Code of 1986, as amended, found in Title 26 of the U.S. Code.

I. EMPLOYER-PROVIDED WELLNESS BENEFITS

A. A Brief History of Wellness Benefits

While health and wellness initiatives have become trendy in the United States as American consumers aspire to better health,[17] perhaps the fastest growing type of health incentive program is the employer-sponsored program.[18] As the poor health habits of many workers increase and the cost of health benefits rises, many employers are exchanging cash compensation for wellness benefits.[19]

Employers have shown interest in employee health and wellness in the past, but financial incentive programs are relatively new.[20] A 1990 survey of 1000 employers found that only four (0.4%) offered financial incentives for wellness.[21] By 1999, a national survey of worksites with fifty or more employees found that about ten percent of employers offered health incentives.[22] Furthermore, just thirteen years ago, "wellness programs typically were offered by insurance companies as part of benefit plans."[23] However, as employee healthcare costs continue to rise, the only options left to employers are to shift the costs to employees or to lower the gross costs by reducing the health risks of employees.[24] Therefore, employers are "anxious to develop and execute [wellness programs] internally to make sure they impact as many workers as possible."[25] According to a 2013 survey from Fidelity Investments and the National Business Group on Health, "[n]early 90% of employers offer wellness incentives, or financial rewards or prizes to employees who work toward getting healthier."[26]

B. Wellness Benefit Options

Employer-sponsored wellness programs are as diverse as they are numerous and include not just access to exercise facilities, but also smoking cessation programs, web-based resources for healthy living, wellness newsletters, lifestyle or behavioral

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17. *See Health and Wellness in America: The Consumer Perspective*, supra note 1.

18. *See* Kristin M. Madison, Kevin G. Volpp & Scott D. Halpern, *The Law, Policy, and Ethics of Employers' Use of Financial Incentives to Improve Health*, 39 J. L. MED. & ETHICS 450, 451 (2011).

19. *See* Julia James, *Workplace Wellness Programs*, HEALTHAFFAIRS (May 10, 2012), http://www.healthaffairs.org/healthpolicybriefs/brief.php?brief_id=69 [http://perma.cc/XQ4Y-BZSQ].

20. Madison et al., *supra* note 18, at 451.

21. *Id.*

22. *Id.*

23. Joyce Gannon, *Companies Offer Wellness Programs To Cut Insurance Costs*, PITTSBURGH POST-GAZETTE (May 11, 2008, 4:00 AM), http://www.post-gazette.com/business/businessnews/2008/05/11/Companies-offer-wellness-programs-to-cut-insurance-costs/stories/200805110245 [http://perma.cc/R3NT-MVFV].

24. *See id.*

25. *Id.*

26. Jen Wieczner, *Your Company Wants to Make You Healthy*, WALL ST. J. (Apr. 8, 2013, 4:00 PM), http://online.wsj.com/news/articles/SB10001424127887323393304578360252284151378 [http://perma.cc/C2S5-R6UY].

coaching, biometric screening, and weight-loss programs.[27] While the value of each of these programs should not be degraded, exercise-focused initiatives, because of their relatively easy administration, broad accessibility, and positive results, are a very common wellness program incentive offered by employers,[28] and, therefore, will be the focus of this Note.

The Kaiser Family Foundation and Health Research and Educational Trust's 2014 *Employer Health Benefits* survey indicates that 30% of all employers and 63% of large businesses offer gym memberships or on-premises exercise facilities to be used by their employees.[29] Additionally, according to the Great Place to Work Institute, wellness programs are even more popular among the "Best Companies to Work For"[30]: 73% have on-premises fitness centers, 63% offer subsidized off-premises fitness centers, and 55% offer incentives for workers to participate in wellness initiatives.[31] However, adoption of wellness programs tends to differ by industry.[32] For example, firms in both the agriculture, mining, and construction category and the retail category offered gym membership discounts or on-premises exercise facilities at a rate significantly below the overall rate of 30%; whereas firms in both the manufacturing category and the transportation, communication, and utilities category offered gym membership discounts or on-premises exercise facilities at a rate significantly above the overall rate of 30%.[33] Nevertheless, these are encouraging data. So, what is motivating companies to offer these benefits?

C. Incentives for Employer Involvement in the Promotion of Employee Wellness

Regardless of whether they have implemented programs to promote the wellness of their employees, most company leaders acknowledge that a healthier workforce is beneficial to the company.[34] Benefits of employer-provided wellness programs are

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27. KAISER FAMILY FOUNDATION & HEALTH RESEARCH & EDUCATIONAL TRUST, EMPLOYER HEALTH BENEFITS: 2014 ANNUAL SURVEY 196 (2014).

28. KAISER FAMILY FOUNDATION & HEALTH RESEARCH & EDUCATIONAL TRUST, EMPLOYER HEALTH BENEFITS: 2010 ANNUAL SURVEY 232 (2010).

29. *Id.* at 173; SOEREN MATTKE, CHRISTOPHER SCHNYER & KRISTIN R. VAN BUSUM, RAND HEALTH, A REVIEW OF THE U.S. WORKPLACE WELLNESS MARKET 20 (2012).

30. Companies nominated for "Best Companies to Work For" lists are selected and ranked on the basis of employees' responses to the "Trust Index Survey," which measures employee perception of the workplace, and the "Culture Audit," which is completed by management and evaluated by an independent "Great Place to Work" team. *Identifying Best Places to Work: US and Globally*, GREAT PLACE TO WORK, http://www.greatplacetowork.com/best-companies [http://perma.cc/2333-SN8J].

31. Leslie Caccamese, *Trends from the 2013 FORTUNE 100 Best Companies to Work For®,* GREAT PLACE TO WORK (Jan. 21, 2013), https://www.greatplacetowork.com/publications-and-events/blogs-and-news/1599 [http:// perma.cc/EY9E-S4E7].

32. MATTKE ET AL., *supra* note 29, at 18.

33. KAISER FAMILY FOUNDATION & HEALTH RESEARCH & EDUCATIONAL TRUST, *supra* note 27, at 199.

34. Barb Hendrickson, *Increasing Employee Participation in Corporate Wellness Programs*, OCCUPATIONAL HEALTH & SAFETY (Sept. 1, 2013), http://ohsonline.com/articles/2013/09/01/increasing-employee-participation-in-corporate-wellness-programs.aspx [http://perma.cc/HY5H-SH8X].

expansive and include reduction in benefit costs (such as decreases in health, life, and workers' compensation insurance costs), improvements in productivity (such as decreased absenteeism, increased employee morale, improved ability to perform, and the development of high-quality staff), reduction in human resource development costs (such as decreased turnover and greater employee satisfaction), and improved image for the corporation.[35]

In the United States, where an increasing number of companies are responsible for providing health care to their employees,[36] companies bear the costs associated with increased health-related expenses, sick leave, disability claims, and absenteeism.[37] Thus, most employers that provide wellness programs do so with the goal of decreasing health care costs by improving employee health.[38]

Employers certainly have a financial incentive to take interest in employee wellness because of its implications for decreased healthcare costs and decreased costs of absenteeism. According to the Wellness Council of America, wellness program results are impressive: a company gains an average of $5.81 for every dollar invested in health-management programs, and the programs reduce absenteeism by an average of 26.8%, health care costs by 26%, and worker's compensation and disability management claims by 32%.[39]

Furthermore, if cost cutting is the goal of the employer, then placing the focus on healthier lifestyles makes practical sense. Indeed, "[u]nhealthy employees use significantly more medical services than healthy ones and cost employers more money."[40] According to Dr. Kenneth E. Thorpe, chairman of the Health Policy and Management Department at the Rollins School of Public Health at Emory University, approximately three-quarters of the money the United States spends on health care is for chronic conditions.[41] If, through subsidized health club memberships, employers can persuade workers to increase their activity levels in order to control

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35. Robert H. Rosen, *Worksite Health Promotion: Fact or Fantasy,* 1 CORP. COMMENTARY 1, 1 (1984).

36. *See ObamaCare Employer Mandate, supra* note 14.

37. *See* Truls Østbye, John M. Dement & Katrina M. Krause, *Obesity and Workers' Compensation: Results from Duke Health and Safety Surveillance System*, 167 ARCHIVES INTERNAL MED. 766, 766 (2007).

38. Peter Conrad, *Wellness in the Work Place: Potentials and Pitfalls of Work-Site Health Promotion*, 65 MILBANK Q. 255, 257 (1987).

39. Hendrickson, *supra* note 34. A recent study found that Johnson & Johnson's wellness program generated a return on investment in a range of $1.88 to $3.92 for every dollar spent on the program. Rachel M. Henke, Ron Z. Goetzel, Janice McHugh & Fik Isaac, *Recent Experience in Health Promotion at Johnson & Johnson: Lower Health Spending, Strong Return on Investment*, 30 HEALTH AFFAIRS 490, 490 (2011). A recent meta-analysis also showed a $3.27 decrease in medical costs and a $2.73 decrease in absenteeism costs for every dollar spent. Katherine Baicker, David Cutler & Zirui Song, *Workplace Wellness Programs Can Generate Savings*, 29 HEALTH AFFAIRS 1, 5 (2010).

40. Lesley Alderman, *Getting Healthy, With a Little Help from the Boss*, N.Y. TIMES (May 22, 2009), http://www.nytimes.com/2009/05/23/health/23patient.html?_r=0 [http://perma.cc/74FR-SVVM].

41. *Id.*

problems like obesity, high blood pressure, and diabetes, company costs typically go down.[42]

While reduction in health care costs may be the most commonly cited goal of employer-provided wellness programs, as the competitive international economic situation continues to make the productivity of American workers a critical issue for corporations, reducing absenteeism, improving employee morale, and increasing productivity may be as important as lowering health costs in the development of workplace wellness programs.[43] According to its director of global corporate affairs, H.J. Heinz Company covers its employees' gym membership costs "because [it] believe[s] healthy and fit employees are always more productive and that is good for both the employee and for the company."[44] Additionally, gym membership compensation packages could act as a possible recruitment tool for employers.[45] If an employer believes that employees who exercise regularly are likely to be more productive than workers who do not exercise, that employer might find it beneficial to offer a mix of cash and gym memberships rather than all cash compensation.[46] Employers may use wellness benefits as an instrument to distinguish employees who value exercise from employees who do not.[47] Workers who are likely to use the gym membership will value it and be attracted to the compensation package, while workers who do not value gym memberships will be less likely to desire the job.[48]

Countless companies across the United States have committed to improving employee health in order to decrease costs associated with health care and absenteeism and also to improve employee morale and productivity.[49] However, many of these initiatives do not stop with the people on the payroll—they recognize the collaborative nature of health promotion and therefore extend the benefits to spouses and dependents.[50]

D. Spouse and Child Involvement

If an employer is promoting health in order to contain health care costs, "[a]n important reality is that roughly two-thirds of corporate health care costs are paid for spouses and dependents."[51] Employers have recognized this and, according to an employer survey conducted by Fidelity Investments and the National Business Group on Health, as the design of wellness programs continues to evolve, a growing number of companies are expanding wellness-based incentives to include spouses and

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42. *See id.*
43. Conrad, *supra* note 38, at 258.
44. Gannon, *supra* note 23.
45. *See* JOSEPH J. MARTOCCHIO, EMPLOYEE BENEFITS: A PRIMER FOR HUMAN RESOURCE PROFESSIONALS 49, 54 (4th ed. 2011).
46. *See id.*
47. *See id.*
48. *See id*.
49. *See supra* note 38 and accompanying text.
50. *Health Care Survey Finds Spending on Corporate Wellness Incentives to Increase 15 Percent in 2014*, FIDELITY (Feb. 20, 2014), http://www.fidelity.com/inside-fidelity/employer-services/health-care-survey-finds-spending [http://perma.cc/A9SU-FZ4Z].
51. Conrad, *supra* note 38, at 262.

domestic partners.[52] "Nearly four out of ten (37 percent) of companies surveyed indicated their [wellness] programs will include spouses and domestic partners in 2014."[53]

Employers receive a dual benefit by including spouses and domestic partners in wellness programs. Including spouses and domestic partners in wellness programs allows employers to reduce spousal health care costs and to include individuals who are powerful drivers of positive—and negative—employee wellness behaviors.[54] A 2012 report from the Health Enhancement Research Organization found that a wellness program is more likely to yield benefits when spouses are included.[55] In fact, employee participation rates were twice as high for employee wellness programs that included spouses compared to the programs that did not include spouses.[56]

In Indiana, Toyota Motor Manufacturing is just one company that is "aggressively expanding its wellness program to serve employees' families," after finding that its former wellness program—which was directed only at employees and only in the areas of tobacco cessation and weight loss—was unsuccessful, as several employees indicated that "it was hard to stop smoking or eating poorly when their spouse was still smoking or eating poorly."[57]

Furthermore, corporations are becoming increasingly aware of employees' desires for personalized wellness programs.[58] Employer-provided memberships at off-premises facilities have the potential of emphasizing employee choice. Jim Sollenberger, vice president of human resources and organizational effectiveness at Berlin Packaging LLC, said that his company "wanted a [fitness] program that fit employees' lifestyles, letting them make their own decisions about the types of activities in which they wanted to engage."[59] Another company, Eschelon Telecom, recognized that "[s]ome employees want a family-friendly health club, while others want one that is mainly utilized by other singles."[60] Carol Braun, vice president of human resources at Eschelon, importantly recognized, "You want them to go where

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52. *Health Care Survey Finds Spending on Corporate Wellness Incentives to Increase 15 Percent in 2014*, *supra* note 50.

53. *Id.*

54. *See* David Tobenkin, *Stay Well Together: When Employers Extend Wellness Programs to Employee's Families, Everyone Benefits,* HR MAG., Feb. 2013, at 63, *available at* http://www.shrm.org/publications/hrmagazine/editorialcontent/2013/0213/pages/0213-family-wellness-benefits.aspx [http://perma.cc/X5SD-JGB8].

55. *Id.*

56. *Id.* It's worth noting that smaller employers, while less likely to have the financial means to provide an on-premises fitness facility to facilitate the inclusion of spouses and dependents, may have the unique advantage of "greater cohesiveness," due to being self-contained in a local area. If an employer can develop a sense that the organization is "family-oriented," spousal participation is likely to increase. *Id.* at 65.

57. *Id.* at 64.

58. *See* Nancy Hatch Woodward, *Exercise Options,* HR MAG., June 2005, at 78, *available at* http://www.shrm.org/publications/hrmagazine/editorialcontent/pages/0605woodward.aspx [http://perma.cc/VC2D-LLFY].

59. *Id.* at 80.

60. *Id.* at 81.

they are comfortable so they keep going."[61] One employee of Berlin Packaging praised the company's flexible fitness plan because his current facility gives him time with his daughter.[62] He and his daughter "go to the gym together," and he "exercises while she 'works out' in the children's section"; afterward, they "meet for a swim."[63]

It is important to recognize the relationship between parents' wellness behaviors and the wellness behaviors of their children. In a study assessing physical activity in children and adults, researchers found that "children of active and less active parents exhibited physical activity patterns similar to their parents."[64] While on-premises fitness centers are generally targeted toward the adult population, many wellness facilities across the United States offer child-focused programming.[65] The YMCA, a historically family-friendly organization, prides itself on being "the starting point for many youth to learn about becoming and staying active, and developing healthy habits they will carry with them throughout their lives."[66] The fitness center chain 24 Hour Fitness, which has 400 locations nationwide, offers "Kids' Club," which the company advertises as a "fun-filled play area" where children from six months to eleven years old can "participate in movement activities."[67] Even more localized facilities, such as Bob's Gym in Evansville, Indiana, provide age-specific programming including Zumba Kids, Kid's Yoga, and supervised access to the basketball courts and swimming pools.[68]

Off-premises facilities, because of the sheer number of them and the variety of programming offered at different locations, provide employees with the ability to make their own decisions about the types of activities in which they want to engage that employer-provided on-premises facilities cannot feasibly replicate.[69] While an active lifestyle promoted by an employer is valuable to all employees, employees with families have needs that employees without families do not share, and vice versa, thus making off-premises facilities more conducive to an employee's chosen lifestyle than most on-premises facilities.

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61. *Id.*

62. *Id.*

63. *Id.*

64. Patty S. Freedson & Sherrie Evenson, *Familial Aggregation in Physical Activity*, 62 RES. Q. FOR EXERCISE & SPORT 384, 384 (1991).

65. *See infra* notes 66–68 and accompanying text.

66. *See Youth Development*, YMCA, http://www.ymca.net/youth-development [http://perma.cc/F9ZN-ZCTL].

67. *Fit Parents, Happy Kids,* 24 HOUR FITNESS, http://www.24hourfitness.com/health_clubs/gym_day_care/ [http://perma.cc/7ZXM-PMNR].

68. *Kids Klub*, BOB'S GYM, http://www.bobsgym.com/kids-klub/ [http://perma.cc/P9D9-WK8R].

69. *See NAWHC Onsite Fitness Center Benchmarking Survey - 2011*, NAT'L ASS'N WORKSITE HEALTH CENTERS, http://www.worksitehealth.org/resources-research [http://perma.cc/XNM5-SYDF] (showing the restrictions that apply to the use of onsite fitness centers, including children under a certain age are not allowed to use the facility).

E. Why Should We as a Society Promote Employer-Provided Wellness Benefits?

"Worksites are potentially the single most accessible and efficient site" for offering health education to adults.[70] Employed adults typically spend more than a third of their waking hours in the workplace, making it the ideal setting to promote behavioral change.[71] Furthermore, many employees "remain in the same company for the year or two it takes to make a successful behavior change" and also benefit from a cohesive social group—their coworkers—which can provide ongoing support.[72] Moreover, employer-provided incentive programs might address the problems associated with unhealthy lifestyles by "increasing the salience of health-related issues, prompting employees to seek out more information."[73] Therefore, since our society values efficiency and positive results, the workplace is the ideal setting for wellness promotion.

Additionally, not only do employers report seeing the benefits of wellness programs, but also, according to the Principal Financial Well-Being Index for American Workers, 62% of employees "believe workplace wellness activities are successful in improving health and reducing risks."[74] Furthermore, "51% of participants say they work harder and perform better . . . 59% say they have more energy and are more productive . . . 45% say that health-related programs encourage them to stay in their current position . . . [and] 43% say they miss fewer days of work as a result of wellness programs."[75] The incentive that tops the list among most employees is a gym membership.[76] Subsidized gym memberships, which are meant to encourage healthy lifestyles, are usually offered on a nondiscriminatory basis, meaning they are available to all employees, regardless of whether they have health risks or diseases.[77]

Nevertheless, current evidence indicates that young workers versus old workers, white workers versus other races of workers, and female workers versus male workers are more likely to participate in employer-provided wellness programs.[78] Also, prior exercise is a strong determinant of employee participation in an exercise-focused, employer-sponsored wellness program.[79] Furthermore, perceived barriers to participation, such as responsibilities at home and distance from work,

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70. *See* Conrad, *supra* note 38, at 258.

71. Michael P. O'Donnell, *The Rationale for Federal Policy to Stimulate Workplace Health Promotion Programs*, 67 N.C. MED. J. 455, 455 (2006).

72. *Id.*

73. Madison et al., *supra* note 18, at 452.

74. Hendrickson, *supra* note 34.

75. *Id.*

76. *See id.*

77. *See* SOEREN MATTKE, HANGSHENG LIU, JOHN P. CALOYERAS, CHRISTINA Y. HUANG, KRISTIN R. VAN BUSUM, DMITRY KHODYAKOV & VICTORIA SHIER, RAND HEALTH, WORK PLACE WELLNESS PROGRAMS STUDY 22 (2013).

78. Wayne N. Burton, Katherine T, McCalister, Chin-Yu Chen & Dee W. Edington, *The Association of Health Status, Worksite Fitness Center Participation, and Two Measures of Productivity,* 47 J. OCCUPATIONAL & ENVTL. MED. 343, 345 (2005).

79. Jean M. Abraham, Roger Feldman, John A. Nyman & Nathan Barleen, *What Factors Influence Participation in an Exercise-Focused, Employer-Based Wellness Program?*, 48 INQUIRY 221, 233 (2011).

have been associated with lower participation.[80] Some evidence suggests that the time-cost of exercise matters to employees.[81] Therefore, it is clear that though these initiatives are widely recognized as valuable by employers and employees, they are not being taken advantage of by the whole employee population.

In order to attract a broader range of employees to participate in exercise-focused initiatives, additional incentives need to be provided. Employees of all races, genders, fitness levels, and familial statuses need to recognize the benefits of wellness and have a financial incentive to engage in these activities. Currently, the tax code subsidizes—and thus incentivizes—a small portion of exercise-focused initiatives but does not incentivize the distribution or use of employer-subsidized gym or health club memberships.[82]

II. LEGAL BACKGROUND: FEDERAL INCOME TAXATION LAW

The 1913 ratification of the Sixteenth Amendment to the U.S. Constitution introduced the federal income tax.[83] The Sixteenth Amendment reads: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."[84] As the government's need for additional revenues has increased, so too has the pool of taxpayers–currently including more than just the very wealthy.[85] Presently, the federal income tax system serves a variety of functions apart from raising revenues to operate the government, including acting as a tool of social policy.[86]

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80. Betty B. Alexy, *Factors Associated with Participation or Nonparticipation in a Workplace Wellness Center*, 14 RES. NURSING & HEALTH 33, 36 (1991).

81. Research suggests that having at least one participating facility in an employee's home zip code raised the likelihood of employees signing up for an exercised-focused, employer-based wellness program. Abraham et al., *supra* note 79, at 228.

82. *See infra* notes 100–101 and accompanying text.

83. J. MARTIN BURKE & MICHAEL K. FRIEL, TAXATION OF INDIVIDUAL INCOME 4 (10th ed. 2012).

84. U.S. CONST. amend. XVI.

85. BURKE & FRIEL, *supra* note 83, at 4. The increased need for government revenue in the 1940s was to fund the American war effort in World War II; however, the income tax still remains an important source of government revenue. *See id.* Approximately $1,316,405,000 of federal income tax was collected by the U.S. government in 2013. *Receipts by Source: 1934-2020*, TAX POL'Y CENTER (Feb. 4, 2015), http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=203 [http://perma.cc/4MMC-BBZG]. The funds collected through the federal income tax are used to fund, among other things, health care, national defense, job and family security, net interest, and veterans benefits. *Your 2014 Federal Taxpayer Receipt*, THE WHITE HOUSE, http://www.whitehouse.gov/2014-taxreceipt [http://perma.cc/CA53-787N].

86. *See* BURKE & FRIEL, *supra* note 83, at 5.

A. What Is Included in Gross Income?

When computing taxable income, the first step is to determine gross income.[87] According to the Internal Revenue Code (IRC), "gross income means all income from whatever source derived."[88] Since the definition of gross income is quite vague, case law often provides a more concrete definition. *Commissioner v. Glenshaw Glass Co.*,[89] perhaps the leading case on gross income under the income tax law, provides a concept of gross income that is neither an all-encompassing theory nor an inherently restrictive definition.[90] The Court in *Glenshaw Glass* held that amounts received by taxpayers that constitute "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion" are taxable.[91] This definition includes employer-subsidized gym memberships as taxable income since, even though they are not cash compensation, they do constitute an "undeniable accession to wealth, clearly realized, and over which the taxpayers have complete dominion."[92] Therefore, the value of the gym membership is included in the employee's gross income and increases his or her tax liability in the same way that cash compensation does.[93]

B. What Is Excluded From Gross Income?

Specific exclusions from gross income are codified in the IRC and were enacted by Congress for a variety of reasons, including reasons of social policy or reasons of incentive.[94] Among the items excluded from gross income are gifts and inheritances,[95] payments for personal physical sickness and injury,[96] and, most importantly for the topic of this Note, certain fringe benefits.[97]

Over the last ninety years, "a patchwork of legislative, judicial and administrative rules" has developed to determine which fringe benefits should be excluded from gross income.[98] Among the items excludable from gross income as fringe benefits are *on-premises* athletic facilities.[99] Treasury Regulation § 1.132-1(e)(1)[100] states in relevant part:

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87. *Id.* at 9.
88. I.R.C. § 61(a) (2012).
89. 348 U.S. 426 (1955).
90. *See* Joseph M. Dodge, *The Story of* Glenshaw Glass*: Toward a Modern Concept of Gross Income*, *in* TAX STORIES 17, 17 (Paul L. Caron ed., 2d ed. 2003).
91. *Glenshaw Glass Co.*, 348 U.S. at 431.
92. *Id.*
93. *See infra* notes 100–101 and accompanying text.
94. *See* BURKE & FRIEL, *supra* note 83, at 226–27.
95. I.R.C. § 102 (2012).
96. I.R.C. § 104 (2012).
97. I.R.C. § 132 (2012).
98. BURKE & FRIEL, *supra* note 83, at 209.
99. I.R.C. § 132(j)(4) (2012).
100. Treasury regulations provide the official interpretation of the Internal Revenue Code by the U.S. Department of Treasury.

> Gross income does not include the value of any on-premises athletic facility provided by an employer to its employees. . . . [T]he term "on-premises athletic facility" means any gym or other athletic facility . . . (i) Which is located on the premises of the employer, (ii) Which is operated by the employer, and (iii) Substantially all of the use of which during the calendar year is by employees of the employer, their spouses, and their dependent children.[101]

While many fringe benefits provided by an employer to an employee are not included in the employee's gross income,[102] the rationale for this treatment is not fully understood.[103] Case law stands for the proposition that fringe benefits, which are offered primarily for the convenience of the employer, should not be imputed as income to the employee.[104] This rationale could be extended to explain the exclusion of on-premises gyms and other athletic facilities. For example, if employees can exercise on their employer's premises, they spend less time commuting to a facility and therefore more time working, thus primarily benefiting the employer. However, this rationale does not explain the expansive definition of "qualifying facility."[105] What constitutes a qualifying facility under this provision is quite broad. For example, the athletic facility does not have to be on an employer's *business premises* to qualify for the exclusion.[106] The premises may be owned or leased by the employer, and the employer need not even be the named lessee on a lease as long as the employer pays reasonable rent for the facility.[107] Furthermore, the Internal Revenue Service (IRS) has ruled privately that use of an athletic and recreation facility that was leased jointly by a company and its affiliates qualified for the exclusion.[108] Additionally, an athletic facility is considered *operated by* the employer whether the employer operates the facility using its own employees or contracts out the operation of the facility.[109] These broad extensions of the "on-premises gyms and other athletic facilities" exclusion suggest that this provision was intended to incentivize the distribution of a wide range of exercise-focused benefits, not just the use of facilities whose close proximity to the worksite primarily benefit the employers. Nonetheless, Treasury Regulation § 1.132-1(e)(3) goes on to state:

> The exclusion provided in this paragraph (e) does not apply to any membership in an athletic facility (including health clubs or country

101. Treas. Reg. § 1.132-1(e)(1) (2012).

102. *See* I.R.C. § 132 (2012).

103. *See* BURKE & FRIEL, *supra* note 83, at 209–20 (discussing the erratic treatment of fringe benefits when calculating employee compensation).

104. *See* Bengalia v. Comm'r, 36 B.T.A. 838, 838–39 (1937) (excluding the value of meals and lodging provided to a hotel manager who was required to be on duty continuously and holding that the meals and lodging were provided so that the manager could perform his duties, not as additional compensation).

105. Dorinda DeScherer, *§ 1A:18.05 On-Premises Gyms and Other Athletic Facilities*, *in* LEXIS TAX ADVISOR–FEDERAL TOPICAL §1-1A:18 (2013).

106. *Id.*

107. *Id.*

108. I.R.S. Priv. Ltr. Rul. 94-30-029 (May 3, 1994).

109. *See* DeScherer, *supra* note 105.

> clubs) unless the facility is owned (or leased) and operated by the employer and substantially all the use of the facility is by employees of the employer, their spouses, and their dependent children. Therefore, membership in a health club or country club not meeting the rules provided in this paragraph (e) would not qualify for the exclusion.[110]

Therefore, the value of a gym membership is excluded from gross income of only those employees who work for establishments large enough to finance the expenditure of building an on-premises athletic facility or leasing an off-premises athletic facility, thus converting it to an on-premises facility.[111]

Certainly, on-campus gym facilities are a convenient option for employees who work long hours or have a lengthy commute.[112] These facilities allow the employee's work-related responsibilities and non-work-related responsibilities to coexist, even though the relationship between the gym facility and the business's primary purpose is clearly tangential.[113] However, employees of small businesses whose owners cannot typically subsidize the costs of providing on-premises athletic facilities do not receive the same tax benefits for utilizing an exercise facility as their on-premises, facility-using counterparts. Additionally, if employers pay for the memberships as a fringe benefit, the IRS requires the employers to include the monthly expenses as income on each of their employees' W-2 tax forms.[114] Employers that offer subsidized gym memberships must "(1) report these amounts on each employee's Form W-2 and (2) withhold payroll taxes on these amounts."[115] If the wellness incentives are provided without proper tax withholding, employers may be responsible for payroll taxes.[116] Because many of the employee rewards under wellness programs are considered nominal, employees generally view wellness-plan rewards as nontaxable benefits, making the triggering of income inclusion an unwelcome surprise.[117]

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110. Treas. Reg. § 1.132-1(e)(3) (2012).

111. *See* I.R.C. § 132(j)(4) (2012); *see also* I.R.S. Priv. Ltr. Rul. 2010-0175 (June 25, 2010).

112. *See* Trenton Hood, Note, *It's Ten O'Clock: Do You Know Where Your Vice-Principal Is? The Effect of* GTE Southwest, Inc. v. Bruce *on Vice-Principal Liability In Texas,* 55 BAYLOR L. REV. 267, 291 (2003).

113. *See id.*

114. *See* Jill Stimson, *Tax Incentives for Companies Who Offer Gym Memberships*, HOUS. CHRON, http://smallbusiness.chron.com/tax-incentives-companies-offer-gym-memberships-18505.html [http://perma.cc/LQ5P-FGXA].

115. *Money and Trinkets Provided for Wellness*, OGLETREE DEAKINS, http://www.ogletreedeakins.com/Shared%20Content/Content/Articles/Publications/Articles/Money%20and%20Trinkets%20Provided%20for%20Wellness_2013-04-09 [http://perma.cc/EA5B-AWT5].

116. *See id.*

117. A taxpayer living in an urban area can expect to pay around $500 for a yearly gym membership, while the national average is approximately $700 a year. *See Gym Membership Statistics*, STAT. BRAIN RES. INST., http://www.statisticbrain.com/gym-membership-statistics/ [http://perma.cc/RVF8-JZ8W]; Jeanine Skowronski, *The Best Gym Deals in America,* MAIN ST. (Jan. 5, 2011, 11:04 AM), http://www.mainstreet.com/article/career/work/life-balance/best-gym-deals-america [http://perma.cc/LJR4-2U53].

III. USING THE TAX CODE TO INCENTIVIZE BEHAVIOR

American workers have an infinite number of options when it comes to spending their income. Not surprisingly, most workers prioritize housing, food, and transportation, but after these essentials, personal preference and need dictate how the remainder of the income is spent.[118] Workers who have not been socialized to recognize the benefits of an active lifestyle will likely not make purchasing a gym membership a priority.[119] Therefore, incentives are necessary to persuade workers to choose an employer-provided gym membership in lieu of the countless other goods in the marketplace. While the American media have already brought the importance of a healthy lifestyle to the forefront of most consumers' attention, a financial incentive is the most logical way to prompt the consumption of wellness benefits over other goods. In order to incentivize the distribution and use of employer-provided wellness benefits—specifically, subsidized health club memberships—these benefits should not be included in gross income for federal income tax purposes.[120]

A. Tax Code as Incentive for Socially Desirable Behavior

Through a series of exclusions of employer expenditures from employees' gross income, Congress subsidizes the procurement of certain benefits using the IRC.[121] By subsidizing some purchases but not others,[122] Congress motivates employees to seek these benefits from employers who may be indifferent to their employees' choices or who may even prefer to provide such benefits in lieu of cash wages.[123] Many people significantly alter their economic behavior to take advantage of tax

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118. *See* Derek Thompson, *Where Americans—Rich and Poor—Spent Every Dollar in 2012*, ATLANTIC (Sept. 16, 2013), http://www.theatlantic.com/business/archive/2013/09/where-americans-rich-and-poor-spent-every-dollar-in-2012/279727/ [http://perma.cc/CMS9-XWCS].

119. *See* Scott Ward, *Consumer Socialization*, J. CONSUMER RES., Sept. 1974, at 1, 9–10.

120. On January 22, 2013, Senator Thomas Harkin (D-IA) introduced the Healthy Lifestyles and Prevention America Act. *See* Healthy Lifestyles and Prevention America Act, S. 39, 113th Cong. (2013). Section 212(a)(A)(ii) of this bill proposed the following: "Gross income shall not include . . . so much of the fees, dues, or membership expenses paid by an employer to an athletic or fitness facility described in subparagraph (C) on behalf of its employees as does not exceed $900 per employee per year." *Id.* at §212(a)(A)(ii). This bill was assigned to the Senate Finance Committee but was not enacted by the 113th Congress. *See* S. 39.

121. *See* William P. Kratzke, *The (Im)balance of Externalities in Employment-Based Exclusions from Gross Income*, 60 TAX LAW. 1, 1–2 (2006).

122. "If the Code specifically excludes particular accession to wealth from an employee's gross income, the employee does not have to pay tax on them. If an employer may deduct from its taxable income an expenditure that benefits employees, and employees may exclude the value of that benefit from their gross income, then the income necessary to purchase that benefit is never subject to tax. In this way, Congress provides a tax subsidy for the purchase of certain benefits." *Id.* at 1 n.1.

123. *See id.* at 1.

breaks.[124] As Sheldon Pollack observes: "The tax laws have a peculiar impact upon private behavior insofar as they do not strictly prohibit particular private action or conduct, but rather establish a broad framework of incentives and disincentives through which private activity is subtly altered."[125]

Policymakers in the United States have increasingly employed the tax code to stimulate a broad range of social policies.[126] These social policies are accomplished using provisions within the tax code that provide credits, deductions, or exclusions that serve as incentives for socially desirable behavior.[127] While the income tax was originally developed to raise revenue, Congress has increasingly relied on the tax code to implement social and regulatory programs—purposes that are clearly non-revenue-raising.[128] In recent years, the federal government has used the tax code as the principle way to provide for new social welfare programs in the form of reduced tax consequences.[129] These reductions have been exclusions from income, deductions from income, nonrefundable credits against tax liability, and refundable credits against tax liability.[130] The federal government's newest social initiatives almost all assume the form of tax discounts.[131]

Scholars are beginning to examine the potential advantages of embedding social and regulatory policy in the tax code.[132] One normative advantage is that placing social policy and regulation in the tax code advances distributive goals.[133] Inscribing a law in the tax code furthers distributive justice goals by allowing for the law to assist low- and middle-income individuals and families particularly well, especially those individuals who were otherwise unaware of the available benefits.[134] Enacting benefits through the tax code also has the benefit of promoting the inclusion of potentially marginalized groups: the more the tax code incorporates social programs, the more inclusive it becomes, since almost every citizen will pay taxes or file a return at some point in his or her life.[135]

One important point of recognition is that delivery of social welfare benefits through the tax code is regressive, potentially creating a system that disproportionately benefits the wealthy and leaves lower-income families behind.[136]

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124. *See* BURKE & FRIEL, *supra* note 83, at 5.

125. Sheldon D. Pollack, *Tax Complexity, Reform, and the Illusions of Tax Simplification*, 2 GEO. MASON INDEP. L. REV. 319, 357 (1994).

126. *See* John Scott & Jeffrey Diebold, *Credits and Deductions: An Experimental Test of the Relative Strength of Economic Incentives*, 1 J. RETIREMENT 77, 77–96 (2014).

127. *Id.*

128. *See* Susannah Camic Tahk, *Everything Is Tax: Evaluating the Structural Transformation of U.S. Policymaking,* 50 HARV. J. ON LEGIS. 67, 77–78 (2013).

129. *Id.* at 69–70.

130. *Id.* at 70.

131. For example, "the empowerment zone credits, the child credit, the first-time homebuyer credit, and expansions of the child care credit and the personal and dependency exemptions." *Id.* (internal citations omitted).

132. *See id.* at 77–78.

133. *See id.* at 93.

134. *Id.* at 93.

135. *See id.* at 93–95.

136. *See Regressive Tax*, INVESTOPEDIA, http://www.investopedia.com/terms/r/regressivetax.asp [http://perma.cc/S8JS-VGTD].

Nonetheless, while income exclusions are theoretically worth more to high-earning employees who will have a higher tax rate than lower-earning employees, it is important to consider the law of diminishing marginal utility: "the perceived value of, or satisfaction gained from, a good to a consumer declines with each additional unit acquired or consumed."[137] For example, one additional dollar is more valuable to a person who has three dollars than a person who has one hundred dollars. Therefore, low-income employees who would not otherwise use their earnings to purchase a gym membership may be incentivized by the tax savings, even though the low-income employees' tax savings are proportionately less than the tax savings granted to a high-earning employee because a low earner values an extra dollar more than a high earner.[138]

A potential benefit of income exclusion, although it is regressive, is that it is simple to administer. Everyone's income is reduced by the same amount: the cost of the gym membership. This prevents the many complications that would occur in a progressive system and reduces complexity by streamlining the process through a simple exclusion from gross income.[139] Additionally, reducing gross income by the cost of the gym membership equally for all employees will be seen as more fair, especially by fiscal conservatives.[140] Those with less income are not given preferential treatment in terms of taxes, and higher earners are not penalized for doing well at their jobs and getting pay raises.[141]

As the prevalence of using the tax code to implement social policy has increased, taxpayers have grown more comfortable with the practice. A change to the tax policy could actually create a situation where employees would favor additional wellness benefits instead of additional wage compensation, while the employer would be indifferent between these two alternatives because both expenses are tax deductible.[142] If Congress authorizes employers to provide nontaxable incentives, such as off-premises gym memberships, it will create the incentive for companies to maximize the benefits of their wellness programs and provide the environment to reduce costs.[143]

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137. *Law of Diminishing Marginal Utility*, BUSINESSDICTIONARY.COM, http://www.businessdictionary.com/definition/law-of-diminishing-marginal-utility.html [http://perma.cc/5CLY-UKQU].

138. For example, assuming a yearly gym membership costs $700, a taxpayer with yearly gross income of $10,000 would notice the $700 deduction from gross income more than a taxpayer with yearly gross income of $100,000. Therefore, even though the tax rates are lower for low-income taxpayers, the value of the gym membership constitutes a larger percentage of their total gross income and thus still has a significant effect.

139. *See* ROBERT W. MCGEE, THE PHILOSOPHY OF TAXATION AND PUBLIC FINANCE 112–13 (2004).

140. *See* John Buck, *The Equity of a Tax System*, ECON. PERSPS. (Dec. 8, 2008, 1:28 AM), http://econperspectives.blogspot.com/2008/12/equity-of-tax-system.html [http://perma.cc/X9GU-5722].

141. *See id.*

142. Richard L. Kaplan, *Who's Afraid of Personal Responsibility? Health Savings Accounts and the Future of American Health Care*, 36 MCGEORGE L. REV. 535, 546 (2005).

143. Expanding section 132 of the tax code to include off-premises health club memberships would not infringe on the employer's autonomy when it comes to creating compensation packages. Employers would still get to choose whether to provide these

One question that frequently arises is why the government should subsidize an activity that many believe will produce cost savings for the employers.[144] Part of the answer is that it is important to maintain cost savings for the employer in order to motivate employers to provide these benefits. In theory, if employers are required to subsidize the memberships, and also the tax liabilities of the employees, this may be perceived by employers as a barrier to the distribution of wellness benefits and cause employers to discontinue the provision of wellness benefits to their employees. Another part of the answer is that, unfortunately, most employers do not have the knowledge or the capability to implement the critical components of successful, comprehensive wellness promotion programs.[145] A tax incentive would serve to encourage more employers, especially those with limited resources, to adopt wellness promotion as a business strategy. Furthermore, small businesses, defined as those with fewer than five hundred employees,[146] make up about 99% of employers in the United States and employ over half of the private sector workforce.[147] Many of these employers do not have the resources to construct an on-premises athletic facility or to implement effective, evidence-based worksite wellness promotion programs.[148] However, in small businesses it is easier to create a sense of community among workers and "develop close and trustworthy relationships" with employees.[149] Small employers "tend to have a visible and accessible senior leader . . . who may exemplify good health practices" and promote healthy behavior.[150] Therefore, off-premises gym memberships are particularly beneficial to small employers. By offering memberships to health facilities, employers not only demonstrate their commitment to healthy lifestyles, but also have the opportunity to personally encourage the use of these resources. Additionally, as discussed previously in this Note, spouses and dependents are more likely to exercise together and encourage each other if they can join an off-premises facility that is close to their home and tailored to their interests, rather than an on-premises facility at the employed individual's workplace.[151]

Just as the value of on-premises athletic facilities is excluded from gross income, it makes logical sense that this provision should be extended to include off-premises athletic facilities, as their benefits to employees are arguably greater.[152] Literature explaining why on-premises facilities are excluded from gross income while

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wellness benefits to their employees, what types of memberships to provide, and what amount to contribute toward the membership.

144. *See* RON Z. GOETZEL, ENID CHUNG ROEMER, RIVKA C. LISS-LEVINSON & DANIEL K. SAMOLY, PARTNERSHIP FOR PREVENTION, WORKPLACE HEALTH PROMOTION: POLICY RECOMMENDATIONS THAT ENCOURAGE EMPLOYERS TO SUPPORT HEALTH IMPROVEMENT PROGRAMS FOR THEIR WORKERS 4 (2008).

145. *Cf. id.*

146. *Frequently Asked Questions*, U.S. SMALL BUSINESS ADMINISTRATION, https://www.sba.gov/sites/default/files/sbfaq.pdf [perma.cc/6NMG-QYHX].

147. GOETZEL ET AL., *supra* note 144, at 7.

148. *See id.* at 8.

149. *Id.*

150. *Id.*

151. *See supra* Part I.D.

152. *See supra* notes 59–68 and accompanying text.

off-premises facilities are included does not seem to readily exist. One distinction that has been made is that since some employees working for a company with an on-premises gym might never use it at all,[153] it would be unfair to impute income to them; this, however, is less of a concern with off-premises facilities.[154] While off-premises memberships would be a bargained-for benefit in theory, it is fathomable that many employers—after recognizing the benefits of healthy, active employees—may offer gym memberships regardless of whether the employees ever expressed interest in using them.[155] Therefore, just as many employees will never use an on-premises facility, the same is true for employees who receive off-premises memberships. Thus, the use distinction does not explain the distinction in the law. Furthermore, as discussed previously, the "employer convenience" rationale does not apply more favorably to on-premises facilities than it does to off-premises facilities.[156] Therefore, in order to incentivize the broadest distribution of employer-provided athletic facility memberships, the tax code should be extended to off-premises facilities in the same way that it already applies to on-premises facilities.

It has been proposed that, in order to increase the number of employers providing workplace programs, more communication, dissemination, and application of effective health promotion methods is needed, and also that employers should be provided with the tools and technical assistance to implement effective workplace programs.[157] Making these benefits excludable from gross income for employees should increase communication about wellness benefits, thus achieving the goal of this proposal. As more employees begin choosing gym memberships in lieu of cash compensation, the topic of wellness benefits will become more salient and, at least theoretically, more employers will inform themselves of the benefits.[158]

A tax incentive to accept an employer-subsidized gym membership might be just the motivation needed to start the journey to a healthier lifestyle for individuals whose thoughts have already been affected by America's fitness frenzy and who are struggling to determine the best way to practice healthier behavior. Ideally, extending section 132 to employer-provided, *off-premises* gym memberships should incentivize employees to ask for these benefits and employers to offer them.

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153. *See* Elizabeth Huddleston, *On-Site Corporate Fitness Facilities Give Companies Competitive Edge*, ATHLETIC BUS. (Dec. 2000), http://www.athleticbusiness.com/Fitness-Training/on-site-corporate-fitness-facilities-give-companies-competitive-edge.html [http://perma.cc/TYQ2-7PLX].

154. *See* E-mail from Deborah Widiss, Associate Professor of Law, Maurer School of Law, to author (Nov. 25, 2014, 18:03 EST) (on file with author).

155. *See, e.g.*, *Working at Zimmer Biomet*, ZIMMER BIOMET, http://www.zimmer.com/careers/working-at-zimmerbiomet.html [http://perma.cc/TK5X-7YXH].

156. *See* Bengalia v. Comm'r, 36 B.T.A. 838, 838–39 (1937) (excluding the value of meals and lodging provided to a hotel manager who was required to be on duty continuously and holding that the meals and lodging were provided so that the manager could perform his duties, not as additional compensation).

157. GOETZEL ET AL., *supra* note 144, at 4–8.

158. *See* MATTKE ET AL., *supra* note 77, at xxi (2013) (discussing the importance of exposure to employer provided wellness programs).

B. Other Options Besides an Exclusion from Income Tax

While extending an existing tax provision to include not only on-premises athletic facilities, but also off-premises athletic facilities, seems like a simple and logical way to incentivize the distribution and use of these benefits, this Note will not neglect to mention other proposals for the promotion of employer-provided wellness benefits.

Several legislators in Congress have advocated for a proposal in which the government "provide[s] tax credits to employers implementing bona fide health promotion programs at the workplace, as certified by the Secretary of [the U.S. Department of Health and Human Services] in coordination with the Director of [the Centers for Disease Control and Prevention]."[159] The tax credits would partially reimburse employers for the costs of providing a qualified health promotion program.[160] This proposal mainly focuses on ways to incentivize the employer to provide these benefits and not on ways to incentivize the employee to choose these benefits over cash compensation.

Some companies have experimented with using other, nontax incentives to reward participation in exercise-focused initiatives.[161] Research shows that the best incentive is always the one that appeals to the target audience; therefore, involving potential participants in the reward selection process tends to make sure the rewards being offered are something the participants value.[162] Some ideas that have been advocated for include the following: name-brand merchandise, gift cards, corporate-identified merchandise (such as tote bags and apparel), increased company contribution to health savings accounts, perks unique to the company (including prime parking spots and preferred vacation times), formal employee recognition by management and peers, or one-on-one time with the CEO or other executives.[163] Each of these rewards is offered with the goal of incentivizing participation in employer-provided wellness programs on a more individualized scale than a sweeping exclusion from income.

C. Limitations and Concerns

One concern that has been voiced by opponents of employer-provided wellness benefits is that corporations are now increasingly concerned with what employees are doing in their off-time.[164] A change in the tax policy to promote employer-provided health club memberships should not be seen as an overt extension of corporate control, but rather as an increased emphasis toward choice on the part of the employee. With the proposed tax policy now favoring subsidized athletic club memberships, employees would likely be given the option between cash compensation (which will be taxed as gross income) and a membership to an off-premises athletic facility (which will not be included in gross income).

Additionally, an important consideration when advocating for an initiative that will decrease federal tax revenue is whether that initiative is worth the decreased

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159. GOETZEL ET AL., *supra* note 144, at 13 (emphasis omitted).
160. *Id.*
161. *See, e.g.*, Hendrickson, *supra* note 34.
162. *Id.*
163. *Id.*
164. *See* Conrad, *supra* note 38, at 269.

revenue. The funds collected through the federal income tax are used to fund, among other things, health care, national defense, job and family security, net interest, and veterans benefits.[165] There is a two-pronged rebuttal to this concern. First, the price of employer-subsidized gym memberships is so small that it is unlikely to have an appreciable effect on the federal income tax revenue.[166] Second, healthier employees will decrease the amount of federal income tax revenue used to pay for health care costs.[167] Therefore, though the amount of federal income tax revenue will decrease, so too will the gross cost of health care.

CONCLUSION

Statistics clearly demonstrate that the incidence of obesity and overweight status in the United States is a serious problem, from both a public health and economic perspective. Fortunately, because an increasing number of employers are required to provide health care insurance to their employees, employers have begun to express interest in the wellness of their employees in order to reduce the gross costs of health care and improve the overall well-being of their workforce. However, even though the data show that an active lifestyle can reduce the prevalence of obesity and the host of related chronic diseases, the tax code is not being used as efficiently as possible to encourage the distribution and use of employer-provided wellness benefits. In order to incentivize the distribution and use of employer-provided wellness benefits—specifically, subsidized health club memberships—these benefits should not be included in gross income. For individuals whose thoughts have already been infiltrated by America's fitness frenzy and are struggling to determine the best way to practice healthier behavior, a tax incentive to accept an employer-subsidized gym membership might be just the motivation needed to start the journey to a healthier lifestyle.

165. *See Your 2014 Federal Taxpayer Receipt*, *supra* note 85.
166. I.R.S. Priv. Ltr. Rul. 94-30-029 (May 3, 1994).
167. *See* Gannon, *supra* note 23.