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NYC to Require Employers to Offer Pretax Transit Benefits

Federal law allows — but does not require — employers to offer employees the opportunity to set aside a limited portion of their wages to pay for qualified commuting expenses with pretax dollars. On October 20, New York City Mayor Bill de Blasio signed into law the Affordable Transit Act, which will require employers in the city to offer pretax transit benefits in 2016. Employers that do not already offer these benefits will need to ensure that they have a qualified transportation benefit program in place when the new law takes effect.

Background

Section 132(f) of the Internal Revenue Code excludes "qualified transportation fringe benefits" from an employee's gross income, subject to certain limits. Under federal law, the tax break is available only if an employer voluntarily offers a transit benefit. Because the transportation fringe benefit can only be provided to employees, self-employed individuals and two-percent shareholders of S corporations are not eligible for this benefit.

Qualified transportation fringe benefits include transit passes, qualified parking, and the cost of transportation in a commuter highway vehicle between home and work. The current monthly limits under section 132(f), which are unchanged for 2015, are $130 for transit passes and commuter highway vehicle costs, and $250 for qualified parking expenses. Proposed federal legislation would, if enacted, bring the transit benefit in line with the parking benefit.

The New Transit Benefit Mandate

On October 20, Mayor Bill de Blasio signed into law the Affordable Transit Act (Intro 295-A). The ordinance will require private employers with 20 or more full-time employees in New York City to provide a pretax qualified transportation benefit program for their full-time employees. For these purposes, "full-time employees" are those who work on average 30 or more hours per week for the employer. Once eligible for the benefit, an employee

will remain eligible for the duration of his or her employment with the employer, even if its workforce drops below the 20-employee threshold.

> **Comment.** San Francisco has had a similar ordinance in place since 2009. The employer mandate to offer commuter benefits to employees was recently expanded to include nine Bay Area counties. (See our May 13, 2014 *For Your Information*.)

Public employers and employers that are exempt from federal, state, and city payroll taxes are not subject to the new mandate. Unionized employers are also excepted from the requirement unless they have 20 or more full-time employees who are not covered by a collective bargaining agreement (CBA). In such circumstances, the employer would have to offer the benefit to those employees not covered by a CBA.

The new law, which will be enforced by the Department of Consumer Affairs (DCA), will require covered employers to offer full-time employees the opportunity to use pretax earnings to purchase qualified transportation fringe benefits — other than qualified parking — in accordance with federal law. Current federal limits, unchanged for 2015, allow employees to fund their transit accounts with pretax dollars up to $130 per month through payroll deductions.

> **Comment.** Because federal income and social security (FICA) taxes are not imposed on amounts set aside for qualified transportation expenses, participating employees will be able to save on commuting expenses and employers will be able to reduce annual payroll costs.

The local law will take effect in January 2016, provided that qualified transportation benefits are still excludible from an employee's gross income for federal income tax purposes and from an employer's wages for federal payroll tax purposes. Because the law provides a six-month grace period to come into compliance, the DCA will not impose penalties for noncompliance until July 1, 2016. Penalties for a first violation will range between $100 and $250, while penalties for subsequent violations will cost $250. Employers will have a 90-day window to cure a first violation, and will be able to avoid penalties if they come into compliance during that period. After the window closes, every 30-day period in which the employer fails to offer the requisite benefit will constitute a subsequent violation and will be subject to a civil penalty of $250.

In Closing

While many New York City employers — particularly larger employers — already offer pretax transit benefits, the new local law will require other private employers to put a qualified transportation benefit program in place. Employers with employees in New York City will need to determine whether they will be subject to the new mandate. If so, they should assess the impact on their benefits program administration, formulate appropriate employee communications, and plan for any payroll changes that may be needed to ensure compliance with the new law in 2016.

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