

NYC and DC Employers: Get Your Commuter Benefit Programs in Gear by January 1

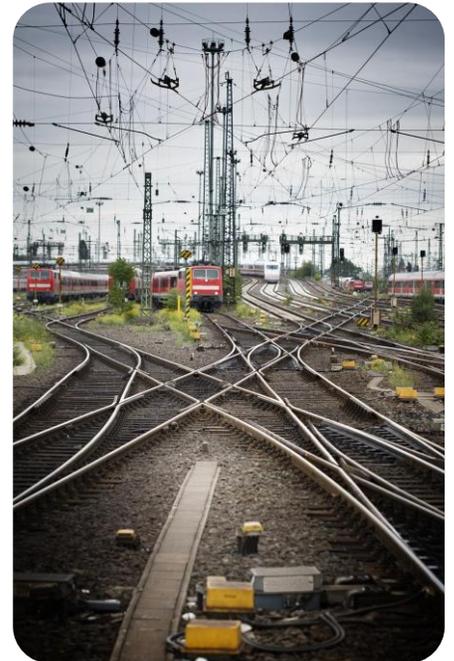
Beginning January 1, 2016, employers in New York City and Washington, DC with 20 or more employees will have to offer commuter benefit programs. Employers that do not already offer pretax transit benefits must act quickly to put a transportation benefit program in place that will satisfy the new laws.

Background

Federal law allows employers to offer employees the opportunity to set aside a limited portion of their wages to pay for qualified commuting expenses with pretax dollars. Under Section 132(f) of the Internal Revenue Code (Code), “qualified transportation fringe benefits” are excludible from an employee’s gross income, subject to certain limits. Federal limits for 2016 will allow employees to fund their transit accounts through pretax payroll deductions of up to \$130 per month for transit passes and vanpooling/commuter highway vehicle costs, and \$255 per month for qualified parking expenses.

While federal law does not require employers to offer commuter benefit programs to their employees, some cities do. Since 2009, San Francisco, San Francisco International Airport, Berkeley and Richmond, CA have required employers within their jurisdictions to provide programs that encourage employees to use public transit or carpool. The Bay Area Commuter Benefits Program — a pilot program that began in 2014 and extends through 2016 — currently requires public, private and nonprofit employers with 50 or more full-time employees in the nine counties surrounding San Francisco Bay to offer transit benefits. (See our [May 13, 2014](#) *For Your Information*.)

Last year, both New York City and the District of Columbia enacted ordinances that will require covered employers to offer commuter benefits to eligible employees working in the city or district beginning January 1, 2016. (See our [November 6, 2014](#) *For Your Information*.)



NYC Affordable Transit Act

The Affordable Transit Act ([Local Law 53](#)), enforced by the NYC Department of Consumer Affairs (DCA), will require most private employers in the city to offer full-time employees the opportunity to purchase qualified transportation fringe benefits — other than qualified parking — on a pretax basis in accordance with federal law. The DCA [website](#) provides information for employers on the city's commuter benefits law, including recently issued [FAQs](#).

Covered Employers

For-profit and nonprofit employers — regardless of where they are located — will be required to offer full-time employees the opportunity to purchase pretax transit benefits in 2016 if they employ 20 or more full-time non-union employees in NYC (including all five boroughs). Employers that have fewer than 20 full-time employees who work in NYC, but more than 20 full-time employees working outside NYC, will not have to offer commuter benefits.

Public employers and employers that are exempt from federal, state and city payroll taxes are not subject to the new mandate. Unionized employers are generally excepted from the requirement. If, however, they have 20 or more full-time employees who are not covered by a collective bargaining agreement (CBA), they would have to offer those employees commuter benefits.

Temporary Help Firms. Temporary help firms that employ 20 or more full-time employees who are placed in NYC are required to offer a pretax transit benefit (other than parking) to those employees.

Chain Businesses, Franchisors and Other Employers with Multiple Locations. Chain businesses — a group of establishments that share common ownership or a principal that owns a majority of each location and are engaged in the same business or operate under a franchise agreement with the same franchisor — are covered by the new law if they satisfy the minimum employee threshold. The number of full-time employees at all of the chain business' locations in NYC is aggregated to determine whether the threshold is met.

Employers that have more than one location in NYC must count all full-time employees at all NYC locations to determine the number of full-time employees. All full-time employees who work in the outer boroughs count toward the total number of employees.

Covered Employees

For purposes of the new commuter benefits law, "full-time employees" are defined as those who work for a covered employer on average 30 or more hours per week, *any portion of which is in NYC*.

Determining Hours Worked. In determining hours worked, employers should calculate the average hours worked in the most recent four weeks. Temporary help firms must aggregate the number of hours worked by the employee in the most recent four weeks at all placements.

No Residency Requirement. According to the DCA, full-time employees who live outside NYC but commute to jobs in NYC are covered by the new law. By contrast, full-time employees who are NYC residents but commute to jobs outside of NYC are not covered by the new law.

Continued Eligibility. Notably, once eligible for the pretax benefit, an employee will remain eligible while employed by that employer, even if its workforce drops below the 20-employee threshold.

Covered Mass Transit Providers

The DCA's FAQs provide a list of roughly 100 publicly and privately owned mass transit providers from which qualified transportation benefits may be purchased. The list includes approved providers in the following major transportation categories:

- NYC regional mass transit services, including Metropolitan Transportation Authority (MTA) subway and bus; Long Island Railroad; Amtrak; New Jersey Transit; and Metro-North
- Ferry and water taxi services
- Vanpool services
- Commuter bus services
- Access-A-Ride and other paratransit providers

Notably, the NYC law does not allow pretax income to be used for bicycling expenses — including Citi Bikes.

Comment. Although qualified parking expenses are not covered by NYC's commuter benefits law, employees may use pretax income to pay for qualified parking expenses under federal tax law.

Employer Recordkeeping

Employers must keep records showing that each eligible employee was offered the opportunity to purchase transit benefits on a pretax basis, and whether the employee accepted or declined to do so. NYC law requires employers to maintain records for two years. The DCA has made available a downloadable [form](#) employers may use for this purpose.

Enforcement

While NYC's commuter benefits law takes effect on January 1, 2016, the DCA is not authorized to seek penalties for noncompliance prior to 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 without penalty. After the window closes, an additional penalty of \$250 may be assessed after every additional 30-day period of noncompliance.

DC Transit Benefits Requirement

Like NYC, the District of Columbia enacted a mandatory commuter benefit ordinance in 2014, as part of the [Sustainable DC Omnibus Amendment Act of 2014](#). Beginning January 1, 2016, covered employers in the District will need to comply with the new requirement.

Generally, employers that already offer a transportation fringe benefit program that provides the maximum benefit available under federal law will be in compliance with the new DC requirement. However, employers who do not already offer such a program may need to establish one — even though DC has not yet issued implementing rules and penalties for non-compliance.

Covered Employers and Employees

When it takes effect in January, the new DC ordinance will apply to “employers” with 20 or more “employees.” However, it will allow the DC mayor to expand coverage to employers with fewer employees in 2017. For purposes

of the new mandate, the terms "employee" and "employer" are broadly defined and have the same meaning as in Sections 3(2) and 3(3) respectively of the Minimum Wage Act Revision Act of 1992. With certain narrow exceptions for volunteers, lay members of religious organizations, and babysitters, an "employee" includes any individual employed by an employer. An "employer" includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee, but does not include the United States or the District of Columbia.

Transportation Benefit Options

By January 1, 2016, covered employers will be required to offer employees pretax transit benefits in at least one of the following ways:

1. A pretax payroll withholding election that provides commuter highway vehicle, transit, or bicycling benefits at levels at least equal to those permitted under Section 132(f) of the Code (up to \$130 per month)
2. An employer-paid benefit program where the employer supplies, at the employee's election, a transit pass or reimbursement of vanpool or bicycling costs (up to \$130/month)
3. Employer-provided transportation at no cost to the employee in a vanpool or bus operated by or for the employer

For these purposes, the terms "transit pass," "vanpool" and "commuter highway vehicle" all have the same meaning as under the Section 132(f) of the Code. This would include transit passes for travel by bus, streetcar or train by the Washington Metropolitan Transit Authority, Maryland Area Regional Commuter, Virginia Railway Express or Amtrak. Like NYC's commuter benefits law, the DC law does not cover qualified parking expenses.

Notice and Recordkeeping

Employers must notify employees of the commuter benefit program, and how to apply. The DC Department of Employment Services (DOES), which is charged with enforcement, is expected to make a notice available that employers may use for this purpose. In addition, employers will be required to keep records showing that each eligible employee was offered the opportunity to elect transit benefits and received them.

Enforcement

A covered employer that fails to offer at least one of these options will be subject to fines and penalties under the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985. The DOES has indicated that it will not begin enforcement for a 90-day period after the new requirements take effect, but will provide outreach and education programs for employers during that time.

In Closing

While many employers already offer qualified transportation fringe benefits, the new local laws will require other private employers to put commuter benefit programs in place by 2016. Employers with employees in NYC or DC will need to determine whether they will be subject to the new mandates, establish or amend existing benefit options to come into compliance, and gauge the impact on their benefits program administration. Employers should develop appropriate employee communications, and plan for any payroll changes that may be needed.

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