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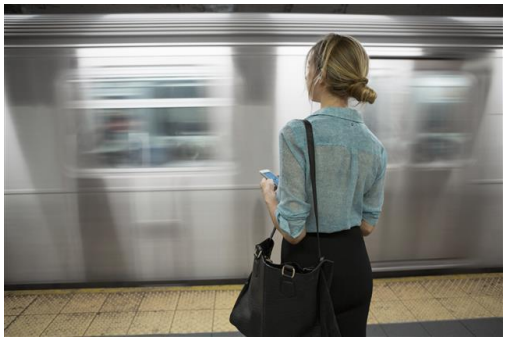
NYC Amends Mass Transit Benefit Rules

Federal law allows — but does not require — employers to offer employees the opportunity to purchase qualified transportation fringe benefits with pretax dollars. Starting in 2016, NYC law requires businesses to offer pretax commuter benefits to their "full-time" employees who work in the city. The NYC Department of Consumer Affairs recently amended its rules to clarify recordkeeping requirements, enforcement provisions, and penalties effective September 7. Employers should review their commuter benefits programs to ensure compliance.

Background

Federal law allows employers to offer employees the opportunity to pay for qualified commuting expenses with pretax dollars. Under Section 132(f) of the Internal Revenue Code, "qualified transportation fringe benefits" are excludible from an employee's gross income, subject to certain limits. Qualified transportation fringe benefits include transit passes, qualified parking, and the cost of transportation in a commuter highway vehicle between home and work. Currently, employees can use up to $255 a month of their pretax income to pay for qualified transportation.

While federal law does not require employers to offer commuter benefit programs, some cities do. Since 2009, San Francisco, San Francisco International Airport, Berkeley and Richmond, California have required covered employers to provide programs that encourage employees to use public transit or carpool. The employer mandate was later expanded to include the nine counties surrounding San Francisco Bay. (See our May 13, 2014 *For Your Information*.) In 2014, both New York City and the District of Columbia enacted ordinances requiring covered employers to offer commuter benefits to eligible employees working in the city or district beginning in 2016. (See our November 6, 2014 *For Your Information*.)



NYC Mass Transit Benefit

New York's Mass Transit Benefits Law (Local Law 53) requires most private employers with 20 or more "full-time employees" in the city (including all five boroughs) to provide a pretax commuter benefits program for them. Under this law, covered employers must allow eligible full-time employees to use pretax earnings to purchase qualified transportation fringe benefits — other than qualified parking — as

permitted by Section 132(f). Alternatively, an employer may provide the benefit at its own expense. If, however, an employer provides less than the maximum benefit allowed under federal law, employees must be offered the opportunity to make up the difference through salary reduction.

> **Comment.** Although qualified parking expenses are not covered by the NYC law, employees may use pretax dollars to pay for qualified parking expenses under federal law. Expenses for CitiBikes are also not covered, since bicycle rental fees are not qualified transportation fringe benefits under federal tax law.

For purposes of the NYC law, full-time employees are those who work an average of 30 or more hours per week, *any portion of which is in the city*, for a single employer. Once eligible for the pretax mass transit benefit, an employee will remain eligible throughout his or her employment, even if the size of the employer's workforce drops below the 20 full-time employee threshold or the employee's working hours are reduced. (For more information on employer coverage and employee eligibility, see our December 7, 2015 *For Your Information*.)

Enforced by the NYC Department of Consumer Affairs (DCA), NYC's commuter benefits law took effect on January 1, 2016. However, it provided employers a six-month grace period — from January 1 to July 1 — to begin offering a commuter benefits program. As of July 1, 2016, the DCA is authorized to issue violations to noncompliant businesses and to seek penalties for violations that occur on or after that date.

Employers and Employees Not Covered

Governmental employers, small private employers, and employers that are not required to pay federal, state, and city payroll taxes are not covered by the commuter benefits law.

Employees of employers that are subject to the new law are not covered if they:

- Work less than an average of 30 hours per week in a four-week period
- Are NYC residents but work outside the city
- Are covered by a collective bargaining agreement

Amended Rules

On June 7, the DCA proposed rules defining the penalties to be imposed for noncompliance with the Mass Transit Benefits Law and clarifying employer recordkeeping requirements and the right to cure violations. Amended rules, which were adopted following public hearing in July, will take effect September 7.

Enforcement and Penalties. As originally proposed, civil penalties for a first violation were to range between $100 and $250, and $250 for subsequent violations. Under the law, employers would have a 90-day window to correct a first violation without penalty. Thereafter, a penalty of $250 could be assessed for each additional 30-day period of noncompliance.

Under the amended rules, employers will face a civil penalty of $250 for the first violation, and any subsequent or recidivist violation. A "first violation" is the first finding by the administrative tribunal that the employer violated the transportation benefits law since July 1, 2016. A "recidivist violation" is any new finding by the tribunal that the employer violated the law after the first violation. A "subsequent violation" is each 30-day period after the expiration of the "cure period" (the 90-day period immediately following a finding of a first violation), or after the finding of a recidivist violation, in which the employer fails to demonstrate it is in compliance.

An employer may avoid a penalty for the first violation if it can show the DCA within the cure period that it is in compliance. The employer would have to demonstrate that it has either: (1) offered its full-time employees the

opportunity to purchase qualified commuting expenses with pretax dollars, or (2) provided, at its own expense, a transit pass for transportation on eligible mass transit or in a commuter highway vehicle, and the value of the employer-provided pass is equal to the maximum transit benefit tax exclusion federal law allows.

Recordkeeping. Employers must maintain records for two years demonstrating compliance with the transportation benefits law. Under the amended rules, employers may satisfy their obligations in one of two ways. Employers must maintain records showing that:

- Each eligible employee was offered the opportunity to purchase transit benefits on a pretax basis, and either accepted or declined the offer; or
- The employer provided, at its own expense, a transit pass or similar form of payment for transportation on public or privately owned mass transit or in a commuter highway vehicle at the maximum pretax level permitted under federal law for transit expenses.

The DCA has made available a downloadable form employers may use for this purpose.

In Closing

NYC's commuter benefits law took effect on January 1, 2016, but employers had a six-month grace period — or until July 1 — to begin offering transportation benefits to eligible employees. Employers should review their programs to ensure compliance.

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