Insight

IN-DEPTH DISCUSSION

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Most New York City Employers Must Offer Commuter Transportation Benefits to Full-Time Employees

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New York City's Mass Transit Benefit Law requires that most New York City employers with at least 20 full-time employees offer such full-time employees the opportunity to use their pre-tax earnings, up to $130 per month,[1] to pay for certain "qualified transportation fringe benefits," but not qualified parking.[2] Although the Mass Transit Benefit Law takes effect on January 1, 2016, covered employers essentially have a six-month grace period to comply because the law provides that penalties will not be assessed for violations that occur before July 1, 2016.[3] With this law, New York City joins San Francisco and Washington, D.C. in mandating that employers offer transportation benefits to their employees.[4]

Federal Transit Benefits

Under federal tax law, employers are permitted, but not required, to offer qualified transportation fringe benefits to any of their employees. These benefits include commuter highway vehicle and mass transit tickets and passes (for use on services provided by entities such as MTA, Long Island Rail Road, Amtrak, New Jersey Transit, Metro North, and certain ferry and water taxi services). An employee uses this benefit by electing that a certain amount of his or her pre-tax pay (up to a maximum of $130 per month) will be used to purchase transit tickets and passes.

The Mass Transit Benefit Law provides that when employees opt to use this benefit, there is a tax savings to both the employee and the employer. When an employee pays for transit expenses with pre-tax income, such benefits are, in effect, not included in his or her taxable income. The employer can exclude any amount that is exempt from income tax from the employee's wages, thereby reducing its share of federal payroll taxes.

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1 26 U.S.C. § 132(f). This is the monthly maximum set by federal tax law. The Internal Revenue Service has the authority to adjust this limit each year for inflation.

2 Local Law No. 53 (2014) of City of New York (hereinafter "Local Law No. 53").

3 Local Law No. 53 § 2.

4 See Michelle Thomas, Rachel Hill, and Eunju Park, *District of Columbia Employers Must Provide Transportation Benefit Programs by the New Year*, Littler Insight (Nov. 23, 2015; Christopher Cobey and Anne Sweeney Jordan, *San Francisco Bay Area Employers Must Comply with Commuter Benefits Program by September 30, 2014*, Littler Insight (Apr. 23, 2014).

Two Alternatives for New York City Employers

Employers must offer one of two benefits to their eligible full-time employees. They may provide the employee the opportunity to use pre-tax earnings up to the federal maximum qualified transportation fringe benefit ($130 per month in 2016) to purchase eligible transit benefits. The offer must be made by the later of January 1, 2016, or four weeks after the employee's start date.[5]

Alternatively, per rules recently issued by the New York City Department of Consumer Affairs ("DCA"), employers may directly pay for tickets or transit passes or make other forms of payment to employees to be used for mass transit or commuter highway vehicle expenses ("employer-paid transit benefit").[6] If the employer-paid transit benefit is less than the federal maximum qualified transportation fringe benefit, the employer must offer employees the opportunity to use pre-tax earnings to pay for the difference between the value of the employer-paid transit benefit and the federal maximum transportation fringe benefit, to purchase eligible transportation fringe benefits.

Which Employers Are Covered?

The New York City Mass Transit Benefit Law applies to most for-profit and not-for-profit employers with 20 or more full-time employees in New York City.[7] However, it does not cover:

- Governmental employers (e.g., the federal government, New York State, New York City, local governments, etc.);
- Employers that are not subject to federal, state, and city payroll taxes;
- Employers operating under a collective bargaining agreement (except that if the employer has 20 or more full-time, non-collectively bargained employees, then the full-time, non-collectively bargained employees must still be offered the transit benefit); and
- Employers that qualify for a "financial hardship exemption." The DCA may grant a financial hardship exemption to an employer that presents "compelling evidence that complying with the Transportation Benefits Law would be impracticable and create a severe financial hardship."[8] Unfortunately, neither the Mass Transit Benefits Law nor the DCA's rules define financial hardship.

To determine the number of full-time employees, employers must calculate the average number of full-time employees working during the most recent consecutive three-month period.[9] If the employer has been in operation for fewer than three months, the employer must calculate the average number of full-time employees per week for the period of time it has been in operation.

Importantly, once a full-time employee qualifies for eligible transit benefits, the employer must continue to offer the eligible transit benefits to him or her for as long as full-time employment continues -- even if the employer's number of full-time employees drops below 20.[10]

Employers and Chain Businesses with More Than One Location

For employers and chain businesses with more than one location in New York City, determining whether the 20 full-time employee threshold is met involves looking at all locations in New York City that share a common owner or principal where such establishments engage in the same business or operate pursuant to a franchise agreement with the same franchisor.[11] For chain businesses, the common owner or principal must own a majority of each establishment.

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5 6 RCNY § 8-04(a).

6 6 RCNY § 8-07.

7 N.Y. Admin. Code § 20-926(c).

8 6 RCNY § 8-08.

9 6 RCNY § 8-02.

10 New York City Admin. Code § 20-926(a); 6 RCNY § 8-04(b).

11 6 RCNY §§ 8-01.

Temporary Help Firms

For purposes of the Mass Transit Benefit Law, "temporary help firms" are considered the "employer" of the full-time employees they supply to other organizations. Accordingly, a temporary help firm must offer eligible transit benefits to the "temporary help" full-time employee if it has 20 or more full-time employees, regardless of the size of the client organization. The temporary help firm determines whether an employee is full-time by aggregating the employees' hours worked at all placements in the most recent four weeks.

Who is a Full-Time Employee?

"Full-time employees" are those employees working an average of 30 or more hours per week, any portion of which is in New York City.[12] Independent contractors, partners, sole proprietors, and 2% shareholders of S corporations are not considered employees. Whether an employee averages 30 or more hours per week is based on the number of hours worked during the most recent four weeks.[13]

Enforcement

Beginning July 1, 2106, an employer may be liable for a civil penalty ranging from $100 to $250 for its first violation of the law. However, the DCA, which is charged with enforcement of the law, must give employers 90 days to "cure" the first violation before it can assess the penalty.[14] After the end of the 90-day cure period, a covered employer is deemed to commit a subsequent violation for every 30-day period it does not offer the transit benefit. For each subsequent violation, there is a $250 civil penalty.[15]

Recordkeeping Requirements

Under DCA rules, employers must maintain records for two years that demonstrate that each eligible full-time employee was offered transportation fringe benefits in compliance with the Mass Transit Benefit Law and, and indicate whether the employee accepted or declined the offer.[16] The DCA has posted an "Employer Compliance Form" on its website that employers may use to document compliance. The form is available at: http://www1.nyc.gov/site/dca/about/pre-tax-transit-benefits-law.page.

12 New York City Admin. Code § 20-926(a).

13 6 RCNY § 8-01.

14 N.Y.C. Admin. Code§ 20-926(b).

15 Id.

16 6 RCNY §8-06.