New York City's Pre-Tax Transportation Benefit Mandate

By Richard I. Greenberg, Daniel J. Jacobs and Melissa Ostrower

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A New York City ordinance requiring most employers to provide qualified pre-tax transportation benefits to their employees becomes effective on January 1, 2016.

While many employers already provide pre-tax transportation benefits as a matter of company policy (see IRS Publication 15-B – Qualified Transportation Benefits for an explanation of the federal tax treatment of such benefits), effective January 1, 2016, unless otherwise exempted, New York City employers with at least 20 full-time employees in the city of New York must offer full-time employees the opportunity to purchase pre-tax qualified transportation fringe benefits.

For purposes of the legislation, a full-time employee is any employee who works an average of 30 hours or more per week for an employer.

The ordinance does not apply:

1. To federal, state or local governmental agencies/employers;

2. Where a collective bargaining agreement exists between an employer and employees, except where the number of full-time employees not covered by any such agreement is at least 20, in which case those full-time employees not covered by the agreement would be eligible for the pre-tax transportation benefits; or

3. Where the employer is not required by law to pay federal, state or city payroll taxes.

The Department of Consumer Affairs (DCA), the same agency tasked with enforcement of the New York City Earned Sick Time ordinance, will have responsibility for enforcing the transportation benefits ordinance.

In addition to the exemptions noted above, the DCA also has authority to waive the requirements of the ordinance if an employer demonstrates to the DCA's satisfaction that offering the benefits would cause a financial hardship for the employer.

The following proposed rules have been issued by the Commissioner of the DCA clarifying certain provision of the ordinance (http://rules.cityofnewyork.us/content/mass-transit-benefits-rules):

- *Establish a minimum time an employee must be employed by an employer before qualifying for transportation benefits* – January 1, 2014, or after four weeks of full-time employment, whichever is later;
- *Exclude remote workers* – Benefits would not need to be provided to full-time employees that work remotely and do not commute to a location or physical worksite in New York City;
- *Impose certain recordkeeping requirements demonstrating compliance with the law* – Maintain records for two years showing that eligible employees were offered benefits and whether they accepted or decline;
- *Establish how business size is calculated to determine whether a business is covered under the law* – Size would be based on the average number of full-time employees during the most recent three consecutive months; and
- *Clarify how the law applies to temporary help firms* – The temporary help firm would be deemed the employer and required to comply with the ordinance.

Employers in violation of the ordinance can be held liable for civil penalties of $100 to $250 for the first violation and $250 for any subsequent violations. Employers will have 90 days to cure a first violation before a civil penalty is imposed. Further, if an employer fails to cure the violation, every 30 days after the cure period expires will be a subsequent violation.

All covered New York City employers must develop measures to ensure compliance with the

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transportation benefit ordinance.

In addition, as transportation benefit plans are not subject to the Employee Retirement Income Security Act of 1974 (ERISA), unlike many other employer-sponsored employee benefit plans, these plans are subject to a myriad of state and local requirements (e.g., wage withholding requirements and escheat or reversion rules).

Jackson Lewis attorneys are available to answer inquiries and provide assistance with this and other workplace issues.