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ACT NOW ADVISORY

NYC Affordable Transit Act: Employers Will Be Required to Offer Qualified Transportation Benefits in the New Year

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Effective January 1, 2016, most employers with 20 or more full-time employees in New York City must offer those full-time employees the opportunity to use pre-tax earnings to purchase qualified transportation fringe benefits in accordance with federal law.[1] Although penalties will not be assessed for noncompliance prior to July 1, 2016, with the new year rapidly approaching, the time for employers to pursue a benefits program that aligns with the new law is now.

In enacting the Affordable Transit Act, Mayor Bill de Blasio stated at a press conference that the legislation "is a win-win for local businesses and working New Yorkers alike." Under current federal law, an employee may exclude qualified transportation fringe benefits from his or her gross income for federal income tax purposes, and an employer generally may exclude most qualified transportation fringe benefits from an employee's wages—even if provided in place of pay. Vanpooling, mass transit passes, parking, and bicycle commuting all currently constitute qualified transportation fringe benefits under federal law. The Affordable Transit Act does not, however, require employers to offer qualified parking as a qualifying fringe benefit.

Other cities already have comparable laws on the books (e.g., San Francisco, S.F., Cal., Ordinance 199-08), and the District of Columbia is on track to have a similar law take effect on January 1, 2016 (the Sustainable DC Omnibus Amendment Act of 2014, Title III, Subtitle A, "Reducing Single Occupancy Vehicle Use by Encouraging Transit Benefits," codified at D.C. Code § 32-151, *et seq*.). Similar to the Affordable Care Act, New York City's Affordable Transit Act defines "full-time employees" to mean employees who work an average of 30 hours or more per week. If an employer's

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[1] Government employers and employers that are not required by law to pay federal, state, and city payroll taxes are exempted from compliance with the Affordable Transit Act. Similarly, employers that are party to a collective bargaining agreement are exempt from the new legislation, except where the number of full-time employees not covered by the collective bargaining agreement is 20 or more, in which case, those full-time employees not covered by the collective bargaining agreement must be eligible for the benefit.

number of full-time employees is reduced to less than 20, any employee eligible for the pre-tax benefits prior to the employee reduction will continue to be provided the pre-tax opportunity while employed with the employer.

To ensure that NYC employers have time to comply with the new law, such employers not only are given a six-month period from the effective date of the Affordable Transit Act before civil penalties may be imposed, but also have a 90-day cure period following a first violation. If a violation is found, New York City's Department of Consumer Affairs, the agency charged with enforcing the Affordable Transit Act, will issue a notice of violation. An employer found to be in violation of the Affordable Transit Act is liable for a civil penalty ranging from $100 to $250 for the first violation. After the expiration of the 90-day cure period, every 30-day period that the employer fails to offer the benefit will constitute a subsequent violation, and a civil penalty of $250 will be imposed for each subsequent violation, limited to one penalty per 30-day period.

Even employers that are otherwise governed by the Affordable Transit Act may nevertheless avoid the duty to provide the benefit if they demonstrate to the Department of Consumer Affairs that offering qualified transportation fringe benefits causes financial hardship.

It should also be noted that the Affordable Transit Act will cease to be effective if qualified transportation benefits are no longer permitted to be excluded from an employee's gross income for federal income tax purposes and from an employer's wages for federal payroll tax purposes. This seems far from likely, however, given the laudable incentives that commuter benefits deliver: attracting and retaining qualified employees while reducing congestion to improve air quality.

What Employers Should Do Now

Don't miss the train! NYC employers that are subject to the Affordable Transit Act should take the following actions now to achieve timely compliance with the new law:

- Assess whether current employee benefit plans and programs offer full-time employees the opportunity to use pre-tax earnings to purchase qualified transportation fringe benefits in accordance with federal law.

- If benefit plans and programs do not offer that opportunity, establish or amend them to take effect January 1, 2016. In doing so,

    - make sure that all NYC employees who work an average of 30 hours or more per week are eligible for the benefits, and

    - keep in mind that certain requirements must be satisfied under federal law to ensure that the transportation benefits offered are qualified.

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For questions regarding how to comply with the NYC Affordable Transit Act or for more information about this Advisory, please contact:

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