

COMPLIANCE ALERT

COMMUTER BENEFITS LEGISLATION KEEPS ROLLING

February 1, 2020

QUICK FACTS

- Internal Revenue Code Section 132(f) permits employers to offer qualified commuter benefits to employees on a tax-free basis.
- A commuter benefit program allows workers to set aside pre-tax wages to pay for qualified transportation costs such as transit passes, vanpools, or parking.
- These programs provide tax savings to employers and can help attract and retain employees.
- Eight local and state jurisdictions currently require employers to offer commuter benefit programs, and the trend is expected to grow.
- Employers should stay alert for guidance and news where employees work regarding commuter benefit program mandates.
- Employers may want to consider voluntarily offering such programs to employees nationwide in advance of any municipal or state requirements that may apply in the future.

BACKGROUND

Internal Revenue Code (Code) Section 132(f) lets employers offer qualified transportation fringe benefits, or commuter or transit benefits, to their employees. Commuter benefits provide tax incentives for employees to use mass transit and other alternative ways to get to work, with the goal of reducing traffic congestion and improving air quality.

In brief, a commuter benefit program allows an employee to set aside wages on a pre-tax basis to pay for qualified transportation costs, up to a monthly limit. The pre-tax wage deduction limit is set annually by the Internal Revenue Service (IRS). Employees benefit from such programs by using pre-tax income to pay for work-related commuter costs; employers benefit from reduced payroll taxes. Employers may also pay for or subsidize commuter highway vehicles that transport employees to work.

Under the Code, a qualified transportation fringe benefit is defined as:

- transportation in a commuter highway vehicle for travel between the employee's residence and place of employment;
- transit passes; and
- qualified parking.

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GROWING TREND

More jurisdictions have recently passed laws that require employers to offer commuter benefit programs. These laws, prompted by growing concerns about climate change and traffic congestion, continue to expand nationwide.

Commuter benefit programs are particularly popular in locations where mass transit is available and used frequently by employees to travel to and from work. Such programs provide tax-savings to both employees and employers and can help attract and retain employees. However, employees are not required to elect commuter benefits, even though the employer may be required to offer them. For example, commuters are unlikely to participate if mass transit is not available or they are not affected by traffic congestion.

Most companies use commuter benefit providers to handle program administration. In these cases, the provider will help design a compliant program, distribute transit cards, process claims, and provide customer service. In addition, such providers handle the compliance issues necessary to ensure that the products and services are in conformance with IRS rules, and often, state and local ordinance requirements.

Below is summary of current local and state commuter benefit laws. Follow the links in the summaries to learn more details about each law. Please note, this information is subject to change.

SAN FRANCISCO

Commencing in 2009, the [San Francisco Commuter Benefits Program](#) became the first municipal ordinance in the nation to mandate employer-provided commuter benefits. San Francisco set the stage for other jurisdictions to commence similar legislation. San Francisco employers with 20 or more employees are required to provide commuter benefits to employees who work an average of at least 10 hours per work week within the geographic boundaries of San Francisco. Under the ordinance, employers must offer to employees the choice to set aside pre-tax wages to pay for transportation in a commuter highway vehicle; employer-paid transit passes or reimbursement for vanpool costs; or employer-paid transportation such as a shuttle, vanpool, or bus.

Failure to comply with the ordinance can lead to a \$100 fine for the first violation, \$200 for the second violation and \$500 for the third violation, up to a maximum of \$800.

SAN FRANCISCO BAY AREA

Employers with 50 or more full-time employees in the nine San Francisco Bay Area metro counties are required to offer commuter benefits in accordance with the [Bay Area Commuter Benefits Program](#). Under the program, employers must offer one or more specified options to covered employees that worked for the employer in the Bay Area an average of 20 or more hours per week in a previous month. The commuter benefit options include pre-tax contributions to

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commuter accounts to pay for transit or vanpool costs, transit or vanpool subsidies, free or low-cost transportation services, or an alternative commuter benefit.

Reporting requirements under the San Francisco Commuter Benefits Ordinance (described above) coordinate with this program. Employers with 50 or more employees across all sites in the Bay Area must register and report to the [Bay Area Commuter Benefits Program](#). Employers with fewer than 50 employees in the Bay Area, but with more than 20 employees nationwide and a location in San Francisco, will continue to report to the [San Francisco Commuter Benefits Program](#).

Failure to comply with the law can lead to a financial penalty as authorized by the California Health and Safety Code.

BERKELEY, CALIFORNIA

The City of Berkeley has a commuter benefits ordinance – called the [TRACC](#) ordinance – that became effective in 2009. The ordinance requires employers in Berkeley with 10 or more employees to provide a commuter benefits program. Covered employees are those that work an average of 10 or more hours per week. Employers can offer pre-tax commuter benefits to pay for mass transit, provide a subsidized benefit, or a combination of the two.

RICHMOND, CALIFORNIA

The [Richmond Commuter Benefits Ordinance](#), which became effective in 2009, mandates employers with 10 or more employees to implement a commuter benefits program. Employers can offer pre-tax commuter benefits to pay for mass transit, vanpooling, or bicycle commuting expenses.

NEW JERSEY

New Jersey in 2019 became the first state in the nation to adopt a commuter benefits [law](#). New Jersey employers with 20 or more employees in the state are required to offer pre-tax commuter benefits to employees, unless they are subject to a collective bargaining agreement (CBA) that was in effect on March 1, 2019, in which case the law becomes effective upon the CBA expiring. To comply with the law, employers must allow employees to set aside pre-tax wages to pay for qualified transit and parking expenses.

New Jersey will enforce the commuter benefits law when final rules and regulations are released. Enforcement is anticipated to start March 1, 2020, but that is subject to change. First violations carry a \$100 to \$250 fine unless corrected within 90 days of notice. If not corrected within 90 days, each subsequent 30-day period carries a \$250 fine.

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NEW YORK CITY

[NYC's Commuter Benefits Law](#) took effect in 2016. The law requires non-government employers with 20 or more full-time non-union employees to offer a commuter benefits program to eligible employees. A full-time employee is an employee who works an average of 30 or more hours per week, any portion of which is in New York City. Employers must allow employees to use pre-tax income to pay for transit passes that can be used on public or privately owned mass transit or commuter vans.

Failure to comply with the law can lead to a \$100-\$250 fine for the first violation if not cured within 90 days. If the violation is not so cured, an additional \$250 fine may be issued after every additional 30-day period of noncompliance.

WASHINGTON, D.C.

The [DC Commuter Benefits law](#) took effect in 2016. The law requires employers with 20 or more employees (counting full- and part-time employees employed as of the previous December 31 or, if greater, the average number of full- and part-time employees during the prior year) in Washington, D.C. to offer commuter benefits to covered employees. Employees are covered by the law if they spend at least 50% of their working time in D.C., or are based in D.C. and perform a substantial amount of work in D.C. and less than 50% in any other state.

To comply with the law, employers must allow at least one of three options. Employees may set aside pre-tax wages to pay for transportation in a commuter highway vehicle or transit passes or bicycling costs up to the amount allowable under Code Section 132(f); the employer may supply transit passes or reimburse the employee for vanpool or bicycling expenses; or the employer may provide transportation services at no cost to the employee, such as a shuttle, vanpool, or bus.

Penalties and fines for non-compliance went into effect in November 2019 and can be as high as \$100/employee for a first offense, \$200/employee for a second offense, \$400/employee for a third offense and \$800/employee for a fourth offense. Fines will be assessed each month until an employer corrects any failure.

SEATTLE, WASHINGTON

The [Seattle Commuter Benefits Ordinance](#) became effective on January 1, 2020. The ordinance applies to employers with 20 or more employees worldwide; government entities and tax-exempt organizations are exempt. Under the ordinance, an employer must allow an employee to make a monthly pre-tax payroll deduction to cover transit or vanpool expenses. The ordinance applies to employees that work at least 10 hours per week in Seattle.

Employers must comply with the ordinance beginning January 1, 2020. However, enforcement action is on hold until

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January 1, 2021. Administrative rules and enforcement procedures for the ordinance are currently being developed. Covered employers should be alert for further guidance from the city of Seattle.

Failure to comply with the law may lead to a penalty of up to \$500 for a first violation, and for subsequent violations, a required penalty of up to \$500 per “aggrieved party.”

LOS ANGELES, CALIFORNIA

A transit benefit program has been approved that is expected to mandate Los Angeles-area employers to offer commuter benefit programs to employees. The program is pending, but Los Angeles employers should be alert for news and guidance regarding any forthcoming requirements.

SUMMARY

In most cases, commuter benefit laws require affected employers to fulfill similar obligations. Examples include:

- Register the business with the regulating agency.
- Offer employees, at a minimum, the option to elect pre-tax payroll deductions to pay for mass transit expenses (e.g., buses, trains, vanpools).
- Maintain records and report information to the regulating agency to demonstrate compliance.
- Display posters in covered worksites that explain the employer’s commuter benefit program, employee rights, and how to access the program.
- Respond to agency investigations regarding alleged violations and take prompt action to take corrective action if required.

KEY TAKEAWAYS

Employers nationwide should stay alert for guidance and news from jurisdictions where employees work regarding commuter benefit program mandates. Most jurisdictions provide news and reminders about various ordinances to companies that are registered to do business in a particular area, and will issue news alerts by email to those registered for the news service. Flexible spending account or commuter benefit vendors are another helpful resource for legislative updates.

Due to the continuing roll out of commuter benefits across the country, employers that have not implemented commuter benefits may want to consider voluntarily establishing and offering such programs to all employees in advance of any further municipal or state requirements. However, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Missouri, North Carolina, South Carolina, Wisconsin and Ohio (other than in Cuyahoga, Franklin, Hamilton and Lucas counties) generally forbid cities, towns and counties from enacting laws to require private sector employers to provide

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any form of employee benefit. Thus, employers in those states should be spared from having to one day deal with city- or county-level commuter benefits laws, but could one day see state legislation similar to New Jersey.

EPIC Employee Benefits Compliance Services

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