HINMAN STRAUB PC
ATTORNEYS AT LAW

121 State Street
Albany, New York 12207-1693
Tel: 518-436-0751
Fax: 518-436-4751

MEMORANDUM

TO: **Memo Distribution List**

LeadingAge New York

FROM: Hinman Straub P.C.

RE: New York City "Transportation Benefits Law"

DATE: December 8, 2015

On October 20, 2014, Mayor Bill de Blasio enacted the New York City "Transportation Benefits Law." The Transportation Benefits Law (the "Law") amended Title 20 of the New York City Administrative Code by adding Chapter 9 (Section 20-926). Specifically, the Law mandates that employers with more than twenty (20) full-time employees working in New York City offer their full-time employees the opportunity to use pre-tax earnings to purchase qualified transportation fringe benefits allowable under existing federal law. The Law applies to for-profit and not-for-profit employers with twenty (20) or more full-time employees working in New York City.

The New York City Department of Consumer Affairs has the primary responsibility and authority to enforce the Law. The Commissioner recently amended Section 6 of the Rules of the City of New York by adopting a new Chapter 8 setting forth rules for the Law (the "Rules"), which clarifies, among other things, the definition of "full-time employee," recordkeeping requirements, the calculation of the number of full-time employees to determine whether an employer is covered, and the ability of an employer to offer certain transportation benefits in lieu of a commuter benefits program.

The Law is effective as of January 1, 2016. The Law affords a "grace period," whereby the Department of Consumer Affairs will not impose civil penalties for any violations that occurred prior to July 1, 2016.

The following provisions of the Law are summarized herein to assist you in evaluating the need to establish and administer a commuter benefits program for your employees. It is recommended that you read this memorandum in its entirety and also consult with your tax professionals in preparation for the implementation of the Law with your business.

Basic Overview of Federal Tax-Free Commuter Benefits

Section 132 of the Internal Revenue Code (29 U.S.C.), passed in 1993 , allows employers to offer tax-free transportation fringe benefits to its employees through tax incentives in order to encourage employee use of mass transportation systems. Previously, such benefits were provided through a voluntary employer-provided program that allowed employers to exclude from an employee's taxable wages certain expenses up to a defined cap ($130 per month). The allowable expenses included expenses for mass transit (fare cards, tokens, vouchers, and/or passes), vanpooling, parking, and, most recently, bicycling expenses.

Applicability of the Law

All employers with more than twenty (20) full-time, non-union employees working in New York City[9] are now required to offer tax-free transportation fringe benefits to their full-time employees, unless specifically exempted by the Law. Covered employers include for-profit and not-for-profit employers in New York City and employers operating as a temporary help firm.

Exemptions

Specific exemptions to the Law include the following:

- Employers who are covered by a collective bargaining agreement ("CBA"). However, an employer, who has twenty (20) or more full-time employees not covered by the CBA, must offer those full-time employees not covered by the CBA commuter benefits.

- Government employers, including the United States, New York State, including any officer, department, independent agency, authority, institution, association, society or other body of the state (i.e., legislature and judiciary), or New York City or any local government, municipality, county, or other entity governed by Section 92 of the General Municipal Law or Section 207 of the County Law.

- Employers not required to pay federal, state, and City payroll taxes.

- Any employer that receives a waiver from the Department of Consumer Affairs after demonstrating that the offering qualified transportation fringe benefits would be a financial hardship for the employer.

"Full-Time Employees"

The Law and Rules define "full-time" employees as those employees actively working an average of thirty (30) hours or more per week within the most recent four (4) weeks with any portion of such work being in New York City.[10] Importantly, employers, who have more than twenty (20) full-time employees working only occasionally in New York City, must offer commuter benefits

[9] New York City for the purposes of this Law includes the Bronx, Brooklyn, Manhattan, Queens, and Staten Island.
[10] The Rules provide that a "week" is defined as the employer's regularly established payroll week.

to those employees working in New York City. However, the Law excludes those full-time employees who are merely residents of New York City and commute to their job outside of New York City and those individuals serving as independent contractors.

In calculating the total number of full-time employees to determine whether an employer is subject to the Law, employers are required to count the total full-time employees at all of their business's locations in New York City, including operations under a franchise agreement with the same franchisor,

In the event that an employer, who had twenty (20) or more full-time employees, reduces its workforce below the twenty-employee threshold, the employer is still required to continue to offer those employees, who were eligible prior to the reduction the opportunity, to take part in the pre-tax qualified transportation fringe benefits for the duration of his or her employment. Additionally, nothing precludes an employer with less than twenty (20) full-time employees from offering a pre-tax transportation fringe benefits program, provided it complies with federal law.

Required Qualified Tax-Free Commuter Benefits

Under the Law and Rules, an employee must be offered the opportunity to use pre-tax income to pay for transportation costs on public or privately owned mass transit, commuter vans, also known as "vanpooling" (vans with a seating capacity of six or more passengers not including the driver), and ferry services into and within New York City.

While Section 132 of the Internal Revenue Code also authorizes certain parking and bicycling expenses to be included in qualified transportation costs, these expenses **are not** covered under the New York City Transportation Benefits Law. Furthermore, qualified transportation costs do not include carpooling expenses or "CitiBikes" and may not include certain "dollar vans" or commercial commuter van services that do not meet the requirements under Section 132(5)(A)(iii) of the Internal Revenue Code.

The benefits may be used for both mass transit and commuter vans if both types of transit are used during an employee's commute. However, consistent with federal law, an employee can only deduct up to $130 per month for transit or vanpooling expenses from his or her taxable income.

How Can an Employer Satisfy its Obligation Under the Law?

A qualifying employer can satisfy its obligation to provide a commuter benefits program through an employer-administered program or use a third-party provider. A commuter benefits program can take several weeks to set up, particularly if the employer chooses to use a third-party provider. If the employer chooses to self-administer a commuter benefits program, it is highly recommended to consult its tax professionals to ensure compliance with all applicable federal, state, and/or local laws.

Generally, third-party providers charge administrative fees for using their services. Under New York State Labor Law, an employer may not deduct any administrative fees from an employee's wages to offset the cost of setting up and maintaining a commuter benefits program.

The Rules also provide that, as an alternative to pre-tax earnings to purchase transportation fringe benefits, an employer may provide employees with a transit pass or similar form or payment for transportation on public or privately owned mass transit or in a commuter highway vehicle at its own expense. In the event that the value of the transit pass is less than $130 per month, then the employer must still offer employees the opportunity to make up the difference in a pre-tax payroll deduction. Importantly, an employer who provides a transit pass at its own expense, still needs to comply with the Law's recordkeeping requirements, discussed further below.

Additionally, an employer may provide cash reimbursements for transit passes purchased by its employees in lieu of offering the use of pre-tax income to purchase qualified transportation fringe benefits. The cash payments must be tax-free to the employee. However, the Internal Revenue Service ("IRS") announced new restrictions (effective January 1, 2016) on employers providing cash reimbursements where "terminal-restricted debit cards" are available in the employer's geographic areas. As a result, employers are recommended to consult their tax professionals to understand how the new IRS restrictions on cash reimbursements affect you.

Administrative Requirements for Employers

The Department of Consumer Affairs mandates that qualifying employers are required to keep records to show that each full-time employee was offered the opportunity to use pre-tax income to purchase transit benefits. Such records must track whether each full-time employee accepted or rejected the opportunity and must be kept for two (2) years.[11] The employer must afford an employee the opportunity to use qualified transportation fringe benefits as of January 1, 2016 or within four (4) weeks from the effective date of a new employee's employment, whichever is later.

A sample compliance form can be found at found at the New York State Department of Consumer Affairs' website.[12]

Enforcement

In the event an employer is found to have violated the Law, an employer shall be liable for a civil penalty, payable to New York City, between $100 and $250 for the first violation. All employers will be allowed a ninety-day period to cure the first violation before the Department of Consumer Affairs will impose a civil penalty. In the event that the employer fails to cure the violation after the ninety-day period, an employer will incur a subsequent violation and an additional civil penalty of $250 every thirty (30) days thereafter. The Law, however, limits the amount of civil penalties on an individual employer not to exceed one (1) violation every thirty (30) days.

Effective Date

The Law will take effect on January 1, 2016. However, the Law affords a "grace period" for employers, prohibiting the imposition of civil penalties for a violation of the Law or any rule

[11] Employers, which are required to offer the transportation benefits program, are advised to consult their tax professionals to determine their record-keeping requirements under federal and state tax law.

[12] http://www1.nyc.gov/assets/dca/downloads/pdf/about/CommuterBenefits-EmployerComplianceForm.pdf

promulgated by the Department of Consumer Affairs, provided the violation(s) occurred before July 1, 2016.

Importantly, should Section 132 of the Internal Revenue Code be repealed or amended in such a way that qualified transportation benefits would be no longer permitted to be excluded from an employee's gross income for federal tax purposes, the Law would expire without further action by the New York City Council.

Hinman Straub is available to provide a more in-depth analysis of this new Act and its impact on your existing sick leave polices.

If you have any additional questions, please contact Joseph M. Dougherty at (518) 436-0751 or jdougherty@hinmanstraub.com

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