

City and County of San Francisco Mandates Transit Benefits

September 5, 2008

On August 22, 2008, Mayor Gavin Newsome signed a new Transit Benefit Ordinance in to law requiring employers with offices in San Francisco to provide one of three transit benefit options to its San Francisco employees:

- ? A pre-tax Transit Pass program;
- ? A program which reimburses employees for them;
- ? Or, door-to-door van pool program at no cost to employees.

The Basics

- 1. Effective Date.** 120 days following the date the Ordinance was signed in to law. In other words, a program must be in place on or about January 22, 2009.
- 2. Covered Employers.** Employers other than governmental entities, with an average of 20 or more employees, inside or outside boundaries of the City and County of San Francisco.
- 3. Employees.** Full time, part time, or temporary employees even if they perform their duties outside of San Francisco. Employees do not include those made available to work through temporary or staffing agencies. To qualify for benefits the employee must work at least ten hours in the prior calendar month for the same employer inside the City and County limits and qualify for California minimum wage.
- 4. Transit Pass.** Pass token fare card, voucher or similar item used for travel by ferry, cable car, bus, light rail, or train. It does not include vehicular FastTrak devices. Note Transit Pass has the same meaning as it does for purposes of federal law (IRC Section 132(f) et seq.)
- 5. Van Pool.** A commuter highway vehicle (80% of which is commuter mileage) capable of holding at least six adults (not including the driver). Again, this term has the same meaning as under federal law.

The Details

1. Employer Choices:

- ? **A Pre-Tax Election:** A program, consistent with 26 U.S.C. § 132(f), allowing employees to elect to exclude from taxable wages and compensation, employee commuting costs incurred for Transit Passes or

vanpool charges (but not for parking), up to maximum level allowed by federal tax law, 26 U.S.C. 132 (f)(2), which presently is one hundred and ten dollars per month (\$110);

? **Employer Paid Benefit:** A program whereby the employer supplies a Transit Pass for the public transit system requested by each Covered Employee or reimbursement for equivalent vanpool charges at least equal in value to the purchase price of the appropriate benefit which shall not exceed the cost of an adult San Francisco MUNI Fast Pass, which presently is \$45; or,

? **Employer Provided Transit:** Transportation furnished by the employer at no cost to the covered employee in a vanpool or bus, or similar multi-passenger vehicle operated by or for the employer.

2. Residency. Employees can live in the City or anywhere else where commuter options exist such as BART, Cal-Train, Golden Gate Transit, AmTrak, SamTrans, and the like.

3. Benefit Amount. For a pre-tax program, up to \$110 per month. For employer-paid Transit Passes, the current purchase price of a monthly MUNI Fast Pass (\$45); for van pooling, the employer cost. The program does not include a parking benefit.

4. Enforcement. The Director of the Department of Environment (DOE) upon consultation with the Office of Labor Standards Enforcement and other City officials will produce educational materials, rules, and regulations. Failure to comply may result in fines of:

? \$100 for the first infraction;

? \$200 for the second;

? \$500 for the third and for each further violation in the same year;

? Plus enforcement costs.

5. Emergency Ride Home. The Ordinance also allows the Director of the DOE in the event of illness or emergency or an immediate family or other verifiable unexpected event out of the commuter's control, to reimburse the commuter for transportation costs to return home or to a transit portal or to his/her remotely parked car. This program will be dependent upon funding by various public agencies (e.g., Bay Area Air Quality Management District, San Francisco Transit Authority, etc.)

6. Employer Support. It is worth noting that the San Francisco Chamber of Commerce as well as other business groups support the Ordinance in large part due to payroll tax savings related to the pre-tax Transit Pass approach.

Establishing the Program

1. Employer requirements. Based on the requirement set forth in IRC Section 132(f) and its regulations, to establish a Transit Pass program, employers must do one of the following:

? **Provide Transit Passes.** The employer obtains a supply of monthly passes and provides them upon request (no more than one per month) and then deducts the cost of the pass on a pre-tax basis from the employee's next pay check.

? **Reimbursement Method.** The employer reimburses employee up to the maximum benefit amount upon receipt of documentation substantiating the expense involved. Regulations under IRC Section 132(f), however, will only allow employers who can demonstrate that the average monthly cost to administer the program exceeds 1% of the average monthly combined value of the vouchers distributed in that month.

? Arrange for qualifying van pool services for transporting employees to and from work.

2. Elections. Employee may elect to participate at any time during the year. Elections must be in writing or electronic form and must include the date of the election and the period it is for. If the employer is distributing passes, this election could take the form of a receipt signed by the employee at the time he/she receives the pass.

If the employee makes an election (picks up the pass) he may use it at the time or at any future date as permitted by the pass issuer (i.e., San Francisco MUNI).

3. Cafeteria Plan, ERISA, etc. The transportation program is subject only to IRC Section 132(f). It is not subject to cafeteria plan rules (e.g., no forfeitures) or the Employee Retirement Income Security Act (no SPD requirement, etc.).

4. Written Program. Although federal law does not require a written program, I recommend that the employer develop a written description of the program not only to justify the pre-tax treatment of otherwise taxable wages, but also to allow for consistent administration of the program.

5. Record Keeping. In our view, accurate record keeping is essential to justify the pay outs (including proper receipts).

2008-16 (a) (Rev)
Mandated Transit Benefits
September 8, 2008

*Revised 2008-16(a) Memorandum due to error in date noted in second bullet
(January 22, 2009 not 2008).*

As a follow up to our Memorandum 2008-16 on San Francisco's mandated transit benefits, we need to clarify two important points:

- ◇ **Maximum Federal Benefit.** It has come to our attention that the current maximum federal benefit is \$115.00, contrary to the amount specified by the Ordinance.
- ◇ **Effective Date.** The Effective Date of the program (on or about January 22, 2009) is correct. The five month time frame includes a thirty day period from the signing of the Ordinance before the Ordinance is actually law and the 120 days for implementation.

If you have any further questions or comments please feel free to contact me.

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