

DEPARTMENT OF EMPLOYMENT SERVICES

NOTICE OF FINAL RULEMAKING

The Director of the Department of Employment Services, pursuant to the authority in Section 303 of Title III-A of the Sustainable DC Omnibus Amendment Act of 2014 (Act), effective December 17, 2014 (D.C. Law 20-142; D.C. Official Code § 32-153 (2012 Repl. & 2018 Supp.)) and Mayor's Order 2016-004, dated January 12, 2016, gives notice of the adoption of the following rules to add a new Chapter 33 entitled "Transit Benefit Programs" to Title 7 (Employment Benefits) of the District of Columbia Municipal Regulations (DCMR).

The new chapter establishes a transit benefit program for covered employers. The purpose of the Act is to reduce single occupancy vehicle use by encouraging employers to provide transit benefits to their employees, and to establish policies and procedures to ensure that covered employers provide commuter benefits to their employees consistent with the requirements established under the Act.

Under Section 302 of the Act, covered employers, *i.e.*, those with twenty (20) or more employees, are required to provide at least one (1) of three (3) transit benefit options to their employees. The rulemaking provides penalties, pursuant to the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985, effective October 5, 1985 (D.C. Law 6-42; D.C. Official Code §§ 2-1801.01 *et seq.* (2016 Repl. & 2018 Supp.)), for covered employers who fail to offer at least one (1) transportation benefit program. The penalties will go into effect when the rulemaking becomes effective.

The Director published a Notice of Proposed Rulemaking in the *D.C. Register* on September 15, 2017, at 64 DCR 009083. Comments were received regarding those proposed rules. In response to comments received, the Department eliminated the previously proposed Section 3305 (Collective Bargaining Agreements); incorporated references to Section 132(f) of the Internal Revenue Code for clarifying definitions; eliminated bicycle benefits inconsistent with Section 132(f)(8) of the Internal Revenue Code; and revised offense penalty amounts. A Notice of Second Proposed Rulemaking was published in the *D.C. Register* on August 17, 2018, at 65 DCR 008567. No comments were received, but DOES made technical and clarifying changes to certain provisions. Specifically: (1) the statutory citation in Subsection 3300.1 was corrected; (2) a statutory citation was added to Subsection 3301.1; (3) Subsections 3302.1 and 3302.2 were revised to clarify that a covered employer shall be subject to fines and civil penalties when the employer fails to offer at least one (1) transit benefit program to each of its covered employees and to correct, revise, and add citations; (4) Subsection 3302.3 was added to clarify how fines will be assessed against covered employers; (5) Subsection 3303.5 was revised to correct the statutory citation; and (6) Subsection 3399.1 was revised to correct a grammatical error in the definition of the term "employee" and to add the phrase "in the District of Columbia" to the definition of the term "employer".

The Director adopted these rules as final on August 2, 2019, and they shall become effective on the date of publication of this notice in the *D.C. Register*.

Chapter 33, TRANSIT BENEFIT PROGRAMS, of Title 7 DCMR, EMPLOYMENT BENEFITS, is added to read as follows:

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3302	PENALTIES AND FINES
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3304	CALCULATION OF NUMBER OF EMPLOYEES
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3300 PURPOSE AND SCOPE

3300.1 The purpose of this chapter is to establish standards and procedures for the implementation of Title III-A of the Sustainable DC Omnibus Amendment Act of 2014, effective December 17, 2014 (D.C. Law 20-142; D.C. Official Code §§ 32-151 *et seq.*) (the “Act”).

3300.2 Unless otherwise required by law, all matters concerning the implementation and enforcement of the Act shall be determined in accordance with these regulations.

3301 TRANSIT BENEFIT PROGRAMS

3301.1 Pursuant to Section 302 of the Sustainable DC Omnibus Amendment Act of 2014, effective December 17, 2014 (D.C. Law 20-142; D.C. Official Code § 32-152 (2012 Repl. & 2018 Supp.)), every covered employer must provide at least one (1) of the transportation benefit programs listed in paragraphs (a), (b), or (c) of this subsection, in compliance with Section 132(f) of Internal Revenue Service (IRS) Code (26 USC § 132(f)), to each of its covered employees within ninety (90) calendar days after the publication of this rulemaking or for new employees thereafter.

(a) An employee pre-tax election transportation fringe benefits program that provides employees the option of pre-tax payment for:

(1) Transportation in a commuter highway vehicle in connection with travel between the employee’s residence and place of employment, at a benefit level equal to the maximum amount of such a fringe benefit that may be deducted from an employee’s gross income under the Internal Revenue Code (26 USC § 132(f));

(2) A transit pass, at a benefit level equal to the maximum amount of such a fringe benefit that may be deducted from an employee’s gross income in compliance with Section 132(f) of the Internal Revenue Code (26 USC § 132(f)); or

(3) Starting in 2026, bicycling benefits at a benefit level equal to the maximum amount of such a fringe benefit that may be deducted from an employee's gross income in compliance with Section 132(f) of the Internal Revenue Code (26 USC § 132(f)).

(b) An employer-paid benefit program whereby the employer supplies, at the election of the employee, either a transit pass for the public transit system requested by the covered employee or reimbursement of vanpool or bicycling costs in an amount at least equal to the purchase price of a transit pass for an equivalent trip on a public transit system; or

(c) Employer-provided commuter transportation at no cost to covered employees in a shuttle, vanpool, or bus operated by or for the employer.

3301.2 Employer may provide both employer-paid benefit(s) and employee pre-tax election(s), but the total combined tax benefit shall not exceed the maximum benefit permitted under Section 132(f)(2) and (6) of the Internal Revenue Code (26 USC §§ 132(f)(2) and (6)).

3301.3 Benefits provided under this section shall be provided in a manner consistent with the requirements of Section 132(f) of the Internal Revenue Code (26 USC § 132(f)) and its implementing regulations.

3302 PENALTIES AND FINES

3302.1 Covered employers who fail to offer at least one (1) transportation benefit program to each covered employee as required by Subsection 3301.1 shall be subject to civil fines and penalties, pursuant to Section 302(b) of the Sustainable DC Omnibus Amendment Act of 2014, effective December 17, 2014 (D.C. Law 20-142; D.C. Official Code § 32-152(b) (2012 Repl. & 2018 Supp.)).

3302.2 The failure to offer at least one (1) transportation benefit program option to each covered employee is a Class 4 infraction pursuant to the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985, effective October 5, 1985 (D.C. Law 6-42; D.C. Official Code §§ 2-1801.01 *et seq.* (2016 Repl. & 2018 Supp.)) and 16 DCMR §§ 3200 and 3201. The fines under Class 4 infractions are as follows:

- (a) For the first offense, \$100;
- (b) For the second offense, \$200;
- (c) For the third offense, \$400; and
- (d) For the fourth and subsequent offenses, \$800.

3302.3 The amount of the fine imposed under Subsection 3302.2 shall be assessed against a covered employer for each covered employee to whom the employer fails to offer at any point during a calendar month at least one (1) transportation benefit program and shall be reassessed for each subsequent calendar month in which such failure continues to exist.

3303 NOTICE REQUIREMENTS

3303.1 The Department shall post an electronic notification on its website that explains the requirements of the Act.

3303.2 Covered employers shall notify covered employees of the available transit benefit program using commercially appropriate means, such as email, internal documents (such as memos, newsletters, or bulletins), or conventional or electronic bulletin boards.

3303.3 Covered employers shall provide information to covered employees as to how they may apply for and receive the transit benefit and how to submit a complaint to the Department.

3303.4 Covered employers shall provide a point of contact for covered employees to obtain further information about the transit benefit.

3303.5 Covered employers shall provide commuter benefits documents to each covered employee as part of the employee benefits package or with the Notice of Hire form required by the Wage Theft Prevention Amendment Act of 2014, approved February 26, 2015 (D.C. Law 20-0157; D.C. Official Code §§ 32-1301 *et seq.*).

3304 CALCULATION OF NUMBER OF EMPLOYEES

3304.1 In determining whether it is a covered employer under this chapter, an employer shall use the greater of (1) the number of full-time and part-time employees as of December 31st of the previous year or (2) the average number of employees during the previous calendar year, to determine its number of employees.

3305 RECORDKEEPING REQUIREMENTS

3305.1 Covered employers shall maintain any documentation necessary to establish compliance with the requirements of the Act for a minimum of three (3) years.

3305.2 Covered employers shall be responsible for providing any documentation necessary to prove compliance with the Act to the Department.

3306 COMPLAINT PROCEDURES

3306.1 Covered employees may file complaints alleging violations of the Act with the Department.

3306.2

- (a) A complaint shall include:
- (1) A sworn allegation of a covered employer's failure to provide a compliant transit benefit program;
 - (2) The complainant's name, address, email, and telephone number;
 - (3) Pay stubs or relevant documents that demonstrate the violation; and
 - (4) Sufficient information to enable the Department to identify the covered employer through District records, such as the employer's name, business address, telephone number, and email.

3306.3 Enforcement and adjudication of a failure to provide a transit benefit program shall be pursuant to the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985, D.C. Official Code §§ 2-1801.01 *et seq.*

3399 DEFINITIONS

3399.1 **Act** means Title III-A of the Sustainable DC Omnibus Amendment Act of 2014, effective December 17, 2014 (D.C. Law 20-142; D.C. Official Code § 32-152).

Commuter highway vehicle has the meaning set forth in Section 132(f)(5)(B) of the Internal Revenue Code (26 USC § 132(f)(5)(B)).

Covered employee means a full-time or part-time employee of a covered employer:

- (a) Who performs at least fifty percent (50%) of his or her working time in the District of Columbia; or
- (b) Whose employment is based in the District of Columbia and the employee performs a substantial amount of his or her work in the District of Columbia and less than fifty percent (50%) in any other state.

Covered employer means an employer with twenty (20) or more covered employees.

Department means the Department of Employment Services.

Employee includes any individual employed by an employer, except that this term shall not include:

- (a) Any individual who, without payment and without expectation of any gain, directly or indirectly, volunteers to engage in the activities of an educational, charitable, religious, or nonprofit organization;
- (b) Any lay member elected or appointed to office within the discipline of any religious organization and engaged in religious functions;
- (c) Any individual employed as a casual babysitter, in or about the residence of the employer; or
- (d) An independent contractor.

Employer includes the District of Columbia government, any individual, partnership, general contractor, subcontractor, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee in the District of Columbia, but shall not include the United States Government.

Full-time employees include individuals who work thirty (30) hours or more per week, unless established otherwise by law.

Part-time employees include individuals who work less than thirty (30) hours per week, unless established otherwise by law.

Transit Pass has the meaning set forth in Section 132(f)(5)(A) of the Internal Revenue Code (26 USC § 132(f)(5)(A)).

Vanpool means a commuter highway vehicle.