LABOR AND WORKFORCE DEVELOPMENT

DIVISION OF WAGE AND HOUR COMPLIANCE

Pre-tax transportation fringe benefit

Proposed New Rules: N.J.A.C. 12:55-3.1 through 3.7

Authorized By: _____

Robert Asaro-Angelo, Commissioner

Department of Labor and Workforce Development

Authority: N.J.S.A. 27:26A-19.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2020 - _____

Submit written comments by _____ to:

David Fish, Executive Director

Legal and Regulatory Services

New Jersey Department of Labor and Workforce Development

P.O. Box 110 – 13th Floor

Trenton, New Jersey 08625-0110

Fax to: (609) 292-8246

Email: david.fish@dol.nj.gov.

The agency proposal follows:

Summary

The Department is proposing new rules at N.J.A.C. 12:55-3.1 through 3.7 in order to implement P.L. 2019, c. 38, which requires every employer in the State of New

Jersey that employs at least 20 persons to provide each employee a pre-tax transportation fringe benefit. The pre-tax transportation fringe benefit required by P.L. 2019, c. 38, is the same pre-tax transportation fringe benefit that would otherwise be discretionary for commuter highway vehicle, transit benefits and qualified parking under 26 U.S.C. §132(f)(1). The maximum benefit levels allowable under Federal law, which may be deducted for such programs from an employee's gross income, are set forth at 26 U.S.C. §132(f)(2).

Proposed new N.J.A.C. 12:55-3.1 would describe the purpose and scope of the subchapter.

Proposed new N.J.A.C. 12:55-3.2 would include definitions of words and terms used throughout the subchapter, including a definition for the term "pre-tax transportation fringe benefit." That proposed regulatory definition is taken verbatim from P.L. 2019, c. 38, which defines the term to mean, "a pre-tax election transportation fringe benefit that provides commuter highway vehicle and transit benefits, consistent with the provisions and limits of 26 U.S.C. 132(f)(1) at the maximum benefit levels allowable under Federal law, to be deducted for those programs from an employee's gross income pursuant to 26 U.S.C. 132(f)(2)." Currently included among the qualified transportation fringe benefits enumerated in 26 U.S.C. §132(f)(1) are transportation in a commuter highway vehicle if such transportation is in connection with travel between the employee's residence and place of employment, transit passes and qualified parking.

Proposed new N.J.A.C. 12:55-3.3 would describe the pre-tax transportation fringe benefit requirement for affected employers (that is, employers who are affected

by the requirements of P.L. 2019, c. 38, and therefore, must offer employees a pre-tax transportation fringe benefit).

Proposed new N.J.A.C. 12:55-3.4 would permit affected employers to use a payroll deduction as a means of providing a pre-tax transportation fringe benefit, provided that the payroll deduction has been authorized by the employee in writing or is included in a collective bargaining agreement.

Proposed new N.J.A.C. 12:55-3.5 would require each affected employer to retain records for six years sufficient to demonstrate that each employee eligible for a pre-tax transportation fringe benefit was offered the opportunity to use pre-tax earnings (gross income) for a pre-tax transportation fringe benefit.

Proposed new N.J.A.C. 12:55-3.6 would concern violations and penalties.

Proposed new N.J.A.C. 12:55-3.7 would address the violator's right to a hearing in the event the violator wishes to contest a penalty levied by the Commissioner for violation of the Act or the subchapter.

As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirement of N.J.A.C. 1:30-3.3(a)5.

Social Impact

The proposed new rules would have a positive social impact in that they would encourage socially and environmentally conscious methods of commuting to work that relieve congestion on the highways and improve society as a whole. P.L. 2019, c. 38, and the proposed new subchapter require affected employers to offer all of their employees the opportunity to utilize a pre-tax transportation fringe benefit that provides

commuter highway vehicle and transit benefits, consistent with the provisions and limits of 26 U.S.C. §132(f)(1) at the maximum benefit levels allowable under Federal law, to be deducted for those programs from an employee's gross income pursuant to 26 U.S.C. §132(f)(2). Included among the qualified transportation fringe benefits enumerated in 26 U.S.C. §132(f)(1) are transportation in a commuter highway vehicle if such transportation is in connection with travel between the employee's residence and place of employment, transit passes and qualified parking. Transit passes encourage the use of mass transit and transportation services designed to move multiple people at one time. Commuter highway vehicles are designed to hold at least six adults (not including the driver) commuting at one time. Qualified parking reduces the cost of fuel and the congestion of employees commuting without predesignated parking. From a social standpoint, the proposed new rules would encourage methods of commuting that benefit the individual commuters involved and the community at large.

Economic Impact

The proposed new rules would have a positive economic impact in that employees qualifying for the gross income exclusion under any of the approved commuting methods would save money funding their commute to work. Employees availing themselves of qualified commuter highway vehicle transportation, transit passes, or qualified parking are permitted under Federal law to exclude up to $270 per month from gross income. That amounts to $3,240 per year in pre-tax dollars per year available for an employee to spend toward commuting expenses that qualify for the pre-tax exclusion, an economic benefit to employees utilizing the pre-tax transportation benefit and to vendors and those providing the commuting services.

Federal Standards Statement

The proposed new rules are subject to, but do not exceed, Federal standards. The requirements of the proposed new rules referring to a "pre-tax transportation fringe benefit" are the same as those imposed by 26 U.S.C. §132(f), which makes reference to a "qualified transportation fringe." Ibid.

Jobs Impact

The proposed new rules would have no impact on either the generation or loss of jobs.

Agriculture Industry Impact

The proposed new rules would have no impact on the agriculture industry.

Regulatory Flexibility Analysis

The proposed new rules would impose no reporting requirements on small businesses, as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.; however, they would impose recordkeeping requirements on small businesses with 20 or more employees. Specifically, proposed new N.J.A.C. 12:55-3.5 would require that each such employer retain records for six years sufficient to demonstrate that each employee eligible for a pre-tax transportation fringe benefit under the Act and this subchapter was offered the opportunity to use pre-tax earnings (gross income) for a pre-tax transportation fringe benefit. The reason for the six-year record retention requirement is that the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1 et seq., was recently amended to impose a six-year statute of limitations for all wage claims. There is no exception from the six-year statute of limitations within the Wage Payment Law for small businesses. However, P.L. 2019, c. 38, does not apply to employers with fewer than 20 employees. As to compliance requirements, generally, the proposed new

rules would require employers with 20 or more employees to offer employees a pre-tax transportation fringe benefit and, where employees decide to utilize the pre-tax transportation fringe benefit, the employer would be required to deduct amounts for same from employees' gross income. Any impact on businesses already administering deductions for employees or taking deductions for employees for pre-tax spending accounts should be minimal; which is to say, the professional services likely needed to comply with the proposed new rules would be the same services already engaged by affected businesses to handle existing payroll deductions.

Housing Affordability Impact Analysis

The proposed new rules would not evoke a change in the average costs associated with housing. The basis for this finding is that the proposed new rules pertain only to lawful payroll deductions from wage payments. The proposed new rules do not pertain to housing.

Smart Growth Development Impact Analysis

The proposed new rules would not evoke a change in the housing production within planning areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. The basis for this finding is that the proposed new rules pertain only to lawful payroll deductions from wage payments and have nothing to do with housing production, either within planning areas 1 or 2, within designated centers, or anywhere in the State of New Jersey.

Racial and Ethnic Community Criminal Justice and Public Safety Impact

The Commissioner has evaluated this rulemaking and determined that it will not have an impact on pretrial detention, sentencing, probation, or parole policies

concerning adults and juveniles in the State. Accordingly, no further analysis is required.

Full text of the proposal follows (additions indicated with boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 3 PRE-TAX TRANSPORTATION FRINGE BENEFIT

12:55-3.1 Purpose and scope

(a) The purpose of this subchapter is to establish standards and procedures for affected employers to provide a pre-tax transportation fringe benefit to its employees, as required by P.L. 2019, c. 38.

(b) The provisions of this subchapter shall be applicable to all affected employers.

12:55-3.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

"Act" means P.L. 2019, c. 38.

"Affected Employer" means an "employer," as that term is defined at N.J.S.A. 43:21-19(h), provided that the employer employs 20 or more employees, whether employed in New Jersey or not, for each working day during each of 20 or more calendar workweeks in the then current or immediately preceding calendar year.

"Cure period" means the ninety-day period immediately following receipt by the employer of the notice under N.J.AC. 12:55-3.7(b) indicating a finding of a first violation.

"Employee" means an individual who is in "employment," as that term is defined at N.J.S.A. 43:21-19(i). N.J.S.A. 43:21-19(i)(2) indicates that "employment" shall include an individual's entire service performed within or both within and without New Jersey if: (A) the service is localized in New Jersey; or (B) the service is not localized in any state but some of the service is performed in New Jersey, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in New Jersey; or (ii) the base of operations or place from which such service is directed and controlled is not in any state in which some part of the service is performed, but the individual's residence is in New Jersey. N.J.S.A. 43:21-19(i)(5) defines the phrase "localized in New Jersey."

"Pre-tax transportation fringe benefit" means a pre-tax election transportation fringe benefit that provides commuter highway vehicle and transit benefits, consistent with the provisions and limits of 26 U.S.C. 132(f)(1) at the maximum benefit levels allowable under Federal law, to be deducted for those programs from an employee's gross income pursuant to 26 U.S.C. 132(f)(2).

12:55-3.3 Pre-tax transportation fringe benefit requirement

(a) Except as set forth in (b) below, an affected employer shall offer to all of its employees the opportunity to utilize pre-tax earnings (gross income) to purchase a pre-tax transportation fringe benefit.

(b) An affected employer shall not be required to offer the opportunity to utilize pre-tax earnings (gross income) to purchase a pre-tax transportation fringe benefit under the following circumstances:

1. To an employee who is covered by a collective bargaining agreement in effect on March 1, 2019, until the expiration of that collective bargaining agreement;

2. To an employee of the federal government, provided that the employee is eligible for a transit benefit through his or her employment with the federal government that is equal to or greater than a pre-tax transportation fringe benefit.

12:55-3.4 Payroll deduction

An affected employer may use a payroll deduction as a means of providing a pre-tax transportation fringe benefit, provided that the payroll deduction has been authorized by the employee in writing or is included in a collective bargaining agreement.

12:55-3.5 Recordkeeping requirement

Each affected employer shall for six years retain records sufficient to demonstrate that each employee eligible for a pre-tax transportation fringe

benefit under the Act and this subchapter was offered the opportunity to use pre-tax earnings (gross income) to purchase a pre-tax transportation fringe benefit.

12:55-3.6 Violations and penalties

(a) An affected employer found to be in violation of the Act or this subchapter, shall be assessed by the Commissioner an administrative penalty in the amounts that follow:

1. First violation – not less than $100 and not more than $250;

2. Second and subsequent violations - $250.

(b) An administrative penalty shall not be imposed on an affected employer for the first violation if the employer demonstrates to the satisfaction of the Department within the cure period that it is complying with the Act and this subchapter.

(c) An employer seeking to demonstrate that it is complying with the Act and this subchapter may do so by submitting the compliance form provided by the Department and available on the Department's website. The Department may require submission of additional information, including documentary evidence, reasonably necessary to prove that a first violation was cured within the cure period.

(d) After the cure period, each additional 30-day period in which an affected employer fails to offer a pre-tax fringe benefit shall constitute a subsequent violation.

(e) An administrative penalty shall not be imposed on any individual employer more than once in any 30-day period.

12:55-3.7 Hearings

(a) When the Commissioner assesses an administrative penalty under N.J.A.C. 12:55-3.6, the employer shall have the right to a hearing under (b) below.

(b) No administrative penalty shall be levied under this subchapter, unless the Commissioner provides the alleged violator with written notification of the violation and the amount of the penalty and an opportunity to request a formal hearing.

(c) A request for formal hearing under (b) above must be received by the Department within 15 business days following receipt of the notice.

(d) All hearings shall be conducted pursuant to the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedures Rules, N.J.A.C. 1:1.

(e) All requests for hearing will be reviewed by the Division of Wage and Hour Compliance to determine if the dispute could be resolvable at an informal conference. If the review indicates that an informal settlement conference is warranted, such conference will be scheduled. If a settlement cannot be reached, the case will be forwarded to the Office of Administrative Law for a formal hearing.

(f) The Commissioner shall make the final decision of the Department.

(g) Appeals of the final decision of the Commissioner shall be made to the Appellate Division of the New Jersey Superior Court.

(h) Upon issuance of a final decision, the penalty imposed under this section may be recovered with costs and, if applicable, interest charges, in a summary proceeding pursuant to the Penalty Enforcement law, N.J.S.A. 2A:58-10 et seq.