

April 23, 2014

San Francisco Bay Area Employers Must Comply with Commuter Benefits Program by September 30, 2014

By Christopher E. Cobey and Anne Sweeney Jordan

Covered San Francisco Bay Area employers without an already-existing and compliant commuter benefits plan have until September 30, 2014, to select at least one of four commuter benefit options, notify employees of how to take advantage of the benefits, and register with the Bay Area Commuter Benefits Program (CBP).

Government Code section 65081, which took effect January 1 of last year, declared:

It is the intent of the Legislature to encourage metropolitan planning organizations and local air quality management districts or air pollution control districts to work with local employers to adopt policies that encourage commuting by means other than driving alone. To encourage this, the Legislature hereby establishes a pilot program in that regard in the greater San Francisco Bay Area.¹

To this end, on March 26, 2014, the Metropolitan Transportation Commission ratified Regulation 14, Rule 1, developed and approved by the Bay Area Air Quality Management District (BAAQMD), implementing the CBP.² Program details and registration are now available at the CBP's website,³ which contains a 24-page "Employer Guide."⁴

The CBP is a pilot program that extends through December 2016.

Which Bay Area Employers are Covered?

The CBP applies to the following employers:

Any public, private, or non-profit entity (person, corporation, partnership, business firm, government agency, special purpose agency, educational institution, health care facility, etc.) for which an average of 50 or more

1 Cal Gov Code § 65081(a). The full text of the statute can be found at <http://leginfo.ca.gov>. The bill creating the statute was 2011-2012 Senate Bill (S.B.) 1339, the committee and floor reports for which can be found at the same location.

2 The full text of Regulation 14, Rule 1, and all other information about the CBP, can be found at http://www.baaqmd.gov/?sc_itemid=97E541A8-52F9-4E5B-996E-2DA100398BB2.

3 <https://commuterbenefits.511.org/>

4 https://commuterbenefits.511.org/docs/employer_guide.pdf

full-time employees⁵ per week perform work for monetary compensation within the geographic boundaries of the District⁶ The term excludes seasonal/temporary employees.⁷

Employers that become subject to this rule at any time after the CBP goes into effect are required to register online with the BAAQMD's Air Pollution Control Officer (APCO) or that Officer's designee, no later than six months after becoming subject to the CBP.⁸

Employers with 50 or more employees account for approximately 60 percent of total employment in the Bay Area.⁹

Which Employees are Covered?

An employee "who performed an average of at least 20 hours of work per week within the previous calendar month within the geographic boundaries of the District, excluding a seasonal/temporary employee"¹⁰ is covered by the pilot program.

What Benefits Must be Provided to Covered Employees?

Once it is determined that an employer is covered, the employer, or a Transit Management Association (TMA) of which the employer is a member,¹¹ must offer at least one of the following commuter benefits:

1. **Pre-tax option:** Allow employees to elect to exclude commuting costs incurred for transit passes or vanpool charges from their taxable wages.¹²
2. **Employer-paid benefit:** Offer employees a subsidy equal to the monthly cost of commuting via public transit or vanpool, or \$75, whichever is lower. Employers may also choose to provide a subsidy for bicycle commuting costs.
3. **Employer-provided transit:** Furnish to employees at no cost, or low cost as determined by the Air Pollution Control Officer (APCO), a vanpool, bus or similar multi-passenger vehicle operated by or for the employer.
4. **Alternative commuter benefit:** Provide a pre-approved alternative employer-provided commuter benefit that is as effective in reducing single occupant vehicles as Options 1-3.

What Notification Must be Given to Covered Employees?

Using appropriate means such as email messages, paper memos, in-house newsletters or bulletins, or conventional or electronic bulletin boards, the employer shall:

1. Notify all covered employees that the employer is subject to the requirements of the CBP.
2. Inform covered employees which commuter benefit options the employer will offer.
3. Provide information about how a covered employee may apply for and receive the commuter benefit.

5 A "full-time employee" is defined by BAAQMD Regulation 14, Rule 1, Section 14-1-209 as an employee who performs "an average of at least 30 hours of work per week within the previous calendar month within the geographic boundaries of the District"

6 The BAAQMD consists of nine counties, including all of Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, and Santa Clara counties, as well as the western portion of Solano County and the southern portion of Sonoma County.

7 BAAQMD Regulation 14, Rule 1, Section 14-1-208.

8 Online registration is available at <https://commuterbenefits.511.org/step1>.

9 BAAQMD Staff Report (January 2014), Sec. 3(A), p. 11; available at <https://commuterbenefits.511.org>; see also California Employment Development Department (EDD) data for 3rd quarter 2011.

10 BAAQMD Regulation 14, Rule 1, Section 14-1-207.

11 A TMA is "[a]n organization, funded in whole or in part by employers and/or property owners, through which employers, developers, property managers or owners, business improvement districts, and/or local government agencies work together to provide information and services to encourage the use of alternative commute modes. The employer financial contribution to a TMA may be in the form of a direct membership payment, via an assessment earmarked for specific commuter benefit programs or services, or indirectly through the rent paid to a business park or building covered by a TMA." BAAQMD Regulation 14, Rule 1, Section 14-1-212.

12 Any program offered pursuant to the pre-tax option must be consistent with Internal Revenue Code section 132(f).

4. Provide a point of contact within the organization from whom employees should obtain further information about the commuter benefit.
5. Provide commuter benefit information as part of the employee benefits package given to all newly hired employees.

The employer must provide this information to covered employees when the commuter benefit is first made available, and at least once per year thereafter.¹³

Are there any Exceptions to the CBP Requirements?

The CBP rules shall not be interpreted to:

1. Prevent an employer from offering a commuter benefit program that is more generous than the minimum requirements of the CBP, as long as the employer complies with all provisions of the CBP.
2. Require any employee to change his or her commute mode.
3. Absolve any employer or other party from any obligation required by an existing collective bargaining agreement with employees, or any provision of law.¹⁴

What if an Existing Commuter Benefit Program Already Covers the Employer and Employees?

Four jurisdictions in the geographic area covered by the CBP have, since 2009, required comparable commuter assistance: the City and County of San Francisco, San Francisco International Airport, and the cities of Richmond and Berkeley. The programs of these four jurisdictions apply to a lower number of employees than the CBP, so employers already complying with any of these four local jurisdictions' programs are likely already satisfying the CBP's requirements. These employers, however, must still register for the CBP, and indicate which option or options are currently being provided to covered employees.

What Other Requirements are there for a Covered Employer?

Covered employers must register online and provide the following information:

1. The employer name;
2. The name, job title, and contact information for the Commuter Benefits Coordinator;
3. The total number of full-time employees and covered employees within the geographic boundaries of the District;
4. The location of each work site within the District boundaries;
5. The number of full-time employees and covered employees at each work site; and
6. The commuter benefit option that the employer has chosen to implement.¹⁵

What if a Covered Employer Fails to Comply with the CBP's Requirements?

An employer that violates the CBP will be subject to civil penalties for the enforcement of air pollution control laws pursuant to the California Health and Safety Code. Proven violations can result in penalties of up to \$10,000 per day.¹⁶

¹³ AAQMD Regulation 14, Rule 1, Section 14-1-405.

¹⁴ BAAQMD Regulation 14, Rule 1, Section 14-1-103.

¹⁵ BAAQMD Regulation 14, Rule 1, Sections 14-1-404.1-404.6.

¹⁶ An unpublished California appellate case affirmed a penalty of \$150,000 against a violator of an air quality district's rules under the same enforcement statute. *See People Ex Rel. Sacramento Metropolitan Air Quality Management District v. Aman* (3d Dist. Ct. of Appeal; Mar. 6, 2012).

Employees are not, however, required to change their behavior in terms of their commuting choices. Thus, while covered employers are required to offer at least one commuter benefit (or an approved alternative benefit), the employee is not required to participate in the program.

What Should Bay Area Employers do by September 30, 2014?

In advance of the September deadline, Bay Area employers should consider the following steps:

1. Carefully assess the business locations, number of employees, and hours of work per week performed by those employees to determine whether the entity is an "employer" covered by the CBP.
2. Determine whether the business is already providing benefits consistent with one or more of the four required commuter benefits from the CBP.
3. Ascertain which one (or more) of the commuter benefits will be provided to covered employees.
4. Determine how the business will notify employees of their commuter benefit options.
5. Confirm the total number of covered employees within the geographic boundaries of the District, the location of each work site within the District boundaries, and the number of covered employees at each work site.
6. Decide who will be the Commuter Benefits Coordinator and serve as a source of information for employees' CBP questions.
7. Register the business and its choices online at <https://commuterbenefits.511.org> by September 30, 2014.

[Christopher E. Cobey](#) is a Knowledge Management Counsel, and [Anne Sweeney Jordan](#) is an Associate, in Littler's San Jose office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Cobey at ccobey@littler.com, or Ms. Jordan at ajordan@littler.com.