

COMPLIANCE CENTER OF EXCELLENCE

Volume 4

2019 COMPLIANCE NEWSLETTER

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The Status of Qualified Transportation Fringe Benefits

The Employer's Road Map

Since 1985, the IRS has allowed employers to provide tax-free qualified transportation benefits to their employees. These benefits include parking, vanpooling, transit passes, and bicycle commuting expense reimbursement. Historically, employees were able to pay for these benefits using pre-tax dollars up to an annual maximum, and employers were able to take a tax deduction for their own contributions. The 2019 maximum contribution limit for qualified parking benefits is up to \$265/month, and the combined limit for both transit passes and vanpooling expenses is also \$265/month.

Congress Puts Up a Roadblock

When the Tax Cuts and Jobs Act (TCJA) passed in 2017, it generally left the pre-tax status of transportation fringe benefits for employees alone, but employers lost the ability to take tax deductions for employer-provided commuter or parking benefits¹. The TCJA also affected nonprofit companies, as it requires they include the cost of qualified transportation benefits in their unrelated business income (UBTI). UBTI is a tax-exempt organization's gross income that it earned from any unrelated trade or business that the organization regularly carries out, minus any allowable deductions.

Employers Try a Round-a-Bout

A number of practitioners suggested employers could work around the loss of the tax deduction by providing additional taxable compensation to employees contingent on the employees using it to elect transportation fringe benefits through a salary reduction arrangement (SRA). Under this theory, the additional compensation remains deductible to the employer as wages and employees could exclude the additional compensation from taxable income by electing the benefit through the SRA instead of accepting the additional cash compensation.

1. In a somewhat bizarre twist, the employer tax deduction for bicycle benefits remains (up to \$20/month), but employees must include it in taxable income. Employees also cannot pay for this benefit on a pre-tax basis through payroll deductions.

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And Partially Succeed

On its face, the Internal Revenue Code (IRC) doesn't appear to support an employer deduction under the proposed workaround² and language found in IRS Publication 15-B also seems to reject it³.

The IRS resolved this in [IRS Notice 2018-99](#) and will permit an employer to take a tax deduction for the value of transportation fringe benefits provided in excess of the exclusion limit (\$265/month for 2019)⁴. This excess is also taxable income to the employee, meaning the employee cannot exclude it by deferral through an SRA.

Example 1

An employer provides \$150/month in additional compensation to be used toward parking expenses in a parking garage adjacent to the employer's office. The amount provided does not exceed the monthly exclusion amount for 2019 (\$265/month), so no portion of the \$150/month may be deducted by the employer. The amount provided is not taxable income to the employee.

Example 2

An employer provides \$500/month in additional compensation to be used toward parking expenses in a parking garage adjacent to the employer's office. In 2019, the employer can deduct \$235/month (\$500 - \$265) as additional paid wages. This \$235/month is also taxable income to employee(s). It does not matter if the employee contributes through an SRA.

Note: 2019 IRS Publication 15-B still includes the seemingly contradictory language, but we believe the guidance in IRS Notice 2018-99 controls.

Which Road to Take?

Several states and localities require employers to provide transportation benefits to their employees. When stakeholders raised concerns with the IRS over the TCJA's effect on employers in these locations, the IRS responded that the TCJA's reduction of the corporate tax rate beginning in 2018 should off-set losing the deduction. Employers considering eliminating the benefit should review state and local laws (see State and Local Requirements below), as well as check the tax implications and weigh them against these benefits' ability to attract and retain new employees.

State and Local Requirements

Despite the TCJA's tax deduction limitations, certain states and cities **require** employers to provide these benefits. Employers operating in the following cities, counties, and/or states should be aware of their local transportation requirements.

2. Specifically, the language of IRC Section 274(e)(2) doesn't seem to support excluding the "earmarked" transportation benefits as additional compensation because it doesn't reference transportation expenses.

3. Page 21 of IRS Publication 15-B states, "Section 13304 of P.L. 115-97 provides that no deduction is allowed for qualified transportation benefits (whether provided directly by you, through a bona fide reimbursement arrangement, or through a compensation reduction agreement) incurred or paid after 2017."

4. Tax-exempt entities also appear to be able to exclude this amount when calculating UBTI.

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Jurisdiction	Covered Employers	Transportation Requirements	More Information
Berkeley, CA	Berkeley employers with at least 10 employees working an average of 10 hours per week	<p>Employers must offer one or more of these options:</p> <ul style="list-style-type: none"> Pretax plan allowing employees to exclude transit, vanpool, or bicycle commuting expenses from taxable wages (bike expenses subject to TCJA limits); A transit subsidy equal to the value of a local monthly AC transit pass; or An employer-provided shuttle service. 	Berkeley Municipal Code 9.88
Los Angeles, CA Including Orange County and portions of San Bernardino & Riverside Counties	Employers with 250 or more employees	Employers must register with the South Coast Air Quality Management District and choose one of the options to reduce emissions.	Rule 2202 South Coast Air Quality Management District
Richmond, CA	Richmond employers with at least 10 employees working an average of 10 hours per week	<p>Employers must offer one of the following options:</p> <ul style="list-style-type: none"> Pretax plan allowing employees to exclude transit, vanpool, or bicycle commuting expenses from taxable wages (bike expenses subject to TCJA limits); Employer purchased transit pass or reimbursement for vanpool charges equal to the cost of an adult monthly transit pass; Employer provided vanpool or bus; or, Other benefit preapproved by city. 	Commuter Benefits Ordinance 22-09
San Francisco, CA	Employers with a location in San Francisco that have 20 or more employees nationwide	<p>Employers must offer one of the following options:</p> <ul style="list-style-type: none"> Pretax plan allowing employees to exclude transit, vanpool from taxable wages; Employer paid monthly benefit equal to the cost of the San Francisco Muni "A" Pass (including BART); Employer provided company funded bus or van service transporting employees to and from the workplace; or, Any combination of the above options. 	San Francisco's Commuter Benefits Ordinance

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Jurisdiction	Covered Employers	Transportation Requirements	More Information
San Francisco Bay Area, CA	Employers with at least 50 employees within the Bay Area Air Quality Management District	<p>Employers must register with the Bay Area Commuter Benefits Program and offer one of the following options:</p> <ul style="list-style-type: none"> • Pretax plan allowing employees to exclude transit, vanpool from taxable wages; • Subsidy to reduce monthly transit or vanpool expenses; • Employer provided transit service; or, • Another commuter benefit that is as effective as one of the above options. 	San Francisco Bay Area Commuter Benefits Program
New York City, NY	Non-governmental New York City employers with at least 20 full-time, non-union employees	<p>Covered employers must offer commuter benefits to eligible employee (meaning employees can use pre-tax dollars to purchase transportation benefits). Transit that is covered includes:</p> <ul style="list-style-type: none"> • NYC regional mass transit services, including Metropolitan Transportation Authority subway and bus; Long Island Rail Road; Amtrak; New Jersey Transit; and Metro-North; • Eligible ferry and water taxi services; • Eligible vanpool services; • Eligible commuter bus services; and • Access-A-Ride and other area paratransit providers. <p>Employers can also purchase a transit pass or pay for other transportation on public or privately owned mass transit or commuter highway vehicle.</p>	New York City Commuter Benefits Law
New Jersey	Employers with 20 or more employees	Employers must offer a pre-tax transportation benefit allowing employees to exclude funds used to pay for commuter highway vehicle and transit benefits from their gross income.	SB 1567 N.J. Press Release

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Jurisdiction	Covered Employers	Transportation Requirements	More Information
Seattle, WA	Employers with 20 or more employees Effective January 1, 2020; enforcement begins January 1, 2021	Employers must offer pre-tax transportation benefit for transit or vanpool reduction, or subsidize purchase price of transit pass.	Commuter Benefits Ordinance
Washington, D.C.	Employers with at least 20 employees	Employers must offer one of the following options: <ul style="list-style-type: none"> • Pretax plan allowing employees to exclude mass transit or vanpool from taxable wages; • Employer paid tax-free subsidy of a transit pass for public transit system, or reimbursement of vanpool costs of an equivalent amount to a trip on public transit; or, • Employer provided bus or vanpool service for employees. 	D.C. Commuter Benefits Law



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Annual PCORI Fee is due

Time to File and Submit Payment for the PCORI Fee

The Affordable Care Act (ACA) created the Patient Centered Outcome Research Initiative (PCORI) to evaluate and compare health outcomes. This initiative is partially funded by the PCORI fee, and it applies to all health plans, including church and government plans, which provide coverage to employees. The instructions may be found [here](#).

Here's what you need to know and do if you sponsor a self-insured group health plan.

Who and When?

- If a group health plan is fully-insured, the insurance carrier is responsible for reporting and paying the PCORI fee. Insurance carriers typically pass the fee along to covered employers through higher premiums.
- The employer as plan sponsor is responsible for reporting and paying the PCORI fee for a self-insured group health plan. A third party administrator (TPA) or other vendor may assist with the calculation, but the plan sponsor must file the IRS Form 720 and pay the applicable fee. If multiple employers participate in the plan, each must file separately unless the plan document designates one employer as the plan sponsor.
- IRS Form 720 and the PCORI fee are due by July 31, 2019.
 - For calendar year plans and other plans with plan year ending dates after October 1, 2018 and before January 1, 2019 (generally, non-calendar year plans with plan years beginning November 1, 2017 or December 1, 2017), July 31, 2019 is the final PCORI reporting and payment date under the ACA.
 - The final PCORI reporting and payment date for other non-calendar year plans is July 31, 2020.



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Which Plans Are Subject to the PCORI Fee?

Most types of group health plans are subject to the PCORI fee, including group health plans that are considered “grandfathered” under the ACA as well as retiree-only coverage. It’s actually a little easier to describe which plans are excluded.

Plans that are excluded from the PCORI Fee
Plans considered “excepted” benefits under HIPAA <ul style="list-style-type: none"> This can include dental- or vision-only coverage (or health flexible spending arrangements (health FSAs) and health reimbursement arrangements (HRAs) limited to reimbursements for dental and vision expenses) Employee assistance programs (EAPs), disease management, wellness plans, etc. if they do not provide significant medical benefits
Expatriate insurance plans if the plan primarily covers employees working and residing outside the United States
Stop-loss or indemnity reinsurance policies
Non-group health coverage (e.g., life, disability, AD&D)

How Much?

The indexed fee schedule is below.

For Plan Years...	Fee per Covered Life
Ending on or after October 1, 2017 and before October 1, 2018	\$2.39
Ending on or after October 1, 2018 and before October 1, 2019	\$2.45

How Do You Calculate the PCORI Fee?

The fee is based on the number of covered lives (i.e., employees, retirees, COBRA participants, and covered spouses and dependents). There are several options for calculating the fee. The goal is to find the method which results in the lowest fee owed. The same method must be used throughout a reporting year, but the employer may choose a different method from year to year.

- Actual Count Method.** Count the covered lives on each day of the plan year, and average the result.
- Snapshot Count Method.** Determine the number of covered lives on the same day (plus or minus 3 days) of each quarter or month, and average the result.
- Snapshot Factor Method.** Using the same day (plus or minus 3 days) of each quarter or month, multiply the number of employees, retirees and COBRA participants who have elected a coverage tier other than self-only coverage by 2.35 (rather than actually counting dependents), and add that to the number of employees, retirees and COBRA participants with self-only coverage. Average the result.

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4. **Form 5500 Method.** Determine the number of participants at the beginning and end of the plan year as reported on Form 5500.
 - a. If dependents are covered, add the participant count for the start and the end of the plan year.
 - b. If dependents are not covered, add the participant count for the start and the end of the plan year and divide by two.
 - c. The Form 5500 must actually be filed by July 31st for this option to be available.

If there are multiple self-insured plans with the same plan year (such as a self-insured medical plan with an HRA), only one fee is owed per covered life. In other words, there is no need to double-count the participants for overlapping coverage. Separate PCORI fees are owed for self-insured benefits with different plan years.

If the plan sponsor owes the fee for a health FSA or HRA on a standalone basis or it is integrated with fully insured coverage (such as a fully insured medical plan), the fee may be calculated by counting only one life per coverage participant. In other words, spouses and dependents do not need to be counted.

How Do We Report and Pay?

The fee is annually reported on IRS Form 720 by July 31st. Even though Form 720 is generally filed quarterly, the PCORI report and fee will just be filed once per year, at the end of the second quarter (unless the employer needs to file the form to report another tax).

Note: While government, church and not-for-profit plans don't generally file federal tax returns, they are required to file the Form 720 if they sponsor a self-insured group health plan.

Only certain portions of [Form 720](#) need to be completed for PCORI purposes:

1. Identifying information at the beginning of the form:

Form 720 (Rev. April 2019) Department of the Treasury Internal Revenue Service	Quarterly Federal Excise Tax Return ▶ See the instructions for Form 720. ▶ Go to www.irs.gov/Form720 for instructions and the latest information.	OMB No. 1545-0023
Check here if: <input type="checkbox"/> Final return <input type="checkbox"/> Address change	Name _____ Quarter ending _____ Number, street, and room or suite no. _____ Employer identification number _____ (If you have a P.O. box, see the instructions.) _____ City or town, state or province, country, and ZIP or foreign postal code _____	FOR IRS USE ONLY T _____ FF _____ FD _____ FP _____ I _____ T _____

2. Part II, line 133 (self-insured plans complete the “Applicable self-insured plans” line; the “Specified health insurance policies” line is completed by insurance carriers for fully insured policies):

Part II						
IRS No.	Patient-Centered Outcomes Research Fee (see instructions)	(a) Avg. number of lives covered (see inst.)	(b) Rate for avg. covered life	(c) Fee (see instructions)	Tax	IRS No.
	Specified health insurance policies					
	(a) With a policy year ending before October 1, 2018		\$2.39			
	(b) With a policy year ending on or after October 1, 2018, and before October 1, 2019		\$2.45			
133	Applicable self-insured health plans					133
	(c) With a plan year ending before October 1, 2018		\$2.39			
	(d) With a plan year ending on or after October 1, 2018, and before October 1, 2019		\$2.45			

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3. Part III, lines 3 and 10 and the signature section:

Part III			
3	Total tax. Add Part I, line 1, and Part II, line 2		3
4	Claims (see Instructions; complete Schedule C)	4	
5	Deposits made for the quarter	5	
	<input type="checkbox"/> Check here if you used the safe harbor rule to make your deposits.		
6	Overpayment from previous quarters	6	
7	Enter the amount from Form 720X included on line 6, if any	7	
8	Add lines 5 and 6	8	
9	Add lines 4 and 8	9	
10	Balance Due. If line 3 is greater than line 9, enter the difference. Pay the full amount with the return (see Instructions)	10	
11	Overpayment. If line 9 is greater than line 3, enter the difference. Check if you want the overpayment: <input type="checkbox"/> Applied to your next return, or <input type="checkbox"/> Refunded to you.	11	
Third Party Designee	Do you want to allow another person to discuss this return with the IRS (see instructions)? <input type="checkbox"/> Yes. Complete the following. <input type="checkbox"/> No		
	Designee name	Phone no.	Personal identification number (PIN)
Sign Here	Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.		
	Signature	Date	Title
	Type or print name below signature	Telephone number	
Paid Preparer Use Only	Print/Type preparer's name	Preparer's signature	Date
			Check <input type="checkbox"/> if self-employed
	Firm's name	Firm's EIN	
	Firm's address	Phone no.	

4. Payment can be made electronically using the [Electronic Federal Tax Payment System](#) or by check or money order using the 720-V payment voucher found near the end of the Form 720 and mailed to:
 Department of the Treasury
 Internal Revenue Service
 Ogden, UT 84201-0009

The fee is tax-deductible.



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Potential FMLA Violations

Delaying and/or Expanding FMLA Leave

On March 14th the Department of Labor (DOL) released Opinion Letter [FMLA 2019-1-A](#). This letter addresses two Family and Medical Leave Act (FMLA) issues.

1. Can an employer delay designating paid leave as FMLA leave?
2. Can an employer allow employees to expand their FMLA leave beyond the federally required 12-week entitlement?

While a DOL opinion letter is specific to the employer's specific questions and circumstances, the letter provides insight into the DOL's approach for similar situations. Courts are not required to follow an agency's opinion letter, but opinion letters do provide reasonable justification for an employer's course of action if challenged.

An FMLA Short-Course

Under the FMLA, eligible employees of covered employers are entitled to take unpaid, job-protected leave for specified family and medical reasons which includes up to 12 weeks of leave (or 26 weeks of military caregiver leave) in a 12-month period. Employers are allowed to require employees to substitute paid leave, such as sick time or vacation time, for unpaid FMLA leave. Once an employer has enough information to determine the leave is FMLA-qualified, the employer must designate the leave as FMLA and provide notice to the employee within 5 days. Failure to provide such notice constitutes interference with an employee's FMLA rights.



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Don't Delay Designation and Be Careful Expanding Entitlement

The opinion letter clearly states that an employer cannot delay the designation of FMLA leave nor designate more than 12 weeks (or 26 weeks of military caregiver leave) as FMLA leave.

The DOL allows an employer to be more generous with their leave policy. However, only 12 weeks (or 26 weeks of military caregiver leave) can be designated as FMLA-protected leave.

If your organization intends to be more generous with leave time and you plan to continue health plan coverage, it is critical that you get the approval from your insurance carrier or stop-loss vendor to extend health coverage beyond the time period the FMLA requires.



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