

Philadelphia
New York
Miami
Princeton
Brussels

**Morgan, Lewis
& Bockius**
C O U N S E L O R S A T L A W

Washington
Los Angeles
Harrisburg
London
Frankfurt
Tokyo

**EMPLOYEE TRIP REDUCTION REQUIREMENTS
-- DELAWARE, NEW JERSEY, NEW YORK AND PENNSYLVANIA**

July 1994

SUMMARY PAGE

White Paper

**Employee Trip Reduction Requirements
-- Delaware, New Jersey, New York and Pennsylvania**

This White Paper discusses recent Pennsylvania, New Jersey, Delaware and New York regulations that require employers with 100 or more employees at a work site, to develop programs that reduce vehicle miles traveled commuting to work. Affected employers must increase the average passenger occupancy of vehicles reporting to the work site to achieve an overall 25 percent increase mandated by the Clean Air Act Amendments of 1990. The new rules establish significant record keeping and reporting obligations, and provide guidance for employers regarding commuting plan implementation and design. Experience with similar regulations in California has demonstrated, however, that employers can expect to face a number of compliance obstacles and concerns.

The Environmental Protection Agency is considering removal of the Philadelphia interstate region from federal employee trip reduction requirements. At this time, however, these new commuting rules are in full effect in the New York to Delaware corridor.

**Employee Trip Reduction Requirements
-- Delaware, New Jersey, New York and Pennsylvania**

July 1994

I. INTRODUCTION

Under the federal Clean Air Act Amendments of 1990, Ozone non-attainment areas classified as "severe" or "extreme" and "serious" Carbon Monoxide non-attainment areas^{1/} must develop programs to reduce vehicle trips and vehicle miles traveled to work. Pennsylvania, New Jersey, Delaware and New York are subject to these requirements, and each has recently adopted, or is developing a trip reduction program.

But just as these states are embarking on trip reduction programs, Southern California - where the concept began -- is trying to salvage its car-pool regulations, known as Regulation XV. Henry Wedaa, chairman of the South Coast Air Quality Management District, has appointed a task force to review California's rules, in effect since 1988 and often cited as a model for other state programs. Mr. Wedaa says Regulation XV is "a rule that must either be modified or mummified."^{2/}

If California's experience with Regulation XV is any indication, employers in Pennsylvania, New Jersey, Delaware and New York can expect to encounter a host of compliance obstacles and concerns.

II. PHILADELPHIA REGION PREFERS TO OPT OUT

The Penjerdel Council, a regional chamber of commerce, has led a fight to reclassify the Philadelphia Metropolitan Air Quality Control Region from "severe" non-attainment for Ozone,

^{1/} The Environmental Protection Agency presently classifies the following regions as "severe" or "extreme" for Ozone or "serious" for Carbon Monoxide or both: Los Angeles-South Coast Air Basin, CA; Chicago-Gary-Lake County, IL-IN; Houston-Galveston-Brazoria, TX; Milwaukee-Racine, WI; New York-North New Jersey-Long Island, NY-NJ-CT; Southeast Desert Modified AQMA, CA; Baltimore, MD; Philadelphia-Wilmington-Trenton, PA-NJ-DE-MD; San Diego, CA; Ventura Co., CA.

^{2/} December 20, 1993 Press Release, South Coast Air Quality Management District. Calling for a complete re-evaluation and major overhaul, Mr. Wedaa stated that "[e]ven if Regulation XV worked as designed, it gets us only a 12 percent reduction in rush-hour travel. Meeting state and federal mandates requires eliminating 30 percent of rush-hour traffic."

to "serious" non-attainment. If that initiative succeeds, trip reduction would no longer be mandated for the Region composed of Philadelphia and four suburban counties in Pennsylvania, three counties in New Jersey, all of Delaware, and two counties in Maryland. The Penjerdel team is presently updating and reanalyzing air quality data for submission to the federal Environmental Protection Agency. One of the elements of Penjerdel's program will be substitute control measures to reduce Ozone precursors, Volatile Organic Compounds and Oxides of Nitrogen.^{3/}

III. ELEMENTS OF TRIP REDUCTION

The regulations adopted or proposed in Pennsylvania, New Jersey, Delaware and New York share the same fundamental design. Plan requirements apply to any work site within "severe" or "extreme" Ozone non-attainment zones with 100 or more employees with an average of at least 33 employees reporting to the work site between the peak commuting hours of 6 a.m. and 10 a.m., Monday through Friday.

Each state must determine the "average vehicle occupancy" (AVO) for vehicles reporting to all work sites within non-attainment regions during peak commuting hours. Each affected employer must determine the average passenger occupancy (APO) of vehicles reporting to its work site during peak commuting hours. Each state program specifies how affected employers shall increase their APO's in order to achieve a 25 percent increase overall in order to comply with the Clean Air Act Amendments of 1990. Affected employers are required to meet record keeping and reporting obligations, and will be subject to penalties for any non-compliance.

A. Pennsylvania

Pennsylvania's Employer Trip Reduction Program ("ETRP") regulations became effective on January 29, 1994. The ETRP regulations follow the general plan outlined above and apply to all affected employers within the Philadelphia Consolidated Metropolitan Statistical Area ("CMSA").^{4/}

Pennsylvania's final regulations, however, include several new provisions that represent a departure from the proposed rules and other state programs. First, the new regulations divide the CMSA into four different Target Areas and APO goals. These Areas generally form

^{3/} Penjerdel will gladly receive suggestions and, most significantly, specific proposals by business and industry to achieve voluntary emission rollbacks in lieu of the vehicle trip reduction program. The representative at Penjerdel is Liz Ferry (telephone 215-972-3950).

^{4/} The CMSA includes the counties of Bucks, Chester, Delaware, Montgomery and Philadelphia.

expanding concentric circles with the center circle, Target Area 1, encompassing Center City Philadelphia.^{5/} Each Target Area is assigned a target APO that affected employers must attain. Thus, an employer with a work site in Target Area 1 must achieve an APO of 3.00, while an employer with a work site in suburban Target Area 3 must attain an APO of 1.58. Section 126.202(a).

The subdivision of the compliance area reflects concerns raised during the comment period regarding the fairness of a single target APO for such disparate areas as Center City and suburban and rural county areas.

The final ETRP regulations include two provisions that may help reduce the burden of compliance for some employers. Subject to certain limitations, an employer with multiple affected work sites in the CMSA may develop a consolidated trip reduction plan that covers all of its work sites. Section 126.205. Similarly, unrelated employers with work sites in close proximity within the same Target Area may create and implement a multi-employer plan that is based upon a single, average APO for all participating work sites. Section 126.206.

The new regulations set forth a number of important compliance deadlines. Employers with 1,000 or more employees at a single work site must submit a trip reduction plan by November 15, 1994. Section 126.204. Employers with less than 1,000 employees at a work site must submit their plan by November 15, 1995. Id.

Second, all affected employers must achieve full compliance with the required APO for their Target Area during the 1997 survey period. Section 126.204. Interim compliance deadlines also apply and employers must maintain full compliance with target APOs once they have been achieved.

B. New Jersey

New Jersey's Employer Trip Reduction Program became effective on December 6, 1993. The final regulations create two geographical zones, the "Urbanized Area Zone" and the "Suburban Area Zone." The Urbanized Area Zone is further divided into three Target Areas.^{6/}

^{5/} Target Area 2 includes portions of Philadelphia County other than Center City; Target Area 3 includes a portion of Philadelphia County, as well as the largely suburban areas of Bucks, Chester and Montgomery Counties closest to Philadelphia and all of Delaware County; and Target Area 4 covers the more rural areas of Chester, Bucks and Montgomery Counties.

^{6/} Target Area 1 includes postal zip codes 07030, 07102, 07302, 07303, 07306, 07310 and 07311. Target Area 2 includes the remainder of Hudson County, and Target Area 3 covers Bergen County, Union County, the remainder of Essex County, and

Employers in Target Area 1 must attain an average of 1.97 passengers per vehicle reporting to the work site during peak morning commuting periods, while employers in Target Areas 2 and 3 must achieve an average of 1.73 and 1.46, respectively. Employers in the Suburban Area Zone must attain an average of 1.38 passengers per vehicle. Affected employers must reach these target APO requirements no later than November 15, 1996.

Affected employers were required to register with the Department of Transportation by March 11, 1994, utilizing standard forms distributed by the Department to employers. Employers who do not meet the definition of affected employer must submit an ETRP return card for non-affected employers. Affected employers must conduct a survey of employee commuting patterns and submit the results to the Department by May 1, 1994. Proposed ETRP plans must be submitted by November 15, 1994.

Like Pennsylvania, New Jersey's ETRP regulations allow employers with multiple work sites to submit a consolidated trip reduction plan that covers all work sites. Similarly, unrelated employers may, subject to certain requirements, submit a consolidated plan that covers their work sites.

New Jersey's final rules include several notable waiver provisions. For example, employers for whom the cost of compliance will substantially impair their ability to continue as a going concern may apply for a "hardship" waiver. An employer may obtain a "good faith" waiver if it has implemented an approved trip reduction plan in good faith but has not achieved the required increase in average passengers per vehicle.

C. Delaware

The Delaware Department of Transportation adopted revised Employee Commute Options ("ECO") regulations on December 29, 1993. The original regulations, which became effective on May 15, 1993, were revised primarily to add enforcement provisions.

The deadline for ECO plan submission is determined by the number of employees at a work site.^{2/} In particular, larger employers should be aware that ECO Plans for work sites with

Clifton, Passaic, and Paterson in Passaic County.

<u># of Employees</u>	<u>Submission Deadline</u>
1,000 +	April 15, 1994
500-999	June 15, 1994
300-499	August 15, 1994
200-299	October 15, 1994
150-199	December 15, 1994
120-149	February 15, 1995
100-119	April 15, 1995

more than 1,000 employees were due by April 15, 1994, with plans for smaller work sites due in two-month intervals thereafter. Each affected work site must achieve its target APO by September 30, 1997.

Unlike Pennsylvania and New Jersey, Delaware has adopted a credit system that allows employers to receive credits if the APO at a work site exceeds the applicable target APO. Subject to certain time restrictions, these credits may be used to offset deficiencies at any of the employer's work sites and may be transferred to other employers.

D. New York

The New York State Department of Transportation adopted Employee Commute Option ("ECO") regulations on April 6, 1994. The rules generally follow the basic design outlined above, and apply to work sites in New York City, Westchester, Nassau, Rockland, and Suffolk Counties, and the towns of Blooming Grove, Chester, Highlands, Monroe, Tuxedo, Warwick and Woodbury.

Local administering agencies are required to notify covered employers of the ECO requirements within 30 days. Employers receiving the notice must submit work site registration forms to the local agency within 30 days. All covered employers must submit initial compliance plans to the local agencies for approval by November 15, 1994.

IV. COMPLIANCE ISSUES

The commuter regulations will create significant compliance issues and concerns for affected employers. Specifically, covered employers will be responsible for developing and implementing programs to reduce the number of commuter vehicles reporting to a work site.

Under the Pennsylvania plan, for example, each employer is required to implement a reduction plan that will first determine the required decrease in its employees' average use (APO) to reach 125 percent of the area average vehicle occupancy (AVO) and then achieve 50 percent of the required decrease in use within two years after the rule became effective, 80 percent within three years, and 100 percent within four years.

Employers subject to the regulations must create a position of transportation coordinator, who will be responsible for developing and implementing the ETRP. In addition to collecting data and developing the plan, the transportation coordinator will be responsible for monitoring employee compliance and developing incentives and mechanisms to encourage employees to reduce their dependence upon single occupancy automobile use. The regulations contain specific guidance regarding the required content of the mandated ETRP.

The regulations recommend a number of measures and incentives that employers may choose to utilize in order to enable them to meet trip reduction goals, including modified work

schedules; increased use of telecommunications and telecommuting; subsidization of employee use of public transportation or car- or van-pools; utilization of flexible hours schedules and guaranteed ride home programs to promote ride-sharing; as well as charging differential parking fees based upon the number of employees in the vehicle, and the provision of preferential parking spots for ride-sharing vehicles.

Transportation coordinators are likely to find that specific work sites will be affected differently by the state rules. For example, compliance at rural work sites is likely to be more difficult because such areas frequently lack mass transit alternatives. Urban work sites, however, may be able to meet their requirements relatively easily depending on the availability and usage of mass transit. Some work sites may be able to develop flexible working hours or adjust the length of the working day more easily than others. Moreover, some employers may be able to implement such measures as telecommuting, while other sales and service organizations may require that employees report to the work site during peak travel hours. The adaptability of the suggested measures for attainment will vary from company to company based upon particular business means and corporate cultures. A number of questions employers may want to address follow:

A. What are the special characteristics of my work force and my work site?

After conducting an employee survey to determine a work site's actual APO in relation to its target APO, each employer will need to determine if there are any unique characteristics that could impact compliance efforts. Employee demographics and work site location may substantially influence the development of a commuting program. For example, work sites with relatively few mass transportation alternatives may have difficulty implementing ridesharing programs if employees do not reside in close proximity to one another. Similarly, individuals with children may resist employer efforts to modify the hours of employment.

B. What transportation facilities and alternatives are available?

To develop an efficient and effective commuter program, employers will also need to identify available transportation facilities and alternatives. Compliance at suburban work sites may be more difficult because such areas frequently lack mass transit alternatives; urban work sites, however, may be able to meet their compliance requirements relatively easily. As noted above, car- or van-pooling may be difficult to implement in some situations. In these cases, employers may wish to determine whether there are any transportation management organizations or groups of employers in their area that operate or coordinate ridesharing and other commuting programs. Finally, employers should explore the possibility that some individuals may wish to commute by walking or by bicycle.

C. How can work rules be revised to achieve the work site's applicable target APO?

Some employers may be able to modify work rules as part of their commuter program. For example, operations at certain work sites may enable employers to revise work schedules or develop staggered work shifts to reduce the number of employees and vehicles reporting to the work site during peak commuting hours. Certain employers may also be able to increase their use of telecommunications and telecommuting in an effort to reduce the number of vehicles reporting to a work site.

D. Are there any contractual limitations that could impact the commuting program?

In developing its commuting program, each employer will need to determine whether there are any contractual limitations that restrict the strategies that may be used to attain the target APO. Collective bargaining agreements, for example, frequently specify starting times and shift hours and contain provisions limiting the hours of employment or number of shifts that may be worked in a given period of time. Depending upon the language of collective bargaining agreements or other contractual undertakings, the employer may be obligated to negotiate changes that are necessary to comply with the Act.

E. What steps will be required to change employee commuting habits and how can I motivate my work force?

Employers will have to be sensitive to the employee relations issues arising from the development and implementation of their compliance programs. The California regulations in effect since 1988 have had a substantial impact on a range of employee relations issues. Experience in California has demonstrated that employers should develop their programs with ample lead-time so that resources can then be focused on implementation. Indeed, internal marketing efforts to employees will likely play as large a role in determining the effectiveness of a commuter plan as the actual design of the program.

Changing the transportation habits of employees could take time and may require new and creative approaches; for example, some California employers hold cash and vacation drawings for employees who participate in ridesharing programs. Ridesharing fairs and other types of promotional activities have also proven to be effective motivational techniques for some employers. Mass transportation stipends are found in many compliance programs and are typically paid to those employees who utilize mass transportation a minimum number of days each month. For individuals who use mass transportation, employers may need to develop a "guaranteed ride home" system to ensure that employees who are forced to work past normal business hours are assured of obtaining evening transportation.

V. CONCLUSION

The foregoing represents only a sample of the issues that employers are likely to face in implementing trip reduction compliance programs. If your organization is covered by one of these commuter programs, you should be aware of all applicable requirements so that you can begin to develop and implement your program.

Kenneth R. Myers
Lawrence B. Fine
Alan K. Maesaka
Judith Walkoff