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The Clean Air Act's Mandate of Employer Trip-Reduction Programs: Is This a Workable Solution to the Country's Air Pollution Problems?

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The Clean Air Act's Mandate of Employer Trip-Reduction Programs: Is This a Workable Solution to the Country's Air Pollution Problems?

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I. INTRODUCTION

November 15, 1994 marked the beginning of the imposition of tough new federally-mandated responsibilities on many employers across the United States. On that day, employers in areas with severe or extreme air pollution problems were required to begin programs to reduce the number of their employees who drive to work. These programs must meet statutory goals by November 15, 1996,¹ or the targeted employers will face fines and possible criminal penalties.²

A provision of the Clean Air Act Amendments of 1990³ requires employers of over one hundred employees in eleven designated states to comply with mandatory trip-reduction programs for commuting employees.⁴ According to Congress, these programs can be achieved in a man-

1. See Caryn A. McBride, *The Federal Clean Air Act: Rx for Environment—or Plague on Area Economy?*, FAIRFIELD COUNTY BUS. J., Nov. 15, 1993, at 1; Stephen L. Kass & Michael B. Gerrard, *Implementation of the Clean Air Act in New York*, N.Y. L.J., Sept. 24, 1993, at 3; Patty Reinert, *Burdens of Clean Air Act Fall on Business, Under State Regs*, WARFIELD'S BUS. REC., June 25, 1993, at 3; Paul H. Schneider & Jody V. Wilson, *Clean Air Act Amendments Will Change Commuting*, N.J. LAW., May 10, 1993, at 16.

2. Wade Lambert, *Business Must Wean Workers From Their Cars*, WALL ST. J., Nov. 4, 1993, at B1.

3. 42 U.S.C. § 7401 et. seq. (1990).

4. See 42 U.S.C. § 7511a(d)(1)(B) (1990).

ner that will enhance mobility⁵ and not cost an unreasonable amount of money to implement.⁶

This newly-implemented federal requirement, that affects about 28,000 companies and 12 million employees,⁷ raises many important legal questions. First, there exists a real possibility of increased employer liability.⁸ "Because company-mandated travel arrangements could be seen as an extension of the workplace, companies could face lawsuits over traffic accidents or even sexual harassment in a car pool."⁹ Second, compliance with the provisions is likely to be difficult for the employer because employees may resist it as a restriction of their personal freedom. Third, the provision makes the employer responsible for the off-duty actions of its employees by fining the employer if the employee does not comply with programs reducing commuting hours. Finally, the costs imposed on employers by this provision are arguably disproportionate to the employers' contribution to the pollution problem in major cities, and compliance may have little positive impact on the overall air pollution in this country.

It is beyond doubt that areas of the United States are facing severe air pollution problems and that a solution is desperately needed. However, it is less than clear that the employer trip-reduction programs will be a workable or meaningful solution to the problem.

II. THE CLEAN AIR ACT AMENDMENTS OF 1990

Signed into law by President Johnson in 1963, the Clean Air Act was the first modern environmental law to be enacted.¹⁰ As originally drafted, the Act was meant to combat the growing problem of air pollution, primarily in urban areas of the country.¹¹ The Clean Air Act has been amended numerous times, and the 1990 amendments were passed in response to the perceived failures of the earlier amendments.¹²

In amending Title I of the Act, Congress recognized that the United States faced serious air pollution problems arising, in large part, from

5. S. REP. NO. 228, 101st Cong., 2nd Sess. 13 (1989) (enacted), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3399.

6. *Signing Statement by President George Bush upon Signing S. 1630*, 26 Weekly Compilation of Presidential Documents 1824 (Nov. 19, 1990) [hereinafter *Signing Statement*].

7. The U.S. Environmental Protection Agency (EPA) estimated these numbers. Laura M. Litvan, *Clean Air Act's Car-Pool Mandate*, NATION'S BUS., Apr., 1994, at 36.

8. *See, e.g., David Ibata, Showers, Raffle Tickets are Ways 1 Firm Tries to Alter Commuting*, CHI. TRIB., Dec. 31, 1993, at 11.

9. Lambert, *supra* note 2, at B1.

10. S. REP. NO. 228, *supra* note 5, at 1, *reprinted in* 1990 U.S.C.C.A.N. at 3387.

11. *See* 42 U.S.C. § 7401(a)(1)-(4) (1977).

12. S. REP. NO. 228, *supra* note 5, at 3, *reprinted in* 1990 U.S.C.C.A.N. at 3389; *see also* 136 CONG. REC. S17232 (Oct. 2, 1990).

the increasing use of automobiles.¹³ Congress, concerned that a majority of Americans were breathing air that did not meet federal air quality standards,¹⁴ realized that the three major air pollutants contributing to health problems in the country—ozone, carbon monoxide, and particulate matter—were produced by motor vehicles.¹⁵ Studies presented to the Senate showed that the health-based air quality standards set by the 1977 Amendments to the Clean Air Act could not alleviate the growing air pollution problems.¹⁶

The goal of the 1990 Clean Air Act Amendments was to protect and enhance the quality of the nation's air resources.¹⁷ Three reasons underlay this goal: (1) the protection of the public health by reducing the levels of unhealthful pollutants in the air; (2) the reduction of health care costs that had risen to over \$40 billion per year just for the treatment of ailments caused by exposure to air pollution; and (3) the reduction of welfare costs that were rising as air pollution began to cause extensive damage to many types of vegetation and crops.¹⁸

The amendments launched a partnership between the state and federal government to help solve the problem.¹⁹ Congress acknowledged that "air pollution recognizes no state or international borders,"²⁰ but added that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments."²¹ As in the earlier amendments, the 1990 plan required that the Environmental Protection Agency (EPA) set nationally uniform air quality standards and declared that states, with the agency's assistance, are responsible for meeting such standards.²² States are required to develop state implementation plans (SIPs), outlining their plans to ensure compliance with the EPA's standards, and to submit them to the EPA for review.²³

Congress also realized that the 1970 and 1977 amendments failed to achieve healthy air because many of the requirements of the amendments were not being met.²⁴ Furthermore, there were problems with

13. S. REP. NO. 228, *supra* note 5, at 1, *reprinted in* 1990 U.S.C.C.A.N. at 3387; *see also* 136 CONG. REC. S17232, 17233 (Oct. 2, 1990).

14. S. REP. NO. 228, *supra* note 5, at 2, *reprinted in* 1990 U.S.C.C.A.N. at 3388.

15. *Id.* at 6-7, *reprinted in* 1990 U.S.C.C.A.N. at 3391-3393.

16. *Id.* at 3, *reprinted in* 1990 U.S.C.C.A.N. at 3389.

17. *Id.* at 5, *reprinted in* 1990 U.S.C.C.A.N. at 3391.

18. *Id.* at 6-9, *reprinted in* 1990 U.S.C.C.A.N. at 3392-3395; *see also* 136 CONG. REC. H2511, 2514-2515 (May 21, 1990).

19. S. REP. NO. 228, *supra* note 5, at 9, *reprinted in* 1990 U.S.C.C.A.N. at 3395.

20. *Id.*

21. 42 U.S.C. § 7401(a)(3) (1990).

22. S. REP. NO. 228, *supra* note 5, at 9, *reprinted in* 1990 U.S.C.C.A.N. at 3395.

23. *Id.*

24. *Id.* at 10, *reprinted in* 1990 U.S.C.C.A.N. at 3396.

understatements of emissions in state reports, inadequacies in predictions of ambient air quality, failures of states to implement some of the controls they had committed to in their SIPs, and failures of the EPA to require additional controls when the attainment deadlines were not being met.²⁵ As a result, Congress decided the 1990 amendments would be a "new and more aggressive control program."²⁶

To combat these problems, Congress focused on a "specific incremental progress"²⁷ toward air pollution reduction goals in the 1990 Amendments. To help ensure compliance, Congress classified areas according to the severity of their air pollution problems and stepped up the control mechanisms of the Act.²⁸

Foremost in Congress' findings was that motor vehicles were the single largest source of ozone and carbon monoxide pollution.²⁹ Studies indicated that merely controlling the pollution each car emits could not reduce or avoid increases in vehicle pollution; the use of the car had to be examined as well, because growth in vehicle miles travelled ("VMT")³⁰ threatened to overwhelm what could be achieved through the emissions standards outlined in other parts of the amendments.³¹ Proponents of the 1990 amendments urged that pollution could be reduced if fewer vehicle trips took place in polluted and congested urban and suburban areas.³² As a result, Title I of the amended act contains several provisions meant "to encourage State and local governments, employers and drivers to plan ahead to reduce vehicle use while maintaining—and in some cases where congestion is a serious problem actually *enhancing*—mobility."³³

The EPA administrator, pursuant to section 107(f)(1) of the amended act, must designate all areas of the country in terms of their air pollution problems.³⁴ An area that does not either meet the standard or contributes pollution to another area that does not meet the standard is to

25. *Id.* at 11-12, reprinted in 1990 U.S.C.C.A.N. at 3397-3398.

26. *Id.*

27. *Id.* at 12, reprinted in 1990 U.S.C.C.A.N. at 3398.

28. *Id.* at 13-14, reprinted in 1990 U.S.C.C.A.N. at 3399.

29. *Id.* at 13, reprinted in 1990 U.S.C.C.A.N. at 3399; see also 136 CONG. REC. S17232, 17233 (Oct. 2, 1990); 136 CONG. REC. H2511, 2518 (May 21, 1990).

30. VMT is a measure of the extent of motor vehicle operation. S. REP. NO. 228, *supra* note 5, at 13, reprinted in 1990 U.S.C.C.A.N. at 3405. The figure represents the total miles driven by the total number of cars in the area.

31. *Id.* at 19, reprinted in 1990 U.S.C.C.A.N. at 3405.

32. *Id.* at 13, reprinted in 1990 U.S.C.C.A.N. at 3399; see also 136 CONG. REC. H2511, 2521 (May 21, 1990).

33. S. REP. NO. 228, *supra* note 5, at 13, reprinted in 1990 U.S.C.C.A.N. at 3399 (emphasis added).

34. *Id.*

be designated a "nonattainment" area.³⁵ Proponents of the amendments linked the nonattainment problem in the most severely polluted cities to total auto use, and projected that future increases in auto use (measured in VMT) would cause most of the emission growth in those cities.³⁶

New Subpart 2 of the Act classifies ozone nonattainment areas into categories depending on the degree to which they exceed the ambient air quality standards for ozone, and prescribes deadlines for attaining the standards and requirements applicable to each category.³⁷ These areas are defined as moderate, serious, severe, and extreme.³⁸ Severe areas³⁹ exceed the standards by more than 50% but no more than 120%, while extreme areas⁴⁰ exceed the standards by more than 120%.⁴¹

Congress updated the transportation control measures in the revised section 108 of the act to reduce VMT and improve traffic flow.⁴² This was a critical problem because the VMT nationwide was projected to increase cumulatively by 40-60% between 1989 and 2005.⁴³ Congress wanted to reduce future VMT growth while providing enhanced mobility to serve increasing travel demands.⁴⁴ The Senate bill focused on "transportation planning toward optimum use of all potential alternatives to the single occupancy vehicle, ranging from highway facilities dedicated to moving high occupancy vehicles, to providing carpool, vanpool services and improved public transit."⁴⁵

The main objective of the Senate bill was to "promote the adoption and implementation of policies to reduce vehicle use in nonattainment areas."⁴⁶ Proponents of the bill hoped that it would "encourage medium- and long-term planning for achieving and maintaining air quality standards."⁴⁷ Upon signing this bill into law, President Bush stated

35. *Id.* at 13-14, *reprinted in* 1990 U.S.C.C.A.N. at 3399-3400.

36. *Id.* at 26, *reprinted in* 1990 U.S.C.C.A.N. at 3412.

37. *Id.* at 30-31, *reprinted in* 1990 U.S.C.C.A.N. at 3416-3417.

38. *Id.*

39. The areas designated by the Clean Air Act of 1990 as "severe" are: "Baltimore, MD; Chicago-Gary-Lake County, IL-IN-WI; Houston-Galveston-Brazoria, TX; Milwaukee-Racine, WI; Muskegon, MI; New York-New Jersey-Long Island, NY-NJ-CT; Philadelphia-Wilmington-Trenton, PA-NJ-DE-MD; San Diego, CA." *Id.* at 35, *reprinted in* 1990 U.S.C.C.A.N. at 3421. Thus, eleven states are targeted: California, Connecticut, Delaware, Illinois, Indiana, Maryland, New Jersey, New York, Pennsylvania, Texas, and Wisconsin. Lambert, *supra* note 2, at B1.

40. Only one area in the United States was designated as "extreme": Los-Angeles-Anaheim-Riverside, CA. *Id.*

41. *Id.* at 31, *reprinted in* 1990 U.S.C.C.A.N. at 3417.

42. *Id.* at 18, *reprinted in* 1990 U.S.C.C.A.N. at 3404.

43. *Id.*

44. *Id.* at 18-19, *reprinted in* 1990 U.S.C.C.A.N. at 3404-3405.

45. *Id.* at 19, *reprinted in* 1990 U.S.C.C.A.N. at 3405.

46. *Id.* at 27, *reprinted in* 1990 U.S.C.C.A.N. at 3413.

47. *Id.* at 28, *reprinted in* 1990 U.S.C.C.A.N. at 3414.

that it "achieves my environmental goals at an acceptable cost."⁴⁸ He appreciated the Act's reliance on the market to reconcile the environment and the economy.⁴⁹

The 1990 Amendments to the Clean Air Act are ambitious and seek to cure a pervasive problem. However, it is doubtful that the dual Congressional policies behind the Clean Air Amendments of 1990—a reduction of VMT and enhanced mobility—can actually be achieved by the current statutory framework. Furthermore, the President's prediction that these programs can be effectuated at an acceptable cost has yet to be borne out.

III. EMPLOYER TRIP-REDUCTION PROGRAMS

One little-recognized, but important addition to the Clean Air Act in the 1990 amendments is section 7511a(d)(1)(b). This section mandates the creation of what has come to be known as "Employer Trip-Reduction Programs"⁵⁰ that employers must implement in ozone or carbon monoxide areas designated as "severe" or "extreme."⁵¹ The employer trip-reduction mandate basically requires that employers of 100 or more employees in each designated area implement programs to increase average vehicle occupancy of commuting trips by employees "by not less than 25 percent above the average vehicle occupancy for all such trips in the area at the time the revision is submitted."⁵² In addition, employers of fewer than 100 employees may be in danger of having this section of the Act apply to them as well.⁵³

The legislative history of this provision shows that Congress intended to reduce VMT by decreasing "both the number of vehicles on the road during rush hours and the time the remaining cars spend idling

48. *Signing Statement*, *supra* note 6.

49. *Id.*

50. These programs are also known as "employee commute options." Janet Naylor, *Business Groups Oppose Plan to Cut Employee Commuting*, WASH. TIMES, Nov. 24, 1993, at C4.

51. *See supra* notes 39 & 40; *see also* Catherine Romano, *Business Copes with the Clean Air Conundrum; Employee Trip Reduction Provision of the 1990 Clean Air Act*, MGMT. REV., Feb., 1994, at 34.

52. 42 U.S.C. § 7511a(d)(1)(B) (1990); *see also* Kass & Gerrard, *supra* note 1, at 3; David Ibat, *Employers Get Commuter-Plan Reprieve*, CHI. TRIB., July 28, 1993, at 1; Joseph J. McGovern, *Does ETRP Equal Mandatory Car Pools?*, FOCUS, Dec. 1, 1992, at 11.

53. The federal regulations apply to companies with 100 or more employees, but the issue should also concern smaller firms. Not only do states have authority to extend the requirements of the law to firms with fewer than 100 workers, it is also not uncommon for Congress to later reduce original numerical thresholds of government mandates.

Litvan, *supra* note 7, at 36. The state of California actually extended the mandate to employers of 50 employees or less, but after opposition from smaller firms, the state legislature passed a bill prohibiting such action until 1996. *Id.*

or operating at inefficient low speeds, and thereby to reduce emissions of hydrocarbons, carbon monoxide [and other materials].”⁵⁴ In order to implement such programs, designated employers in nonattainment areas must “provide services, facilities or incentives to encourage employees to share commuting trips.”⁵⁵ These programs “put the onus on companies to encourage the use of car-pooling, mass transit, and company-arranged transportation”⁵⁶

Employers have been encouraged to arrange employee car pools, provide employer van pool services, furnish passes for public transportation, offer prizes as incentives for compliance, and allow employee “telecommuting.”⁵⁷ Other possible actions by employers to ensure compliance may include reducing the number of parking spaces at the workplace or providing showers at the worksite for bikers or walkers.⁵⁸ Employers may even try changing employee work schedules to unusual times because the mandates of the Employer Trip-Reduction Programs are primarily concerned with rush-hour ozone levels.⁵⁹

The Senate bill requires the designated states to submit SIP revisions mandating that the statutorily prescribed employers achieve no less than a 25 percent improvement in commuting vehicle occupancy above a baseline that is the areawide average for all such trips.⁶⁰ This baseline would vary, depending on the availability of mass transit to the employees. For example, “the baseline vehicle occupancy rate for center city trips where transit is more readily available might be 1.7 passengers per vehicle while for a suburban area, the baseline rate might be only 1.1 or 1.2.”⁶¹ Thus, employers in suburban areas would not be required to meet goals as ambitious as those imposed upon their urban counterparts.

54. S. REP. NO. 228, *supra* note 5, at 45, reprinted in 1990 U.S.C.C.A.N. at 3431.

55. *Id.*

56. Lambert, *supra* note 2, at B1; see also Dale D. Buss, *Dealers Apprehensive Over Ride-Sharing Law*, AUTOMOTIVE NEWS, Jan. 10, 1994; McBride, *supra* note 1, at 1; Ibata, *supra* note 52, at 1.

57. Lewis Goldshore, *DOT Proposing Employer Trip Reduction Programs*, N.J. L.J., June 28, 1993, at 6.

58. Litvan, *supra* note 7, at 36; see also Pat Paquette, *We Stopped Watering our Lawns During the Draught, But . . .*, CAL. J., Sept. 1, 1993.

59. See, e.g., Glenn L. Unterberger, *Commuting Regulated for Business, Law Firms; New Pa. Environmental Program Targets 100-Employee Companies*, LEGAL INTELLIGENCER, Jan. 11, 1994, at 9; Dale D. Buss, *A Tough Act to Follow: Ask Not for Whom the Regulatory Bell Tolls; If You Employ More than 100 People, it Tolls for You*, CORP. REP. WIS., July, 1993, at 8; Reinert, *supra* note 1, at 3; Schneider & Wilson, *supra* note 1, at 16; Jennifer Liebrum, *Laws May Wean Houston Drivers From Their Cars; 22 Area Firms Seek Ways to Cut Down Commuting*, HOUSTON CHRON., May 5, 1993, at A25.

60. S. REP. NO. 228, *supra* note 5, at 45, reprinted in 1990 U.S.C.C.A.N. at 3431.

61. *Id.*

This improvement must be attained by November, 1996.⁶² A written plan detailing how this goal will be met must have been submitted to the state Department of Transportation by these employers by November 15, 1994, at which time the employers must also have begun implementing the plan.⁶³

Relying on one particular California experiment, the Senate bill stressed not only that such programs can be successful, but also that "employer ridership programs appear to make economic as well as environmental sense."⁶⁴ The bill noted that trip reduction programs can result in savings to employers who subsidize parking, because they will be paying for fewer employee parking spaces.⁶⁵ The bill further noted that these programs also result in savings to employees because of reduction in car care expenses and gasoline.⁶⁶ However, many other costs and liabilities that need to be taken into consideration when evaluating the cost effectiveness of section 7511a(d)(1)(B) may serve to reduce or even negate any documented savings.⁶⁷

This paper takes the position that the costs of complying with the employer trip-reduction programs will far exceed their ultimate benefits in reducing air pollution, and that Congress' goal of increasing mobility is unobtainable under the current statutory scheme. Further, this paper suggests alternative solutions to the current air pollution problem that may prove to be less expensive, easier to administer, and more likely to achieve the goals set by Congress.

IV. POSSIBLE INCREASED EMPLOYER LIABILITY

A significant danger inherent in these mandatory employer trip-reduction programs is that the implementation of company-sponsored travel arrangements⁶⁸ may be interpreted by courts as an expansion of

62. See McBride, *supra* note 1, at 1; Kass & Gerrard, *supra* note 1, at 3; Reinert, *supra* note 1, at 3; Schneider & Wilson, *supra* note 1, at 16.

63. 42 U.S.C. § 7511a(d)(1)(B) (1990); see also Kass & Gerrard, *supra* note 1, at 3; *Clean Air Regulations Approved by Environmental Quality Board*, PR NEWSWIRE, Sept. 21, 1993; LeAnn Spencer, *Share the Ride? Few Would Go Along*, CHI. TRIB., July 23, 1993, at 1; Goldshore, *supra* note 57, at 6; Paul H. Schneider, *U.S. Clean Air Act Amendments Bring New Regulations*, N.J. LAW., Apr. 12, 1993, at 19.

64. S. REP. NO. 228, *supra* note 5, at 46, reprinted in 1990 U.S.C.C.A.N. at 3432.

65. *Id.*

66. *Id.*

67. For example, "possible conflicts with unions if employers try to use collectively bargained paid parking as an incentive or disincentive" may become a costly situation for employers. Barbara Presley Noble, *At Work: Getting Them There is Half the Job*, N.Y. TIMES, Nov. 21, 1993, § 3, at 25.

68. Such arrangements might include the use of transit systems, use of employer-provided van pools, formation of employee car pools, or even employer-paid taxicab rides home during odd work hours. See Goldshore, *supra* note 57.

the workplace. If this is the case, employers or their insurance companies could potentially be held liable for incidents such as employee injuries sustained in traffic accidents, injuries caused to third parties by commuting employees, or sexual harassment of an employee in a company-sponsored mode of transportation.⁶⁹

This potential liability would result in increased costs for the affected employers. Whether these costs are "acceptable" as the President concluded they would be, depends on how the courts interpret the problem and how liberally damages are awarded. If history is any indication, however, and the commute is viewed as an expansion of the workplace, employers are likely to bear the burden of most costs incurred during an employer-mandated employee commute.

A. *Increased Employer Liability Pursuant to Other Federal Statutes: Expansion of the Workplace*

Such an expansion of what the workplace legally encompasses would hardly be novel. In many instances, federal statutes' requirements for employers have translated into increased employer liability and increased employer costs. The Federal Employers' Liability Act (FELA),⁷⁰ is one such statute. For example, the case of *Empey v. Grand Trunk Western R.R. Co.*⁷¹ held that, for the purpose of FELA, an employee is within the scope of his employment if he is injured while availing himself of employer-provided housing.⁷² In *Empey*, an employee of the railroad company was transported to a motel by the railroad company and he stayed there before starting his next work assignment,⁷³ as required by the Federal Hours of Service Act.⁷⁴ The Act provided that railroad employees could only work twelve consecutive hours before they were required to rest for ten hours; the statute also required that railroad employers provide rooms for their off-duty train crew.⁷⁵ The employer in *Empey* had a contract with a certain hotel in this city, and although the employees were not *required* to stay at that particular hotel, if they chose to stay at another facility, it would be at their own expense.⁷⁶ Empey stepped out of his shower at the employer-suggested hotel, slipped in a puddle of water, and injured his back—a broken latch on the shower door had permitted the leakage onto the

69. Lambert, *supra* note 2, at B1; *see also* Noble, *supra* note 67, at 25.

70. 45 U.S.C. § 51 et. seq. (1986).

71. 869 F.2d 293 (6th Cir. 1989).

72. *Empey v. Grand Trunk Western R.R. Co.*, 869 F.2d 293, 295 (6th Cir. 1989).

73. *Id.* at 294.

74. 45 U.S.C. § 61 et. seq. (1982).

75. *Empey v. Grand Trunk Western R.R. Co.*, 869 F.2d 293, 294 (6th Cir. 1989).

76. *Id.*

floor.⁷⁷ The court held that Empey was within the scope of his employment with the railroad when he fell at the hotel, and that any negligence of the hotel would be imputed to the employer-railroad pursuant to FELA.⁷⁸

In another FELA case, *Moore v. Chesapeake & Ohio Railway Co.*,⁷⁹ an employer was held liable under FELA for its employee's injuries sustained in a cafeteria provided by the employer. Though the employee was not required to eat in the cafeteria, it was restricted to employees, and their guests.⁸⁰ The court held the employer liable for the employee's injuries because the cafeteria *enhanced the possibility of increased productivity* by the employees, and because the employer *received benefits* from the cafeteria in that the cafeteria improved employee morale and enabled employees to return from lunch to work on time.⁸¹ Similarly, the court in *Holman v. American Automobile Insurance Co.*,⁸² relying on the same rationale used in *Moore*, held an employer liable for the injuries one of its employees sustained in the employer-provided cafeteria.⁸³

By analogy to these cases, it is clear that the employer trip-reduction programs could also expand the scope of employer liability to include off-worksites injuries. Following the "encouragement of use" analysis of *Empey*, it is clear that, to comply with the Clean Air Act, employers will persuade their employees to utilize alternative methods of getting to work. The "benefit to employer" reasoning of *Moore* and *Holman* is also important; employee compliance with the trip-reduction programs would benefit their employers by saving thousands of dollars in noncompliance fines.⁸⁴

In a similar vein, the FELA case of *Carney v. Pittsburgh & Lake Erie R.R. Co.*⁸⁵ held that the employer was liable for the injuries an employee sustained when he fell from a negligently maintained bed while staying at the local YMCA. The employer in *Carney* had arranged for, but did not require, its employees to stay at the YMCA.⁸⁶ The court stated that the employee's "residence and lodging at the YMCA was part of the *operational activities* of the railroad."⁸⁷ A later

77. *Id.*

78. *Id.* at 295.

79. 649 F.2d 1004 (4th Cir. 1981).

80. *Id.* at 1010.

81. *Id.*

82. 39 S.E.2d 850 (Ga. 1946).

83. *Id.* at 854.

84. See *infra* section VII.

85. 316 F.2d 277 (3d Cir.), *cert. denied*, 375 U.S. 814 (1963).

86. *Id.* at 279.

87. *Id.* (emphasis added).

case decided under the federal Jones Act⁸⁸ clarified the types of actions that would constitute "operational activities." The Supreme Court, in *Hopson v. Texaco, Inc.*,⁸⁹ held that a shipowner/employer's use of cab transportation to take its employees to the United States Consul's office, as required by law, constituted part of its operational activities, rendering the employer liable for injuries sustained by the employees in an accident involving a cab in which they were passengers.⁹⁰

Employer trip-reduction programs could be seen as falling within the "operational activities" of the company, because federal law requires that they be implemented as part of company policy. According to *Carney* and *Hopson*, this would subject the employer to increased liability for employee injuries occurring outside of the traditionally defined worksite. If the workplace is expanded in this way, to include employee commuting, employers could be legally liable for commuting accidents or incidents. Certainly, then, there is a very real danger to employers in following the dictates of section 7511a(d)(1)(B) of the Clean Air Act—they could be held liable for any harm that befalls their employees while those employees commute to or from work.

Other FELA cases discussing employer liability for off-workplace employee injuries seem to place emphasis on some degree of employer control over the employee's activity. For example, in *Duffield v. Marra, Inc.*,⁹¹ an employee slipped in the parking lot of a motel in which he was staying at his employer's expense. Although the employee was not "on the job" at the time of the accident, the court held that "an employee acts within the scope of his employment not only when he performs actual work, but also when he is engaged in acts incidental to his employment."⁹² In contrast to the previous cases, the employer arranged for the

88. 46 U.S.C. § 688 (1964).

89. 383 U.S. 262 (1966).

90. *Id.* at 264; see also *Penn Central Corp. v. Checker Cab Co.*, 488 F. Supp. 1225, 1228 (E.D. Mich. 1980) (another case decided under the FELA which held that "where a railroad utilizes cab services to transport its employees, these services can constitute an operational activity of the railroad, thus rendering the railroad liable for injuries sustained by the employees in the course of the cab transportation.").

91. 520 N.E.2d 938 (Ill. App. Ct. 1988).

92. *Id.* at 943 (citing *Fowler v. Seaboard Coastline R.R. Co.*, 638 F.2d 17, 20 (5th Cir. 1981)). Although "incidental to employment" is a term of art that normally is construed to mean "incidental to the production activities of a company," other courts have construed phrases such as this literally. See, e.g., *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 736 (1989); *Easter Seal Soc'y for Crippled Children and Adults v. Playboy Enter.*, 815 F.2d 323, 334 (5th Cir. 1987) (both construing phrase "work for hire"). There is no reason to think that the courts may not interpret this phrase literally as well. The *RANDOM HOUSE COLLEGE DICTIONARY* (1982 ed.) defines "incidental" as meaning "happening in conjunction with something else." Certainly, then, a literal interpretation of the phrase "incidental to employment" would include employee commutes to work that conformed to employer requests.

employee to stay at the motel in order to keep the employee close to the worksite so that he could be called into work quickly.

The issue of employer control was also important in *Mostyn v. Delaware, L. & W. R. Co.*⁹³ There, an employee who had left his railroad bunk car because it was infested with vermin was injured as he slept by the side of the tracks. In spite of the fact that the employee was not required to sleep in the bunk car (which he did at his own expense), and could have slept in town as other workmen did, the court held that the employee was within the scope of his employment at the time of the accident, and held his employer liable for the injury.⁹⁴ The court stated that "when a railroad provides shelter or food or both for its employees, and they are using the accommodations so provided to prepare themselves for their work, . . . they must be regarded as in [the employer's] 'employ.'"⁹⁵

In *Metropolitan Coal Co. v. Johnson*,⁹⁶ a railroad employee was injured as he commuted from home to work on his employer's commuter train. Even though the employee was on the employer's premises and had been given a pass to ride the train by the employer, the court held that the employee was *not* within the scope of his employment at the time of the injury. The court based its holding on the fact that the employee was not required to use the employer's train to get to work—the employer had given the employee the pass merely as a "perk" and not as a request to use this particular means of transportation. The employee "could have taken one of any number of other routes, trains, or means of transportation to go from his home to work."⁹⁷ Similarly, in *Getty v. Boston and Maine Corp.*,⁹⁸ a railroad employee who slipped in a railroad station parking lot as he walked to board a commuter train to work argued that he was within the scope of his employment because a heavy snowstorm made other forms of transportation impractical and, in effect, compelled him to take the train to work. However, the court held that there was no "employer compulsion" to take the train, and thus the employer was not liable for the employee's injuries.⁹⁹ The court further noted that

[t]he sort of necessity referred to in *Metropolitan Coal* must stem more directly from a specific requirement of his job or a *specific understanding* as to his mode of travel. . . . [A]bsent circumstances

93. 160 F.2d 15 (2d Cir. 1947).

94. *Id.* at 17-18.

95. *Id.*

96. 265 F.2d 173 (1st Cir. 1959).

97. *Id.* at 178.

98. 505 F.2d 1226 (1st Cir. 1974).

99. *Id.* at 1228.

indicating a *special arrangement with one's employer*, subjective conditions resulting from employee choices of where to live and how to travel are insufficiently related to employment to determine the coverage of the federal statute."¹⁰⁰

Unlike transportation provided under federally mandated employer trip-reduction programs, in these cases the employers did not compel their employees to use a specific form of transportation, nor did the employees' use of the transportation provide any benefit to their employers.

The Clean Air Act's mandatory employer trip-reduction programs clearly involve a degree of employer control and compulsion. Employers will strongly encourage employees to use alternative means of getting to work each day, and some will provide other methods of transportation to their employees. In addition, employers may reduce the number of parking spaces at the worksite or begin charging employees for the use of parking spaces. And finally, employers will be required to poll their employees periodically to learn whether or not the employees are complying with the program's mandates.

Employers' compliance with other federal statutes, such as the FELA and the Jones Act, has expanded both the traditionally recognized workplace and employer liability when the employer's compliance with the federal requirements: (1) entails encouraging the employee to use certain facilities or means of transportation; (2) clearly benefits the employer; (3) is part of the employer's operational activities; or (4) involves some degree of employer control. Because the Clean Air Act's mandate of employer trip-reduction programs would encompass all four of these elements, it seems clear that a similar expansion of the definition of the workplace and of employer liability could follow the Clean Air Act's requirements.

B. *Employees Commuting To and From Work under an Employer's Trip-Reduction Program: Is This an Exception to the "Going and Coming" Doctrine?*

One rule of law explicitly excludes incidents during a commute from the employer's liability, with certain exceptions. The "going and coming" doctrine normally provides that an employee commuting to or from his workplace is not acting within the scope of his employment, and thus an employer would not be liable under the doctrine of *respondeat superior* to either employees or to third parties for incidents stemming from employees' commutes to work.¹⁰¹ Further, under the same

100. *Id.* at 1227-28 (emphasis added).

101. See, e.g., *Konradi v. United States*, 919 F.2d 1207, 1209 (7th Cir. 1990); *Weiss v. Culpepper*, 281 So. 2d 372, 373 (Fla. 3d DCA 1973); *Pyne v. Witmer*, 543 N.E.2d 1304, 1307 (Ill.

doctrine, injuries to an employee that occur while the employee travels to or from work are generally not compensable under the Workers' Compensation Act.¹⁰² The rationale behind this rule is that the risks to which the employees are exposed while travelling to and from work are shared by society as a whole and do not normally arise as a result of the work of employers.¹⁰³

There are, however, several exceptions to the going and coming rule. The four most widely approved exceptions are as follows:

- (1) The Claimant's employment contract includes transportation to and from work or payment therefor;
- (2) The Claimant has no fixed place of work or serves as a travelling salesperson;
- (3) The Claimant is on a special mission for the employer; or
- (4) Special circumstances are such that Claimant was furthering the business of the employer.¹⁰⁴

Exceptions one and four are especially relevant to the possibility of increased employer liability under section 7511a(d)(1)(B) of the Clean Air Act Amendments of 1990.

The first exception, known as the "wage payment or travel exception"¹⁰⁵ to the "going and coming" rule, provides that if a workers' compensation applicant were being paid for the time he travelled to or from work, his injury would be compensable.¹⁰⁶ For example, an employee paid from the time he left home, rather than from the time he arrived at work, would be compensated under workers' compensation law for injuries sustained during the commute to work. In effect, the employee

1989); *Biel, Inc. v. Kirsch*, 161 N.E.2d 617, 618 (Ind. 1959); *Roger v. Dufrene*, 553 So. 2d 1106, 1108 (La. Ct. App. 1989).

102. *See, e.g.*, *Hughes v. Decatur General Hosp.*, 514 So. 2d 935, 937 (Ala. 1987); *Cook v. A.H. Davis & Son, Inc.*, 567 A.2d 29, 30 (Del. Super. Ct. 1989); *Hall v. DeFalco*, 533 N.E.2d 448, 452 (Ill. App. Ct. 1988); *Hughes v. Gearhart Indus., Inc.*, 552 So. 2d 717, 719 (La. Ct. App. 1989); *Manzo v. Amalgamated Indus. Union Local 76B*, 575 A.2d 903, 904 (N.J. Super. Ct. App. Div. 1990); *Fine v. S.M.C. Microsystems Corp.*, 553 N.E.2d 1337, 1338 (N.Y. 1990); *Brown v. Workmen's Comp. Appeal Bd. (Liken Employment Nursing Serv.)*, 588 A.2d 1014, 1016 (Pa. Commw. Ct. 1991); *Septa v. Workmen's Comp. Appeal Bd. (Scott)*, 582 A.2d 421, 422 (Pa. Commw. Ct. 1990); *Kear v. Workmen's Comp. Appeal Bd. (Fairman Drilling Co.)*, 517 A.2d 586, 588 (Pa. Commw. Ct. 1986); *Evans v. Illinois Employers Ins. of Wausau*, 790 S.W.2d 302, 304 (Tex. 1990).

103. *Evans*, 790 S.W.2d at 305.

104. *See, e.g.*, *Mahon v. Reilly's Radio Cabs, Inc.*, 513 A.2d 367, 370 (N.J. Super. Ct. App. Div. 1986); *Brown v. Workmen's Comp. Appeal Bd. (Liken Employment Nursing Serv.)*, 588 A.2d 1014, 1016 (Pa. Commw. Ct. 1991); *Septa v. Workmen's Comp. Appeal Bd. (Scott)*, 582 A.2d 421 (Pa. Commw. Ct. 1990); *Kear v. Workers' Comp. Appeals Bd. (Fairman Drilling Co.)*, 517 A.2d 586, 588 n.1 (Pa. Commw. Ct. 1986).

105. *See Baroid v. Workers' Comp. Appeals Bd.*, 121 Cal. App. 3d 558, 566 (1981) (citations omitted).

106. *See also Manzo v. Amalgamated Indus. Union Local 76B*, 575 A.2d 903, 904 (N.J. Super. Ct. App. Div. 1990).

would be considered to have been acting within the scope of his employment during such a commute.¹⁰⁷

Such an exception could logically be expanded to include some forms of employer compliance with the employer trip-reduction programs. For example, an employer that compensated employees for carpooling in their own cars,¹⁰⁸ provided passes for mass transit, or awarded complying employees with prizes or cash bonuses, could be viewed as paying the employee for his travel time. Further, an employer that conditioned employment on compliance with the trip-reduction programs¹⁰⁹ could be seen as providing a bonus of continued employment to those employees who comply.

However, the cases in this area are quick to point out that an employer's mere provision of free transportation for its employees is not enough to bring the employees' travel to and from work within the scope of employment.¹¹⁰ Rather, there must be some benefit to the employer as a result of the provision of employee transportation.¹¹¹ An employer furnishing transportation to its employees in conjunction with a federally-mandated trip reduction program would certainly receive a benefit from this action—it would escape the high fines levied against employers for noncompliance with the act.¹¹² Thus, there exists a real danger of increased employer liability in this area.

The final exception to the "going and coming" doctrine applies when the employee is furthering the business of the employer by means of his travel. Under the "furtherance of employer's business" exception,¹¹³ off-premise injuries are only compensable if, at the time of the injury, the employee is actually engaged in the furtherance of the employer's business activities.¹¹⁴

107. *Id.*; see also *Baroid*, 121 Cal. App.3d at 566, n.2 (1981) (citations omitted). This idea seems to stem from the common law, which held that "where, as an incident of the employment, the master is transporting the servant to or from his work, the servant is constructively within the scope of his employment, and the master owes him a duty of care." 53 AM. JUR. 2D *Master and Servant*, § 185 (1970).

108. See, e.g., *Septa*, 582 A.2d at 422; *Kear*, 517 A.2d at 588.

109. See *infra* section VI.

110. See *Mahon v. Reilly's Radio Cabs, Inc.*, 513 A.2d 367, 370 (N.J. Super. Ct. App. Div. 1986).

111. *Id.* at 371.

112. See *infra* section VII.

113. *Brown v. Workmen's Comp. Appeal Bd. (Liken Employment Nursing Serv.)*, 588 A.2d 1014, 1016 (Pa. Commw. Ct. 1991).

114. The reasons behind this exception are clear:

[t]he risks which are generated by an employee's activities while serving his employer's interests are properly allocated to the employer as a cost of engaging in the enterprise. . . . [But when the employer] had only a marginal relationship with the act which generated the risk and did not benefit by it, the purpose of this policy falls, and the responsibility for preventing the rise is properly allocated to employee.

An employee's compliance with his employer's trip-reduction program plans would save his employer from expensive noncompliance fines.¹¹⁵ Further, an employee adhering to the mandates of such programs would be following his employer's direct orders. These actions could certainly be interpreted as an employee furthering the business of his employer, and would, thereby, fall within the final exception to the "going and coming" doctrine and expand the employer's liability for incidents occurring during its employees' commutes to and from work.

Thus, an employer who obeys the dictates of section 7511a(d)(1)(B) and creates a trip-reduction program, if his employees comply with such a program, may become liable for drastically increased workers' compensation insurance premiums.¹¹⁶ Further, if the injury occurs not to his employee, but to a third person, the employer will be liable for such injuries, that are not covered by workers' compensation insurance. The resultant costs of either situation promise to increase employers' expenses radically. These dramatic cost increases imposed upon a small percentage of air polluters, do not seem to be in accord with the 1990 Clean Air Act's goal of implementing these programs at an acceptable cost.

C. *Voluntary Employer Commuting Plans and Resultant Employer Liability*

Prior to the Clean Air Act's mandate of trip-reduction programs, employers in some areas instituted *voluntary* programs to transport their employees to and from the workplace from either their homes or from public transportation facilities.¹¹⁷ In *Hall v. DeFalco*,¹¹⁸ the court held that an exception to the "going and coming" rule exists where an employer "provides a means of transportation to or from work or has done an affirmative act in supplying an employee with something in connection with going to or coming from work."¹¹⁹ In *Hall*, a manager of a fast-food restaurant transported employees to and from a public train station from work on a daily basis in order to improve access to the workplace and thereby benefit the employer corporation. The court held that an accident that occurred while the manager was driving one of the

Marcel v. Pool Co., 1992 WL 373646 (E.D.La. 1992).

115. See *infra* section VII.

116. Workers' compensation, because it is normally an exclusive remedy, is meant to be interpreted liberally in favor of coverage. See, e.g., *Hall v. DeFalco*, 533 N.E.2d 448, 452 (Ill. App. Ct. 1988); *Mahon*, 513 A.2d at 369.

117. *Hall*, 533 N.E.2d 448; see also *Schauder v. Pfeifer*, 570 N.Y.S.2d 179 (N.Y. App. Div. 1991).

118. 533 N.E.2d 448 (Ill. App. Ct. 1988).

119. *Id.* at 452 (citing *Hindler v. Dillbeck*, 370 N.E.2d 165, 169 (Ill. 1977)); see also *Saintida v. Tyre*, 783 F. Supp. 1368, 1374 (S.D. Fla. 1992).

employees to the station was an affirmative act within the scope of the manager's employment, and that the injured employee should recover workers' compensation.¹²⁰

Similarly, in *Schauder v. Pfeifer*,¹²¹ an employer's voluntary van pool service created for the benefit of his employees fell within the expanded definition of the workplace, and as a result the court awarded workers' compensation to an injured employee. The employer formed a van pool for transporting its employees to and from work for a monthly fee, and the driver of the van, an independent contractor, was under the direct control of the employer. In an accident involving the van during a commuting trip, an employee was injured. In that case, the court held that "an employer who assumes, by contract or custom, the responsibility of transporting its employees must likewise bear the responsibility for the risks encountered in that transportation."¹²²

The law in most jurisdictions is in accord with these cases, holding that when "the employer provides the worker with transportation, an accident which occurs during the transportation is considered to have arisen out of and in the course of employment, rendering it compensable [under the Workers' Compensation Act]."¹²³

When workers' compensation insurance companies pay higher claims to injured employees, the employers paying the premiums for such insurance will necessarily be forced to pay higher rates for their insurance, thus increasing employer costs. Further, the fact that courts are willing to expand the definition of the workplace for purposes of workers' compensation claims suggests that courts may also be willing to alter the definition of the workplace in situations outside of the realm of workers' compensation. This possibility is one that could deeply affect employers subject to the requirements of section 7511a(d)(1)(B).

Employers can try to escape the potential increased costs of workers' compensation insurance by choosing methods other than providing employee transportation to comply with the Clean Air Act's requirements. However, even alternative means of compliance may create significant increases in employer costs.¹²⁴ Furthermore, because the courts have been so willing to increase employer liability in the area of workers' compensation, it is plausible that they will expand liability in other

120. *Hall*, 533 N.E.2d at 452.

121. 570 N.Y.S.2d 179 (N.Y. App. Div. 1991).

122. *Id.* at 180.

123. *Saintida*, 783 F. Supp. at 1374 (citing *Wert v. Tropicana Pools, Inc.*, 286 So. 2d 1, 2 (Fla. 1973)).

124. For example, the options of telecommuting and reduced work weeks often result in decreased employee production, and reducing employee parking spaces or charging for them may result in costly conflicts with unions. See *infra* section VII.

areas as well. Because worker's compensation can be seen as a potential *limit* on liability,¹²⁵ many employers may choose the more easily anticipated costs of the workers' compensation insurance over the uncertain and potentially exorbitant costs imposed by the other methods of compliance with the Clean Air Act mandate. Thus, a large-scale implementation of transportation-centered plans by employers, with its resultant increase in worker's compensation insurance rates, is the most likely outcome.

V. EMPLOYEES' PERCEIVED LOSS OF PERSONAL FREEDOM

Employers who try to convince employees to give up their cars will not be faced with an easy task—"despite public campaigns to get motorists to share rides with co-workers or to use mass transit, commuters increasingly prefer to drive alone."¹²⁶ Increased use of the auto for commuting is connected with the movement of the work force from the city to the suburbs.¹²⁷ Work trips now are frequently linked to other trips, such as personal errands and picking up children from day care. As a result, commuting options are often not feasible for employees.¹²⁸ Driving alone is simply more convenient.¹²⁹ Further, recent history in some areas has shown a disturbingly rapid rise in vehicle miles driven.¹³⁰ Employees who now combine many other tasks with their commute to and from work each day will be severely hampered if forced to commute in car pools or mass transit.¹³¹ Their mobility will not be "enhanced," as the Act promises, but, rather, will become more restricted. In fact, this inevitable decrease in mobility may actually worsen air pollution conditions. Employees who are required to ride from work in multiple-passenger transportation may, after arriving home, hop back into their cars

125. See, e.g., *Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 636 (1983); *Fontenot v. AWI, Inc.*, 923 F.2d 1127, 1132 (5th Cir. 1991); *Smither & Co. v. Coles*, 242 F.2d 220, 222 (D.C. Cir. 1957).

126. David Ibata, *Cars Remain Road-Cloggers of Choice*, CHI. TRIB., June 17, 1993, at D1; see also Robert Reinhold, *Hard Times Dilute Enthusiasm for Clean-Air Laws*, N.Y. TIMES, November 26, 1993, at A1. "[E]mployees are unlikely to change their solo-driving ways." Litvan, *supra* note 7, at 36.

127. Ibata, *supra* note 125, at 1; see also Matthew L. Wald, *Companies Encourage Employees to Carpool*, N.Y. TIMES, Apr. 12, 1993, at B1.

128. *Id.*

129. Ibata, *supra* note 125, at 1.

130. "During the 1980s vehicle miles driven in the Chicago area increased by a third while the region's population increased barely 2 percent." Stephen F. John & Douglas N. Kane, *Getting Serious About Auto Pollution*, CHI. TRIB., Feb. 9, 1993, at 15.

131. Thus, the employer trip-reduction mandate becomes a quality of life issue. Linda Molnar, *New Rules Nudging Companies to Reduce Employee Commuting*, N.Y. TIMES, Jan. 16, 1994, Section 13NJ, at 1.

and retrace the miles they just travelled to run errands or pick up their children.

And although driving a car is *not* a fundamental right in the United States,¹³² many drivers feel they have a divine right to freedom of movement.¹³³ This is a notion that psychologists say may be "the biggest hurdle of all" in implementing the employer trip-reduction programs.¹³⁴ Employees may balk at compliance with the programs because they feel as though their personal freedom is infringed upon.¹³⁵ "This is an issue where America's love of the automobile and personal freedom will come face-to-face with the commitment to protect the environment,"¹³⁶ and the employer will be thrust into the middle of this dispute.

VI. PROBLEMS CREATED BY EMPLOYER CONTROL OVER EMPLOYEES' ACTIONS

Another problem inherent in section 7511a(d)(1)(B) is that the mandatory programs will force employers to oversee their employees' off-duty travelling to and from work. This role will create burdens on the employer in the forms of both increased costs of monitoring, and in costs of possible decreased productivity due to declining employee morale.

Employer trip-reduction regulations in many states impose six primary requirements onto large employers: (1) the affected employers must register with the Department of Transportation; (2) each employer must designate an Employee Transportation Coordinator to administer the program at each work location with 100 or more employees; (3) employees must be surveyed periodically to determine their commuting patterns; (4) the employer must submit to the Department of Transportation a compliance plan that describes what actions will be taken to reduce automobile commuting, and the plan's accuracy and likely effi-

132. See, e.g., *Lillios v. Justices of the N.H. Dist. Court*, 735 F. Supp. 43, 47 (D.C.N.H. 1990); *Ross v. Gunaris*, 395 F. Supp. 623, 627 (D.C.Mass. 1975); *People v. Peterson*, 734 P.2d 118, 122 (Colo. 1987); *Ward v. State*, 373 S.E.2d 65, 67 (Ga. Ct. App. 1988); *Heying v. State*, 515 N.E.2d 1125, 1128-29 (Ind. Ct. App. 1987); *State v. Skurdal*, 767 P.2d 304, 307 (Mont. 1988); *State v. Green*, 427 N.W.2d 304, 305 (Neb. 1988); *Porter v. Jensen*, 390 N.W.2d 511, 515 (Neb. 1986); *State v. Coyle*, 470 N.E.2d 457, 458 (Ohio 1984); *Commonwealth Dep't of Transp. v. Wysocki*, 535 A.2d 77, 78 (Pa. 1987); *Texas Dep't of Pub. Safety v. Schaejbe*, 687 S.W.2d 727, 728 (Tex. 1985); *Smith v. Cox*, 609 P.2d 1332, 1333 (Utah 1980).

133. "Automobility is inextricably linked with personal freedom. Attempts to limit mobility are attacks on freedom." Matt DeLorenzo, *There's Room for Fast, Fun Cars in Diet of Social Responsibility*, AUTOWEEK, Dec. 31, 1990, at 11. "Most people feel they have a God-given right to drive their car. It is going to be a difficult task to change the mindset of employees." Noble, *supra* note 67, at 25.

134. Spencer, *supra* note 63, at 1.

135. Molnar, *supra* note 131, at 1.

136. Buss, *supra* note 59, at 8.

cacy in reducing vehicle trips must be approved by a Department of Transportation-approved "certifier"; (5) the employer must make good faith efforts to implement its plan; and (6) the employer must increase the number of passengers in each vehicle (Average Passenger Occupancy or APO) by not less than 25 percent over the regional average.¹³⁷ Each of these steps promises to be costly in terms of both its creation and its administration.

These requirements essentially compel employers to supervise and administer the heretofore private actions of their employees.¹³⁸ Not only must the employers submit plans for employee commuting reduction, they must also police the employees by surveying them at given intervals to determine if the employees are actually complying. The fact that a coordinator must be appointed to ensure that the program is being properly administered compounds the employer-policing role. The requirement of an employer's "good faith effort" to implement the plan forces the employer to intrude upon the formerly personal actions of its employees. Employees who feel that employers are infringing upon their personal activities too greatly may resent the interference, and this may decrease employee morale, which often translates into diminished productivity.¹³⁹

Although companies will be subject to fines for not drawing up employee trip-reduction plans as required by section 7511a(d)(1)(B), "there is no penalty [under the statute] for workers who refuse to cooperate."¹⁴⁰ Thus, employers will bear the responsibility for getting their workers out of their cars.¹⁴¹ Employers can "draw from a long list of

137. Schneider & Wilson, *supra* note 1, at 16; *see also* Unterberger, *supra* note 59, at 9. "The APO is determined by dividing the number of employees by the number of vehicles driven to work." Romano, *supra* note 51, at 34. The APO is "the standard for measuring compliance with trip reduction regulations." Schneider & Wilson, *supra* note 1, at 16.

138. The employer trip reduction provision "means telling employees their preferred method of transportation may no longer be acceptable—and even punishing those who drive to work alone." Romano, *supra* note 51, at 34.

139. When employees believe their privacy is being violated there is a negative effect on employee morale and productivity. Ernest Kallman, *Electronic Monitoring of Employees: Issues & Guidelines*, J. SYS. MGMT., June, 1993, at 17. Erosion of morale often goes hand-in-hand with reduced productivity. Jennifer J. Laabs, *Companies Kick the Smoking Habit*, PERSONNEL J., Jan., 1994, at 38; Gail Gilmore, *Coping with the Reality of Rightsizing: Seeking Efficiency and Productivity Gains*, RISK MGMT., Jan., 1994, at 43. High employee morale, on the other hand, often leads to increased productivity. Cindy D. Edmonds, *Running a City on a Shoestring: Vestavia Hill, Alabama*, MGMT. ACCT. (USA), Jan., 1994, at 28; Marilyn Citron, *Staying Well: Small Companies have the Most to Gain from Employee Wellness Programs*, DETROITER, Oct., 1993, at 36.

140. Reinhold, *supra* note 125, at A1. Further, "the law does not allow employers to threaten employees with 'severe penalties' if they don't [comply]" Jeff Millar, *Making a Federal Case, Right Out of the Blue*, HOUSTON CHRON., Apr. 10, 1994, Outlook Section, at 6.

141. Spencer, *supra* note 63, at 1.

possible measures" to get their employees to comply: "eliminating current parking subsidies; defraying the cost of mass transit; setting up car and van pooling and ride-sharing programs . . . encouraging work at home; operating mid-day shuttles to local shopping areas; providing 'guaranteed [taxicab] rides home' to late workers; [and] establishing more on-site amenities such as health clubs."¹⁴² Employers can also reduce the number of parking spaces in their lots or begin charging high rates for parking,¹⁴³ thereby forcing a certain percentage of their workforce to give up the single-passenger commute. This method, although unpopular and likely to give the employer a "bad rap" among employees, is highly effective in reducing the number of commuters.¹⁴⁴

Under the "employment at will" doctrine,¹⁴⁵ adopted in most states, an employer also has the option of legally conditioning his employees' continued employment with the company on their compliance with the commuting program. Thus, employees who fail to comply would simply lose their jobs. Although this solution would certainly save the employer the fines levied for noncompliance,¹⁴⁶ there are other substantial costs involved in imposing such an ultimatum, especially in terms of the larger-sized companies that section 7511a(d)(1)(B) targets.

Stated simply, for many employees it will be nearly impossible to comply with such programs. For those living or working in suburban areas, mass transit is often not an option. Further, car pools and van pools may not be feasible for those employees with additional transportation needs beyond commuting to and from work. For example, many employees run errands on their way to and from work, pick up a spouse from work, or pick up children from day care.¹⁴⁷ Employees with disa-

142. Buss, *supra* note 59, at 8.

143. See, e.g., Jim Barlow, *A Bad Solution for Our Pollution*, HOUSTON CHRON., Jan. 20, 1994, Business Section, at 1.

144. Romano, *supra* note 51, at 34. However, this may lead to "conflicts with unions if employers try to use collectively bargained [-for] paid parking as an incentive or disincentive." Noble, *supra* note 67, at 25.

145. This state law doctrine, relating to an employment relationship for an indefinite term, states that unless the employer and employee have contracted otherwise, either may terminate the employment relationship for good reason, bad reason, or no reason at all. See, e.g., Chauvin v. Tandy Corp., 984 F.2d 695, 697 (5th Cir. 1993) (applying Louisiana law); Solomon v. Walgreen Co., 975 F.2d 1086, 1089 (5th Cir. 1992) (applying Mississippi law); Forbus v. Sears Roebuck & Co., 958 F.2d 1036, 1041 (11th Cir.) (applying Alabama law), *cert. denied*, 113 S. Ct. 412 (1992); LaScola v. U.S. Sprint Communications, 946 F.2d 559, 563 (7th Cir. 1991) (applying Illinois law); Schneider v. TRW, Inc., 938 F.2d 986, 990 (9th Cir. 1991) (applying California law); Warren v. Crawford, 927 F.2d 559, 562 (11th Cir. 1991) (applying Georgia law); Smith v. Gould, Inc., 918 F.2d 1361, 1364 (8th Cir. 1990) (applying Nebraska law); Economu v. Borg-Warner Corp., 829 F.2d 311, 317 (2d Cir. 1987) (applying Connecticut law).

146. See *infra* section VII.

147. See *supra* section V. Although some companies have placed stores, drycleaners, and child care facilities on the workplace property so that employees can run errands without leaving

bilities may find participation in a car pool or van pool to be particularly difficult. Working odd shifts to escape the dictates of the statutory provision may not be feasible for parents of small children, and biking or walking to work is not an option for those living a long distance from the workplace.

Those employees who cannot comply with the employer's trip reduction program when the employer conditions continued employment on compliance will face the loss of their jobs. Imposition and enforcement of such ultimatums may lower morale among the remaining employees, and pose the danger of decreased productivity.¹⁴⁸

Employers risk facing additional costs by conditioning employment on compliance with the trip reduction programs. For example, if the employer terminates employees for failure to comply with the programs, the employer may, in some instances, be liable for increased unemployment compensation insurance.¹⁴⁹ Moreover, if the labor pool in the area surrounding the company is small, or if the terminated employees possess specialized skills, they may be expensive or impossible to replace. Retraining new employees will also be time-consuming and costly in such situations.

The trip reduction programs only require that the employer reduce the APO of his commuting employees by 25%. This places the employer in the difficult position of choosing which employees must comply. Unless the employer is careful and fair in his choices, this, too, may cause employee resentment. Overall, the employer control demanded by the employer trip-reduction programs will result in costs of lower workplace morale and productivity.

VII. EXCESSIVE COSTS OF COMPLIANCE

A final dual cause for concern is that section 7511a(d)(1)(B) of the Clean Air Act Amendments of 1990 imposes real costs on the employer that may be disproportionate to the employers' contribution to the air

the workplace, most companies don't have the resources to bring shopping areas closer to the employees. Romano, *supra* note 51, at 34.

148. "Faced with the possibility of a layoff . . . many employees experience significant levels of stress, sometimes to the point where their work performance deteriorates." This can create "significant morale problems that can lead to loss of productivity and decreased work quality" Gilmore, *supra* note 139, at 43.

149. For example, if an employee is fired because she is unable to work odd shifts or participate in a carpool or van pool due to child care obligations, at least one state affected by the employer trip-reduction requirement would allow the employee to recover unemployment compensation benefits. See *Sanchez v. Unemployment Ins. Appeals Bd.*, 569 P.2d 740, 745 (Calif. 1977).

pollution problem,¹⁵⁰ and the amount of pollution that will actually be reduced as a result of this provision is questionable.¹⁵¹ According to one source, "even perfect compliance with [the employer trip-reduction program]'s requirements would reduce ozone pollution by only about 2 percent."¹⁵² And figures show that commuting accounts for only one quarter of all vehicle trips,¹⁵³ so, perhaps the employer trip-reduction programs—aimed *only* at commuters—are not the most cost-effective solution to the problem.¹⁵⁴

Employers will be required to pay high costs under the new provisions whether they comply or fail to comply with them. The cost of compliance itself promises to be substantial. "Officials estimate the program could cost up to \$192 million a year [in Washington, D.C.]. Most of that money would be paid by individual employers."¹⁵⁵ In Chicago, estimates of compliance with section 7511a(d)(1)(B) of the Clean Air Act start at \$200 million per year;¹⁵⁶ compliance in Connecticut is estimated between \$200 and \$900 per employee annually.¹⁵⁷

The provision requires employers to "offer alternatives to traditional single-passenger commuting. Some of those alternatives would be the purchase of vans and offering airline tickets, portable televisions or cash as incentives for employees who walk or bike to work."¹⁵⁸ Employers may also revise work schedules "to reduce the number of trips" that employees take to and from work,¹⁵⁹ or allow their employees

150. "[O]nly about 14 percent of the vehicle miles traveled during the morning rush hour is to employers of 100 or more people." McBride, *supra* note 1, at 1.

151. "[S]uch plans will reduce air pollution anywhere from 5 percent to no gain at all." Barlow, *supra* note 142, at 1. The employer trip-reduction programs will reduce air pollution only slightly more than "requiring that water-based paint be used to stripe roads." *Id.* In California, "most of the regulators who will enforce the new requirement are a bit pessimistic about how well it will actually achieve cleaner air." Litvan, *supra* note 7, at 36.

152. Buss, *supra* note 56, at 3.

153. Commuting has fallen from 32 percent of all vehicle trips in 1969 to 26 percent in 1990. Barlow, *supra* note 142, at 1.

154. "'Only a small percentage of pollution comes from work-related travel. Even if we achieve the [employer trip reduction program's] goal, it will have a negligible effect on air quality.'" Molnar, *supra* note 130, at 1. One writer has predicted that the trip-reduction programs will end up costing "thousands more dollars than other methods" of cleaning up the environment. Barlow, *supra* note 142, Business Section, at 1. In addition, even an air pollution control officer has stated that "'This . . . [is] the most costly and least-effective program available to us.'" Steve LaRue, *Tough EPA Smog Plan Advances, Reluctantly*, SAN DIEGO UNION-TRIB., Dec. 8, 1993, at B1.

155. Naylor, *supra* note 50, at C4.

156. Ibata, *supra* note 125, at D1.

157. McBride, *supra* note 1, at 1.

158. Ted Gregory, *Businesses Rally, Seek Upgrade of Area's Clean-Air Classification*, CHI. TRIB., Dec. 18, 1993, at 5.

159. Litvan, *supra* note 7, at 36.

to "telecommute."¹⁶⁰ All of these alternatives amount to costly propositions for employers¹⁶¹—the cost per employee can range from \$107 to \$700 per year in the Chicago metropolitan area,¹⁶² and in the Baltimore area, costs are expected to be up to \$1000 per employee per year.¹⁶³

Employees under the program would be urged to car-pool or use mass transit. But in places where that's not practical, or for employees who work odd hours, much of the [financial] burden would be placed on employers. They would have to offer van pools, shortened workweeks, and "guaranteed rides home" to late workers in some instances.¹⁶⁴

Many employers also complain about the cost of the paperwork and bookkeeping the new legislation requires.¹⁶⁵ In addition, the costs of hiring an employee to manage the trip-reduction program and of making periodic checks to ensure that employees are complying with the program, are borne completely by the employer. Some states, such as New Jersey, even require each plan and update submitted by employers to include a fee, ranging from \$200 to \$1600.¹⁶⁶ Of course, the high costs of compliance will be felt most severely by the smaller companies (100-200 employees) affected by the trip-reduction provision.

"Some business executives also fear that the federal mandate could force some firms to relocate out of the [affected] region and discourage others from moving in."¹⁶⁷ The loss of these businesses would result in costs not only to other businesses in the area, but to the surrounding community as well.

Even though compliance costs are high, not complying will prove even more expensive. Section 7511d(a) of the Clean Air Act Amendments of 1990¹⁶⁸ provides for enforcement measures against those employers failing to comply with the mandatory trip-reduction programs.¹⁶⁹ If employers can't get their employees to begin complying by November 1996, companies could face possible criminal penalties and

160. See, e.g., Molnar, *supra* note 131, at 1.

161. For example, many employers have complained that revising work schedules can actually reduce production, which in turn increases employer costs. Litvan, *supra* note 7, at 36.

162. Gregory, *supra* note 158.

163. Reinert, *supra* note 1, at 3.

164. Naylor, *supra* note 50, at C4.

165. Reinhold, *supra* note 126, at A1.

166. Schneider & Wilson, *supra* note 1, at 16.

167. Ibata, *supra* note 52, at 1.

168. 42 U.S.C. § 7511d(a) (1990).

169. The section states that:

Each implementation plan revision required under section 7511a(d) . . . of this title . . . shall provide that, if the area to which such plan revision applies has failed to attain the national primary ambient air quality standard for ozone by the applicable attainment date, each [such employer] shall . . . pay a fee to the State as a penalty for

finest ranging up to \$25,000 a day.¹⁷⁰ However, there is a loophole—[i]f the employer spends an amount equal to the cost of providing each employee a parking space at the workplace and does not achieve the required increase in ridership but shows that such an increase is not feasible, the requirement of the bill will be considered to have been met.¹⁷¹

Some argue that there are more efficient ways to clean the air and that perhaps the burden should be shifted to commuters, rather than employers.¹⁷² “The Clean Air Act sets out to lower [the number of commuters] to reduce the pollution created by cars. But critics of the legislation say that the lack of suburban mass transit makes achieving the goals difficult, if not impossible, and puts an unfair burden on suburban employers and commuters.”¹⁷³ The employer trip-reduction programs will not enhance mobility, and the costs borne by employers will be too great.

VIII. POSSIBLE ALTERNATIVE SOLUTIONS

Largely because of the above-mentioned problems with the employer trip-reduction mandate, in the one instance prior to November 1994 where this plan was put into action, the program did not work. Los Angeles, California implemented the plan earlier than required¹⁷⁴ and was to serve as a “model for the anti-air pollution battle” in other states.¹⁷⁵ However, “after five years of trying, and despite threats of fines of up to \$50,000 a day against companies that refuse to cooperate, Los Angeles’ chief air quality officer acknowledges that the campaign to get more people to stop driving hasn’t produced the hoped-for results.”¹⁷⁶ Explanations for the failure of the California program are many—the program “costs too much for the air quality benefits it pro-

such failure . . . for each calendar year beginning after the attainment date, until the area is redesignated as an attainment area for ozone.

42 U.S.C. § 7511d(a) (1990). Section 7511d(b) goes on to state that the fee shall be \$5,000, but will be subject to some adjustments. 42 U.S.C. § 7511d(b) (1990).

170. Fines for noncompliance in Wisconsin could reach as high as \$25,000 per day. Buss, *supra* note 59, at 8. Failure to comply in Texas would mean state fines starting at \$10,000 per day. Liebrum, *supra* note 59, at A25. In Illinois a noncomplying employer would be fined between \$1000 and \$10,000 per day. Spencer, *supra* note 63, at 1.

171. S. REP. NO. 228, *supra* note 5, at 32, reprinted in 1990 U.S.C.C.A.N. at 3418. Of course, this begs the questions of how to determine what a parking space costs and how to show that an increase in ridership is not possible.

172. Randall Lane, *The Commuter Police*, FORBES, Dec. 20, 1993, at 239.

173. Spencer, *supra* note 63, at 1.

174. Litvan, *supra* note 7, at 36.

175. David Ibata, “Model” Smog-Busting Plan Flops; Local Firms Buck U.S. Law as Clean Air Deadline Nears, CHI. TRIB., Jan. 7, 1994, News Section, at 1.

176. *Id.*

duces,"¹⁷⁷ "it often ties up too much manpower,"¹⁷⁸ and "it is a very difficult, paper-heavy process."¹⁷⁹

However, there are simple market-based solutions to the problem of air pollution caused by the number of motor vehicles on the roads, including increasing gasoline taxes¹⁸⁰ or requiring "high-priced tax stickers for driving at certain congested hours."¹⁸¹ The money raised through such programs could be earmarked to improve mass transit systems so that they could serve a wider range of geographical areas. Because of the increased costs associated with driving, employees would *voluntarily* drive less frequently to work, thus eliminating employee feelings of loss of personal freedom. In the same vein, employers would no longer assert control over their employees' driving habits, which in turn could eradicate morale problems created by mandatory trip reduction. And by removing employer control from the picture, the employer would no longer face risks of liability for employee commuting accidents. Another benefit to such programs is that they would decrease driving *across the board*, and would not merely curb commuter air pollution problems.¹⁸²

Yet another plausible alternative to the employer trip-reduction programs is rewarding voluntary compliance with clean air standards with corporate tax credits. However, this solution would again limit the scope of the clean-up to employers only.

These proposed solutions would be much easier to manage because they would require involving a much smaller number of people in administration. Companies would not need to hire additional employees to run trip-reduction programs, and the government would not need to hire as many employees to ensure compliance. Furthermore, these suggestions would be much less costly. The salaries of the employees hired to police the programs, mentioned above, would be eliminated. Also, the first two suggestions would actively generate money to improve the mass transit systems. The employer trip-reduction program scheme, in contrast, only provides federal money to improve mass transit in the event that employers fail to meet their deadlines under the statute.¹⁸³

177. *Id.*

178. *Id.*

179. *Id.*

180. Stephen F. John & Douglas N. Kane, *Getting Serious About Auto Pollution*, CHI. TRIB., Feb. 9, 1993, at 15; see also Barlow, *supra* note 142, at 1.

181. Barlow, *supra* note 143, at 1.

182. In California, General Accounting Office researchers "suggested that market-based disincentives that touch all drivers, not just employees of certain-size companies—such as an increase in the gasoline tax—might be more effective in helping to reduce emissions." Litvan, *supra* note 7, at 36.

183. See S. REP. NO. 228, *supra* note 5, at 26, reprinted in 1990 U.S.C.C.A.N. at 3412.

These proposed solutions may actually improve the diversity in many suburban companies as well. By actively improving mass transit and the areas it reaches, poorer inner-city workers may be able to commute to suburban companies that may offer higher salaries and more potential.¹⁸⁴

Through the use of an increased tax levied on either gasoline itself or on drivers driving during congested hours, or even by awarding corporations tax credits for voluntary compliance, "people's behavior and attitudes toward driving"¹⁸⁵ can be modified in a less intrusive manner. Although politicians may be reluctant to pass tough measures such as stiff tax increases,¹⁸⁶ the air pollution problem in the United States calls for solutions that work, regardless of the possible political repercussions. These proposals, used instead of the employer trip-reduction programs would, in the long run, lead to better overall results in cleaning up this country's air pollution problem.

IX. CONCLUSION

Section 7511a(d)(1)(B) of the Clean Air Act Amendments of 1990 has the potential to increase dramatically employer responsibility, liability, and costs, and to infringe upon employees' freedom of mobility. The Amendments set out as their purpose not only to decrease VMTs, but also to enhance mobility—and to meet both goals at an acceptable cost. But the decrease in VMTs won't come as easily as Congress had planned. Mobility is not enhanced by requiring individuals with different personal schedules to ride mass transit or car pool to work each day. Moreover, it is questionable whether the cost of the program is "acceptable" in light of the large number of actual and potential increased costs borne by employers. If the plan causes large corporations to move from severe or extreme nonattainment areas into attainment areas, the whole cycle will start anew elsewhere. In the meantime, communities will lose valuable sources of income and many workers will lose their jobs.

The proposed solutions of a simple increase in the gasoline tax, a required tax for driving during congested hours, or a corporate tax credit awarded for voluntary compliance, are much simpler, cheaper, and more effective methods for combating the pervasive air pollution problem plaguing our larger cities. Section 7511a(d)(1)(b) of the Clean Air Act has already been put to the test and has failed to produce the desired results. Perhaps now is the time to experiment with alternative solu-

184. See generally E. Douglass Williams & Richard H. Sander, *Prospects for Putting America to Work in the Inner City*, 81 GEORGETOWN L.J. ASS'N 2003 (1993).

185. Molnar, *supra* note 131, at 1.

186. Barlow, *supra* note 143, at 1.

tions, *before* the employer trip-reduction programs become an accepted part of the costs to American businesses.

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