

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 2206 (Lee)
Version: April 20, 2022
Hearing Date: June 28, 2022
Fiscal: No
Urgency: No
TSG

SUBJECT

Nonattainment basins: employee parking: parking cash-out program

DIGEST

This bill facilitates compliance with Parking Cash-Out (PCO) program laws by obligating commercial landlords to provide any of their tenants who are large employers with information about the cost of any parking provided as part of the lease.

EXECUTIVE SUMMARY

PCO programs give employees the option of receiving cash from their employer in lieu of subsidized parking. For three decades now, California law has required large employers located in regions with bad air quality to offer a PCO program to their employees. In practice, few employers are compliant, at least in part because of a vexing accounting problem. PCOs are simple enough to implement when it is clear how much an employer is paying to subsidize its employee's parking costs. In most commercial leases, however, parking costs are bundled together with all of the other amenities provided in exchange for the rent. That bundling makes it difficult for employers to calculate how much they are subsidizing their employees' parking and, as a result, difficult to administer a PCO program. This bill seeks to address the problem by requiring commercial landlords to provide separate information about parking costs to tenants who are large employers the next time they sign or renew a lease.

The bill is author-sponsored. Support comes from environmental groups and two municipalities who believe the bill is crucial to more widespread uptake of PCO programs. Opposition comes from commercial landlords, who contend that they should not have to bear the burden of breaking out the value of parking. The bill passed out of the Senate Transportation Committee by a vote of 11-3. If the bill passes out of this Committee, it will next be heard on the Senate Floor.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Defines a “parking cash-out program” as an employer-funded program under which an employer offers to provide a cash allowance to an employee which is equivalent to the parking subsidy that the employer would otherwise pay to provide the employee with a parking space. (Health & Saf. Code § 43845(a).)
- 2) Defines a “nonattainment air basin” as an air basin that does not meet specified state ambient air quality standards. (Health & Saf. Code § 39608(a).)
- 3) Defines “parking subsidy” as the difference between the out-of-pocket amount paid by an employer on a regular basis in order to secure the availability of an employee parking space not owned by the employer and the price, if any, charged to an employee for use of that space. (Health & Saf. Code § 43845(c)(2).)
- 4) Requires an employer of 50 or more people who is located in a nonattainment air basin and who provides a parking subsidy to its employees to offer those employees a parking cash-out program. (Health & Saf. Code § 43845(a).)
- 4) Allows a parking cash-out program to include a requirement that an employee participant certifies that the participant will comply with guidelines established by the employer designed to avoid neighborhood parking problems, with a provision that an employee that is not complying with the guidelines will no longer be eligible for the parking cash-out program. (Health & Saf. Code § 43845(b).)
- 4) Authorizes the California Air Resources Board (CARB) to impose specified civil penalties on an employer for failure to provide a parking cash-out program when required to do so. (Health & Saf. Code § 43845(f)(1).)
- 5) Authorizes a city, county, or air district to adopt, by ordinance or resolution, a penalty or other mechanism to ensure that employers within its jurisdiction are compliant with the parking cash-out law, so long as specified mechanism for ensuring due process are included. (Health & Saf. Code § 43845(f)(2).)
- 6) Prohibits a city, county, or air district and CARB from both imposing penalties on an employer for violating parking cash-out program requirements, and specifies that in event of that both entities impose penalties, only the penalty imposed by CARB applies. (Health & Saf. Code § 43845(f)(3).)

This bill:

- 1) Requires a commercial landlord entering into or renewing a lease for property in a nonattainment air basin on or after January 1, 2023, to provide any tenants who are employers of 50 or more employees with one of the following:
 - a) the market-rate parking cost amount as a separate line item in the lease; or
 - b) a list of parking costs within 30 days after the lease is entered into or renewed.
- 2) Specifies that the market-rate parking costs listed in the lease pursuant to (1)(a), above, are to be no less than what the parking would cost an individual unaffiliated with the property on which parking is provided or the employer through a transaction for the closest publicly available parking within one-half mile of the employee's workplace.
- 3) Requires an employer, upon the request of an employee, to give to that employee the parking cost information received from the lessor.
- 4) Requires an employer to offer a parking cash-out program even if the employer's lease does not comply with the requirements to list the market-rate parking costs as a separate line item in the lease.
- 5) Redefines "parking subsidy" to mean the difference between the price, if any, charged to an employee for the use of a parking space made available by an employer to that employee and either of the following:
 - a) the market rate of parking available to an employee, as required to be reflected in a lease, or;
 - b) the out-of-pocket amount paid by an employer for onsite or offsite employee parking acquired through the marketplace with no special rate offered because of a property lease, for an employee parking space not owned by the employer.
- 6) Provides that the requirement to list parking costs does not create a right for an employee to access, review, or challenge a lease, or a proposed lease, entered into between an employer and a lessor.

COMMENTS

1. Background on the Parking Cash Out Program

PCO programs give employees the option of receiving cash from their employer in lieu of subsidized parking. The idea is to incentivize employees to use alternative forms of transportation to get to work.

Three decades ago, California made PCO programs mandatory for large employers who subsidize their employees' parking costs and who operate in regions with bad air quality. AB 2109 (Katz, Ch. 554, Stats. 1992) The California Air Resources Board (CARB)

is the primary body tasked with enforcing the PCO program requirement, though more recent law also enables city, counties, and air districts to do so as well. (SB 728, Lowenthal, Ch. 359, Stats. 2009)

2. Positive reviews of PCO programs

There appears to be general agreement that, as a public policy intervention, mandatory PCO programs are highly effective – when employers comply with them.

CARB commissioned an analysis of impact of PCO programs on commuting behavior in 1997.¹ As summarized by the author, that analysis determined that when a PCO program was available to employees:

- Solo driving dropped 17 percent, from 76 percent to 63 percent of employees.
- Carpooling increased by 64 percent, from 14 percent to 23 percent of employees.
- Combined bicycling and walking increased 33 percent, from three to four percent.
- Vehicle miles traveled, along with their associated emissions, decreased by 12 percent per employee per year.
- Average carbon-dioxide emissions per employee per year went down to 367 kg (or nearly half a ton).

In 2002, the Legislative Analyst's Office (LAO) studied PCO programs and concluded that parking cash-out programs are inexpensive to administer and offer numerous benefits.² Among other things, the LAO concluded, PCO programs help to ease traffic congestion, improve air quality, reduce greenhouse gas emissions, promote social equity, and support investments in other travel modes.

3. Bundled amenities in commercial leases act as a barrier to PCO uptake

Despite the apparent benefits associated with PCO programs, the author reports that PCO programs have not been as widely adopted as they should be, even among employers who are required by law to do so. The cause of this low uptake level appears to be logistical rather than philosophical. PCOs are simple enough to implement when it is clear how much an employer is paying to subsidize its employee's parking costs. In most commercial leases, however, parking costs are bundled together with all of the other amenities provided in exchange for the rent. As a result, it is difficult or impossible for employers to disaggregate their parking costs in the way that they must

¹ Shoup. *Evaluating the Effects of Parking Cash Out: Eight Case Studies* (Sep. 1, 1997) California Air Resources Board <https://ww2.arb.ca.gov/sites/default/files/classic/research/apr/past/93-308a.pdf> (as of Jun. 19, 2022).

² *A Commuter's Dilemma: Extra Cash or Free Parking?* (Mar. 19, 2002) Legislative Analyst's Office https://lao.ca.gov/2002/parking/031802_cash_or_parking.html (as of Jun. 19, 2022).

do to be able to pass that amount back to employees who choose to forgo their parking spot in favor of the PCOP money.

The purpose of this bill is to get around this problem by ensuring that an employer can calculate how much it costs to subsidize its employees' parking. To achieve this outcome, the bill requires a commercial landlord to inform any tenant who is subject to the PCO requirement how much any parking associated with the lease costs. The commercial landlord can comply with this requirement in either one of two ways. It can break out the cost of parking as a separate line-item in the lease itself, or it can provide a list of parking costs to the employer within 30 days after the lease is entered into or renewed. These requirements would only apply prospectively: commercial landlords would have to adhere to them when entering into or renewing any lease agreement to which the requirements are applicable beginning January 1, 2023.

Environmental organizations and other proponents of PCO programs applaud what they view as a way of overcoming the longstanding accounting problem that has stood in the way of more widespread adoption of PCOs. For their part, commercial landlords object to the fact that the bill places the onus on them to disaggregate the value of the parking they offer from the value of other amenities that are included in the lease.

In an attempt to achieve the bill's purpose without newly drawing commercial landlords into the middle of the PCO program, the author proposes to offer amendments in Committee that take a slightly different approach. The proposed amendments eliminate the requirement that commercial landlords calculate and state the fair market value of their parking in every lease. Instead, the proposed amendments provide employers with a short menu of options for how to calculate the value of the parking subsidy they are providing. Employers can use: (1) the fair market value of the parking if reflected in the lease; (2) the actual marketplace parking rate paid by the employer for a parking spot off of the property; (3) the fair market value of a parking space located within a quarter mile of the workplace, as evidenced by advertisements or signage; or (4) a formula maximizing the cost of parking at \$350 and setting a default floor of \$50 for when the cost of parking cannot otherwise be established.

Some further refinements may be needed for clarity and to ensure this menu of options is simple and workable for employers to implement. It may also be wise to add an inflationary adjustment to the bill so that the Legislature does not need to go back and revisit the amounts on a regular basis. However, since the proposed amendments no longer require commercial landlords to get involved in the PCO program process, they have indicated that they will no longer be opposed to the bill once the amendments are processed.

4. Proposed amendments

In order to address the issues set forth in the Comments, above, the author proposes to incorporate amendments into the bill that would:

- eliminate commercial landlords' obligation to state the fair market value of their parking in each lease renewed on or after January 1, 2023; and
- provide employers with a short list of options from which they can calculate the amount of any parking cash out payment they are to make to employees electing to take that payment in lieu of parking.

A mock-up of the amendments in context is attached to this analysis.

5. Arguments in support of the bill

According to the author:

The Parking Cash Out (PCO) program was approved by this very legislature three decades ago and is still not being implemented properly, which has detrimental environmental impacts. [...] One reason that PCO is not being implemented is due to the difficult nature of calculating the value of employee parking when it is included with the total cost of office rental space. Many owners of commercial real estate "bundle" the cost of parking with the cost of office space into a single lease price. This practice makes it difficult for employers to separate the cost of parking spaces associated with the commercial space that is being leased. Without that information, employers are unable to offer employees cash in lieu of parking subsidies. AB 2206 simply helps facilitate compliance with existing law by requiring parking owners to provide employers subject to PCO with unbundled parking costs.

In support, the Natural Resources Defense Council writes:

There is widespread agreement that employers are not complying with the existing PCO law. In part, this is due to the difficult nature of calculating the value of employee parking when it is included with the total cost of office rental space. This practice makes it difficult for employers to separate the cost of parking spaces associated with the commercial space that is being leased. Without that information, employers are unable to offer employees cash in lieu of parking subsidies. In order to facilitate compliance with existing law and achieve PCO's traffic congestion and air pollution benefits, AB 2206 requires parking owners to provide employers subject to PCO with unbundled parking costs.

6. Arguments in opposition to the bill

In opposition to the bill, the California Business Properties Association writes:

[T]his bill puts an unnecessary burden on commercial real estate companies that, in many cases, cannot put a value on what parking is worth to the company that is occupying the space as it is part of a larger lease. Our members recognize that the current cash-out parking program faces many implementation challenges, however, we do not believe this mandate will resolve any of the issues – they will only put a significant burden on property managers and shift responsibility that currently rests with certain employers, onto a third party. AB 2206 inappropriately places the onus onto the property manager of a leased building to put a value on something that is determined by the lessee of the office space and is legally the employer’s responsibility.

SUPPORT

Bay Area Air Quality Management District
City of Santa Monica
Natural Resources Defense Council
Seamless Bay Area
Sierra Club
SPUR
Transbay Coalition

OPPOSITION

California Business Properties Association

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 728 (Lowenthal, Ch. 359, Stats. 2009) authorized cities, counties and air districts to enforce violations of the PCO program requirement.

AB 1186 (Blumenfield, 2009), like this bill, would have required the lessor of a nonresidential building located within a nonattainment area to itemize parking costs in all lease agreements entered into or renewed after January 1, 2011 if the tenants of the building are provided free parking. In his message vetoing AB 1186, Governor Schwarzenegger wrote: “I have signed SB 728 (Lowenthal) which would clarify that either the California Air Resources Board or a local air district may enforce the existing

parking cash-out law. With respect to this bill, although well-intended, I am concerned about placing an additional burden on commercial property owners at this time. It is my hope that better enforcement will shed more light on the challenges and effectiveness of this program.”

AB 2109 (Katz, Ch. 554, Stats. 1992) established the Parking Cash Out Program (PCOP). The PCOP requires specified employers who provide subsidized parking for their employees to offer a cash allowance in lieu of a parking space.

PRIOR VOTES:

Senate Transportation Committee (Ayes 11, Noes 3)

Assembly Floor (Ayes 47, Noes 15)

Assembly Transportation Committee (Ayes 11, Noes 3)

Amended Mock-up for 2021-2022 AB-2206 (Lee (A))

Mock-up based on Version Number 98 - Amended Assembly 4/20/22

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 43845 of the Health and Safety Code is amended to read:

43845. (a) As used in this section, the following terms have the following meanings:

- (1) "Employee" means an employee of an employer subject to this section.
- (2) "Employer" means an employer of 50 persons or more in the state who provides a parking subsidy to employees.
- (3) "Parking cash-out program" means an employer-funded program pursuant to which an employer offers to provide a cash allowance to employees where the cash allowance provided to each eligible employee is equal to or greater than the parking subsidy that the employer would otherwise pay to provide the employee with a parking space.

(4) "Market rate cost of parking" or "parking acquired through the marketplace" shall be no less than if the parking were to be obtained by an individual unaffiliated with the property on which parking is provided or the employer through a transaction for the closest publicly available parking within one-quarter mile of the employee's workplace.

~~(4)~~ (5) "Parking subsidy" means the difference between the price, if any, charged to an employee for the use of a parking space made available by an employer to that employee and ~~either~~ *the lowest* of the following:

(A) The market rate cost of parking available to an employee, ~~if any, pursuant to the which may be reflected in an employer's lease and shown as a separate line item in such lease.~~, ~~if shown as a separate line item in the lease. as required to be reflected in a lease pursuant to paragraph (1) of subdivision (d).~~

(B) The out-of-pocket amount paid by an employer for onsite or offsite employee parking acquired through the marketplace, with no special rate offered because of a property lease, for an employee parking space not owned by the employer.

(C) The price for use of a parking space located within one quarter mile of the place of employment as evidenced by a ~~written public~~ offer, ~~such as through a printed or otherwise publicly displayed advertisement or a listing including price such as on a publicly accessible parking smartphone application,~~ available for acceptance by any member of the public, for use of that parking

space from within the previous six months. If the employer uses this subparagraph as the basis for calculating the employee's parking subsidy, then the employer shall maintain ~~a copy of~~ appropriate *evidence of the written offer it relied upon, such as a physical copy or photograph of an advertisement or a screen shot showing availability and price within a parking smartphone application*, for at least four years from the time of any cash allowance payment made based upon that offer.

(D) If, using the aforementioned methods, the monthly market rate cost of parking either exceeds \$350 or cannot be established, a revised market value shall be assumed for the purpose of complying with this law such that:

(i) If otherwise valued at over \$350 per month, the market value shall be assumed to be \$350.

(ii) If the market value cannot be established due to a lack of publicly advertised parking within one-quarter mile of the place of employment, and the employer has documented its efforts to establish such a value, then the value shall be assumed to be equal to the lowest-priced transit serving the site or \$50 per month, whichever is higher.

(b) In any air basin designated as a nonattainment area pursuant to Section 39608, each employer shall offer a parking cash-out program.

(1) Where an employee receives a parking subsidy, the employer shall maintain a record of communication to such employee that they have been informed of their right to receive the cash equivalent of the parking subsidy.

(c) A parking cash-out program may include a requirement that an employee participant certifies that the employee participant will comply with guidelines established by the employer designed to avoid neighborhood parking problems, with a provision that an employee participant that is not in compliance with the guidelines will no longer be eligible for the parking cash-out program.

~~(d) (1) A lessor shall do either of the following for any lease entered into or renewed on or after January 1, 2023, with a lessee who is an employer and that offers parking to the employer:~~

~~(A) List the market-rate parking costs as a separate line item in the lease. The market-rate parking costs shall be no less than if the parking were to be obtained by an individual unaffiliated with the property on which parking is provided or the employer through a transaction for the closest publicly available parking within one-half mile of the employee's workplace.~~

~~(B) Provide a list of parking costs to the employer within 30 days after the lease is entered into or renewed.~~

~~(2) Paragraph (1) does not create a right for an employee to access, review, or challenge a lease, or a proposed lease, entered into between an employer and a lessor. Upon the request of an employee, an employer shall give to that employee the parking cost information received from the lessor pursuant to paragraph (1).~~

~~(e) An employer shall offer a parking cash-out program pursuant to subdivision (b) even if the employer's lease does not comply with the requirements of paragraph (1) of subdivision (d).~~

~~(f)~~(d) Subdivision (b) does not apply to any employer who, on or before January 1, 1993, has leased employee parking, until the expiration of that lease or unless the lease permits the employer to reduce, without penalty, the number of parking spaces subject to the lease.

~~(g)~~(e) It is the intent of the Legislature, in enacting this section, that the cash-out requirements apply only to an employer that can reduce, without penalty, the number of paid parking spaces it maintains for the use of its employees and instead provide its employees with the cash-out option described in this section.

~~(h)~~(f) (1) The state board may impose the civil penalty described in Section 43016 for a violation of this section.

(2) (A) A city, county, or air district may also adopt, by ordinance or resolution, a penalty or other mechanism to ensure that an employer within the jurisdiction of that city, county, or air district is in compliance with this section.

(B) If a city, county, or air district establishes a penalty, the governing body shall also establish procedures for providing notice to an employer that is in violation of this section and for appeal by the employer of any penalty imposed.

(C) If a city, county, or air district establishes a penalty pursuant to this paragraph, a penalty may be imposed on an employer pursuant to paragraph (1) or this paragraph, but not both. If a penalty is imposed on an employer pursuant to both paragraph (1) and this paragraph, only the penalty imposed by the state board shall apply.