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WISCONSIN'S EMPLOYER COMMUTE OPTION PROGRAM: A NEW TWIST ON AN OLD IDEA

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I. INTRODUCTION

The Employee Commute Option (ECO) program, mandated by the 1990 Clean Air Act,¹ is a new twist on a once-common practice in urban America. Heralded as a new and innovative way to reduce air pollution, an ad hoc ECO program actually was in place in Wisconsin decades ago. If one were to look back to the 1920s, for example, one would discover that few workers drove automobiles to work. Due to a variety of factors, such as the shorter distance from home to work, a good public transport infrastructure, and a lack of parking, people used alternate means of transportation to get to their place of employment, such as walking or taking the streetcar. While many people did have automobiles, they were mostly used for weekend drives in the country, fishing trips, and other social events. The Wisconsin workers of that era were, in essence, early participants in a kind of ECO program.

Today, of course, commuting habits have changed. Somewhere in the transposition of America from a rural to urban to suburban society, perhaps in the 1950s, the importance of public transportation took a back seat to the ease and convenience of the private automobile. Today, the automobile has evolved into a daily necessity in American society. No longer saved for Sunday outings in the country, it now takes people to work. With people living greater distances from work and the relatively low cost of operating a vehicle, it is no wonder that people opt to drive to work rather than to get there some other way. The increase in automobile use and the current trend in land use development has brought about a marked increase in the amount of air pollution and, specifically in southeast Wisconsin, ozone. Air pollution, ozone, and land use issues for the 1990s and beyond now dictate that we change our commuting habits in an effort to clear the air and ease the burgeoning traffic problems that plague southeastern Wisconsin.

* Secretary of the Department of Natural Resources of Wisconsin. Secretary Meyer would like to thank Michael D. Scott for his assistance in writing this article.

1. Clean Air Act of 1990 § 182, 42 U.S.C. § 7511a (Supp. V 1993).

One solution to these problems is conceptually simple: reduce the volume of traffic during peak traffic periods. ECO is a program based on this simple concept. This article discusses some of the major points of interest regarding ECO, including the history of ECO, how ECO works, the goals of the program, and its pitfalls and solutions.

II. HISTORY OF ECO

The federal government, concerned that more people are driving than ever before and that they are driving longer distances, and in an effort to curb vehicle pollution, required that severe ozone nonattainment areas implement programs designed to reduce commuter trips to large employers as part of the 1990 Clean Air Act.²

The U.S. Environmental Protection Agency (EPA) designated eleven counties in Wisconsin as ozone problem areas. They are part of a large region that covers eastern Wisconsin, northeastern Illinois, northwestern Indiana, and western Michigan. These four states are cooperating to develop regional cleanup plans. Under federal law, required cleanup actions will vary depending on the seriousness of each county's ozone problem. The EPA classified six Wisconsin counties (Milwaukee, Waukesha, Racine, Kenosha, Ozaukee, and Washington) as "severe" areas, which must comply with section 182(d)(1)(B) of the Clean Air Act³ and implement ECO programs. The Lake Michigan region is the third worst region for ozone in the country, following southern California on the

2. *Id.* § 182(d), 42 U.S.C. § 7511a(d).

3. The Act provides:

(B) Within 2 years after November 15, 1990, the State shall submit a revision requiring employers in such area to implement programs to reduce work-related vehicle trips and miles traveled by employees. Such revision shall be developed in accordance with guidance issued by the Administrator pursuant to section 7408(f) of this title and shall, at a minimum, require that each employer of 100 or more persons in such area increase average passenger occupancy per vehicle in commuting trips between home and the work-place during peak travel periods 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. The guidance of the Administrator may specify average vehicle occupancy rates which vary for locations within a nonattainment area (suburban, center city, business district) or among nonattainment areas reflecting existing occupancy rates and the availability of high occupancy modes. The revision shall provide that each employer subject to a vehicle occupancy requirement shall submit a compliance plan within 2 years after the date the revision is submitted which shall convincingly demonstrate compliance with the requirements of this paragraph not later than 4 years after such date.

Id. § 182(d)(1)(B), 42 U.S.C. § 7511a(d)(1)(B).

West Coast and the Washington, D.C.-Boston corridor on the East Coast.⁴

Under section 182(d)(1)(B), states with severe ozone nonattainment areas must require employers with 100 or more employees at a worksite to implement programs to reduce work-related vehicle trips and miles traveled by employees. This program will affect 800 to 1000 Wisconsin employers and 80,000 to 200,000 employees.

The Wisconsin ECO program requires businesses and other employers that have more than 100 employees at a worksite to develop plans encouraging their employees to use alternative means of transportation, rather than driving to work every day alone.⁵ The goal is a 25% increase in the average number of people arriving at worksites in each vehicle by 1996.⁶ At a minimum, each affected employer must increase its average passenger occupancy (APO) per vehicle at least 25% above the base line average vehicle occupancy (AVO) rate in commuting trips between home and the workplace during peak travel periods.⁷

The deadline for submitting programs for EPA approval was November 15, 1992.⁸ Affected employers must submit compliance plans that will demonstrate how compliance with the ECO program will be achieved by November 14, 1994, or within 120 days after formal notification by the DNR (or 180 days after becoming affected for those employers who became affected after November 15, 1993).⁹ Actual compliance must be achieved within four years after program submittal.¹⁰ Inherent in the Wisconsin program was the creation of a new chapter in the Wisconsin Administrative Code¹¹ which became effective October 1, 1993, and established the requirements for the ECO program.¹² Other states must also submit programs addressing the ECO requirements. Large

4. AIR MGMT. BUREAU, WIS. DEP'T OF NAT. RESOURCES, 1 OPERATION OZONE 3, 1 (No. 6, Dec. 1992) [hereinafter OPERATION OZONE].

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. WIS. ADMIN. CODE § NR 486.07 (Sept. 1993).

10. OPERATION OZONE, *supra* note 4, at 1.

11. WIS. ADMIN. CODE § NR 486 (Sept. 1993). A revision of this section will be in effect January 1, 1995.

12. In April 1994 the media reported that Wisconsin Governor Thompson and Illinois Governor Edgars had agreed to request that the EPA relax ECO requirements for Wisconsin and Illinois. At the time of this writing, the Clean Air Act provisions on ECO remain unchanged with no indication from the relevant Congressional committees that the ECO provisions will be reopened. Therefore, Wisconsin and other affected states throughout the country are in the active process of fully implementing ECO.

metropolises on the East Coast such as New York City and the entire state of New Jersey must participate in the ECO program. Other cities with ECO programs in place or contemplated include Denver, Phoenix, Tucson, Houston, Seattle, and San Francisco. Closer to home, the Chicago metropolitan area and northeastern Indiana must implement ECO programs to reduce ozone in the Lake Michigan region.

In southern California, ECO programs have been in place for several years. Involving approximately 6000 companies and thousands of commuters, the southern California ECO programs have increased the vehicle occupancy rate by 10%. While this is short of their goal of a 25% increase in APO, it is quite an accomplishment, considering the scope of implementing ECO in an area the size of southern California, and the region's dependence on the automobile.

III. REQUIREMENTS OF ECO

In southeastern Wisconsin, the base line AVO has been determined to be 1.12 (the average vehicle occupancy for all commute trips made in 1992).¹³ Thus, a 25% increase in AVO would correspond to an APO of 1.4. This is the goal of Wisconsin's ECO program.

What does an increase in the APO to 1.4 mean in practical terms? If a company has 100 employees, the current AVO of 1.12 assumes that approximately 89 of them drive to work by themselves. The remaining 11 arrive by other means, such as walking or biking, taking public transit or car pools. Achieving an APO of 1.4 means that only approximately 72 of those 100 employees would be able to drive to work by themselves. Thus, an additional 17 employees would have to find an alternative way of getting to work. Twenty-nine employees could not drive to work alone. In effect, the number of vehicles arriving at worksites per 100 employees must be reduced from 89 to 72.

However, that is merely the basics. Several caveats within the ECO program may significantly affect who will have to participate, and to what extent. For example, an important requirement for participation in the ECO program is that the employer have 100 employees at a worksite.¹⁴ If any worksite of 100 or more employees has 33 or fewer employees reporting during the peak period (6 a.m. to 10 a.m., Monday through Friday), the worksite may be exempted from the ECO program by the

13. Studies have established the AVO rate for Wisconsin at 1.12. OPERATION OZONE, *supra* note 4.

14. WIS. ADMIN. CODE § NR 486.02(16) (Sept. 1993).

DNR.¹⁵ Likewise, if an employer has 100 employees that work in two or three shifts, only the employees that report to work on the first shift (between 6 a.m. and 10 a.m.) would be required to participate in the ECO program.

To determine exactly how many employees arrive at the worksite during the peak times and which employers will have to participate, employers must survey their employees regarding their commuting habits.¹⁶ Good survey techniques are vital to insure success of the program; the survey must be conducted over a five-day period during the ozone season, and survey forms available from or approved by the DNR must be used.¹⁷

Once the surveys are complete and the affected employers are identified, those employers will have to develop a compliance plan that contains sufficient transportation strategies so that the target APO rate for commuter trips made by their employees can be reached by November 1996.¹⁸ To assist affected employers in formulating a program, each employer will be required to have an Employee Trip Coordinator (ETC) to aid in formulating and managing the ECO effort at each affected worksite.¹⁹ These ETCs will be trained through a DNR-approved program.

A unique feature of the ECO program is that affected employers may comply with the target APO of 1.4 by participating in a DNR-approved averaging or trading option program. The averaging option allows employers to combine employees at separate worksites for determining whether the company complies with the target passenger occupancy rate. The trading feature allows employers that exceed the target APO to trade excess APO credits to employers who do not achieve the target APO of 1.4.²⁰

IV. GOALS OF ECO

One of the hoped-for results of the ECO program is a reduction of ground-level ozone, which occurs from ground level to two miles above the earth's surface. Ground-level or atmospheric ozone is different from stratospheric ozone. While stratospheric ozone protects humans and the earth's surface from harmful ultraviolet rays, atmospheric ozone is an

15. *Id.* § NR 486.03(2)(a). The 6 a.m. to 10 a.m. period is the time of day when motor vehicles contribute most to ground-level ozone. *See id.* § NR 486.02(16).

16. *Id.* § NR 486.06(3).

17. *Id.*

18. *Id.* § NR 486.06(1).

19. *Id.* § NR 486.05.

20. *Id.* § NR 486.10.

unwelcome and unhealthy compound. Moreover, stratospheric ozone is naturally occurring, but atmospheric ozone (hereinafter "ozone") is created when nitrogen oxides (NO_x) and volatile organic compounds (VOCs) react in the presence of sunlight.²¹

Although the "ozone season" stretches from May 1 to September 30, ozone is most prevalent during the summer months, when the sun is hottest and atmospheric conditions are ripe for ozone to form. The health effects of ozone are evident during the summer months. Ozone can be especially hazardous to children, elderly adults, and individuals with lung ailments such as asthma or bronchitis. Even in healthy individuals, ozone can irritate lungs, nasal passages, and eyes, and can cause scar tissue in lungs, reducing lung capacity. Scientific studies have documented the effect of ozone on plants and animal species as well.²² Vehicle exhaust contains NO_x and VOCs, and vehicles are a major contributor of those chemicals. It is estimated, for example, that about half of the NO_x and VOCs emitted in southeastern Wisconsin comes from mobile sources (i.e., cars and trucks).²³ While the chemical reaction that causes ozone to form is very complex and not fully understood, it is believed that if some of the pollutants that help in the formulation of ozone could be reduced, the formation of atmospheric ozone in turn would be reduced. This reduction would be beneficial to human health and the environment.

It has been estimated that the ECO program will reduce ozone by 3.5% of its current levels in southeastern Wisconsin.²⁴ While that may not seem significant, it is a reduction from a large contributing segment. In addition, the ECO program will foster other beneficial byproducts that will help other aspects of environmental protection. For example, having fewer automobiles on the road during the morning rush hour will mean a reduction in carbon monoxide (CO) and carbon dioxide (CO₂), which, in turn, may correlate to a reduction in global warming. Non-point water pollution (run-off of gas and oil drippings from parking lots and roadways during rainstorms) will be reduced, creating less water pollution, especially of the groundwater table.

21. AIR MGMT. BUREAU, WIS. DEP'T OF NAT. RESOURCES, 1992 AIR QUALITY DATA REPORT 8 (Jan. 1994)[hereafter AIR QUALITY REPORT].

22. *Id.* at 10, 38-40.

23. 1990 DNR estimates, using Mobile 5a models. For information on other contributors to ozone, see AIR QUALITY REPORT, *supra* note 20, at 8-9.

24. Interview with John Duffe, Bureau of Air Management, Department of Natural Resources (Apr. 1993).

One of the more significant side effects of the ECO program is the promotion of better land use, since less traveling during rush hour may eliminate or reduce the need to build new roads or expand existing ones. Additionally, prospective employers desiring to locate or expand in southeastern Wisconsin may choose to locate in an area better serviced by public transport and closer to the living areas of prospective employees, rather than in rural areas where a long commute is necessary. This would help utilize vacant industrial areas, such as Milwaukee's Menomonee River Valley, and keep urban sprawl, such as that occurring in Waukesha and Ozaukee counties, to a minimum.

Dispersion of the workforce within an established urban area is another benefit. Larger companies, perhaps in the long term, could divide a large, centrally-located worksite into smaller ones. For example, if a major Milwaukee law firm has 200 lawyers and support staff working in one downtown office, it could be split into three or four offices. The primary core office could stay downtown, while the others could move to the south, north, and perhaps west sides of Milwaukee. Business could still be conducted efficiently between the satellite offices via fax and computer modems.

The ECO program would also promote the faster development of other means of transportation, such as inter-urban rail travel, electric cars, or the use of alternative fuels. In addition, one cannot overlook the added health benefits to those workers who would walk or ride their bikes to work every morning.

V. CHALLENGES OF ECO

Despite the fact that ECO will reduce ozone and provide ancillary benefits as well, there are some minor challenges associated with the program. These challenges—for employers, employees, local governments, and the DNR—need to be met and addressed both during and after implementation of the program to insure its ultimate success. The biggest challenge is employee and employer acceptance. Part of the success of ECO will depend on the success of the DNR's educational effort. In that respect, the DNR has plans for a comprehensive publicity campaign aimed at both employers and employees.

With regard to employees, the greatest challenge will be convincing them to give up the convenience and social benefits of driving their automobiles to work and encouraging them to get to work via some means other than their cars. The ready access to the automobile, commuting in comfort, and the ability to use the automobile for personal errands on the way to or from work has become a way of life for many

Wisconsin workers. The ECO program could be perceived as disrupting the urban/suburban lifestyle to which people living in southeastern Wisconsin have grown accustomed.

Since it will be difficult, if not impossible, to give up the self-commute attitude, the program could be perceived as a step backwards. Overcoming an employee's socio-economic mindset is the key element; just as people have sought and actually moved from the crowded inner city to the more open suburban or quasi-rural areas, so too have people progressed from sitting placidly in a bus to driving their own cars. It will take hard work on the part of DNR staff to insure employees that the benefits to the environment and future land use as a result of ECO will outweigh the disadvantages of not using one's automobile to drive to and from work.

Likewise, the DNR faces the challenge of convincing employers that ECO is a worthwhile and necessary program. The ECO program will mean a certain amount of economic investment, both in hiring and training transportation coordinators and in providing amenities (on-site day care, bike racks, showers, etc.) and other incentives for their employees who participate in the program. Employers are concerned that the program will lower employee morale, which could equate to lower productivity and lost profits. While ECO can be thought of as another method of pollution control, some employers who will be affected by the program have not previously needed to be concerned about pollution control measures.

Moreover, it will be difficult to insure compliance with the program. The sheer magnitude of the program will make compliance checks and enforcement difficult. The DNR has six staff positions to implement the ECO program. That may sound like a sufficient number, but the nature of the ECO program dictates that detail-oriented compliance activities be undertaken. There is also the question of exactly how to monitor and enforce the program. Issuing permits is a possibility; again, however, that would mean more people would be needed to work on the permit program.

Another big challenge facing the successful implementation of the ECO program is the lack of an existing transportation infrastructure to accommodate the individuals who will no longer be able to drive to work and who will have to seek transportation alternatives. Milwaukee and other large Wisconsin cities such as Racine and Kenosha do have extensive bus systems. Yet these systems tend to run few buses to the outlying areas of the city suburbs. The whole purpose of ECO is somewhat diminished if a worker has to drive two or three miles simply to get to the

nearest bus stop. Safety is another concern that has been voiced with respect to taking the bus to work.

And what of the rural areas and smaller cities such as West Bend? Can a person who currently commutes from West Bend to Milwaukee by car be able to do so by bus? Not if buses do not run from West Bend to Milwaukee.

As an alternative to the bus, people could walk or ride a bike. But unlike Madison, where commuting by bike is a viable option, riding a bike to work in Milwaukee could be an arduous event. That is because the city is not set up for bicycle commuting. There are bike paths and trails, but the ones that currently exist, such as the seventy-six mile bike trail that encircles Milwaukee and uses the city's extensive park system throughout much of its route, are primarily designed for leisure purposes and as a result are not especially convenient for someone who would want to use them to travel to work. Once off the bike trails and into downtown Milwaukee, safety becomes a major concern because the downtown streets are simply not set up to accommodate bicycles.

In the fall of 1993, Milwaukee developed a comprehensive bike plan designed to increase bicycle usage and to address areas such as bike routes, parking, and safety. For example, eleven miles of new and safer bike routes are planned along city streets, and seven more miles will be improved. Routes will stem from downtown Milwaukee to Wauwatosa, Bay View, and UW-Milwaukee.²⁵

Employers should consider providing transportation alternatives to their employees and being innovative with these alternatives. They could provide services such as "jitney buses" that pick up employees at their homes or at neighborhood collection points; they could provide the option of working at home one or more days a week, connected to the main office by fax and computer (tele commuting), and they could organize car pooling and van pooling.

Employers could also provide incentives to their employees to leave their cars at home, such as giving a free bicycle to anyone who volunteers to bike to work instead of drive, or adding a commute bonus to the paychecks of those employees who do not drive to work. In some cases, disincentives to driving alone may work. For example, employers could eliminate free parking at a worksite. Free parking at a worksite is often taken for granted. Yet if workers had to pay for parking, it is believed that they would consider a less expensive alternative, such as taking the

25. Mike Nichols, *City Adds 11 Miles of Bike Routes*, MILWAUKEE J., Oct. 2, 1993, at A1.

bus or car pooling. Whether or not that is the case, the money acquired from paid parking could be used by an employer to fund other aspects of its ECO program, such as providing free bicycles or a pick-up service.

Flexible work schedules is another option. One of the more popular concepts that both employers and employees find appealing is the four-day work week, during which an employee would work ten hours a day for four days and then get a three-day weekend.

Local governments and large employers need to consider developing a more complete and encompassing multimedia commute system, one that incorporates buses, bike paths, and other means of commuting into a viable transportation network. A well-developed infrastructure is the key to having the ECO program work and become successful.

VI. LEGAL ISSUES

In Wisconsin, ECO is a new concept, and as of the end of 1993, the DNR is not aware of any legal challenges to or litigation stemming from the ECO program. However, there are several diverse areas in which legal challenges could arise as a result of ECO. There is the prospect of constitutional challenges associated with the ECO program based on due process, equal protection, restraints on travel, or "right to work" grounds.

Aside from standard liability issues involving the operation of car pools, van pools, and their occupants, there may also be labor law issues as well. This is especially true in the context of labor unions and how the ECO program and participation in it would factor into a labor contract or contract negotiations.

VII. CONCLUSION

The ECO program may not be popular. It may be difficult to implement and even more difficult to enforce. The benefits of the program may not be significant. Yet it is a start, a beginning.

Recycling, too, had a shaky start. But through trial and error, and such programs as curbside recycling bins, people are accustomed to recycling newspaper and aluminum cans. Today, recycling is accepted and expanding: it is becoming an integral part of the fabric of American society.

Some day, perhaps in as little as five or ten years, the ECO program and the inevitable changes that it will bring to our lifestyle will be recognized and accepted as an important and essential tool in the goal of protecting the environment and promoting better land use.