



Bailey Cavalieri LLC
ATTORNEYS AT LAW

CLIENT ALERT

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Plastic Bag Legislation Update December 2011

On January 1, 2012, Montgomery County, Maryland will begin charging a \$0.05 tax on all paper and plastic bags issued by retailers to customers in the ordinary course of business (the "Bag Tax"). According to our records, Montgomery County is the first jurisdiction in the United States to impose a Bag Tax on both paper and plastic bags.

Background

The Bag Tax is an "excise tax" that the County has the authority to impose as long as the tax is not based on the amount of the item or the amount of the transaction. Thus, the County is within its authority to impose a flat tax on the provision of each paper or plastic bag provided to customers for carry out. The County's stated purpose for the Bag Tax is to "raise revenue and create an incentive for consumers and retailers to use fewer disposable bags." It is the County's position that the decreased use of disposable bags would be a step toward the County's larger goal of "improving and cleaning up the natural environment."

Montgomery County, Maryland Bill No. 8-11 – The Bag Tax

The Bag Tax applies to "carryout bags," which are defined as "a paper or plastic bag provided by a retail establishment to a customer at the point of sale, pickup, or delivery to carry out purchased items." Exempt bags from the Bag Tax include: (i) bags provided by pharmacists to carry prescription drugs, (ii) any newspaper bag or bag intended for initial use as a dry cleaning, garbage, pet waste or yard waste bag, (iii) a bag provided at the point of sale at a seasonal event, such as a farmer's market, street fair, or yard sale or by an occasional retailer, (iv) a paper bag that a restaurant gives a customer to take prepared or leftover food or drink from the restaurant, and (v) a bag used to package a bulk item or to contain or wrap a perishable item.

The Bag Tax applies to "retail establishments," which are defined as "any person engaged in the retail sale of goods, including any . . . supermarket, convenience store, shop, service station, or restaurant, and any other sales outlet where a customer can buy goods."

The Bag Tax will be levied at a rate of \$0.05 cents and will be imposed on each customer for each carryout bag the retail establishment provides to the customer. The retailer must record the number of carryout bags provided to the customer and the total amount of the Bag Tax levied on the customer's receipt. The retailer is responsible for collecting the Bag Tax and remitting 80% of the receipts to the County each time the retailer collects \$100 from the Bag Tax. The retailer retains 20% of the receipts for itself.

Failure to collect the Bag Tax and comply with the law results in a fine of \$500 for the first offense and \$750 for each subsequent offense.

Analysis

In the past few years, several jurisdictions have tried to ban the use of plastic bags because of the ecological impact of plastic bags on the environment. Legislation with respect to plastic bags has ranged from complete bans of the use of plastic bags to implementation of recycling programs to taxes. The majority of the legislation on the topic has been focused on imposing taxes or restrictions on retailers that choose to provide plastic bags to consumers or requiring retailers who provide plastic bags to consumers to implement recycling programs for such bags. Here, however, the Montgomery County Bag Tax is the first legislation of its kind to *impose a tax upon the consumer for the use of BOTH paper and plastic bags*.

In our opinion, the Bag Tax is wrought with legal issues that the Montgomery City Council likely did not consider at the time the Bag Tax was enacted. First, the Bag Tax has a direct impact on interstate commerce in terms of its potential to force national retailers to implement sweeping changes in their point of sale software in order to comply with a county tax in Maryland. Second, the Bag Tax may impermissibly discriminate against bag manufacturers without a proper basis for doing so. Third, the Bag Tax may also have a disparate impact on consumers who may not have the means to purchase reusable or recyclable carryout bags.

Finally, the fact that the Bag Tax includes paper bags and not just plastic bags could be the Bag Tax's ultimate demise. While much of the legislative history discusses the ecological impact of plastic bags and similar plastic bag laws in effect in other jurisdictions, the legislative history lacks the same type of empirical data with respect to paper bags. Therefore, by including paper bags as part of the Bag Tax, the Montgomery City Council may lack the necessary rational basis for the tax.

At this time, we are unaware of any retailer or retail advocate that is mounting a challenge to the Bag Tax. We are working with our clients and retail network to determine the potential avenues for compliance and costs of compliance for the Bag Tax. What we are hearing at this point is that many retailers do not have the point of sale software to account for such a tax in terms of keeping track of the number of carry out bags provided to consumers with each transaction and printing that information on the sales receipt. We expect the dialogue in the retail industry regarding the Bag Tax to significantly increase after January 1, 2012.

Please contact us for more detailed legal advice regarding the Bag Tax.

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