

EMPLOYEE BENEFITS

NEW IRS TECHNICAL ADVICE MEMORANDUM SUGGESTS THERE MAY NOT ALWAYS BE SUCH A THING AS A FREE LUNCH FOR EMPLOYEES

by Eric W. Gregory

For many years, the IRS has looked the other way when employers have provided their employees with free meals. A new Technical Advice Memorandum (“TAM”) suggests otherwise, in ultimately holding that employer-provided meals were not excludible from income except in limited situations.

In 2014, the Department of Treasury released its [priority guidance plan](#), which raised the issue of employer-provided meals as one of the priority projects for the upcoming year. Despite that pronouncement, there has been little publicly-available information suggesting that the IRS has actually made employer-provided meals an enforcement priority—until now. In this latest TAM, the IRS disallowed most of an employer’s meal exclusion claims, discussed the impact of new meal delivery options, and provided further insight on the impact of providing meals to employees who are on-call for emergencies.

General Exclusion Rule: “Substantial Noncompensatory Business Reason”

As a general rule, the Internal Revenue Code (“Code”) provides that gross income includes income from whatever source derived, including compensation for services. The value of meals provided to an employee by an employer are generally considered “compensation,” unless the meals are: (1) provided on the employer’s business premises; and (2) for the employer’s convenience. Code Section 119. Treasury regulations provide that meals are considered furnished for the convenience of the employer if they are furnished for a “substantial noncompensatory business reason” of the employer.

A substantial noncompensatory business reason requires a business nexus under which the employee must accept the meals in order properly to perform his or her duties. This test is analyzed by the IRS on a facts and circumstances basis. For example, the IRS and courts have held that meals provided to employees in the following circumstances were noncompensatory: meals provided to employees who are required to occupy living quarters on a business premises, meals provided to employees who could not otherwise secure proper meals within a reasonable meal period, and meals provided to restaurant or food service employees.

Latest IRS Guidance: Substantiation is Critical

In [TAM 201903017](#), the IRS analyzed an employer program that provided free meals and snacks, without charge, to all employees, contractors and visitors, without distinction as to the employee’s position, specific job duties, ongoing responsibilities, or other facts and circumstances. Employees were provided meals in snack areas, at employee desks, and in cafeterias.

The employer provided a number of business justifications for providing the meals: providing a secure business environment for confidential discussions; innovation and collaboration; employee protection due to unsafe conditions around the worksite; improvement of employee health; and a shortened meal period policy. Taxpayers bear the burden of proving that they are entitled to exclusions, so the employer was obligated to support its claims of convenience based on these justifications. The IRS held that the employer had to demonstrate that these policies exist not just in form, but by showing that they are enforced on the specific employees for whom the employer claims the policies apply. The employer was also required to demonstrate how the policies relate to the furnishing of meals.

The IRS found that the employer had no policies for any employee positions related to the discussion of confidential business information, demonstrated no link between its desire for innovation and collaboration and the furnishing of meals, no factual support regarding safety-related policies or issues, and no policies related to employee health that would have required employer-provided meals. The IRS clarified that general goals and objectives of improving employee health do not qualify as a substantial noncompensatory reason for furnishing meals.

Meal Delivery is a New Potential Factor

In the TAM, the IRS noted that there is no prior statutory discussion or caselaw discussion regarding the effect of meal delivery availability on whether meals may be furnished for the convenience of the employer. The IRS noted that in the past several years, the proliferation of food delivery services, online ordering options, and mobile phone applications that provide delivery services has made meal delivery much more abundant than in the past. The IRS reasoned that while the availability of meal delivery is not determinative concerning the exclusion analysis, meal delivery should be a consideration in determining whether an employer qualifies for the exclusion in situations where delivery options are limited.

Therefore, employers considering taking the position that excludable meals are being provided to employees who cannot otherwise secure proper meals within a reasonable meal period should also consider whether meal delivery services might be available to those employees. If meal delivery is readily accessible, this might mitigate against that justification as a substantial noncompensatory business reason.

Meals for On-Site Employees for Emergencies Remains a Substantial Noncompensatory Business Reason

Finally, the TAM provided that employees who are required to remain on site during meal periods to respond to emergencies could receive excludable meals. The IRS acknowledged that whether a situation rises to the level of an “emergency” depends on the nature of the employer’s business. In this case, the IRS noted that unpredictable occurrences that are of a nature that “call for immediate action” can be appropriately considered emergencies.

While such policies can give rise to excludable meals, it is critical that employers maintain substantiation not only of these policies, but to whom they apply and when. In this case, the employer was required to “beef up” (meal pun intended) its substantiation by obtaining written declarations of employees describing how their job required them to respond to “emergencies.”



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Conclusion

Employers can learn three important lessons from this TAM. First, it is clear that the IRS has begun examining and enforcing the law with respect to free meals provided to employees. Second, the IRS takes the position that detailed substantiation, written policies, and records of enforcement are critical for an employer’s claim of substantial noncompensatory business reasons for excludable meals. Finally, employers have new insight on how recent developments in the areas of meal delivery might impact this analysis.

While it is helpful insight into the mind of the IRS, employers should be wary of drawing definitive conclusions from the TAM. A TAM is guidance furnished by the Office of Chief Counsel in response to a technical or procedural question. The advice in a TAM is a final determination of the position of the IRS, but only with respect to the specific issue in the specific case identified. The IRS maintains that a taxpayer may not rely on a TAM issued to another taxpayer.

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