

## The IRS Says Let Them Eat Snacks

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Recently released National Office Technical Advice Memorandum No. 201903017 (dated Sept. 14, 2018) continues the IRS' narrow position on an employer's ability to offer its employees free meals under Code section 119 without triggering imputed income equal to the value of the meals. The IRS' position is especially significant now that, due to tax reform changes, an employer is allowed a 50% deduction for meals that qualify under Code section 119 through the end of year 2025 (while some other employee meals no longer are deductible at all). We review the new guidance below.

### Background

Code section 119 provides a limited exception for excluding from taxable wages the value of meals that are furnished by the employer (or on its behalf) and on the employer's business premise for the convenience of the employer. Meals will be considered furnished for the convenience of the employer if the meals are furnished for a substantial noncompensatory business reason. The IRS Regulations have provided parameters of the types of situations that result in substantial noncompensatory business reasons to meet this test, such as that the meals are provided during the employee's normal working hours to have the employee available for emergency calls.

### The TAM

In the TAM, the taxpayer under audit asserted the following business justifications to support the free office meals, all of which were rejected because the employer failed to have policies or data in place to support these general concerns and failed to substantiate a link between the general concern and providing the free meals:

- Foster collaboration and innovation. The IRS held the employer had no policy and there was no data correlating the free meals to this business reason.
- Protect confidential and proprietary information. The IRS held the employer had no policy and there was no data correlating the free meals to this business reason.
- Safety concerns with the surrounding area. The IRS held the employer had no policy and there was no data correlating the free meals to this business reason.
- Provide healthy eating options. The IRS held the employer had no policy and there was no data correlating the free meals to a business reason.
- Cannot obtain a meal within a reasonable meal period. The IRS held that employees had access to many nearby eating facilities, and there was no indication that their ability to secure a meal within a reasonable period was significantly limited. Notably, the IRS held that the ability to bring their own lunch is not a factor in this analysis.

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- Short meal breaks due to work demands. The IRS held the employer had no policy for meal periods for salaried employees, found no evidence that employees actually took shorter meal breaks or that they did so due to the nature of the work, and found no evidence that the nature of the work mandated a short meal period.
- Available to handle emergencies. The IRS held that “on call” employees (and other select employees needed to respond to emergencies) during lunch met this exclusion.

Importantly, on top of all this, the IRS rolled out a new weapon in its arsenal to tax free meals at work – the increased prevalence of meal delivery services (UberEats, Doordash, Grubhub, etc.), including online ordering options and mobile phone applications that provide delivery services. The IRS stated that –

“while the availability of meal delivery is not determinative in every analysis concerning § 1.119-1(a)(2)(ii)(c), especially in situations where delivery options are limited, meal delivery should be a consideration in determining whether an employer qualifies under this regulation and generally when evaluating other business reasons proffered by employers as support for proving meals for the ‘convenience of the employer’ under section 119.”

We note that on-premises meals can also be excluded as *de minimis* fringe benefits under Code section 132(e) as either so small that accounting for them is impractical or as part of an on-site eating facility. But, as the employer provided the meals at no charge and there was no dedicated eating facility (where meals are prepared, such as a cafeteria), the meals did not meet the special *de minimis* fringe benefit rules that, in part, require revenue to cover the direct operating costs of the facility.

Fortunately, the Service did rule that snacks, on the other hand, get a tax-free pass, even if offered on a continual basis, which is wonderful news for employers and employees alike. The IRS found that the value of the snacks is small, the portions are sometimes difficult to quantify (e.g., stored in open-access areas) as is the low value of each snack portion, even if offered on a continual basis. Therefore, snacks remain tax-free as a *de minimis* fringe (just like the traditional coffee and donuts).

## Action Steps

Employers providing free snacks to employees can continue business as usual and not impute income to employees for the snack bar. However, employers that offer, or are considering offering, free meals at work should tread very carefully and read through the 50-page TAM to make sure they avoid the pitfalls. Importantly, make sure that policies and procedures are clear on the business need for the meals that the employer enforces, and be prepared to carry the burden of proof that there is a business justification for this very popular fringe benefit – and to defend why takeout delivery services should not alter this result.

GROOM