

## **THERE'S NO SUCH THING AS A FREE LUNCH...BUT THERE ARE FREE SNACKS**

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Something to gnaw on during your lunch hour today (sorry, we couldn't resist): the IRS recently released TAM 201903017, which ruled that free employee meals provided by an employer were includible in its employees' taxable income – and therefore subject to employment taxes.

Section 119(a)(1) of the Code excludes the value of meals provided to an employee by an employer if the meals are furnished on the employer's business premises "for the convenience of the employer." The "convenience" test can be met if the employer has a substantial noncompensatory business reason for providing the free meals, such as that the employee must be available for emergency calls or that there are no nearby alternatives to secure a meal within the employee's meal period. Under Section 119(b)(4) of the Code, if more than 50% of an employer's employees on its premises receive meals that satisfy the "convenience" test, then all meals provided by the employer are deemed to be for its convenience and are therefore excluded as a taxable fringe benefit to its employees. Section 3121(a)(19) of the Code excludes the value of any such meals from employee wages for purposes of employment tax withholding if it is "reasonable to believe" that the meals are excludable under Section 119.

In TAM 201903017, the employer-taxpayer (which, although redacted, appears to be a large technology corporation) did not include the value of employer-provided meals and snacks in its employees' income, nor did it withhold and pay the related amount of employment taxes. To support its practice, the employer argued that it had a number of substantial noncompensatory business reasons for providing the free meals, including:

1. Protecting the employer's confidential information by providing a secure environment for business discussions on the employer's business premises;
2. Fostering collaboration and innovation by encouraging employees to remain on premises;
3. Protecting employees due to unsafe conditions surrounding the premises;
4. Providing healthy eating options for employees to improve employee health;
5. Providing meals where the employee's job demands require only a short meal break;

6. Allowing employees to secure a meal within a reasonable meal period; and
7. Providing meals so that employees are available to handle emergency outages that regularly occur.

The IRS rejected 6 of the 7 proposed reasons, with the emergency outages being the sole legitimate noncompensatory business reason under Section 119. In so doing, the IRS ruled that the employer had provided little or no factual support that it maintained and enforced policies that required employees to receive the free meals for purposes of fostering collaboration, protecting confidential information, eating healthy, or taking a short meal break. In addition, the IRS argued that the availability of meal-delivery services was a mitigating factor in determining whether employees could secure a meal within a reasonable meal period. The IRS also stated that, given the lack of evidence provided by the Company, it was not reasonable to believe that the free meals were excludable under Section 119, and, therefore, the fair market value of those free meals should have been included in employee income and subject to employment taxes.

While this ruling is specific to that employer's tax situation, it serves as a reminder – if not a warning – that companies who provide perks such as free meals to attract and retain talent should be prepared to withhold on those benefits or, perhaps more likely, be prepared to support their position as to why they didn't.

But the ruling did throw the employer one bone. The IRS confirmed that the employer's provision of beverages and snacks – which included small, difficult to quantify goods that are stored in open access area – were de minimis fringes that are not taxable to its employees under Section 132(e) of the Code. So don't think twice about grabbing that extra serving of popcorn from your common area.

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