IRS Concludes That Employers Can Provide Limitless Snacks Tax-Free to Employees, But Not Meals

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In an unusually long Technical Advice Memorandum (TAM 201903017) released February 19, 2019, the Internal Revenue Service Office of Chief Counsel provides technical advice to IRS personnel on the inclusion in employees' wages of the value of meals and snacks provided without charge by an employer to its employees.

Under the facts in TAM 201903017 (the TAM), the IRS concludes that meals (with limited exceptions) provided employees without charge at the employer's headquarters are includible in the employees' wages, but that snacks and drinks provided in designated snack areas are excludable from the employees' wages. The TAM analyzes in detail Sections 119 and 132 of the Internal Revenue Code of 1986. Section 119 excludes from gross income the value of meals provided employees if the meals are furnished for the convenience of the employer. Section 132 addresses the tax treatment of fringe benefits provided employees, and excludes from employees' gross income certain de minimis fringe benefits.

A Technical Advice Memorandum is an IRS legal memorandum that provides technical advice to IRS personnel, often an IRS agent examining a taxpayer. The TAM appears to address issues raised during an IRS examination of an employer's tax treatment of meals and snacks provided its employees. A number of issues are addressed, the more significant of which are discussed below.

The employer in the TAM provided meals without charge to all employees, contractors, and visitors without regard to the employee's position, specific job duties, ongoing responsibilities, or other external circumstances. Unlimited snacks and drinks were also provided in open snack areas that were available to employees, contractors, and escorted guests. The employer offered the following reasons that furnishing the meals was for its convenience, thereby allowing the value of the meals to be excluded from employees' wages:

- Protecting confidential and proprietary information, including intellectual property, by providing a secure environment for business discussions on business premises
- Fostering collaboration and innovation by encouraging employees to stay on the employer's business premises

- Protecting employees due to unsafe conditions surrounding the employer's business premises
- Providing healthy eating options for employees to improve employee health
- Because, given the employer's particular location, employees cannot secure a meal within a reasonable meal period
- Providing meals when the demands of the employees' job functions allow them to take only a short meal break
- Providing meals so that employees are available to handle emergency outages that regularly occur

The TAM determined that, based on the apparent lack of policies supporting reasons 1-6 above, and the insufficient factual support to justify the employer's need to furnish the meals, the employer could not exclude the value of the meals from the employees' wages under Section 119. According to the IRS, an important fact was that the employer could not prove that most employees were ever in a situation in which they had to accept the employer-provided meals to perform their duties properly.

With respect to reason 7 (providing meals so that employees are available to handle emergency outages that regularly occur), the TAM finds that for certain employees, this reason does justify excluding the value of meals from the employees' gross income. While the TAM concludes that some employees were needed to address emergencies during meal times, it found less employees met this standard than the employer contended (the adequate records requirement could not be met).

The TAM reaches a different conclusion for snacks. First, the TAM concludes that snacks provided employees in designated snack areas are not meals prepared for consumption at meal time, and, therefore, do not qualify as meals provided for the convenience of the employer under Section 119. Second, it concludes that the value of the snacks is excludable from gross income as a de minimis fringe benefit under Section 132. The TAM provides the following rationale for this conclusion: "Generally, quantifying the value consumed by each employee of snacks that come in small, sometimes difficult to quantify portions and are stored in open-access areas is administratively impractical given the low value of each snack portion, even if the employer offers the snacks on a continual basis." It is conceivable, however, that under the right circumstances, snacks could be taxable.

The conclusions of the TAM are unremarkable (except possibly for the new concept that meal deliveries to an area mean that employees are deemed to be able to secure a meal within a reasonable time period), but the analysis is note-worthy with respect to how IRS views the application of Sections 119 and 132. Two themes emerge. First, employers should establish policies that support the importance to the employer (i.e., for the convenience of the employer) of furnishing meals to employees and keep records of the enforcement of the policies. Written policies are preferable. Second, the facts must be specific and reasonably support the employer's belief in the importance of furnishing the meals. For example, if the safety of employees is a reason for furnishing meals, there should be a policy addressing the employees' safety; facts showing how providing meals enhances the employees' safety; and facts showing that employer's neighborhood experiences out of the ordinary risks to safety during the relevant time period. In the end, the burden is on the employer of demonstrating the importance of furnishing meals to employees at no cost.

For more information about this alert, please contact one of the authors or any member of McGlinchey Stafford's Corporate and Tax Law teams.

Related people

Paul S. Leonard
Douglas W. Charnas
Kathy Conklin