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TO: CIS Trust

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DATE: July 8, 2025

RE: Meal/Beverage Costs and Taxation

Introduction

Under federal and state tax law, the general rule is that something of value is taxable unless an exception exists. Here, the question at issue is whether and under what circumstances an employer-provided meal (including beverages) may be excludable from an employee's taxable income.

While citations in this memo derive from federal law, these same concepts extend to Oregon State taxation rules. The reason for this is that Oregon operates in conformity with the Federal Tax Code, except where it has legislatively mandated a different result. In his case, Oregon state has not mandated a different result, so the rules described below apply both for federal and Oregon state tax purposes.

De Minimis Fringe Benefits

In recognition that some benefits offered to employees are just too small to reasonably tax, federal tax law allows for an exclusion under Code §132(a)(4) for so called "de minimis fringe benefits."

Under Code §132(e), a de minimis fringe benefit is defined as "any property or service the value of which is (after taking into account the frequency with which similar fringes are provided by the employer to the employer's employees) so small as to make accounting for it unreasonable or administratively impracticable."

Value

While the value of the benefit is a factor in this determination, the frequency with which the benefit is offered as well as the practical aspects of accounting for the benefit are also considered under the terms of Code §132(e). In addition, it is notable that the IRS has not defined a safe harbor dollar value. Rather, it considers each of these three factors in concert when determining whether a benefit is de minimis. IRS Information Letter 2008-0023 (June 13, 2008) (an employer's $50 threshold for withholding on noncash gifts might be a "rule of convenience in the administration of the fringe benefit rules" but failing to adopt a safe harbor).

Frequency

When considering the value, the IRS does not consider a single instance and instead looks to the frequency with which a benefit (and similar benefits) are offered. IRS regulations provide that frequency is to be determined on an employee-by-employee basis, and taxability is based on how much an individual employee takes advantage of a particular benefit. Treas. Reg. §1.132-6(b)(1).

Administrability

The administrability arm of this analysis is particularly difficult, as the IRS has not issued a clear standard. Regulatory language focuses on the concept that cash and a cash equivalent (like gift cards and theater tickets) can never be de minimis. Treas. Reg. §1.132-6(c). With regard to the broader concept, the regulation states only that "the value of any fringe benefit that would not be unreasonable or administratively impracticable to account for is includible in the employee's gross income." *Id.*

We know from a tax court memo that benefits that are actually accounted for are subject to tax. *Mihalik v. Comm'r*, T.C. Memo. 2022-36 (2022) (finding that it was not unreasonable nor administratively impracticable for an airline employer to account for tickets issued to employees because the airline's records document substantial data about the ticket benefit process.). In a private letter ruling, the IRS has also determined that if the cost of accounting for the benefit exceeds the cost of the benefit, this fact is an important "administrative guidepost" in making a determination that it is not administratively practical to account for the benefit. Priv. Ltr. Rul. 201005014 (Oct. 28, 2009), revoked on other grounds by Priv. Ltr. Rul. 201135022 (Sept. 2, 2011).

Application to Employer-Provided Meals

There is no hard and fast rule. However, where an employer offers only occasional meals to employees or particular groups of employees, the de minimis fringe benefit rule may allow for tax-free treatment of those meals. That being said, if the benefits are actually accounted for (e.g., reflected as a documented with specificity as part of an employe's compensation package), the benefit is unlikely to constitute a de minimis fringe benefit because the practical act of accounting for the benefit means that accounting for it is not unreasonable or administratively impracticable.

Special Rules Regarding Meals

Occasional Overtime Expenses

While, as discussed above, occasional employer-provided meals are often excluded under the de minimis fringe benefit rules generally, the regulations also include a specific exception when the following conditions are present:

1. the benefit provided is "reasonable";
2. the benefit is only provided on an occasional basis;
3. the benefit is provided "because overtime work necessitates an extension of the employee's normal work schedule"; and
4. the benefit is provided "to enable" the employee to work overtime. Treas. Reg. §1.132-6(d)(2).

Meals for the Convenience of the Employer

Under Code §119, meals can also be provided to employees on a tax-free basis where they are provided for the convenience of the employer.

Generally, this means that the meal must be provided to an employee or an employee's spouse or tax dependent, by or on behalf of the employer, on the business premises of the employer; and for the convenience of the employer.

The most difficult factor to meet with regard to this analysis is the question of whether the meal was provided for the convenience of the employer. The regulations provide for a non-exhaustive list of qualifying conditions, including meals furnished when there are no alternatives available for procuring food within a meal period and in the case of emergencies. Treas. Reg. §1.119-1(a)(2)(ii)(d). However, the IRS has informally articulated the following conditions as constituting a situation in which the convenience of the employer rules would apply:

> "the carrying out of the employee's duties in compliance with employer policies for that employee's position must require that the employer provide the employee meals in order for the employee to properly discharge such duties."

Thus, if the employer's policies make meals necessary for an employee to meet their duties (e.g., a policy governing a particular long meeting, which requires work through meal periods), then meals meet the standard. IRS Chief Counsel Memorandum AM 2018-004 (Oct. 23, 2018).[1]

With this in mind, where a policy requires an employee to remain onsite over a meal period due to a meeting schedule, Code §119 could allow for tax-free treatment of the cost of the meal.

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[1] Chief Counsel memoranda are directed to IRS field employees and cannot be used or cited as precedent. Code §6110(k)(3).

Hypothetical Situations

1. *Would the food and beverages provided by an employer for its employees at a "team-building" event likely be taxable? Is your answer different if it is a policy of the employer to hold such events on a regular basis for cultural or other internal reasons?*

In depends. If the event does not occur regularly, and if it is not reasonable to account for the expense, this could fall under the de minimis rules. However, if the employer is able to specifically track the cost of food and beverages on a per-employee basis, the employer will not be able to show that the expenses are de minimis. The above-scenario could fall under convenience of the employer if the employer can articulate the business need for the event and if either food is not reasonably accessible outside of the team building space or if part of the function of the team building exercise relates to the employees eating and talking together.

2. *If an employer allows a retirement party to be held, and pays for the cost of a cake and non-alcoholic beverages at the party, is it likely that a slice of cake and one non-alcoholic beverage would be considered "de minimis"?*

Yes, this is an example of a cost that is not feasible to reflect in accounting, so unless the parties are happening constantly, this would qualify for de minimis treatment. That being said, if the costs are being reflected on a per-employee basis and with precision pursuant to Advisory Opinion No. 25-126A, the employer would no longer have a basis to argue that reflecting the costs is not administratively feasible.

3. *If an employer allows its employees to bring family members to a social event where food and beverages are provided, is it likely that the cost of the food and beverages would exceed the de minimis threshold (due to the additional consumption of the food and beverage by the employee's family members)?*

Not necessarily, as a general rule, food consumed at a single party (whether by an employee or by an employee and their family) qualifies for de minimis treatment, as determining the cost of the exact food a person consumed is nearly impossible. That being said, if these amounts are calculated pursuant to Advisory Opinion No. 25-126A, the employer would not be in a position to argue that the amounts cannot be reasonably calculated.

4. *An employer provides its staff with an afternoon at a local ropes course (or zip line). Lunch and non-alcoholic beverages are provided. Would the "de minimis" analysis include the cost of renting the ropes course (divided per employee) as well as the cost of the lunch and beverage?*

If this is a rare occurrence, it may be excludable on a de minimis basis. However, the cost of renting the rope course is more difficult to justify on this basis, as it is easily spread across the employee population and could be reflected as a specific amount.

Disclaimer: *Each of the factual scenarios described above would turn on the specific facts of the scenario, and we suggest running specific scenarios by your attorney or tax advisor.*

A Note on Oregon Government Ethics Commission Advisory Opinion No. 25-126A

Advisory Opinion No. 25-126A identifies a series of situations in which city employees are provided with food and beverages and concludes that city-provided food must generally be represented as part of an employee's official compensation package. While analysis of Advisory Opinion No. 25-126A is outside the scope of this memo, this guidance is relevant to the de minimis discussion because anytime the value of a fringe benefit (like food or beverages) can be allocated to a particular employee with specificity, the de minimis rules will not allow for a tax exclusion.

Thus, if a city determines that compliance with Advisory Opinion No. 25-126A requires a precise accounting of food and beverages consumed, and if it is in fact able to create this accounting, the de minimis rules will not allow for a tax exclusion.

However, if a City determines that following Advisory Opinion No. 25-126A requires a pro rata allocation of the total cost of offered meals and beverages across attendees or that a policy providing that meals and beverages are already part of compensation is sufficient, the de minimis rules may allow for tax-free treatment.