Office of Chief Counsel
Internal Revenue Service
Memorandum

Number: **AM 2018-004**
Release Date: 11/23/2018

CC:TEGE:EOEG:ET2:AKHOLUBECK:
POSTS-119906-17

UILC: 119.00-00

date: October 23, 2018
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subject: Section 119 - Determining Substantial Noncompensatory Business Reason

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

1. In determining whether an employer's reasons for furnishing meals to employees are substantial noncompensatory business reasons under Treas. Reg. 1.119-1(a)(2)(i) for purposes of determining whether the meals are excludible from income as meals provided for the convenience of the employer under section 119 of the Internal Revenue Code (Code), should the IRS apply the test used by the Supreme Court in *Kowalski v. Commissioner*, 434 U.S. 77 (1977). If so, does the test in *Kowalski* provide that the section 119 exclusion applies to employer-provided meals only if the employee is required to accept such meals to properly perform duties, or has this test been superseded by the enactment of section 119(b)(2)?

2. In light of certain holdings in *Boyd Gaming Corp. v. Commissioner,* 177 F.3d 1096 (1999), that the IRS may not supplant an employer's business judgment with its own, may the IRS question whether certain business needs and goals and employer policies, proffered by employers as reasons for furnishing meals to employees, are substantial noncompensatory business reasons for furnishing meals under Treas. Reg. 1.119-1(a)(2)?

3. If an employer claims to have a business policy that, if such policy does exist and is enforced, qualifies as a substantial noncompensatory business reason, can the IRS

require substantiation that such employer actually has communicated the policy to employees and meaningfully enforces such a policy? If so, what substantiation must the employer provide?

CONCLUSIONS

1. The "*Kowalski t*est" continues to be the applicable standard for determining whether meals are furnished for the convenience of the employer. Accordingly, the test is relevant for determining whether a business reason for furnishing meals to employees is a substantial noncompensatory business reason. However, the test does not demand that the employee must literally be required to accept and eat the meal to "properly perform duties." Rather, the test means that 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. If the employer's particular business policies are such that employer-provided meals are necessary for the employee to properly discharge the duties of a particular job position, then meals provided to employees with such duties in that job position are provided for the convenience of the employer, even if certain individual employees in that position decline the meals.

2. While *Boyd Gaming* precludes the IRS from substituting its judgment for the business decisions of a taxpayer as to its business needs and concerns and what specific business policies or practices are best suited to addressing these business needs and concerns, *Boyd Gaming* does not preclude the IRS from determining whether an employer actually follows and enforces its stated business policies and practices, and whether these policies and practices, and the needs and concerns they address, necessitate the provision of meals so that there is a substantial noncompensatory business reason for furnishing meals to employees within the meaning of the regulations under section 119 and the applicable judicial guidance.

3. Taxpayers bear the burden of proving that they are entitled to exclusions. Employers who claim the exclusion from income and wages for meals furnished for the convenience of the employer must provide substantiation if requested concerning the business reasons supporting its claim of furnishing meals for the convenience of the employer. Employers who provide specific business policies as substantial noncompensatory business reasons for furnishing meals to employees must be able to substantiate that such policies exist in substance not just in form by showing they are enforced with respect to the specific employees for whom the employer claims these policies apply and must demonstrate how these policies relate to the furnishing of meals to employees. The form and quality of substantiation that is sufficient to demonstrate a particular business policy will vary according to the facts and circumstances of each case.

FACTS

In conducting employment tax examinations, TEGE Division Counsel has informed us that the IRS has encountered a pattern of cases in which employers furnish meals to employees and do not include the value of these meals in the employees' income, claiming that the meals are excluded from income under section 119 of the Code. Section 119 provides that the value of meals furnished by an employer to an employee is excluded from an employee's gross income if the meals are provided for the convenience of the employer on the employer's business premises. In these cases, the meals are provided on the business premises of the employer, which generally include a room or rooms where meals are prepared and/or served to employees, so only the "convenience of the employer" requirement of section 119 is at issue.

The employers in these cases proffer a variety of business reasons for furnishing meals to their employees and claim that such reasons are substantial noncompensatory business reasons. For example, many employers claim that innovation and collaboration are a key aspect of their company's business model and culture, and the meals the employer provides facilitate employee innovation, collaboration, and productivity. Many also claim that meals are provided to enable employees to work long days and overtime. Some claim that meals are provided to promote a healthier workforce, because the furnished meals are healthier than the meal options the employees might otherwise consume off the premises. Certain employers claim that meals are provided to discourage employees from jeopardizing trade secrets by encouraging them to remain on business premises for meals, rather than leave the premises and possibly discuss sensitive information during meals in public places.

In many of these cases, the IRS has applied the "*Kowalski* test" (the test the Supreme Court applied to determine "convenience of the employer" under section 119 in *Kowalski v. Commissioner*, 434 U.S. 77, 90 (1977), which provides that the section 119 exclusion applies to employer-provided meals only if the meals are necessary for the employee to properly perform his or her duties) and the applicable regulations, and determined that many of these business reasons are not substantial noncompensatory business reasons for furnishing meals to employees. However, in response some employers maintain that Congress statutorily overturned *Kowalski* with the enactment of section 119(b)(2) of the Code in 1978.

In addition, some employers claim to furnish meals for policy reasons that qualify for the section 119 exclusion under various provisions of the regulations, but these employers provide little to substantiate that they actually have and enforce these policies. Further, some employers claim that the IRS cannot question or examine employers concerning their use of these policies, based on the Ninth Circuit's decision in *Boyd Gaming Corp. v. Commissioner,* 177 F.3d 1096 (1999), which provided that it was "inappropriate to second guess these reasons or to substitute a different business judgment". *Id.* at 1101.

LAW AND ANALYSIS

Section 61(a)(1) provides that gross income includes compensation for services, including fringe benefits, except as otherwise provided. Section 119(a) allows an employee to exclude the value of any meals furnished by or on behalf of his employer if the meals are furnished on the employer's business premise for the convenience of the employer.

Section 1.119-1(a)(1) of the Income Tax Regulations states that the question of whether meals are furnished for the convenience of the employer is one of fact to be determined by analysis of all the facts and circumstances in each case. Section 1.119-1(a)(2)(i) provides meals furnished by an employer to the employee will be regarded as furnished for the convenience of the employer if such meals are furnished for a substantial noncompensatory business reason of the employer.

Section 1.119-1(a)(2)(ii)(a) provides that meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to an employee during his or her working hours to have the employee available for emergency calls during the meal period. In order to demonstrate that meals are furnished to an employee to have the employee available for emergency calls, it must be shown that emergencies have actually occurred, or can reasonably be expected to occur, in the employer's business which have resulted, or will result, in the employer calling on the employee to perform his or her job during his meal period.

Section 1.119-1(a)(2)(ii)(b) provides that a substantial noncompensatory business reason can be a situation where the employer's business is such that the employee must be restricted to a short meal period (30 to 45 minutes) and the employee cannot be expected to eat elsewhere in such a short period. The provision provides the example of a business where peak work load occurs during meal hours.

Section 1.119-1(a)(2)(ii)(c) provides that meals will be regarded as furnished for a substantial noncompensatory business reason of the employer if the meals are furnished to the employee during the employee's working hours because the employee could not otherwise secure proper meals within a reasonable meal period. As an example, this section provides that meals may qualify for the exclusion under section 119 when there are insufficient eating facilities in the vicinity of the employer's premises.

1. In determining whether business reasons are substantial noncompensatory business reasons, should the IRS apply the "Kowalski test" or has this test been superseded by the enactment of section 119(b)(2)?

In the 1977 Supreme Court case of *Kowalski v. Commissioner*, New Jersey state police troopers received cash meal allowances which were excluded from income as meals provided for the convenience of the employer under section 119. *Kowalski v. Commissioner*, 434 U.S. 77 (1977). The Supreme Court ruled that the section 119 exclusion for employer-provided meals applied only to meals provided in kind, and not

to cash allowances. *Id.* at 94. In the opinion, the Court traces the legislative history of section 119 in order to provide a standard for determining when meals are provided for the convenience of the employer.

> In enacting § 119, the Congress was determined to "end the confusion as to the tax status of meals and lodging furnished an employee by his employer." However, the House and Senate initially differed on the significance that should be given the convenience-of-the-employer doctrine for the purposes of § 119. As explained in its Report, the House proposed to exclude meals from gross income "if they [were] furnished at the place of employment and the employee [was] required to accept them at the place of employment as a condition of his employment." Since no reference whatsoever was made to the concept, the House view apparently was that a statute "designed to end the confusion as to the tax status of meals and lodging furnished an employee by his employer" required complete disregard of the convenience-of-the-employer doctrine. The Senate, however, was of the view that the doctrine had at least a limited role to play…. After conference, the House acquiesced in the Senate's version of § 119.

Id. at 90-92 (citations omitted), citing H.R. Rep. No. 83-1337, 83d Cong., 2d Sess.,18 (1954).

Based on the language that was eventually adopted as section 119 and on explanations from the Senate Report concerning the section 119 bill, the Court concludes that:

> The language of § 119 quite plainly rejects the reasoning behind rulings like O.D. 514, which rest on the employer's characterization of the nature of a payment. This conclusion is buttressed by the Senate's choice of a term of art, "convenience of the employer," in describing one of the conditions for exclusion under § 119. In so choosing, the Senate obviously intended to adopt the meaning of that term as it had developed over time, except, of course, to the extent § 119 overrules decisions like *Doran* [*v. Commissioner*]. As we have noted above, *Van Rosen v. Commissioner*, provided the controlling court definition at the time of the 1954 recodification and it expressly rejected the *Jones* [*v. United States*(][1] theory of "convenience of the employer" [which rests on employer

[1] Earlier in the opinion, the Court discusses O.D. 514, *Doran V. Commissioner*, and *Jones v. United States* as pre-section 119 cases where employer-provided meals and housing were found to be excludible from income based on the employer's characterization of the meals and housing as noncompensatory. *Kowalski,* 434 U.S. at 85, 87, 89, citing O.D. 514, 2 Cum.Bull. 90 (1920); *Jones v. United States*, 60 Ct.Cl. 552, 569 (1925); and *Doran v. Commissioner*, 21 T.C. 374 (1953). In *Van Rosen v. Commissioner*, on the other hand, the Tax Court rejected the idea that the tax treatment of employer-provided meals and lodging should "turn on the intent of the employer," but rather "settled on the business-necessity rationale for excluding food and lodging from an employee's income." *Id.* at 88, citing *Van Rosen v. Commissioner*, 17 T.C. 834, 838 (1951).

> characterization]… and adopted as the exclusive rationale the business-necessity theory.[2] …Finally, although the Senate Report did not expressly define "convenience of the employer" it did describe those situations in which it wished to reverse the courts and create an exclusion as those where "[an] employee must accept . . . meals or lodging in order properly to perform his duties."

Id. at 92-93 (citations omitted) (footnotes omitted), citing O.D. 514, 2 Cum.Bull. 90 (1920); *Van Rosen v. Commissioner*, 17 T.C. 834, 838-40 (1951); and S.Rep. No. 1622, 83d Cong., 2d Sess., 190 (1954).

Thus, basing its finding on legislative history and pre-statute case law, the Supreme Court in *Kowalski* provides that the appropriate standard for determining convenience of the employer is the business-necessity theory, which means, as stated in the Senate Report, a situation where an employee must accept the employer-provided meals in order properly to perform his or her duties.

In 1978, Congress added section 119(b) to the Code as part of an Act addressing the taxation of fringe benefits, Pub. L. No. 95-427, 92 Stat. 996 (1978). Section 119(b)(2) provides that, in determining whether meals are furnished for the convenience of the employer, the fact that a charge is made for such meals, and the fact that the employee may accept or decline such meals, shall not be taken into account. The legislative

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[2] The term "business-necessity theory" referenced here is coined by the Court earlier in the opinion, and comes from several early IRS rulings and court cases concerning employer-provided meals and lodging, including the Tax Court case of *Van Rosen v. Commissioner* cited by the Court. Specifically, the Tax Court in *Van Rosen* found that:

> The catch phrase 'furnished for the convenience of the employer' has oftentimes been adopted as a short-cut expression to describe the subsistence and quarters furnished, where the tax result has been favorable to the employee. Rather obviously, such a statement, and nothing more, is an over-simplification of the problem. …Rather obviously, neither the salary nor the subsistence and quarters would have been provided unless the employer regarded the expenditures as being for his convenience. …The better and more accurate statement of the reason for the exclusion from the employee's income of the value of subsistence and quarters furnished in kind is found, we think in [*Benaglia v. Commissioner*], where it was pointed out that, on the facts, the subsistence and quarters were not supplied by the employer and received by the employee 'for his personal convenience comfort or pleasure, but solely because he could not otherwise perform the services required of him. 'In other words, though there was an element of gain to the employee, in that he received subsistence and quarters which otherwise he would have had to supply for himself, he had nothing he could take, appropriate, use and expend according to his own dictates, but rather, the ends of the employer's business dominated and controlled, just as in the furnishing of a place to work and in the supplying of the tools and machinery with which to work. The fact that certain personal wants and needs of the employee were satisfied was plainly secondary and incidental to the employment.

Van Rosen,17 T.C. at 837–38 (citations omitted), citing *Benaglia v. Commissioner*, 36 B.T.A. 838, 839 (1937); *see Kowalski*, 434 U.S. at n.21.

history indicates that the purpose of this addition was to overrule an IRS regulation under section 119 that had provided that the exclusion under section 119 was not available to employers who charged for meals furnished to employees, not to change the standard by which "convenience of the employer" is determined. During congressional debate on the bill, Senator Bob Dole, who introduced the provision, stated that:

> [T]he Internal Revenue Service has taken the position that employer-provided meals are disqualified automatically from being treated as being furnished for the convenience of the employer where the employee bears a portion of the cost of the meal and has the option of accepting the meals or providing his own meals. … I am concerned that the IRS has attempted to narrow the meaning of the broad term "convenience of the employer." If the IRS interpretation is left standing, the tax exclusion will not apply to meals furnished for a charge if the employee may decline to purchase the meals and obtain them in another way. I believe that the position of the Internal Revenue is inconsistent with the correct reading of the law. Careful reading of the legislative history shows that this automatic disqualification rule is not warranted. There is nothing in the legislative history which indicates that Congress intended employer meals be precluded from the application of section 119 if the employee bears a portion of the cost. *Madam President, the legislation acted on today is not intended to alter the basic thrust of section 119.*

124 Cong. Rec. 23883-84 (emphasis added). As Senator Dole's statement indicates, the purpose of this provision was to make the section 119 exclusion available to employees who are offered meals at a subsidized price by their employer and who have the option to decline to purchase such meals. The provision was not intended to otherwise "alter the basic thrust of section 119" and the legislative history does not evidence an intent to change the business-necessity rationale behind "convenience of the employer" with this provision.

The more recent Ninth Circuit case of *Boyd Gaming Corp. v. Commissioner* provides clarification as to how the business-necessity rationale and section 119(b)(2) are reconciled. *Boyd Gaming Corp. v. Commissioner,* 177 F.3d 1096 (1999), A.O.D. 1999-010 (Aug. 10, 1999). The court in *Boyd Gaming* did not reject the business-necessity rationale. Even though section 119(b)(2) had been part of the Code for 20 years at the time of the case, the court relied heavily on the *Kowalski* opinion and the business-necessity rationale therein (calling it at one point the "*Kowalski* test") in finding that meals furnished to employees who could not leave their employer's premises during work hours because of a "stay-on-premises" employer policy were furnished for the convenience of the employer.[3]

[3] The taxpayer, Boyd Gaming Corp., did dispute the continued viability of *Kowalski*, but in a footnote the court responded that, "In light of our decision, we need not address this issue." *Boyd Gaming*, 177 F3d at 1100 n.7. It then went on to apply the "*Kowalski* test" to the facts in the case.

> For guidance, we look to the Supreme Court's decision in *Commissioner v. Kowalski*. The Court examined the history of section 119 and concluded that the "convenience of the employer" should be measured according to a "business-necessity" theory. Under that theory, the exclusion from gross income applies only when the employee must accept the meals "in order properly to perform his duties." … Boyd has adopted a "stay-on-premises" requirement and, as a consequence, furnishes meals to its employees because they cannot leave the casino properties during their shifts. Common sense dictates that once the policy was embraced, the "captive" employees had no choice but to eat on the premises. … [T]he furnished meals here were, in effect, "indispensable to the proper discharge" of the employees' duties.

Boyd Gaming, 177 F.3d at 1100-01 (citations omitted) (footnotes omitted) (citing *Kowalski,* 434 U.S. at 93; *Van Rosen*, 17 T.C. at 838-40; and *Caratan v. Commissioner*, 442 F.2d 606, 609 (9th Cir. 1971).

In addition, the court explained that the "*Kowalski* test" does not require that "the meals must be linked to an employee's specific duties," because such a test would be "virtually impossible to satisfy; only restaurant critics and dieticians could meet such a test." *Id*. at 1101. This further clarification of the business-necessity rationale is in line with the provision in section 119(b)(2) that the fact that an employee may accept or decline a meal is not taken into account when determining whether a meal is furnished for the convenience of the employer.

Thus, the *Kowalski* test, as clarified by *Boyd Gaming*, and in keeping with section 119(b)(2), provides that "convenience of the employer" means that 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. If the employer's particular business policies are such that employer-provided meals are necessary for the employee to properly discharge the duties of a particular job position, then meals provided to employees with such duties in that job position are provided for the convenience of the employer, even if certain individual employees in that position decline the meals. Accordingly, the *Kowalski* test is applicable in determining whether a particular noncompensatory business reason for furnishing meals is *substantial,* as required by the regulations under section 119 for meeting the convenience of the employer standard.

> 2. *In light of certain holdings in* Boyd Gaming Corp. v. Commissioner*, 177 F.3d 1096 (1999), that the IRS may not supplant an employer's business judgment with its own, may the IRS question whether certain business needs and goals and employer policies, proffered by employers as reasons for furnishing meals to employees, are substantial noncompensatory business reasons for furnishing meals under Treas. Reg. 1.119-1(a)(2)*

Boyd Gaming Corp. v. Commissioner concerned an employer who furnished meals to employees and excluded these meals from employee wages under section 119 on the basis that employees were required by the employer to remain on premises during work hours for reasons "including addressing security and efficiency concerns, maintaining work force control, handling business emergencies and continuous customer demands, and the impracticality of obtaining meals within a reasonable proximity" and were therefore furnished meals for the convenience of the employer. *Boyd Gaming*, 177 F.3d. at 1097-98. One of the arguments made by the IRS to support the claim that the meals in this case were not provided for the convenience of the employer was that the evidence did not support the employer's claimed security and efficiency reasons behind its "stay-on-premises" policy, and therefore there was no business nexus between the policy and the meals provided to employees. *Id.* at 1098. The Ninth Circuit disagreed, finding that, "[g]iven the credible and uncontradicted evidence regarding the reasons underlying the 'stay-on-premises' policy, we find it inappropriate to second guess these reasons or to substitute a different business judgment for that of Boyd." *Id*. at 1101. However, the Court also cautioned that "it would not have been enough for Boyd simply to wave a 'magic wand' and say it had a policy in order to be entitled to a deduction. Instead, Boyd was required to and did support its closed campus policy with adequate evidence of legitimate business reasons." *Id.*

The IRS issued an Action on Decision (AOD) on the *Boyd Gaming* case, acquiescing to the decision and providing that the IRS "will not challenge whether meals provided to employees of … businesses similar to that operated by *Boyd Gaming* meet the section 119 'convenience of the employer' test where the employer's business policies and practices would otherwise preclude employees from obtaining a proper meal within a reasonable meal period." Announcement 99-77, 1999-32 I.R.B. 243, 1999-2 C.B. 243, August 9, 1999. The IRS also stated that "[m]ore generally, in applying section 119 and Treas. Reg. section 1.119-1, the Service will not attempt to substitute its judgment for the business decisions of an employer as to what specific business policies and practices are best suited to addressing the employer's business concerns." *Id*. However, the AOD reiterated the Ninth Circuit's caution, adding that "the Service will consider whether the policies decided upon by the employer are reasonably related to the needs of the employer's business (apart from a desire to provide additional compensation to its employees) and whether these policies are in fact followed in the actual conduct of the business." *Id.*

Thus, while *Boyd Gaming* precludes the IRS from substituting its judgment for the business decisions of Taxpayer as to its business needs and goals and what specific business policies or practices are best suited to addressing these business needs and goals, *Boyd Gaming* does not preclude the IRS from determining whether an employer actually follows and enforces its stated business policies and practices, and whether these policies and practices, and the needs and goals they address, require employees to receive employer provided meals on business premises and thus qualify as a substantial noncompensatory business reason for furnishing meals to employees within the meaning of the regulations under section 119 and the applicable judicial guidance of *Kowalski.*

Therefore, in examining whether meals are excludable under section 119, it is appropriate for the IRS to determine whether specific employer policies related to the employer's stated business needs and goals (including general business goals such as promoting collaboration and healthier employees, keeping employees safe, or protecting sensitive information) have, in fact, been adopted and, if so, whether those specific employer policies connect the employer's stated needs and goals to the business necessity of furnishing meals to employees. A general business goal without a related policy that governs how employees subject to the policy carry out their employee duties and substantiation of how employer-provided meals are necessary to enable the employee to perform their duties in accordance with the policy will not be a substantial noncompensatory business reason.

3. If an employer claims to have a business policy that, if such policy does exist and is enforced, qualifies as a substantial noncompensatory business reason, can the IRS require substantiation that such employer actually has communicated the policy to employees and meaningfully enforces such a policy? If so, what substantiation must the employer provide?

There is no provision in section 119, related regulations, or in case law that requires the IRS to accept at face value an employer's claim that a general business goal relates to the provision of meals to employees. As noted above, the IRS is not precluded from requiring substantiation that a specific policy exists and an explanation and substantiation that the provision of meals is necessitated by the policy. On the contrary, "[s]tatutory exclusions from income are matters of legislative grace and are narrowly construed. Consequently, taxpayers bear the burden of proving that they are entitled to any exclusion claimed." *Bussen v. C.I.R.*, 108 T.C.M. (CCH) 267 (T.C. 2014) (citing *Commissioner v. Schleier*, 515 U.S. 323, 328 (1995) and *Robertson v. Commissioner*, T.C. Memo.1997–526 (citing *Interstate Transit Lines v. Commissioner*, 319 U.S. 590, 593 (1943)), aff'd, 190 F.3d 392 (5th Cir.1999)).

In *Boyd Gaming,* for example, while the court found it was inappropriate for the IRS to second guess the business reasons behind Boyd's "stay-on-premises" policy, the Ninth Circuit did not question the appropriateness of determining whether the taxpayer actually had such a policy; the court notes in a footnote that both parties had stipulated that "Boyd imposed a 'stay-on-premises' requirement during the taxable years at issue, and that employees who violated this policy were subject to disciplinary action." *Boyd Gaming*, 177 F.3d 1101 n.8.[4] The existence and enforcement of the "stay-on-premises"

[4] In its decision upholding the IRS's determination in this case, the Tax Court had noted that no employee had ever been disciplined for leaving the premises, but the Ninth Circuit found that the Tax Court had focused "on an inconclusive statement by a single employee" and concluded that the Tax Court had "seized on rather weak, tangential evidence of non-enforcement and inappropriately ignored the parties' stipulations and other testimony." *Boyd Gaming*, 177 F.3d 1101 n.8 (citing *Boyd Gaming Corp. v. C.I.R.*, 74 T.C.M. 71-72 (1997)). However, the court does not suggest that it was inappropriate to make a determination as to whether the policy existed or not.

policy was not at issue in the case, and the court does not suggest that it is inappropriate to inquire and determine whether an employer has and enforces a business policy that it claims to have. The court implies that some sort of substantiation is necessary when it cautioned that "it would not have been enough for Boyd simply to wave a 'magic wand' and say it had a policy in order to be entitled to a deduction," and when it stated that "Boyd was required to and did support its closed campus policy with adequate evidence of legitimate business reasons." *Boyd Gaming*, 177 F.3d at 1098.

It is the taxpayer's responsibility to provide substantiation when claiming exclusions from income. For employers who claim the exclusion from income and wages for meals furnished for the convenience of the employer, the IRS has a responsibility to require substantiation from the employer concerning the business reasons to support its claim of furnishing meals for the convenience of the employer. Employers who provide specific policies as substantial noncompensatory business reasons for furnishing meals must be able to substantiate that such policies exist in substance not just in form by showing they are enforced with respect to the specific employees for whom the employer claims these policies apply and demonstrating how these policies relate to the furnishing of meals to employees. Such substantiation is necessary for the IRS to conclude that the policy qualifies as a substantial noncompensatory business reason for furnishing meals to employees.

A written expression of an employer policy, for instance, in an employee manual or employment contracts, provided to the employees for whom this policy applies, generally provides adequate substantiation that the policy exists. But a written policy is not required by statute or regulations, so other substantiation may also be provided. For example, disciplinary records showing that employees have been disciplined for violating a policy or a record of requests for waivers from a policy for special circumstances would also serve as substantiation of an employer policy. However, while a written policy is not necessary, a taxpayer must be able to provide enough substantiation to demonstrate that an actual policy, rather than a mere business goal or objective, actually exists. If a policy exists, the employer must also demonstrate how providing meals relates to the policy such that the meals are necessary for the employees to properly perform their duties.

Substantiation for Employer Claims of a "Shortened Meal Period" Policy

Section 1.119-1(a)(2)(ii)(b) provides that a substantial noncompensatory business reason can be a situation in which the employer's business is such that the employee must be restricted to a short meal period (30 to 45 minutes) and the employee cannot be expected to eat elsewhere in such a short period. The provision includes an example of a business in which peak work load occurs during meal hours. An employer who claims to have a "shortened meal period" policy, as described in this provision, must substantiate that the employees to whom the policy applies really are limited to a short meal period, and this shortened meal period is due to the nature of the employer's business.

As with any policy, written documentation of the policy that has been distributed to the affected employees is one example of substantiation (in this case, the written documentation should also provide that the reason for the policy is related to the nature of the business). The employer could also show disciplinary records that demonstrate employees were disciplined for violation of the policy. Or, if the employees are required to check in and out for lunch, the employer could show these records to demonstrate short lunch periods. The employer could also provide evidence that, as the provision suggests, peak workloads for these employees occur during meal hours (such as a customer count for work days that shows peak customer visits during meal hours). A mere assertion by the employer that its business is of a nature that requires short meal periods is insufficient substantiation that the employer qualifies under § 1.119-1(a)(2)(ii)(b). The employer must provide additional information that demonstrates that employees indeed have shortened meal periods, employees are aware of the shortened meal period requirement, which the employer meaningfully enforces, and that these shortened meal periods are linked to the nature of the employer's business.

Finally, self-imposed limitations on meal periods on the part of employees (such as claims that employees take short meal periods due to the expectations of "corporate culture") do not qualify as a situation in which an employer's business requires a shortened meal period. As the language of the provision indicates ("the employer's *business is such that* the employee must be restricted to a short meal period"), the short meal period must be caused by aspects of the employer's business itself, not the preferences and practices of the employees.

Substantiation for Employer Claims of an "On Call for Emergencies" Policy

Section 1.119-1(a)(2)(ii)(a) provides that meals are furnished for a substantial noncompensatory business reason if the meals are furnished so that employees are available for emergency calls during the meal period. It must be shown that emergencies have actually occurred or can reasonably be expected to occur. Neither the regulations nor case law provides a description of what qualifies as an "emergency" for purposes of § 1.119-1(a)(2)(ii)(a). The example in the regulations and the few court cases that reference § 1.119-1(a)(2)(ii)(a) address employees who were responding to emergency situations that involved or had the potential to involve physical danger or harm to individuals and/or damage to property (fire, medical emergencies, dangerous motor vehicle situations, etc.). The Merriam-Webster Dictionary defines "emergency" as "an unforeseen combination of circumstances or the resulting state that calls for immediate action." Whether a situation rises to the level of an "emergency" depends on the nature of an employer's business. Employers have the knowledge and information to determine what occurrences or incidents constitute "emergencies" within the meaning of the section 119 regulations with respect to their own businesses, as long as they employ a reasonable application of this standard that does not result in classifying routine or non-exigent circumstances as "emergencies."

As with the shortened meal period provision, a mere assertion by the employer that its employees must be available for emergencies is insufficient; an employer claiming to

have an “available for emergency calls” policy for certain employees must provide substantiation that such employees need to be available for emergency calls during each meal period for which they are claiming the exclusion and, as the provision states, must also demonstrate that emergencies for these employees have occurred or can reasonably be expected to occur. Substantiation that an employee responded to a one-time or seldom occurring emergency during a meal period is insufficient to demonstrate that all the meals over a longer period are provided so that the employee is available to respond to emergencies that have occurred or are reasonably expected to occur. Rather, the employer must show (1) either that it has a policy requiring the employee to be available to respond to emergencies during meal periods as part of the employee’s job duties or that the employee’s job duties otherwise necessitate his or her availability during meal periods, and (2) in order to cover an extended period during which meals are provided, that the emergencies to which the employee responds occur or are reasonably expected to occur throughout such extended period.

A written policy that was distributed to affected employees is one example of such substantiation (and should be supplemented with information showing that emergencies have occurred or can be reasonably expected to occur). The employer could provide disciplinary records showing that employees have been disciplined for not responding to, or not being available to respond to emergencies. Another example of substantiation would be records of emergencies that occurred during meal times and the employees who responded to such emergencies. Finally, the employer could provide “on-call schedules” that document when employees are on-call for emergencies.

If you have any additional questions, please contact me or Andrew Holubeck of my office at (202) 317-4774.