

the labor costs attributable to cooks, waiters, and waitresses are included in direct operating costs, but the labor cost attributable to a manager of an eating facility whose services relating to the facility are not primarily performed on the premises of the eating facility is not included in direct operating costs. If an employee performs services relating to the facility both on and off the premises of the eating facility, only the portion of the total labor cost of the employee relating to the facility that bears the same proportion to such total labor cost as time spent on the premises bears to total time spent performing services relating to the facility is included in direct operating costs. For example, assume that 60 percent of the services of a cook in the above example are not related to the eating facility. Only 40 percent of the total labor cost of the cook is includible in direct operating costs. For purposes of this section, labor costs include all compensation required to be reported on a Form W-2 for income tax purposes and related employment taxes paid by the employer. In determining the direct operating costs of an eating facility, the employer may include as part of the facility, vending machines that are provided by the employer and located on the same premises as the other eating facilities operated by the employer.

(2) *Multiple dining rooms or cafeterias.* The direct operating costs test may be applied separately for each dining room or cafeteria. Alternatively, the direct operating costs test may be applied with respect to all the eating facilities operated by the employer.

(3) *Payment to operator of facility.* If an employer contracts with another to operate an eating facility for its employees, the direct operating costs of the facility consist both of direct operating costs, if any, incurred by the employer and the amount paid to the operator of the facility to the extent that such amount is attributable to what would be direct operating costs if the employer operated the facility directly.

(c) *Valuation of non-excluded meals provided at an employer-operated eating facility for employees.* If the exclusion for meals provided at an employer-operated eating facility for employees is

not available, the recipient of meals provided at such facility must include in income the amount by which the fair market value of the meals provided exceeds the sum of—

(1) The amount, if any, paid for the meals, and

(2) The amount, if any, specifically excluded by another section of chapter 1 of this subtitle.

For special valuation rules relating to such meals, see § 1.61-21(j).

[T.D. 8256, 54 FR 28617, July 6, 1989]

**§ 1.132-7T Treatment of employer-operated eating facilities—1985 through 1988 (temporary).**

(a) *In general*—(1) *General rule.* The value of meals provided to employees at an employer-operated eating facility for employees is excludable from gross income as a de minimis fringe only if—

(i) On an annual basis, the revenue from the facility equals or exceeds the direct operating costs of the facility, and

(ii) With respect to any officer, owner or highly compensated employee, access to the facility is available on substantially the same terms to each member of a group of employees that is defined under a reasonable classification set up by the employer that does not discriminate in favor of officers, owners, and highly compensated employees. See § 1.132-8T.

(2) *Employer-operated eating facility for employees.* An employer-operated eating facility for employees is a facility that meets all of the following conditions—

(i) The facility is owned or leased by the employer,

(ii) The facility is operated by the employer,

(iii) The facility is located on or near the business premises of the employer,

(iv) Substantially all of the use of the facility is by employees of the employer operating the facility, and

(v) The meals furnished at the facility are provided during, or immediately before or after, the employee's workday.

For purposes of this section, the term "meals" means food, beverages, and related services provided at the facility. If an employer can determine the number of employees who receive meals that are excludable from income under

section 119, the employer may, in determining whether the requirement of paragraph (a)(1)(i) of this section is satisfied, disregard all costs and revenues attributable to such meals provided to such employees. For purposes of this section, each dining room or cafeteria in which meals are served is treated as a separate eating facility, regardless of whether each such dining room or cafeteria has its own kitchen or other food-preparation area.

(3) *Operation by the employer.* If an employer contracts with another to operate an eating facility for its employees, the facility is considered to be operated by the employer for purposes of this section. If an eating facility is operated by more than one employer, it is considered to be operated by each employer.

(b) *Direct operating costs.* The direct operating costs test must be applied separately for each dining room or cafeteria. For purpose of this section, the direct operating costs of an eating facility are: (1) The cost of food and beverages and (2) the cost of labor for personnel whose services relating to the facility are performed primarily on the premises of the eating facility. Direct operating costs do not include the cost of labor for personnel whose services relating to the facility are not performed primarily on the premises of the eating facility. Thus, for example, the labor cost for cooks, waiters, and waitresses is included in direct operating costs, but the labor cost for a manager of an eating facility whose services relating to the facility are not primarily performed on the premises of the eating facility is not included in direct operating costs. If an employee performs services both on and off the premises of the eating facility, only the applicable percentage of the total labor cost of the employee that bears the same proportion as time spent on the premises bears to total time is included in direct operating costs. For example, assume that 60 percent of the services of the cooks in the above example are not related to the eating facility. Only 40 percent of the total labor cost of the cooks is includible in direct operating costs. For purposes of this section, labor costs include all compensation required to be reported

on a Form W-2 for income tax purposes and related employment taxes paid by the employer.

(c) *Valuation of non-excluded meals provided at an employer-operated eating facility for employees.* If the exclusion for meals provided at an employer-operated eating facility for employees is not available, the recipient of meals provided at such facility must include in income the amount by which the fair market value of the meals provided exceeds the sum of: (1) The amount, if any, paid for the meals, and (2) the amount, if any, specifically excluded by another section of the Code. For special valuation rules relating to such meals see § 1.61-2T (j).

[T.D. 8063, 50 FR 52308, Dec. 23, 1985, as amended by T.D. 8256, 54 FR 28600, July 6, 1989]

#### § 1.132-8 Fringe benefit non-discrimination rules.

(a) *Application of nondiscrimination rules—(1) General rule.* A highly compensated employee who receives a non-additional cost service, a qualified employee discount or a meal provided at an employer-operated eating facility for employees shall not be permitted to exclude such benefit from his or her income unless the benefit is available on substantially the same terms to:

- (i) All employees of the employer; or
- (ii) A group of employees of the employer which is defined under a reasonable classification set up by the employer that does not discriminate in favor of highly compensated employees. See paragraph (f) of this section for the definition of a highly compensated employee.

(2) *Consequences of discrimination—(i) In general.* If an employer maintains more than one fringe benefit program, i.e., either different fringe benefits being provided to the same group of employees, or different classifications of employees or the same fringe benefit being provided to two or more classifications of employees, the non-discrimination requirements of section 132 will generally be applied separately to each such program. Thus, a determination that one fringe benefit program discriminates in favor of highly compensated employees generally will not cause other fringe benefit programs