The Firehouse Lawyer

Volume 21, Number 8

August 2023

Be sure to visit firehouselawyer.com to get a glimpse of our various practice areas pertaining to public agencies, which include labor and employment law, public disclosure law, mergers and consolidations, financing methods, risk management, and many other practice areas!!!

Eric T. Quinn, Editor

Joseph F. Quinn, Staff Writer

The law firm of Eric T. Quinn, P.S. is legal counsel to more than 40 Fire Departments in the State of Washington.

Our office is located at:

7403 Lakewood Drive West, Suite #11
Lakewood, WA 98499-7951

Mailing Address: See above
Office Telephone: 253-590-6628
Joe Quinn: 253 576-3232

Email Joe at joequinn@firehouselawyer.com
Email Eric at ericquinn@firehouselawyer2.com

Access and Subscribe to this Newsletter at:
firehouselawyer.com

Inside this Issue

. TAXABLE INCOME…OR NOT?

It has been about 16 years since we wrote about this topic in the *Firehouse Lawyer*, so…it is about time! No, actually it is about taxes. We want to cover those fringe benefits that are *excludible* from income taxes for your employees.

Although I am not a tax attorney by any stretch of the imagination, and disclaim any great expertise in this area, I **am** able to read and understand the IRS regulations and publications dealing with this subject. In this article, I will simply try to paraphrase IRS regulations and guidance, using as my primary source IRS Publication 15-B the Employer's Guide to Fringe Benefits for use in 2023.[1]

The purpose of this article, therefore, is to alert the readers about the issues surrounding taxability of fringe benefits, and your responsibilities as employers to participate in the documentation or retention of records, to support and substantiate a taxpayer's position. At times during the article my purpose is merely to set forth the IRS position on certain items, and not to agree or disagree with their position or interpretation. However, at other times I will attempt to add my thoughts. Hopefully, I will be clear in each case as to which of those two modes of expression are being used!

[1] https://www.irs.gov/pub/irs-pdf/p15b.pdf

This article focuses on the taxability or exclusion of the following, as income to the employee: **meals paid by employer, education programs, employer-provided clothing such as uniforms, take-home vehicles (qualified non personal use vehicles), awards, cell phones and similar technological devices, safety equipment, and group life insurance. We may also add discussion of rent-reduced housing.** Given this broad range of covered benefits, it should be no surprise that the whole issue of the *Firehouse Lawyer* this month is devoted to this important subject.

Meal Allowances or Reimbursements

Infrequent meals of de minimis value are excludible. If a meal has so little value, taking into account how frequently you provide meals, that accounting for it would be unreasonable, or impracticable, then it is considered de minimis. For example, coffee, doughnuts, or soft drinks are considered de minimis. An occasional meal afforded to allow an employee to work overtime is de minimis.

You can exclude meals served on the employer's premises, if the meals are furnished for the employer's convenience. There has to be a substantial business purpose and the meal is not being given as added compensation. In a provision that is seemingly aimed at fire departments, meals provided to emergency employees so that they will be available for emergency calls/responses are made specifically excludible. If you can show that such calls have occurred or are reasonably expected to occur, then the exclusion applies.

Meal Reimbursements while traveling away from home on business of the employer are generally excludible from taxable income. Traveling away from your tax home means longer than an ordinary day's work **and** the employee needs substantial sleep or rest to meet work demands. Meals taken away from tax home but not on an overnight trip are generally taxable as income/wages. To be excludible, meal reimbursements should be done under an "accountable plan", which means the expenses must have been expenses that would have been deductible business expenses, all details of the expense must be substantiated within a reasonable time, and the plan must require any excess payments to be reimbursed.

Per diem payments may be excludible without substantiation of actual costs, but only if in accord with IRS allowed amounts, and the overnight rule still applies. Per diem plans are acceptable to the IRS, but only if the payments are paid for meals away from home, the amounts are reasonably calculated not to exceed actual expenses or anticipated expenses, and must be paid at the federal per diem rate, a flat rate or in accord with a stated schedule. (Thus it would seem that the typical fire district/RFA per diem plan would pass muster with the IRS, at least for overnight stays with meal plans.) The same de minimis rule mentioned above for actual meals can apply here to reimbursements as long as these are only occasional, especially if needed to work overtime.

Reimbursed meals while attending trade, professional, or business meetings at certain exempt organizations are excludible from wages. Typical organizations include chambers of commerce, business associations, or service clubs. For example, the Fire Chief attends the local Rotary meeting by invitation to present a program on the fire department, which includes a meal

cost, which the district reimburses. This should be excludible. However, **entertainment meals** are generally not excludible, but are taxable income if paid by the employer. The IRS rules require the "business meeting" to be directly related to business. In other words, the main purpose of the business meeting and meal is the active conduct of business; business must be actually conducted during the meal period. All facts must be considered, but the activity must be clearly in a business setting of the organization. Thus, reimbursing elected officials or commissioners for the meal cost at the association holiday party would probably not be excludible from taxable income, so it is not recommended. But reimbursing meal costs incurred at a state or county fire commissioners conference should be non-taxable, as those are business-related meals generally (except perhaps for a banquet meal, if the 'banquet meeting' includes little or no business).

Education Programs or College Tuition etc.

This exclusion applies to educational assistance provided to employees under an educational assistance program. Even graduate level course can be covered by the program. Educational expenses can include books, equipment, fees, supplies and of course tuition. Educational expenses related to sports, games or hobbies are generally ineligible under these programs. Eligible expenses do not include tools or supplies (other than textbooks) if the employee can keep them after the course ends. Lodging, meals and transportation are also not covered under these programs, to qualify for exclusion, although they might be addressed elsewhere in the IRS regulations.

Certain rules, some of which may not really apply in the public employee sector, are set up to test whether a program is a bona fide educational assistance program. Your program cannot allow employees to opt for cash instead. You must give reasonable notice to employees of the existence of the program. You cannot favor highly compensated employees under these programs. Even former employees who separated through retirement, disability or layoff may be covered.

Under such a program, up to $5,250 per year is excludable from taxable income. Any amount in excess of that amount must be reported and included in their wages for the year. (Of course, all of it would have to be so reported and included if you have no adopted plan!) The only exception to that statement would be if an amount could be considered "working condition benefits", which are explained in depth below.

Employer-Provided Clothing

Clothing or uniforms provided by the employer are not includible in income if they are specifically required as a condition of employment and are not worn or adaptable to general usage as ordinary clothing. That rule may be problematic for departments that buy sweatshirts or polo shirts, which seem rather ordinary, and may not be required uniforms. But if the clothing is excludible income, so is the cleaning cost. The rules on accountable plans must be satisfied (see above). It would seem prudent to have a policy in place not allowing such items to be worn as ordinary clothing or while off duty, to enhance the chances that such clothing will not be considered a taxable income item.

Obviously, employer-provided bunker gear, turnouts, or personal protective equipment or

clothing (to use the safety regulation name) should not be taxable. Such gear also fits the definition of "safety equipment" (see below).

Safety Equipment

Safety equipment is excludible from income/wages if it helps the employee perform his/her job more safely; it does not have to be "required" safety equipment to qualify as non-taxable. This is another accountable plan item.

Mileage Allowance (personal vehicle used)

If the employer provides the employee with a vehicle to use **OR** a mileage allowance, this allowance or value is not taxable if the following **"accountable plan" rules** are followed: (1) there must be a business connection to the allowance or vehicle use; (2) adequate substantiation is needed; and (3) excess amounts must be returned.

Awards/Recognition

Generally awards are taxable, with some very limited exceptions. De minimis awards or recognition are non-taxable events. De minimis essentially means of nominal value. It should also be something given infrequently. These are excludible unless given in cash or a "cash equivalent", such as a gift card or gift certificate. Some examples of de minimis (excludible from income) awards would be a holiday turkey or ham, flowers, plaques, coffee mugs, or a gold watch upon retirement. Is there a threshold amount for "nominal value"? Not really, but if it would cost more to account for it, than it cost, you are probably safe. Employee Achievement Awards have special requirements. These are **only for length of service or safety**. To be excludible, it must be awarded as part of a meaningful presentation. It cannot be cash or a "cash equivalent". Length of service awards generally cannot be given during the first five years of employment, and can only be given in five-year increments, except for retirement awards. Safety achievement awards have other special limitations. If given to managers, administrators, clerical personnel, or professional employees they do not qualify as non-taxable. During a tax year, only 10% of eligible employees can get such awards. For example, if you had 50 eligible employees, only 5 annually could get awards, as the 6th one would be taxable! The average cost of all employee achievement awards made by the employer during a single year cannot exceed $400 per employee.

Cell Phones

At this point, the rules regarding cell phones are much simpler than they were 16 years ago. We can analyze this issue the same as the "working conditions benefits" described below. If the phone is provided for noncompensatory business purposes, there is an exclusion. The personal use (assuming it is minimal) is excludable as a de minimis fringe benefit. The term "cell phone" is deemed by the IRS to encompass similar telecommunications equipment. Because of the emergency response work of most fire service personnel, there is no difficulty finding the purpose to be noncompensatory. Of course, if you just provided the phone to promote goodwill with the employee, or added compensation, the value would not be excludible. Duh!

Group Term Life Insurance

Generally, up to $50,000 in term life insurance benefits are excludible from income. The same amount is excludible when figuring social security and Medicare, if those apply in your jurisdiction. So, obviously, there is also no withholding for income taxes. The insurance must provide a general death benefit to an employee group of at least 10 employees. Insurance must be based on a formula that prevents individual selection. The formula must use criteria such as age, years of service, pay level, or position. The policy must be provided by or through the employer, directly or indirectly, although it is not necessary for the employer to be paying the premiums.

Leave Sharing Programs

It is not uncommon for fire service employers to have leave sharing programs, whereunder one employee can transfer, for example, sick leave balances to another employee who may be experiencing serious health problems and has therefore run out of sick leave and/or vacation leave. Be aware that the amounts paid to the recipients of the leave are considered wages by the IRS. These amounts are includible in the gross income of the recipients and are generally subject to the rules of reporting for social security, Medicare and FUTA taxes, in addition to normal withholding. Of course, the amounts are *not* included in the wages of the transferors.

Similarly, if the employer has a leave-sharing program that the employer administers, to provide leave to employees in the event of a major disaster, the analysis is the same. The donor who puts leave into such a program has no adverse tax consequences, as long as any recipient is subject to the social security, withholding and other laws cited above.

Working Condition Benefits

This exclusion applies to property and services provided to an employee so they can perform their job. The exclusion applies to the extent that the cost related to the property or services can be deducted as a business expense or depreciation expense deduction to the employee if the employee had to pay for it. Examples of working condition benefits include an employee's use of a "company car" for business purposes, or an employer-provided cell phone provided primarily for noncompensatory business purposes. Also, job-related educational expenses can qualify for this treatment.

IRS publications include much discussion of the use of a "qualified nonpersonal use vehicle." Below we will call these QNUVs. Since fire service personnel are often provided vehicles that they can use to commute, so that the employer can count on rapid response to emergency calls from off duty (or on call) employees, we will discuss those at some length here.

A QNUV is any vehicle the employee is not likely to use more than minimally for personal purposes, because of its *design.* Clearly marked fire service vehicles will qualify as long as personal use (other than commuting) is prohibited by the policy of the employer agency. An ambulance or clearly marked aid car is a QNUV. We recommend that sedans (whose design is more like a common automobile) be clearly marked "For Official Use Only" in addition to the insignia or other identifying information on the vehicle. De minimis personal use while commuting is allowable under this exclusion, like stopping at the grocery store on the way home or to work.

If the vehicle is qualified as a QNUV, then all use of it is excludible, i.e. not considered income to the employee. Thus, even if such an employee takes the QNUV, on an extended trip away from the employer's principal place of business, there is no problem expected from the IRS.

Educational expenses can also qualify for exclusion as a working condition benefit. The educational expense must be job-related. Each program must be evaluated independently and specifically to see if it is truly job-related. If required by the employer or by law, to retain qualification for the employment, present salary, or status, and if it serves a bona fide business purpose of that employer, it can qualify as a working condition benefit. This is also true because if the employee paid such a cost, it would be tax deductible as an ordinary and necessary business expense.

Employer-Provided Lodging

Actually, we had a question about this topic in August, and that is what made me think about revisiting this entire topic. After all, it has been 16 years since we wrote about fringe benefits and taxation.

Generally, if you provide lodging on your business premises, for the convenience of the employer, and as a condition of employment, that value is excluded from the income of the employee/taxpayer. Suppose you provide a rent-free or rent-reduced house or other lodging to an employee and in return they agree to maintain the facility and respond to calls from that location. Excludible. Or if you have facilities for lodging or rooms in a usually unstaffed station and you agree with an employee to "reside" there, that value is excludible. In essence, this is because the employer is getting valuable consideration for the benefits provided to the employee. You must remember, however, that the use of the lodging must be *required* by their conditions of their employment, as in a contract, for example.

Conclusion

Well, we hope you have found this article helpful but if there are related topics that the readers might find useful to be covered in a future article on this subject (or really any fire-service related topic) just let us know.