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Five-Star Exclusion: Modern Silicon Valley Companies Are Pushing the Limits of Section 119 by Providing Tax-Free Meals to Employees

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* Candidate for J.D., Washington and Lee University School of Law, May 2015. I am grateful for Professor Brant Hellwig, whose valuable insight guided every stage of this Note. I would like to express my deepest thanks to my parents, Lee and Connie Lomax, and to all my family and friends—their love and encouragement have put me where I am today. Finally, I would also like to thank both the 2013–14 and 2014–15 Washington and Lee Law Review editorial boards for their countless comments, edits, and suggestions throughout the process.

I. Introduction

For the fourth time, *Fortune Magazine* named Google the best company to work for in the United States.[1] One can easily understand why—the benefits are unparalleled. In California, a day in the life of a "Googler" begins by taking Google's free shuttle from San Francisco to the Mountain View campus.[2] She can start the day with a free fitness class before getting a complimentary cappuccino on the way to the office.[3] The company also provides a concierge service to handle everyday tasks.[4] The concierge can arrange anything from onsite dry cleaning to haircuts or bike repairs.[5] During downtime, an employee can go bowling at the campus lanes, receive a massage, or take a dance class.[6] All of these benefits are free.[7] The company even has expansive mortality benefits if an employee passes away—each child of a deceased employee receives $1,000 per month until he reaches nineteen.[8]

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1. *See 100 Best Companies to Work For*, FORTUNE (Jan. 3, 2013, 8:43 PM), http://money.cnn.com/magazines/fortune/best-companies/?iid=bc_lp_header (last visited Sept. 24, 2014) (ranking companies based on an extensive employee survey) (on file with the Washington and Lee Law Review).

2. *See* Kevin Smith, *Google Employees Reveal Their Favorite Perks Working for the Company*, BUS. INSIDER (Mar. 6, 2013, 11:02 AM), http://www.businessinsider.com/google-employee-favorite-perks-2013-3?op=1 (last visited Sept. 24, 2014) (listing a variety of employee reactions to the many perks that Google offers) (on file with the Washington and Lee Law Review).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *See* Meghan Casserly, *Here's What Happens to Google Employees When They Die*, FORBES (Aug. 8, 2012, 2:53 PM), http://www.forbes.com/sites/meghancasserly/2012/08/08/heres-what-happens-to-google-employees-when-they-die/ (last visited Sept. 24, 2014) (discussing Google's death benefit plan, which

Most strikingly, however, Google provides unlimited meals and snacks to its employees.[9] While many companies provide food to their employees in some form, like free coffee and doughnuts for example, Google and other Silicon Valley tech companies separate themselves by their meal plans' level of extravagance.[10] Google runs twenty-five cafes at its Mountain View, California headquarters,[11] and serves over 50,000 meals per day at its 120 cafes around the world.[12] The meals are lavish—fresh sushi at Asian-themed Cafe Gia or organic produce from Cafe 150, a restaurant using only local ingredients found within 150 miles of Mountain View.[13] Google employees even coined the phrase "the Google fifteen" for the weight gain new employees experience when they have access to unlimited, gourmet food.[14]

Although Google does not disclose the financial impact of its cafe operations, outside estimates suggest a significant expenditure.[15] One source puts the cost around twenty dollars per

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also vests all stock and grants fifty percent of the employee's salary each year to the employee's surviving spouse for ten years) (on file with the Washington and Lee Law Review).

9. *See* Smith, *supra* note 2 (quoting a former employee who stated that workers are never more than 150 feet away from a cafe or micro kitchen).

10. *See* Mark Maremont, *Silicon Valley's Mouthwatering Tax Break*, WALL ST. J. (Apr. 7, 2013, 7:03 PM), http://online.wsj.com/news/articles/SB10001424127887324050304578408461566171752 (last visited Sept. 24, 2014) ("Although some employers long have been providing free lunches for their executives or even ordinary workers, Silicon Valley has taken the practice to a new level.") (on file with the Washington and Lee Law Review).

11. *See* J.P. Mangalindan, *Google: The King of Perks*, FORTUNE (Jan. 30, 2012, 3:18 PM), http://money.cnn.com/galleries/2012/technology/1201/gallery.best-companies-google-perks.fortune/4.html (last visited Sept. 24, 2014) (stating that Google increased its number of cafes from eleven to twenty-five) (on file with the Washington and Lee Law Review).

12. Maremont, *supra* note 10.

13. *See* Mangalindan, *supra* note 11 (describing these free food options as making Google "legendary" for its meal options).

14. *See* Meghan Keneally, *Noisy Massage Chairs, Over-Inflated Egos and Too Much Free Food, It's a Hard Life at Google: Employees Take to Web to Gripe About Their Job Perks*, DAILY MAIL (June 19, 2013, 1:23 PM), http://www.dailymail.co.uk/news/article-2487276/Former-Google-employees-complain-job-perks.html (last visited Sept. 24, 2014) (stating that some employees use corporate gym facilities to prevent the weight gain) (on file with the Washington and Lee Law Review).

15. *See* Vasanth Sridharan, *Google's Ginormous Free Food Budget: $7,530*

employee each day, which tallies out to approximately $72 million per year.[16] Another source believes Google pays closer to ten dollars per employee each day.[17] Depending on the calculation, it appears each employee receives between $4,000 to $8,000 in free food each year.[18] Yet Google does not report this benefit as taxable compensation to its employees.[19] Hence, the employees presumably pay no taxes on this considerable perk.[20]

Other Silicon Valley companies follow Google's lead and provide free meals.[21] Facebook has several options for its employees, including two gourmet cafes in addition to barbeque, pizza, burrito, and burger restaurants.[22] Zynga, the social gaming tech company, now retains a thirty-three-member culinary staff that feeds 1,200 employees meals such as chicken vindaloo, beef tenderloin, and lobster mushroom bisque.[23] Some caterers in the Bay Area call the food boom the "Google Effect," where even nontech companies are beginning to offer free food to compete for

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*Per Googler, $72 Million a Year**, BUS. INSIDER (Apr. 23, 2008, 2:36 PM), http://www.businessinsider.com/2008/4/googles-ginormous-food-budget-7530-per-googler (last visited Sept. 24, 2014) (making an estimate about the meal plan's cost) (on file with the Washington and Lee Law Review).

16. *See id.* (admitting that originally this estimate was for Google's American operations only but later recalculating and believing that the worldwide total is close to this number).

17. Maremont, *supra* note 10.

18. *See id.* ("Assuming a fair-market value of between $8 and $10 per meal, a Googler chowing down two squares a day could get dinged for taxes on an extra $4,000 to $5,000 a year."); Sridharan, *supra* note 15 (estimating the cost per employee at $5,000 to $7,530).

19. *See* Maremont, *supra* note 10 (reporting that former Google employees have said Google does not include meal value on paystubs or W-2 tax statements).

20. *See id.* (finding no evidence the employees pay tax).

21. *See id.* (naming Facebook, Twitter, Zynga, and Yahoo as providers of free employee meals).

22. *See id.* (noting that Facebook's Cafe Epic offers from morning until night dishes like she-crab soup and grilled steak with chimichurri sauce).

23. *See* Yukari Iwatani Kane, *The Tech World's Hottest Meal Ticket*, WALL ST. J. (Dec. 23, 2010, 12:01 AM), http://online.wsj.com/news/articles/SB10001424052748703886904576031650379762720 (last visited Sept. 24, 2014) (describing Zynga Culinary as "one of the hottest food scenes" in San Francisco) (on file with the Washington and Lee Law Review).

talent.[24] One example of the Google Effect is Yahoo!, whose new Chief Executive Officer Marissa Mayer formerly worked at Google and brought the free meal practice over to her new company.[25] Mayer even went as far as to say that Yahoo! instituted a Google-like plan to make it "the absolute best place to work."[26] Even small startups outside the Bay Area have begun providing free meals to meet this new industry standard.[27] Yet, as of now, none of these companies or their employees treats the meal benefit as taxable income.[28] In this way, these companies have effectively created a lavish form of tax-exempt compensation.[29]

This practice has sparked debate in the legal community over whether these meals should constitute taxable income.[30] On one side of the debate, some argue that Google, Facebook, and the other Silicon Valley companies have these meals for a primarily compensatory purpose as a means of attracting the best talent.[31]

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24. *See* Shira Ovide, *Work Perk: Free-Meal Rule Widens*, WALL ST. J. (July 11, 2012, 6:20 PM), http://online.wsj.com/news/articles/SB10001424052702304022004577516912524877338 (last visited Sept. 24, 2014) (quoting a caterer stating that free food "has become the norm") (on file with the Washington and Lee Law Review).

25. *See* Maremont, *supra* note 10 (relaying some of Mayer's comments about bringing the food perk to Yahoo!).

26. *Id.*

27. *See, e.g.*, Molly Young, *The Calorie-Packed Perk*, N.Y. TIMES (June 19, 2013), http://www.nytimes.com/2013/06/20/fashion/the-calorie-packed-perk.html?pagewanted=all&_r=0 (last visited Sept. 24, 2014) (describing the benefits arms race for skilled start-up labor in New York) (on file with the Washington and Lee Law Review).

28. *See, e.g.*, Maremont, *supra* note 10 (stating former Google employees reported not paying taxes on their free meals). Google, other large companies, and the IRS have declined to comment on the tax status of the food programs. *Id.* Theoretically, these companies could pay the taxes for their employees. This is unlikely because those tax payments would also constitute additional compensation, and the taxpayer would still need to include it on a tax return. *See* Old Colony Trust Co. v. Comm'r, 279 U.S. 716, 729 (1929) (finding tax payments that a company provided for its officers still constituted income).

29. *See, e.g.*, Maremont, *supra* note 10 (describing the meals as a "mouthwatering tax break").

30. *See, e.g.*, *id.* (describing lawyers' disagreement on whether the IRS should make the companies pay taxes on the meals).

31. *See id.* (quoting statements of Martin J. McMahon, Jr., a tax law professor at the University of Florida, who believes the meals represent taxable

On the other side, some believe that the meals do not have a primarily compensatory purpose but rather help the employers by establishing more social interactions that aid innovation and encourage employees to spend more time at work.[32]

This Note examines the tax treatment of free employee meals under programs provided by Google and companies that emulate its practices, concluding that the fringe benefit is indeed taxable.[33] First, the Note provides a context for fringe-benefit taxation as a part of gross income.[34] Second, the discussion identifies two relevant exclusions that could potentially apply to the meals—*de minimis* fringe benefits and the convenience-of-the-employer doctrine.[35] Third, after sorting through statutes, regulations, and judicial decisions, this Note argues that the free meal practices constitute taxable compensation.[36] It demonstrates that the Silicon Valley companies cannot meet the burden of establishing the meals as *de minimis* fringe benefits because the statute specifically mentions eating facilities, the meals occur too frequently, and accounting for them would not be difficult.[37] The

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income); *Google Mountain View (Global HQ)*, GOOGLE, http://www.google.com/about/jobs/locations/mountain-view/ (last visited Sept. 24, 2014) (citing both Cafe Gia and Cafe 150 as "perks" in response to a frequently asked question entitled "What's the best thing about working at Google Mountain View?" on a Google careers page) (on file with the Washington and Lee Law Review).

32. *See* Maremont, *supra* note 10 ("But these lawyers argue that some technology firms could qualify, in part because free food encourages longer work hours and is a crucial part of Silicon Valley's collaborative culture."); James B. Stewart, *Looking for a Lesson in Google's Perks*, N.Y. TIMES (Mar. 15, 2013), http://www.nytimes.com/2013/03/16/business/at-google-a-place-to-work-and-play.html?pagewanted=1&_r=0 (last visited Sept. 24, 2014) (recounting a story from a Google employee who took a day off yet still came into the office, saying, "I live in a studio apartment, and I don't have free food") (on file with the Washington and Lee Law Review).

33. *See infra* Part V (concluding the current Tax Code requires the employees to pay taxes on the free meals).

34. *See infra* notes 45–55 and accompanying text (analyzing the Tax Code language and subsequent regulations).

35. *See infra* Part III.A (discussing the applicable standards for *de minimis* fringe benefits); Part IV.A–B (discussing the applicable standards for the convenience-of-the-employer doctrine).

36. *See infra* Part V (recounting the argument that the meals are taxable because neither exclusion applies).

37. *See infra* Part III.B (analyzing these three reasons).

Note then argues that the convenience-of-the-employer doctrine does not apply.[38] The meals do not serve a "substantial noncompensatory business reason," which is required to establish the exclusion.[39] Finally, this evidence will lead to the conclusion that the current Tax Code does mandate employees pay taxes on the meals, and that policy reasons should not prevent IRS enforcement.[40]

II. Prevailing Legal Framework for Fringe Benefits

To avoid tax liability, the Silicon Valley employees must prove that an exclusion allows them to leave the free meals out of their gross income. This Part provides a framework for the Internal Revenue Code's treatment of fringe benefits. It establishes that the Silicon Valley companies provide meals that constitute gross income unless an applicable exclusion applies.[41] The following Parts address two possible exclusions for the free meals—the *de minimis* fringe benefit exclusion of § 132[42] and the meals furnished for the convenience-of-the-employer exclusion of § 119.[43]

A. The Expansive Definition of Gross Income

The Sixteenth Amendment to the Constitution allows the federal government to collect income taxes "from whatever source derived."[44] The Amendment engendered the modern federal tax system by allowing income taxation without apportionment, a

38. *See infra* Part IV.D (applying the doctrine to the free meal programs).

39. Treas. Reg. § 1.119–1(a)(2)(i) (2013); *see also infra* Part IV.D (asserting that the employers do not need to provide free meals as a necessary component of business operations).

40. *See infra* Part V (concluding with this sentiment and evaluating some of the policy arguments).

41. *See infra* notes 66–70 and accompanying text (concluding that the Tax Code's expansive base supports this claim).

42. I.R.C. § 132(e) (2012).

43. *See id.* § 119(a) (providing the statutory framework for the convenience-of-the-employer doctrine).

44. U.S. CONST. amend. XVI.

move away from a system based on consumption taxes.[45] This broad power imposes no significant taxation limitations on Congress but rather grants it the ability to define and narrow taxable income.[46] Subsequently, Congress has echoed the Sixteenth Amendment by also defining gross income utilizing the "whatever source derived" language.[47] Section 61(a) of the Internal Revenue Code[48] defines gross income and casts a wide net, listing certain types of income but not limiting the definition in any way.[49] Instead, Congress has used other statutes to provide specific and deliberate exclusions from this expansive definition.[50] The landmark Supreme Court case *Commissioner v. Glenshaw Glass Co.*[51] reflects this notion.[52] The Court strongly characterized gross income as Congress exerting its full taxing power, recognizing the "intention of Congress to tax all gains except those specifically exempted."[53] Accordingly, the Court ruled that the taxpayers' awards of punitive damages were gross income because Congress did not enumerate such an exclusion.[54] For the purposes of evaluating the Silicon Valley meal programs, this background indicates that the tax base is expansive—any

45. *See* Erik M. Jensen, *The Taxing Power, The Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1057, 1091 (2001) (contending that the inadequacies of consumption taxes provided the impetus for a federal income tax).

46. *See, e.g.*, Daniel N. Shaviro, *Psychic Income Revisited: Response to Professors Johnson and Dodge*, 45 TAX. L. REV. 707, 711 n.17 (1990) (stating the Sixteenth Amendment does not constrain how Congress and the courts may define taxation).

47. I.R.C. § 61(a).

48. *Id.*

49. *See id.* § 61(a)(1)–(15) (providing fifteen categories of potential income).

50. *See, e.g.*, *id.* § 101 (providing an exclusion for certain death benefits); *id.* § 104 (compensation for injuries and sickness); *id.* § 130 (scholarships); *id.* § 132 (certain fringe benefits); *id.* § 134 (military benefits); *id.* § 136 (energy conservation subsidies); *id.* § 139 (disaster relief payments).

51. 348 U.S. 426 (1955).

52. *See id.* at 428–29 (deciding whether punitive damages fell within the scope of the 1939 definition of gross income, which is virtually identical to § 61(a) for all intents and purposes).

53. *Id.* at 430.

54. *See id.* at 431–32 (finding no evidence that Congress intended to exempt these damages awards).

income not specifically exempted by statute, or limited by judicial or administrative interpretations, constitutes taxable income.[55]

B. Free Meals as Fringe Benefits

As a threshold issue, the free meals plainly constitute gross income under § 61(a)(1) as a fringe benefit.[56] A fringe benefit is essentially any nonmonetary benefit an employee receives in connection to the provision of services.[57] The examples are limitless, from a free parking spot to a company car.[58] Section 132 of the Internal Revenue Code lists fringe benefits excludable from taxable income.[59] Congress first created this section in 1984, responding to concerns that the IRS would take new measures to create nonstatutory fringe benefit exclusions.[60] Congress worried that the Treasury Department's planned regulations would affect

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55. *See* J. MARTIN BURKE & MICHAEL K. FRIEL, TAXATION OF INDIVIDUAL INCOME (10th ed. 2012) (describing these types of exemptions as the only limits to the scope of gross income).

56. *See* I.R.C. § 61(a)(1) (2012) ("[G]ross income means all income from whatever source derived, including (but not limited to) the following items: (1) Compensation for services, including fees, commissions, fringe benefits, and similar items . . . .").

57. *See, e.g.*, Universal Mar. Serv. Corp. v. Wright, 155 F.3d 311, 320 (4th Cir. 1998) ("[T]he term 'fringe benefits' means those advantages given to an employee in addition to his regular, monetary pay whose value to the employee is too speculative to be readily converted into a cash equivalent."); BLACK'S LAW DICTIONARY 1952 (9th ed. 2009) (defining a fringe benefit as "[a] benefit (other than direct salary or compensation) received by an employee from an employer, such as insurance, a company car, or a tuition allowance"); INTERNAL REVENUE SERV., PUBLICATION 15-B: EMPLOYER'S GUIDE TO TAX FRINGE BENEFITS 2 (2014), http://www.irs.gov/pub/irs-pdf/p15b.pdf ("A fringe benefit is a form of pay for the performance of services.").

58. *See, e.g.*, Treas. Reg. § 161-21(a)(2) (2013) (listing examples of excludable fringe benefits).

59. *See* I.R.C. § 132 (listing eight current fringe benefit exclusions specifically envisioned by Congress).

60. *See* Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (creating § 132, which contained fringe benefit exclusions for no-additional-cost services, qualified employee discounts, working-condition fringe, and *de minimis* fringe); Act of Oct. 7, 1978, Pub. L. No. 95-427, 92 Stat. 996 (barring the Treasury Department from promulgating new fringe benefit regulations to give Congress time to legislate).

some employee benefits that many did not consider taxable compensation yet leave some valuable benefits untaxed.[61] In introducing the fringe benefits provisions of the Deficit Reduction Act, Congress sought to balance two considerations. First, it wanted to protect situations when employers provided their employees the same goods they sold to the public because those goods often served more than a compensatory purpose.[62] Second, it wanted to prevent employers from taking advantage of tax-free benefits by clarifying fringe-benefit taxation.[63] Without clear rules, tax incentives would exist to utilize more noncash compensation. This practice, in turn, would shrink the tax base and place a disproportionate tax burden on employees receiving cash income.[64] Congress believed this bill ended the uncertainties about fringe-benefit taxation, making any fringe benefit that did not fit within a statutory provision taxable.[65] This legislative history further illustrates that employees should pay tax on fringe benefits unless a statutory provision directly applies to the received benefit.

The fringe benefits enjoyed by the Silicon Valley employees must be analyzed under this statutory framework. Regardless of how the employer characterizes the free meals, it cannot argue that daily free meals do not constitute fringe benefits under this broad definition simply because they are not cash compensation.[66] A free meal is a benefit no matter the motivation for providing it, and most of the Silicon Valley companies characterize it as such.[67] If cups of coffee and personal use of the copier are fringe

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61. *See* H.R. REP. NO. 95-697, at 7–8 (1977) (describing the reasons for the imposed moratorium on fringe benefit regulations).

62. *See* H.R. REP. NO. 98-432, at 286 (1983) (using the example of clothing store employees wearing the company brand).

63. *See id.* at 286–87 (expressing the desire to set clear boundaries for tax-free benefits).

64. *See id.* at 287 (reiterating the goal of eliminating discrimination and inequities in benefits taxation).

65. *See id.* at 287–88 (stating that any fringe benefit not a part of the bill or the Code is taxable under §§ 61 and 83).

66. *See* Treas. Reg. § 1.61-1 (2013) ("Gross income includes income realized in any form, whether in money, property, or services.").

67. *See supra* notes 21–29 and accompanying text (describing how employees use free meals as an enviable perk in recruiting employees).

benefits, two or three lavish meals per day certainly fit within the category.[68]

As a fringe benefit, the taxpayer must include the value of the free meals in gross income unless a related exclusion applies.[69] In other words, § 61(a) presumptively includes the free meals as gross income, subjecting the employees to tax liability, unless the taxpayer can establish that a fringe benefit exclusion directly applies.[70] Of all the possible exclusions, the Silicon Valley companies could only point to two as possibly relevant—the *de minimis* fringe benefit exclusion[71] and the meals furnished for the convenience-of-the-employer exclusion.[72] Each of these merits discussion, but the following analysis will demonstrate that neither applies to the free meals.[73]

III. De Minimis Fringe Benefits

A. Statutory Construction of § 132(e)

Of the exclusions listed in § 132, the *de minimis* fringe provision is the only relevant exclusion for free meals.[74] Neither the fringe benefits of "no-additional-cost service" nor "qualified employee discount" applies because each of those provisions focuses on benefits that do not cost an employer a substantial

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68. *See* Treas. Reg. § 1.132-6(e) (providing examples of *de minimis* fringe benefits).

69. *See id.* § 1.61-21(a) (stating that gross income includes fringe benefits not covered by enumerated exclusions).

70. *See* I.R.C. § 61(a) (2012) (including all income as taxable unless an exclusion applies instead of limiting the types of taxable income to certain specified categories).

71. *Id.* § 132(e).

72. *See id.* § 119(a) (codifying this exclusion).

73. *See infra* Part III.B (analyzing the *de minimis* fringe exclusion); *infra* Part IV.D (evaluating the convenience-of-the-employer doctrine).

74. *See* I.R.C. § 132(a) (enumerating eight potential exclusions: "(1) no-additional-cost service, (2) qualified employee discount, (3) working condition fringe, (4) de minimis fringe, (5) qualified transportation fringe, (6) qualified moving expense reimbursement, (7) qualified retirement planning services, or (8) qualified military base realignment and closure fringe").

amount of money.[75] The "working condition fringe" provision applies to either business expenses described in § 162 or depreciation in § 167, both of which are outside the scope of free meals provided at an employee's workplace.[76] Finally, the other fringe benefits listed in § 132 are much more specific and do not relate to employer-provided meals.[77] Thus, the exclusion provided for *de minimis* fringe benefits under § 132 stands as the only option even relevant for removing these meals from the tax base.[78]

De minimis fringe benefits are 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."[79] The Treasury Department provides a few examples of excludable benefits: personal use of the copying machine; occasional parties or group meals; holiday gifts of property; coffee, donuts, and soft drinks; and other similar incidentals.[80] It also provides instances of nonexcludable fringe

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75. *See id.* § 132(b) (mandating that the employer not incur "substantial additional cost including forgoing revenue" in providing a service to an employee); *id.* § 132(c) (requiring any employee discount still have a price either at employer cost or at no more than twenty percent less than the normal price).

76. *See id.* § 132(d) (defining working condition fringe benefits); *id.* § 162 (allowing a deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business"); *id.* § 167 (providing a deduction for depreciation of business property).

77. *See id.* § 132(f) (allowing an exclusion for various transportation expenses involved in commuting to and from work); *id.* § 132(g) (providing an exclusion for employer reimbursement of moving expenses related to work); *id.* § 132(m) (excluding retirement planning advice or information provided by an employer); *id.* § 132(n) (relating to military base realignment and closure).

78. *But see id.* § 132(e)(2)(B) (stating that meals fulfilling § 119 will be considered *de minimis* fringe under this provision). The statute states "[f]or purposes of subparagraph (B), an employee entitled under section 119 to exclude the value of a meal provided at such facility shall be treated as having paid an amount for such meal equal to the direct operating costs of the facility attributable to such meal." *Id.* For the purposes of this Note, § 132 and § 119 are discussed separately, analyzing whether a taxpayer could exclude the meals under § 132(e) if § 119 did not apply.

79. *Id.* § 132(e)(1).

80. *See* Treas. Reg. § 1.132–6(e)(1) (2013) (listing these examples and

benefits, such as season tickets, country club or gym memberships, and use of corporate recreation facilities like hunting lodges or boats.[81] Whether a benefit is *de minimis* often turns on the frequency with which the employee receives the benefit.[82] A taxpayer must measure the frequency of the benefit in one of two ways. Primarily, frequency depends on how often an individual employee receives a particular benefit, rather than how often the total workforce receives a particular benefit.[83] If it is difficult to determine how much an individual employee receives a benefit, then the taxpayer can determine frequency based on how much the employer provides the benefit to the entire workforce.[84] These regulations indicate that receiving a daily benefit likely does not constitute *de minimis* fringe.[85]

Additionally, the Internal Revenue Code includes a provision about eating facilities in relation to *de minimis* fringe benefits.[86] That provision allows the taxpayer to exclude certain free meals as *de minimis* if certain conditions apply: the employer must receive the meals at a facility on or near the business premises of the employer and the revenue the employer receives from those facilities must exceed the costs of operating them.[87] This

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others that are excludable under I.R.C. § 132).

81. *See id.* § 1.132–6(e)(2) (listing these examples and others that are not excludable under I.R.C. § 132).

82. *See* I.R.C. § 132(e)(1) (2012) (noting that the taxpayers must account for the frequency they receive the benefit in question when determining that benefit's value).

83. *See* Treas. Reg. § 1.132–6(b)(1) (noting that this "employee-measured" way of determining frequency does not allow an employee to exclude a benefit provided infrequently to the entire workforce if he receives that benefit every day).

84. *See id.* § 1.132–6(b)(2) (stating the individual frequency is not important in circumstances when it is difficult to measure).

85. *See id.* § 1.132–6(b)(1) ("For example, if an employer provides a free meal in kind to one employee on a daily basis, but not to any other employee, the value of the meals is not de minimis with respect to that one employee.").

86. *See* I.R.C. § 132(e)(2) (defining an instance when meals from certain eating facilities automatically constitute a *de minimis* fringe benefit).

87. *See id.* § 132(e)(2)(A)–(B) ("The operation by an employer of any eating facility for employees shall be treated as a de minimis fringe if—(A) such facility is located on or near the business premises of the employer, and (B) revenue [is] derived from such . . . .").

statutory framework provides the standard for determining whether the meals from the Silicon Valley employers are *de minimis* fringe benefits.[88]

B. The Meals Do Not Constitute De Minimis Fringe Benefits Under § 132(e)

Based on this legislative framework, the argument that the free meals are *de minimis* fringe benefits should fail to persuade the IRS.[89] This argument would contend that accounting for the free meals would become "unreasonable or administratively impracticable" for these companies, analogizing the meals to free coffee or occasional pizza parties in an office.[90] This argument is not persuasive for several reasons. First, the statute itself actually mentions eating facilities, allowing a *de minimis* exclusion if that facility's revenue "equals or exceeds" its operating costs.[91] Although the statute says "if" instead of "only if," this language still implies that the companies cannot exclude the free meals if they receive no revenue from the cafes and spend millions of dollars each year to run them.[92] The tax exclusion for these subsidized eating facilities derives from accounting difficulties.[93] Congress did not wish to impose the burden of recording which employees ate at the facility on particular days or the costs of the particular meals, as long as the facility generally profited.[94] The Silicon Valley companies could argue

88. *See infra* Part III.B (applying § 132(e) and asserting that these meals do not fall within the statutory scope).

89. *See* § 132(e)(1) ("The term 'de minimis fringe' means 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.").

90. *Id.*

91. *Id.* § 132(e)(2)(B).

92. *Id.*; *see also supra* notes 15–19 and accompanying text (describing the various estimates of Google's food costs).

93. *See* H.R. REP. NO. 98-432, at 299 (1983) (discussing the decision to include subsidized eating facilities as a *de minimis* fringe benefit).

94. *See id.* (evaluating these recordkeeping difficulties but noting that an employee eating regularly at the facility may not necessarily fit within the

that they face a similar problem—they would find it difficult to individually account for the vast quantities of meals, drinks, and snacks consumed on a daily basis.[95] Yet by adopting this provision, Congress chose to specifically limit the *de minimis* fringe benefits to profit-bearing meal facilities rather than free meal facilities.[96] Thus, this eating facility provision in § 132 strongly weighs against the Silicon Valley free meal programs as constituting *de minimis* fringe benefits especially when considering the legislative history.[97]

Second, even without considering the meal-program provision, § 132 and its corresponding regulations emphasize that the frequency with which an employee receives the fringe benefit dictates whether it remains excludable.[98] The *de minimis* fringe provisions allow the taxpayer to exclude meals occasionally, not on a regular or routine basis.[99] The regulation explicitly states that an employee who receives a free meal on a daily basis cannot exclude those meals.[100] Silicon Valley employees not only receive a meal each day, but often two or even three.[101] Based on this

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exclusion).

95. *See supra* notes 9–14 and accompanying text (noting the vast quantity of options for food at Google and other companies).

96. *See* I.R.C. § 132(e)(2)(B) (2012) (requiring the eating facilities' revenues exceed operating costs). Even without this provision, modern food service technology such as meal cards would seemingly make accounting relatively easy.

97. *See id.* (codifying this eating facility provision).

98. *See* Treas. Reg. § 1.132–6(b)(1)–(2) (2013) (describing how employers and employees should measure frequency in deciding whether a benefit is *de minimis*).

99. *See id.* § 1.132–6(d)(2) (allowing employer-provided meals on an occasional basis or for overtime work).

100. *See id.* ("For example, if an employer provides a free meal in kind to one employee on a daily basis, but not to any other employee, the value of the meals is not de minimis . . . ."). The regulation does state that the frequency of the benefit "is not relevant in some circumstances" when the employer controls the personal use of the benefit. *Id.* Personal use of a copier when an employee uses that copier for business purposes eighty-five percent of the time serves as an example. *Id.*

101. *See, e.g.*, Stewart, *supra* note 32 (describing an employee who even came into the office to eat on her off day).

frequency provision, *de minimis* fringe benefits do not apply to the free meals.[102]

Third, accounting for the meals does not appear difficult enough for the IRS to deem "administratively impracticable."[103] In cases which the IRS has discovered that employees excluded free meals improperly, the employer usually settles with the IRS and then decides on a fair market per-meal value to withhold from employee paychecks.[104] This withholding practice demonstrates that these large companies could easily calculate a flat tax rate for each meal, and that number would not likely seem "so small as to make accounting for it unreasonable" in the eyes of the IRS.[105]

These three reasons refute the possibility of a company such as Google or Facebook using § 132 to avoid tax liability when providing free meals.[106] The *de minimis* piece of the Tax Code focuses on small perks in the workplace like communal soft drinks or the annual Christmas party, not two or three extravagant meals each day.[107] Companies and firms that do not provide daily meals yet still serve food to their employees somewhat often may fit under this exclusion, however.[108] For example, one San Francisco automotive parts manufacturer provides a catered meal every Friday.[109] The Silicon Valley companies could assert that even if a weekly meal seems relatively frequent, the IRS's more liberal stance on § 132 likely

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102. *See* § 1.132–6(b)(1)–(2) (2013) (describing how employers and employees should measure frequency in deciding whether a benefit is *de minimis*).

103. I.R.C. § 132(e)(1) (2012).

104. *See* Maremont, *supra* note 10 (stating that if the companies do settle with the IRS, many will increase compensation to cover the employees' larger tax burden).

105. § 132(e)(1).

106. *See supra* notes 92–105 and accompanying text (analyzing these three reasons).

107. *See* Treas. Reg. § 1.132–6(e)(1) (2013) (listing examples of acceptable *de minimis* fringe benefits, including occasional cocktail parties, picnics, flowers, low value birthday or holiday gifts, and occasional sporting event tickets).

108. *See* Ovide, *supra* note 24 (discussing how a large number of San Francisco businesses provide free food or similar benefits on a weekly or monthly basis).

109. *See id.* (examining San Francisco's Mission Motor Company).

results in a business-friendly interpretation and a lack of enforcement.[110] To reiterate, however, no interpretation of § 132 would allow multiple daily meals and snacks, as their frequency and extravagance exceeds the scope of *de minimis* fringe benefits.[111] Even assuming a weekly meal constitutes *de minimis* fringe benefits, the statutory language explicitly prohibits daily meals.[112] Thus, § 132 does not serve as a shield for Google, Facebook, and the other meal-providing companies.[113]

IV. Convenience-of-the-Employer Doctrine

If § 132 provides no exclusion, the Silicon Valley companies have to rely on the convenience-of-the-employer doctrine. That doctrine provides an exclusion if the company-provided meals primarily serve the employer's business rather than the employee.[114] This Part discusses the history of the doctrine, its current form in § 119, and relevant cases before arguing that the Silicon Valley companies cannot use it as a valid exclusion for the free meal programs.

A. The Development of the Convenience-of-the-Employer Doctrine

The convenience-of-the-employer doctrine existed well before its 1954 codification in § 119 of the Internal Revenue Code.[115]

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110. *See IRS Letter Emphasizes the Liberal Tax Treatment of* De Minimis *Fringe Benefits*, 34 PENS. & BEN. WK. NEWSL. no. 34 (Research Inst. of America), Aug. 25, 2008 (evaluating an IRS letter that emphasized the Code does not specify a dollar limit on *de minimis* fringe benefits).

111. *See supra* notes 21–23 and accompanying text (describing the free meal plans at some Silicon Valley companies).

112. *See* Treas Reg. § 1.132–6(d)(2) ("For example, if an employer provides a free meal in kind to one employee on a daily basis . . . the value of the meals is not de minimis . . . .").

113. *See* Maremont, *supra* note 10 (listing some of these companies).

114. *See, e.g.*, Heyward v. Comm'r, 36 T.C. 739, 743 (1961) (finding that the Senate reports indicate this is an appropriate phrasing of the rule), *aff'd*, 301 F.2d 307 (4th Cir. 1962).

115. *See, e.g.*, Kitchen v. Comm'r, 11 B.T.A. 855, 856 (1928) (applying the doctrine to taxes collected in 1921); *see also* 1919-1 C.B. 71 (US), 1919 WL 49990 (representing the first mention of "convenience of the employer" in a treasury

Before that codification, courts applied two different standards—the "employer-characterization" and "business-necessity" tests.[116] The employer-characterization test essentially turned on whether an employer intended free meals or lodging to form part of an employee's compensation.[117] Courts and the Treasury Department often looked to the accounting practices of the employer to make this distinction.[118] This relatively low bar allowed the employer to decide whether free meals and housing constituted taxable income.[119] Conversely, the business-necessity test represented a larger obstacle for employees seeking to exclude meals and lodging from their income.[120] This test asked whether the benefit conferred serves as a necessary component to "the functioning of the employer's business."[121] Reasoning that any free benefits would convenience the employee, judges applied this test to require the employer's needs to form the primary reason for providing free meals and lodging.[122] These contrasting tests created different outcomes for virtually identical cases.[123] As

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decision).

116. *See* Comm'r v. Kowalski, 434 U.S. 77, 85–86 (1977) (comparing the two different doctrines).

117. *See id.* (describing various decisions that reflect this test).

118. *Compare* Doran v. Comm'r, 21 T.C. 374, 376 (1953) (determining that the statute characterized state employee's salary as base pay plus rental allowance, so that rental allowance was taxable income), *with* 1920-2 C.B. 90 (US), 1920 WL 49099 (deciding "supper money" fell within the convenience-of-the-employer exception because it was not "additional compensation and not being charged to the salary account").

119. *See* Mary Louise Fellows & Lily Kahng, *Costly Mistakes: Undertaxed Business Owners and Overtaxed Workers*, 81 GEO. WASH. L. REV. 329, 373 (2013) (stating that "the doctrine foreshadowed the extreme deference to business owners").

120. *See Kowalski*, 434 U.S. at 88–89 (discussing Tax Court cases rejecting the idea that "would make tax consequences turn on the intent of the employer").

121. *Id.* at 86.

122. *See* Benaglia v. Comm'r, 36 B.T.A. 838, 839 (1937) (finding a hotel employee could exclude his housing "because he could not otherwise perform the services required of him" without living on the premises); Van Rosen v. Comm'r, 17 T.C. 834, 838 (1951) (determining income was excludable when "the ends of the employer's business dominated and controlled").

123. *Compare Doran*, 21 T.C. at 376 (applying employer-characterization test to determine a university employee could not exclude his school-provided

a result, the Supreme Court admitted that the precodification doctrine was "not a tidy one."[124] When Congress decided to revamp the Internal Revenue Code in 1954, the new § 119 sought to "end the confusion as to the tax status of meals and lodging furnished an employee by his employer."[125]

The legislative history of that codification demonstrates how Congress implemented the convenience-of-the-employer doctrine.[126] The House seemed to favor eliminating the convenience-of-the-employer test altogether.[127] It proposed to allow exclusion of meals if the employer required the employee to eat on the premises.[128] This broadly shaped exclusion completely avoided the compensation issue and instead would have allowed the employer to decide whether it would impose such a requirement.[129] The Senate modified the House's provisions, finding them too ambiguous.[130] It decided to formally codify the convenience-of-the-employer doctrine, adding that the compensatory nature of benefits does not solely determine tax treatment.[131] This decision constituted a "major revision" in the

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lodging), *with* Diamond v. Sturr, 221 F.2d 264, 268 (2d Cir. 1955) (applying the business-necessity doctrine to allow a psychiatrist at a mental institution to exclude his housing and meals from his income).

124. Comm'r v. Kowalski, 434 U.S. 77, 84 (1977).

125. H.R. REP. NO. 83-1337, at 18 (1954).

126. *See Kowalski*, 434 U.S. at 90–91 ("[T]he House and Senate initially differed on the significance that should be given the convenience-of-the-employer doctrine for the purposes of § 119.").

127. *See id.* at 91 ("[T]he House view apparently . . . required complete disregard of the convenience-of-the-employer doctrine.").

128. *See* H.R. REP. NO. 83-1337, at 18 ("[T]hese meals and lodging are to be excluded from employee's income if they are furnished at the place of employment and the employee is required to accept them at the place of employment as a condition of his employment.").

129. *See id.* (rejecting a previous test that determined "the value of meals and lodging are includible in the employee's income, even where they are furnished for the convenience of the employer, if there is an indication that the meals and lodging were taken into account in establishing the salary paid").

130. *See* S. REP. NO. 83-1622, at 18 (1954) (finding the House provisions "ambiguous" because they failed to analyze the compensatory nature of benefits).

131. *See id.* ("[T]he basic test of exclusion is to be whether the meals or lodging are furnished primarily for the employer (and thus excludable) or whether they were primarily for the convenience of the employee (and therefore

prevailing tax treatment, resulting in the first iteration of § 119.[132]

B. The Modern Standard of the Doctrine Under § 119

The 1954 statute established only two requirements for excluding meals—the employer must provide the meal for the "convenience of the employer" and the meal must be provided "on the business premises of the employer."[133] The Supreme Court first analyzed this framework in *Commissioner v. Kowalski*,[134] a decision that serves as the most important judicial interpretation of § 119.[135] The Court in *Kowalski* addressed the tax treatment of state-provided meal allowances for the New Jersey State Police.[136] The State provided the officers bi-weekly cash payments for meals, and allowed those officers to eat wherever they wanted without providing any accounting.[137] The Court sought to determine whether § 119 allowed officers to exclude that money from their incomes.[138] Relying on precodification case law, New Jersey argued that the meal money did not constitute compensation because the allowance merely replaced a failed meal station program that allowed troopers to eat while still on

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taxable)."); JOINT COMM. ON INTERNAL REVENUE TAXATION, SUMMARY OF THE NEW PROVISIONS OF THE INTERNAL REVENUE CODE OF 1954, at 13 (1955) (stating that the Senate intended to "specifically nullify the 'indication of compensation' rule").

132. Albert A. Gordon, *The "Convenience of the Employer" Exclusion and the Partner-Employee: A New Look*, 23 U. MIAMI L. REV. 779, 781 (1968).

133. Internal Revenue Code of 1954, Pub. L. No. 83-591, 68A Stat. 106 (codified as amended in scattered sections of 26 U.S.C.).

134. 434 U.S. 77 (1977).

135. *See, e.g.*, *So There Was a Free Lunch After All: CA-9 Reverses* Boyd Gaming, 90 J. TAX'N 324 at *1 (1999) (describing *Kowalski* as a "benchmark Supreme Court decision").

136. *See Kowalski*, 434 U.S. at 79–82 (describing the meal allowances at issue).

137. *See id.* at 80–81 (noting that the troopers received the same allowance, paid bi-weekly, whether or not they were on patrol, and the State required no proof that the troopers used the money for their lunches).

138. *See id.* at 78 (stating the issue presented was whether the allowances were includable in gross income under § 61(a) and, if so, otherwise excludable under § 119).

duty.[139] The Court held that the 1954 statute did not allow a taxpayer to exclude cash payments under the convenience-of-the-employer doctrine.[140] It reasoned that even if New Jersey provided the cash allowances for its convenience, they did not fit within § 119 because they were not actual *meals*.[141] Furthermore, even if §119 allowed cash allowances for food, the Court found that the meal allowances did not seem necessary for an officer to "properly perform his duties."[142]

Kowalski is important because the Court reiterated that § 119 replaced prior law and the precodification notion of the doctrine.[143] Without that case law, § 119 could not allow the exclusion because the officers received cash for meals instead of the actual meals.[144] Additionally, the Court determined that the new statute followed the business-necessity test.[145] It adopted the "properly perform his duties" language,[146] and in doing so explicitly rejected the employee characterization doctrine.[147]

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139. *See id.* at 83 (relying on "lower-court cases and administrative rulings" that determined payments for the convenience of the employer were not compensatory).

140. *See id.* at 94–95 (rejecting New Jersey's argument that § 119's legislative history indicated that Congress desired to exclude cash reimbursements).

141. *See id.* at 84 ("By its terms, § 119 covers *meals* furnished by the employer and not *cash* reimbursements for meals.").

142. *Id.* at 95.

143. *See id.* at 93 (noting that the codification "comprehensively modified the prior law, both expanding and contracting the exclusion").

144. *See id.* at 84 (determining cash reimbursements did not constitute meals under § 119).

145. *See id.* (determining that Congress followed the rationale behind *Van Rosen v. Comm'r* in adopting § 119); Boyd Gaming Corp. v. Comm'r, 177 F.3d 1096, 1100 (9th Cir. 1999) ("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."); *supra* notes 114–23 and accompanying text (comparing precodification cases).

146. Comm'r v. Kowalski, 434 U.S. 77, 95 (1977).

147. *See id.* at 92 ("The language of § 119 quite plainly rejects the reasoning behind rulings . . . which rest on the employer's characterization of the nature of a payment."). Some scholars believe that in practice, the employer-characterization view still prevails in contradiction to *Kowalski*. *See* Fellows & Kahng, *supra* note 119, at 375 ("It is clear that the 'convenience-of-the-employer' requirement has returned to the deferential standard Congress had turned away from when it enacted I.R.C. § 119."). This Note discusses this contention

Kowalski conveyed that an employer must affirmatively demonstrate that it provides free meals for a business purpose rather than merely relying on whether the employer accounts for the meals as compensation.[148]

Two amendments to § 119 after *Kowalski* warrant mentioning for the purpose of applying the statute to the Silicon Valley companies. First, in 1978, Congress determined that the ability of an employee to accept or decline meals does not implicate the convenience-of-the-employer doctrine.[149] Second, a 1998 amendment clarified situations in which only some employees of a company claimed the convenience-of-the-employer exclusion.[150] If at least half of the meals provided to employees are for the convenience of the employer, then for tax purposes, all of the meals on the premises are for the convenience of the employer.[151] Thus, the modern version of the statute maintains the convenience-of-the-employer doctrine but provides little guidance for its application, requiring considerable emphasis on the particular circumstances of each case.[152]

The Treasury Department has promulgated a series of regulations to interpret and enforce § 119.[153] The regulations

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as it relates to the practices of the Silicon Valley companies. *See infra* notes 246–48 and accompanying text (arguing that these companies would have to apply the employer-characterization test to establish an exclusion).

148. *See Kowalski*, 434 U.S. at 86 (rejecting "an exclusion from income based solely on an employer's characterization of a payment as noncompensatory").

149. *See* Act of October 7, 1978, Pub. L. No. 95-427, 92 Stat. 996 (codified at I.R.C. § 119(b)(2) (2012)) ("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.").

150. *See* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 ("All meals furnished on the business premises . . . shall be treated as furnished for the convenience of the employer if . . . more than half of the employees to whom such meals are furnished on such premises are furnished such meals for the convenience of the employer.").

151. *Id.*

152. *See* Jane Zhao, Note, *Nights on the Museum: Should Free Housing Provided to Museum Directors Also Be Tax-Free?*, 62 SYRACUSE L. REV. 427, 436 (2012) ("[T]he characterization of employer-provided meals or housing varies significantly with the facts of each case.").

153. *See* Treas. Reg. § 1.119-1 (2013) (clarifying the language and meaning found in § 119).

reiterate that the convenience-of-the-employer test requires "analysis of all the facts and circumstances in each case," but the Department's interpretation identifies a variety of common factors to consider.[154] The regulations echo the business-necessity test by requiring a "substantial noncompensatory business reason of the employer" to exclude free meals from the taxpayer's income.[155] Nevertheless, the regulations maintain that meals may have a compensatory purpose as long as this "business reason" still exists.[156]

Several qualifications that fulfill this requirement are relevant. First, employees that must remain on call for emergencies fulfill this requirement.[157] Second, employees may exclude meals provided on account of an employer-required shorter meal period because employees would not have time to eat elsewhere.[158] Third, circumstances could prevent the employee from securing a meal within a proper time, such as an employer located in a remote location.[159] The regulations also note that providing meals "to promote the morale or goodwill of the employee, or to attract prospective employees" does not adequately fulfill this "substantial business reason" requirement.[160] Finally, the Treasury Department provides several relevant examples of situations in which an employee can

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154. *Id.* § 1.119-1(a)(1); *see also id.* § 1.119-1(a)(2) (listing various considerations for meals furnished without a charge).

155. *Id.* § 1.119-1(a)(2)(i).

156. *See id.* ("[I]f the employer furnishes meals to his employee for a substantial noncompensatory business reason, the meals so furnished will be regarded as furnished for the convenience of the employer, even though such meals are also furnished for a compensatory reason.").

157. *See id.* § 1.119-1(a)(2)(ii)(a) ("[I]t 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 job during his meal period.").

158. *See id.* § 1.119-1(a)(2)(ii)(b) ("[M]eals are furnished to the employee during his working hours because the employer's business is such that the employee must be restricted to a short meal period . . . .").

159. *See id.* § 1.119-1(a)(2)(ii)(c) ("[T]he meals are furnished to the employee during his working hours because the employee could not otherwise secure proper meals within a reasonable meal period.").

160. *Id.* § 1.119-1(a)(2)(iii).

appropriately exclude meals:[161] bank tellers who must limit lunches to thirty minutes;[162] an employee at a state institution required to remain on duty at all times;[163] a construction employee at a remote job site;[164] and a hospital that provides a free cafeteria to keep employees on call but that does not require employees to remain on premises.[165] However, the regulations say that a remote company that allows an employee to either purchase a meal on-site or bring a meal to work does not fulfill the standard.[166] None of the examples directly addresses the issue here.

Aside from these regulations, the IRS has issued limited other guidance on the matter. Most of the Agency's statements about § 119 concern more traditional and obvious applications of the convenience-of-the-employer doctrine—they have allowed exclusions for airline flight crew members,[167] hospital employees,[168] and church staff.[169] No ruling or memorandum has applied directly to the free meals at issue here, except for an advice memorandum on certain investment bank employees.[170] That memorandum was particularly strict, requesting a clear showing of necessary shorter meal periods and emergency situations along with forbidding any free meals other than those in the lunch period.[171] Although relevant, that memorandum

161. *Id.* § 1.119-1(f)(1)–(9).

162. *Id.* § 1.119-1(f)(3).

163. *Id.* § 1.119-1(f)(5).

164. *Id.* § 1.119-1(f)(7).

165. *Id.* § 1.119-1(f)(9).

166. *Id.* § 1.119-1(f)(8).

167. *See* I.R.S. Chief Couns. Advisory 201151020, 2011 WL 6464323 (Aug. 31, 2011) (finding that the requirement that crew remain on airplanes during meal periods served as a noncompensatory business reason).

168. *See* I.R.S. Priv. Ltr. Rul. 80-38-142 (June 27, 1980) (allowing exclusion for employees in remote hospital whose lunch periods were restricted to thirty minutes for emergency-availability reasons).

169. *See* I.R.S. Priv. Ltr. Rul. 91-29-037 (Apr. 23, 1991) (allowing exclusion for church ministers and staff because they needed to be available around-the-clock for prayer and support).

170. *See* I.R.S. Field Serv. Advisory, 2002 WL 1315674 (advising on free meals supplied by a bank that conducted private banking and securities transactions.)

171. *See id.* (listing these requirements and requesting the bank provide

relied on a later-overturned case, so its persuasive value is admittedly limited.[172] Accordingly, other case law must supplement this lack of IRS guidance.

C. The Role of Business Judgment

As discussed, the passage of § 119 explicitly rejected the employer-characterization test in favor of the business-necessity doctrine.[173] The employer-characterization model focused on whether the employer intended the meals as primarily compensation or for a necessary business purpose.[174] Even if this approach is no longer law, the convenience-of-the-employer doctrine still incorporates a business judgment aspect. The following cases from the Ninth Circuit indicate how courts consider a company's reasoning for providing free meals or lodging to its employees when applying § 119.[175]

First, *Caratan v. Commissioner*[176] involved § 119's application to farm employees.[177] Caratan required its supervisory and management personnel to reside on the farm for around-the-clock management decisions, so it provided lodging free of charge.[178] The lower court held that the taxpayers had not proved that the provided lodging "was indispensable to the proper

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more evidence about its meal practices).

172. *See* Boyd Gaming Corp. v. Comm'r, T.C. Memo. 1997-445 (Sept. 30, 1997), *rev'd*, 177 F.3d 1096 (9th Cir. 1999) (deciding casino employees were not entitled to exclude meals under § 119).

173. *See* Comm'r v. Kowalski, 434 U.S. 77, 85–86 (1977) (comparing the two doctrines); *supra* notes 122–48 and accompanying text (discussing the history of § 119 and the convenience-of-the-employer doctrine).

174. *See Kowalski*, 434 U.S. at 85–86 (describing the employer-characterization test's intent component).

175. *See infra* Part IV.C (discussing cases that assert that courts respect a company's judgment that free meals are necessary if provided with legitimate reasoning).

176. 442 F.2d 606 (1971).

177. *See id.* at 607 (describing M. Caratan, Inc. as a farming operation that primarily sold grapes).

178. *See id.* at 607–08 (providing testimony that some farming practices, such as irrigation, occurred twenty-four hours per day, which necessitated a supervisor's presence both day and night).

discharge of their employment duties."[179] The Ninth Circuit rejected this evaluation, holding that the taxpayers could exclude the lodging because it was a condition of their employment under § 119.[180] The court reasoned that no evidence had contradicted the taxpayers' contention that they could not simply live near the farm, so the lower court erred in deciding that the farm could possibly operate differently.[181] *Caratan* counsels that no court can form a business judgment about the necessity of providing free food or lodging when all evidence supports the opposite conclusion.[182] Thus, this case indicates that § 119 allows the taxpayer to exclude free meals or lodging if the employer provides suitable evidence that the benefit is necessary to its business operations.[183]

Additionally, *Boyd Gaming Corp. v. Commissioner*[184] follows *Caratan* and provides relevant legal analysis.[185] In *Boyd Gaming*, a hotel required its employees to remain at the hotel and receive free meals in the cafeteria, pointing to certain unique aspects of the casino industry.[186] The dispute concerned application of the "substantial noncompensatory business reason" test provided in

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179. Caratan v. Comm'r, 52 T.C. 960, 963 (1969).

180. *See Caratan*, 442 F.2d at 611 (reasoning that the taxpayers met their burden of proof).

181. *See id.* at 609–10 (discussing that the lower court did not weigh evidence but rather substituted its own judgment about farming operations).

182. *See id.* at 610 (determining the lower court's conclusions constituted a business judgment separate from all the evidence provided by the taxpayers' witnesses).

183. *See id.* (rejecting the possible availability of feasible alternative housing as contradicting the farm's business judgment).

184. 177 F.3d 1096 (9th Cir. 1999).

185. *See id.* at 1097 ("This case involves the question whether there really is a 'free lunch.'"). This case concerns § 119 in a roundabout way. If meals from an on-premises facility are for the convenience of the employer, they constitute a *de minimis* fringe benefit under I.R.C. § 132(e) (2012). If a *de minimis* benefit, they are exempt from the deduction limits that I.R.C. § 274(n) provides for business meals. This case began when Congress lowered the deduction limit from one hundred percent to eighty percent. *Id.* Nevertheless, the case focuses on the convenience-of-the-employer doctrine as the key issue. *See id.* (noting the case originated from the Tax Court's rejection of Boyd's § 119 claim).

186. *See id.* at 1097–98 (listing concerns relating to security, efficiency, emergencies, and lack of close alternatives).

Treasury Regulation § 1.119–1(a)(2)(i).[187] To meet this test, the hotel argued that it required the employees to remain on business premises for reasons the regulations contemplated, such as availability for emergencies, short meal periods, and food service responsibilities.[188] The lower court asserted that the regulations for § 119 required a "business nexus," meaning that the employee must accept the meal as part of his employment duties or job description.[189] The Ninth Circuit rejected this notion, however.[190] It decided that the hotel's stay-on-premises requirement fulfilled § 119 and *Kowalski*, which required no additional business nexus.[191] As discussed, *Kowalski* required convenience-of-the-employer meals to relate to an employee properly performing his duties.[192] *Boyd Gaming* says that these duties refer to an employee doing the tasks his or her job requires, rather than referring to a job that innately requires consuming food during it.[193] The court reasoned that the meals must not relate to the employees' specific duties in a strict sense, as the lower court held, or else the convenience-of-the-employer doctrine would only apply to "restaurant critics and dieticians."[194] Instead, Boyd fit within § 119 because it provided legitimate business reasons for requiring its employees to remain on the premises to perform

187. *Id.* at 1099; *see also supra* notes 153–66 and accompanying text (discussing the applicable treasury regulations corresponding to I.R.C. § 119).

188. *See Boyd Gaming*, 177 F.3d at 1100 (describing the arguments the Tax Court rejected before the appeal).

189. *See* Boyd Gaming Corp. v. Comm'r, T.C. Memo 1997-445, 1997 WL 599594, at *18 (Sep. 30, 1997) (finding that the meals were not necessary to allow the employees to perform their jobs properly).

190. *See* Boyd Gaming Corp. v. Comm'r, 177 F.3d 1096, 1100 (9th Cir. 1999) (asserting that the Tax Court misinterpreted § 119 and *Kowalski* with its "substantial business reason" analysis).

191. *See id.* at 1101 ("Contrary to the Tax Court's conclusion, no nexus other than the 'stay-on-premises' policy was required for the meals to satisfy the *Kowalski* test.").

192. *See* Comm'r v. Kowalski, 434 U.S. 77, 95 (1977) (adopting the business-necessity test); *supra* notes 145–48 and accompanying text (analyzing *Kowalski*).

193. *See Boyd Gaming*, 177 F.3d at 1101 (finding that the test would rarely be satisfied if it required an employee's specific duties relate to consuming food).

194. *Id.*

their jobs.[195] The court explained, "[c]aptive employees had no choice but to eat on the premises."[196]

Thus, *Boyd Gaming* stands for three relevant propositions. First, providing free meals because employees must remain on business premises for legitimate reasons adequately meets the convenience-of-the-employer doctrine.[197] Second, § 119 does not require free meals to directly relate to the performance of an employee's "specific" duties to constitute legitimate business reasons.[198] Third, courts will respect a company's business judgment about these legitimate reasons if they do not merely constitute a sham.[199] This component of the case directly relates to the Silicon Valley companies, especially because the IRS acquiesced in the Ninth Circuit's decision.[200] Quoting *Boyd Gaming*, the IRS indicated it would take a middle course regarding the appropriateness of an employer-furnished meal policy: it will "not attempt to substitute its judgment for the business decisions of an employer," yet it would not allow an employer "to wave a 'magic wand'" and simply declare its policies qualified under § 119.[201] This guidance counsels businesses to create a meals policy deriving from actual business needs and follow that policy to allow tax exclusion.[202]

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195. *See id.* at 1097–98 (accepting the hotel's judgment that it needed employees on-site for security and emergency demands).

196. *Id.* at 1101.

197. *See id.* (determining that the casino had explained a reasonable need to keep employees from traveling off-premises for meals).

198. *See id.* (noting that a business nexus is not required).

199. *See id.* (demonstrating that a court should give some credence to the business decisions of employers).

200. *See* Announcement 99-77, 1999–32 I.R.B. 243 at *1 (making the recommendation of acquiescence to the *Boyd Gaming* decision).

201. *See id.* (quoting Boyd Gaming Corp. v. Comm'r, 177 F.3d 1096, 1101 (9th Cir. 1999)).

202. *See id.* ("Thus, 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."). Some scholars note that this IRS statement requires less of an explanation for prohibiting or restricting employees from leaving for lunch but a clear showing that this prohibition or restriction actually occurs. *See* MARTIN J. MCMAHON & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION OF INDIVIDUALS

When considering whether an employer provides meals for a substantial business reason, *Caratan* and *Boyd Gaming* advise that the employer's bona fide business judgment provides the basis for the decision rather than a court's.[203] In other words, § 119 will protect the company that makes a rational decision about providing free meals or lodging for business needs.[204] This business judgment component serves as an important piece of analysis when considering the Silicon Valley meal practices.[205]

D. The Meals Fail the Convenience-of-the-Employer Test Under § 119

All available evidence suggests that the Silicon Valley meals are not for the convenience of the employer within the meaning of § 119, so the employees do have tax liability. To reiterate the applicable standard, the employer must provide meals for a "substantial noncompensatory business reason" on the business premises.[206] As the regulations and cases on § 119 demonstrate, this analysis depends on the factual circumstances of each benefit program.[207] This subpart first argues that the companies fulfill none of the enumerated business reasons in the regulations, and

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¶ 8.08 (2d ed. 2013) ("It appears from this statement that the IRS will not question an employer's judgment in prohibiting or restricting the employees' ability to leave the business premises for meals, . . . but it will demand that the employer actually prohibit or restrict employees from leaving the business premises . . . .").

203. *See* Boyd Gaming Corp. v. Comm'r, 177 F.3d 1096, 1101 (9th Cir. 1999) (finding it inappropriate to second-guess decisions about the casino business); Caratan v. Comm'r, 442 F.2d 606, 610 (1969) (counseling against using a court's decisions about the farming business over the employer's business experience).

204. *See Boyd Gaming*, 177 F.3d at 1101 (requiring the employer to support its policies with legitimate business reasons).

205. *See infra* notes 232–36 and accompanying text (discerning whether legitimate reasons support the Silicon Valley companies' business judgment).

206. *See* Treas. Reg. § 1.119–1(a)(1) (2013); *supra* Part IV.A (describing the statutory framework of the convenience-of-the-employer test).

207. *See id.* ("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.").

it asserts that the companies' potential explanations also do not constitute substantial business reasons.[208]

1. The Regulations Provide No Business Reasons for the Free Meals

To exclude the meals, the taxpayer has the burden of finding clear statutory language to justify an exclusion.[209] The free meal programs do not meet this standard. Although the statute does not explicitly define "convenience of the employer,"[210] the corresponding regulations provide enough guidance to demonstrate that the Silicon Valley employees should pay taxes on the free meals.[211] The companies must provide a reason for the free meals aside from boosting employee morale or recruiting the best employees.[212] The Silicon Valley companies immediately face an uphill battle, however, because they cannot point to any of the frequent noncompensatory business reasons found in the regulations.[213] Two of these enumerated reasons deserve analysis.

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208. *See infra* Part IV.D.1 (discussing that the regulations provide no enumerated business reason to which the Silicon Valley Companies can analogize their meal practices); *infra* Part IV.D.2 (finding the alternative business reasons do not satisfy § 119).

209. *See, e.g.*, I.R.C. § 61(a)(1) (2012) (listing fringe benefits as a part of gross income); Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 430 (1955) (describing Congress's intention to tax all income unless a specific exemption applies); *supra* Part II.A–B (providing the background for gross income and fringe benefit taxation).

210. *See* I.R.C. § 119(a) (establishing an exclusion for meals provided for the convenience of the employer but not defining it).

211. *See* Treas. Reg. § 1.119–1 (providing extensive definitions and examples for what constitutes substantial business reasons for providing meals to employees).

212. *See id.* § 1.119–1(2)(iii) ("Meals will be regarded as furnished for a compensatory business reason of the employer when the meals are furnished to the employee to promote the morale or goodwill of the employee, or to attract prospective employees.").

213. *See id.* § 1.119–1(2(ii) (listing six categories of frequently cited noncompensatory business reasons that can be summarized as follows: emergency duties; necessarily-shortened lunch periods; remote jobsites; restaurant employment; reason exists for most employees; missed meal during working hours); *supra* notes 154–66 and accompanying text (discussing the regulation's substantial business reason requirement).

First, the taxpayer could argue that the "short meal period" reason in § 1.119–1(a)(iii)(b) applies because the meals save time compared to leaving the premises.[214] That provision is not that broad: it requires that "the employee must be restricted to a short meal period" because of the nature of the employer's business.[215] The regulations use a position such as a bank teller as an example, where banks require thirty-minute lunches because peak business occurs during the traditional lunch break.[216] The Silicon Valley companies are not analogous. Although the employees may enjoy saving time using the on-premises facilities, the nature of the tech industry does not require shorter meal periods nor do the employers impose time limits.[217] Google's encouragement of on-the-job bowling and massages underscores this point.[218] Additionally, many of the meals are consumed either before or after the workday,[219] so they generally do not fall within the scope of this time-saving category nor the convenience-of-the-employer doctrine.[220] Thus,

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214. *See id.* § 1.119–1(a)(iii)(b) (stating that the need for employees to have a shorter meal period is a substantial noncompensatory business reason).

215. *Id.* § 1.119–1(a)(iii)(b).

216. *See id.* § 1.119–1(f)(3) (allowing bank tellers with this restricted lunch period to exclude on-premises meals provided by the employer).

217. *See, e.g.*, Karyn Johnson, *Perks at Work: Unconventional Benefits Can Attract and Keep Employees*, NWJOBS (Sept. 23, 2011), http://blog.nwjobs.com/careercenter/perks_at_work_unconventional_benefits_can_attract_and_keep_employees.html (last visited Sept. 24, 2014) (stating that the employees of one tech company would do CrossFit exercises during their lunch breaks) (on file with the Washington and Lee Law Review).

218. *See* Smith, *supra* note 2 (describing the different leisure activities available to Google's employees during the workday).

219. *See, e.g.*, *id.* (quoting a former Google employee who stated he would eat a free breakfast before starting work and remain late to eat a free dinner); Kane, *supra* note 23 (describing the happy hour and dinner service at Zynga, which presumably many employees would attend after completing their work for the day).

220. *See* Treas. Reg. § 1.119–1(a)(2) (2013) ("Generally, meals furnished before or after the working hours of the employee will not be regarded as furnished for the convenience of the employer."). *But see id.* § 1.119–1(2)(ii)(d) (providing an exception to this general rule for restaurant employees); *id.* § 1.119–1(2)(ii)(f) (allowing the exclusion to apply when duties during normal working hours prevented the employee from obtaining a meal with a substantial noncompensatory business reason).

this time-restriction category does not apply to the Silicon Valley companies unless they provide a business need for shortened meal periods other than the desire to simply save time.[221]

Second, the only other enumerated reason would contend that the employees cannot travel off-premises to obtain another meal in a reasonable time under § 1.119–1(2)(ii)(c).[222] Usually, this provision applies in situations when work occurs in remote locations without available alternatives to purchase meals.[223] For tech companies located directly in San Francisco or New York, this regulation does not apply because those cities have almost limitless food options.[224] Google and Facebook do have their headquarters a considerable distance outside of San Francisco in Mountain View and Menlo Park, respectively.[225] These towns, however, still have a variety of restaurants within close proximity to the business campuses, which employees

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221. *See id.* § 1.119–1(2)(ii)(b) (stating this category does not apply when an employer limits a lunch break to allow the employee to finish work earlier in the day).

222. *See id.* § 1.119–1(2)(ii)(c) ("Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours because the employee could not otherwise secure proper meals within a reasonable meal period.").

223. *See, e.g.*, Wilhelm v. United States, 257 F. Supp. 16, 21 (D. Wyo. 1966) (finding that feeding employees was indispensable for the ranch business because the nearest town was twenty-four miles away); Stone v. Comm'r, 32 T.C. 1021, 1024–25 (1959) (applying doctrine to tunnel construction site forty miles away from nearest town).

224. *See, e.g.*, Robin Wilkey, *San Francisco Restaurants Outnumber Every City in America*, HUFFINGTON POST (Aug. 2, 2012, 6:05 PM), http://www.huffingtonpost.com/2012/08/02/san-francisco-restaurants_n_1735091.html (last visited Sept. 24, 2014) (stating that San Francisco has the most restaurants per capita in the United States at 39.3 restaurants per ten thousand households, with New York City having the fourth most) (on file with the Washington and Lee Law Review).

225. *See Google Locations*, GOOGLE, http://www.google.com/about/company/facts/locations/ (last visited Sept. 24, 2014) (providing the address to the company's Mountain View, CA headquarters) (on file with the Washington and Lee Law Review); *Facebook HQ*, FACEBOOK, https://www.facebook.com/pages/Facebook-HQ/166793820034304 (last visited Sept. 24, 2014) (providing the address to Facebook's Menlo Park, CA headquarters) (on file with the Washington and Lee Law Review).

could easily travel to within a lunch hour.[226] In fact, even local restaurants complain that the free meal programs have cost them considerable business from Google employees, which illustrates that those employees had several nearby options before the free meal program's genesis.[227] Thus, at least regarding their corporate headquarters, Google and Facebook cannot fulfill the convenience-of-the-employer test because of a lack of alternative restaurant options for their employees.

2. The Companies Can Provide No Alternative Business Needs to Satisfy § 119

If the Silicon Valley companies cannot point to one of the business reasons enumerated in the regulations, they would have to provide alternative reasons that conform to § 119. Their argument would rely on *Boyd Gaming* by asserting its reasons for the policies and asking the IRS to respect the business judgment behind those reasons.[228] In *Boyd Gaming*, the taxpayer provided a list of business ideas behind its requirement to keep employees on the premises, all relating to the nature of the casino industry.[229] To provide a similar list, the Silicon Valley companies would necessarily cite reasons related to productivity and the work environment. They could contend their practices increase output because the free meals keep employees at work for longer

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226. *See, e.g.*, Michelle Mills, *4 Local Restaurants Officially Certified for Delivering Authentic Neapolitan Pizza*, SAN GABRIEL VALLEY TRIB. (Mar. 6, 2014, 12:53 PM), http://www.sgvtribune.com/lifestyle/20140306/4-local-restaurants-officially-certified-for-delivering-authentic-neapolitan-pizza (last visited Sept. 24, 2014) (listing local pizza restaurants) (on file with the Washington and Lee Law Review).

227. *See* Daniel Ebolt, *Can't Compete with Free Eats*, MOUNTAIN VIEW VOICE (July 11, 2013, 11:44 AM), http://www.mv-voice.com/news/2013/07/11/cant-compete-with-free-eats (last visited Sept. 24, 2014) (describing how Mountain View restaurant owners lost the majority of their business when Google began providing free meals) (on file with the Washington and Lee Law Review).

228. *See* Boyd Gaming Corp. v. Comm'r, 177 F.3d 1096, 1100 (9th Cir. 1999) (stating that a court should not substitute its business judgment when evaluating the decisions of a company).

229. *See id.* at 1097–98 (listing concerns relating to security, efficiency, emergencies, and lack of close alternatives).

hours; the open cafeterias encourage collaboration and interaction; and the meals improve employee health and energy.[230] This argument fails for two reasons.

First, the employees do not require the meals to properly perform their jobs at the Silicon Valley companies.[231] The modern version of the doctrine derives from the "business-necessity" test, which asks whether the employer needed to provide meals for its business to function.[232] Virtually every case applying the doctrine—deciding whether an employer had a "substantial noncompensatory business reason" for furnishing free meals or lodging—has focused on whether the meals or lodging were a condition precedent to business operations.[233] In other words, courts have interpreted the noncompensatory business reason as those that correlate to accomplishing an essential component—"business needs" rather than "business wants."[234] For the Silicon Valley companies, providing free meals to employees does not satisfy this requirement because they do not need the meals to "properly perform their duties."[235] No part of developing software or producing code requires unlimited steak or sushi at lunch.[236] These companies can provide meals to make their employees

230. *See* Maremont, *supra* note 10 (describing a few of these arguments).

231. *See* Comm'r v. Kowalski, 434 U.S. 77, 95 (1977) (requiring meals and lodging be provided to an employee "to properly perform his duties" to satisfy the convenience-of-the-employer doctrine).

232. *See id.* at 86–88 (describing the business-necessity test); *supra* notes 134–48 and accompanying text (analyzing *Kowalski* and its interpretation of § 119).

233. Treas. Reg. § 1.119–1(a)(2); *see, e.g.*, *Boyd Gaming*, 177 F.3d. at 1097–98 (deciding that the employer needed its employees to stay on-premises during work hours because of the nature of the casino business); Caratan v. Comm'r, 442 F.2d 606, 609 (9th Cir. 1971) (determining that providing meals and lodging to employees was indispensable to the proper functioning of the farm); Jacob v. United States, 493 F.2d 1294, 1298 (3d Cir. 1974) (finding that a director's around-the-clock availability for emergencies at an institute for the mentally handicapped was a substantial noncompensatory business reason).

234. *See, e.g.*, *supra* notes 156–66 and accompanying text (listing regulations that provide acceptable noncompensatory business reasons that allow an employer to provide free meals).

235. *Kowalski*, 434 U.S. at 95.

236. *See supra* notes 21–23 and accompanying text (providing examples of the lavish meals provided to employees).

comfortable and happy with the hope they produce better results, but in no way is it essential to operations. Additionally, the companies do not require the employees to eat the meals or restrict them to the business premises, and these employees could perform their jobs by bringing their lunches or leaving for an outside lunch.[237] The meals do not relate to employment duties but rather only enhance the employment itself.[238] Accepting this "increased productivity and collaboration" argument would extend the convenience-of-the-employer doctrine to a scope wholly unsupported by fifty years of statutory interpretation and would reject the legislative intent behind § 119.[239] The nature of the Tax Code does not allow such significant departures from its boundaries, but rather would require Treasury Department regulation or congressional action to broaden the exclusion.[240] Until such action occurs, the Silicon Valley companies cannot demonstrate their practices derive from substantial noncompensatory business reasons.

Second, all outward evidence indicates that these Silicon Valley companies mainly provide these meals as compensation—a way to compete for the best talent and keep morale high.[241] Congress defined § 119 to ask whether meals or lodging are furnished primarily for the convenience of the employer (and excludable) or the employee (and subsequently taxable).[242] Even

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237. *Cf.* Treas. Reg. § 1.119–1(f)(8) (stating that meals sold by a company cafeteria were not for the convenience of the employer even when no outside eating facilities were available because the employee could bring his own lunch).

238. *See* Comm'r v. Moran, 236 F.2d 595, 597–98 (8th Cir. 1956) (discussing the convenience-of-the-employer rule as implicating meals and lodging provided "as a necessary incident of the proper performance of [an employee's] duty"); S.S. Kresge Co. v. United States, 218 F. Supp. 240, 243 (E.D. Mich. 1963) ("To come within the 'convenience of the employer rule', it is essential that the employee be required to accept the meals to properly perform his duties.").

239. *See supra* notes 167–72 and accompanying text (providing IRS decisions applying § 119).

240. *See supra* notes 57–64 and accompanying text (describing congressional apprehension at creating extra-statutory exclusions that depart from the Internal Revenue Code).

241. *See* Treas. Reg. § 1.119–1(a)(2)(iii) (2013) (stating that meals furnished to promote morale or attract prospective employees are considered a compensatory business reason).

242. *See* S. REP. NO. 83-1622, at 18 (1954) (stating the appropriate test as

if increasing time spent at work did constitute a noncompensatory business reason, the free meal programs do not serve this purpose primarily. Instead, the free meals primarily benefit the employee, and the companies market them accordingly: Google lists the free meals as "perks" in response to a FAQ entitled "What's the best thing about working at Google Mountain View?" on a Google careers page;[243] Zynga provides free food as a "perk to keep employees happy and healthy;"[244] Yahoo! began a free meal program at Marissa Mayer's command to compete for talent.[245] The characterization that these meal programs derive from noncompensatory business reasons constitutes "wav[ing] a magic wand" and forming a sham tax shelter.[246] Accepting this justification would represent a return to the employer-characterization test that § 119 specifically eliminated.[247] Instead, the objective circumstances demonstrate compensatory motives.[248] For these reasons, the free meals are not for the convenience-of-the-employer as § 119 requires.

V. Conclusion

The companies have the burden of establishing that an exclusion applies for their employees to avoid tax liability.[249] The

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whether the meals were furnished primarily for the employer or rather for the employee).

243. GOOGLE MOUNTAIN VIEW (GLOBAL HQ), http://www.google.com/about/jobs/locations/mountain-view/ (last visited Sept. 24, 2014) (on file with the Washington and Lee Law Review).

244. Kane, *supra* note 23.

245. *See* Maremont, *supra* note 10 (relaying some of Mayer's comments about bringing Google's perk to Yahoo!).

246. Boyd Gaming Corp. v. Comm'r, 177 F.3d 1096, 1101 (9th Cir. 1999).

247. *See supra* notes 147–48 and accompanying text (discussing how § 119 adopted the business necessity test rather than employer characterization).

248. *See* Treas. Reg. § 1.119–1(a)(2)(i) (2013) ("[T]he mere declaration that meals are furnished for a noncompensatory business reason is not sufficient to prove that meals are furnished for the convenience of the employer, but such determination will be based upon an examination of all the surrounding facts and circumstances.").

249. *See* Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 430 (1955) (reiterating that it is the "intention of Congress to tax all gains except those

preceding analysis demonstrates that neither § 132(e) nor § 119 applies to the free meal programs offered by Google, Facebook, and the other Silicon Valley companies.[250]

Even if the statutory language clearly requires employees to pay tax on the meals, some proponents believe that policy reasons justify not paying tax. They argue that free meals encourage increased interaction and collaboration between employees.[251] Others say that the free food contributes to an environment that maximizes employee comfort.[252] Regardless of the policy reasoning behind these benefits, the Tax Code remains clear about the convenience-of-the-employer doctrine. No exclusion applies, so the free meals constitute gross income. Additionally, different policy reasoning also justifies assessing taxes on the meals. Tax-free compensation for these tech companies creates market inefficiency, allowing employees in the tech sector to receive more compensation than similarly situated employees in another sector. This creates an inequitable advantage for tech companies over others, especially for recruiting talent. In creating the Tax Code, Congress specifically attempted to correct this type of imbalance to avoid burdening one type of employer over another.[253]

If the Silicon Valley companies deserve this type of tax advantage, Congress should specifically create it. As of now, the Tax Code mandates that the employees pay taxes on the free meals. If they believe the meals are important, the employers could increase cash compensation to those employees in a proportionate amount to reflect this increased tax liability. With the growing practice of providing free meals to companies, it is

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specifically exempted"); *supra* notes 44–59 and accompanying text (discussing gross income and exclusions under the Tax Code).

250. *See supra* Part III.B (applying § 132(e)'s *de minimis* fringe benefit exclusion to the free meals); *supra* Part IV.D (applying the convenience-of-the-employer doctrine under § 119).

251. *See, e.g.*, Maremont, *supra* note 10 (quoting Colorado Professor Victor Fleischer as arguing against the aggressive enforcement of tax laws against Silicon Valley companies).

252. *See* Young, *supra* note 27 (quoting a head recruiter who believes the lavish perks pay off in employee productivity).

253. *See* H.R. REP. NO. 98-432, at 286 (1983) (describing the goal of creating equitable fringe benefit taxation).

important that the IRS takes a clear stand. Indeed, the IRS recently stated that it aims to release guidance on employer-provided meals at some point in 2015.[254] This Note seeks to begin a conversation about these practices to further develop equitable application of the Tax Code.

254. *See* U.S. DEP'T OF THE TREASURY, 2014-2015 PRIORITY GUIDANCE PLAN 7 (2014), http://www.irs.gov/pub/irs-utl/2014-2015_pgp_initial.pdf.