SLAPPING THE HAND AT THE DINNER TABLE: A PRACTICAL TAX SOLUTION TO EMPLOYER-PROVIDED MEAL BENEFITS

SCOTT J. VAIL*

The U.S. Department of Treasury ("DOT") placed employer-provided meals with 316 other priorities in its Priority Guidance Plan, thereby indicating its intent to possibly require employers and/or employees to pay taxes on this favorite fringe benefit. Congressional concerns of noncompliance, economic inefficiency via burden shifting, and inequity among taxpayers have influenced this development. Statutory rules, not new IRS regulations, emphasizing the potential tax incentives can be created that both balance these concerns and still address employer and employee interests. This Note will address problems with and the development of employer-provided meals as well as using illustrations such as Googleplex to demonstrate that a satisfactory compromise is possible.

TABLE OF CONTENTS

* J.D. Candidate 2016, University of Illinois College of Law. B.S. Accounting, 2012, Butler University. I am grateful for the help and hard work of the *University of Illinois Law Review* editors, members, and staff. I am forever indebted to those closest to me for their undying support. I dedicate this Note to my mentor, teacher, and friend, Dr. Jason T. Range, J.D., Ph.D., whose guidance has illuminated life.

I. INTRODUCTION

The U.S. Department of Treasury ("DOT") is the family member at the dinner table that slaps every hand that reaches for food or beverage while cracking a smile and saying, "Not before you pay." Unfortunately, the family dinner table hypothetical is a salt grain compared to a turkey in the volume of complexity the DOT will be grappling with when attempting to create rules[1] that may require employers and/or employees to pay taxes on a favorite fringe benefit: employer-provided meals. Three concerns led the DOT to place employer-provided meals with 316 other priorities in its Priority Guidance Plan,[2] which are summed up in the following excerpt from a 1984 House Committee Report:

> [T]he committee is concerned that without any well defined limits on the ability of employers to compensate their employees tax-free by using a medium other than cash, [(1)] new practices will emerge that could shrink the income tax base significantly, [(2)] and further shift a disproportionate tax burden to those individuals whose compensation is in the form of cash [causing] [a] shrinkage of the base of the social security payroll tax . . . . [(3)] Finally, non-cash compensation would increase inequities among employees in different types of business, and among employers as well.[3]

1. The term "rules" is used throughout the Note as a reference to the body of authority governing the tax treatment of employer-provided meals. Thus, "rules" includes both binding authority such as Internal Revenue Code ("I.R.C.") provisions, I.R.C. regulations, federal and tax court decisions, and non-binding authority such as IRS memorandums and other similarly related administrative materials.

2. DEP'T OF THE TREASURY, 2014–2015 PRIORITY GUIDANCE PLAN (Aug. 26, 2014), *available at* http://www.irs.gov/pub/irs-utl/2014-2015_pgp_initial.pdf [hereinafter DOT GUIDANCE PLAN 2014–2015].

3. H.R. 98–432, at 1591–92 (1984) (Conf. Rep.).

Stated differently, the three primary concerns persisting over the last three decades are: (1) overall noncompliance; (2) economic inefficiency through burden shifting; and (3) inequity among taxpayers.

Can rules be created that plausibly balance those three congressional concerns pertaining to tax-free fringe benefits, generally, and employer-provided meals, specifically? Can the interests of employers and employees, who may be subject to such taxation, be integrated into those rules? If so, how should the tax rules over employer-provided meals be structured to reflect such a dichotomy of interests? This Note answers the first two questions in the affirmative. Accordingly, the Note recommends a statutory solution drawing on the Patient Protection and Affordable Care Act ("ACA")[4]—as opposed to the issuance of new regulations or guidance by the Internal Revenue Service ("IRS")—which emphasizes potential tax incentives to both the employer and the employee.[5] The solution also addresses congressional concerns through a two-tier limitation on the provision of employer-provided meals based on the meals' fair market value.

Part II will first highlight the primary issues and arguments, qualitatively and quantitatively, associated with employer-provided meals.[6] The evolution of statutes, regulations, and jurisprudence on employer-provided meals will follow.[7] Part III will describe the current economic landscape, with "Googleplex"[8] as the primary example of what prompted the DOT's recent interest in employer-provided meals.[9] Then, the Note will analyze the weaknesses of current tax governance on employer-provided meals through application of rules to the Googleplex example.[10] A subsidiary purpose of this application is to illustrate that clarity, not willful noncompliance, is the primary issue with tax rules on employer-provided meals. Alternative tax-reformation solutions, other than basic inclusion of meals in employees' income, will also be applied to the Googleplex example in light of the main goals of tax system reformation.[11] Finally, Part IV will pose an interest-balancing statutory framework, rationalized by a health-favoring policy that allows for specialized treatment of certain employer-provided meals while effectively mitigating overprovision and misuse of employer-provided meals as a medium for cash compensation.[12]

4. 42 U.S.C. §§ 18001–18003 (2012).
5. *See infra* Part IV.
6. *See infra* Part II.A.
7. *See infra* Part II.B.
8. Adam Roberts, *Lunch at the Googleplex,* AMATEUR GOURMET (Oct. 22, 2012), http://www.amateurgourmet.com/2012/10/lunch-at-the-googleplex.html.
9. *See infra* Part III.A.
10. *See infra* Part III.B.
11. *See infra* Part III.C.
12. *See infra* Part IV.A, B.

II. BACKGROUND

A. Slapping the Hand of Silicon Valley: The Context Surrounding Employer-Provided Meals

What's the "big hairy deal"[13] with the DOT's sudden interest in employer-provided meals? This area of employer-provided benefits is relatively minor when levied against other income provisions not subject to tax.[14] Yet, when the DOT's 2014–2015 Priority Plan was made public, news publications immediately took note of a one-liner couched among 316 others: "Guidance under §§ 119 and 132 regarding employer-provided meals."[15] The news publications, like family members at our hypothetical dinner table, pointed to the guest who reached for the mashed potatoes much too early.[16] That guest was Silicon Valley.[17]

Before delving into the employee benefit heaven otherwise known as Silicon Valley, an examination of both the increasing rule pile for employer-provided meals and the consistent stream of proposals for tax reformation on fringe benefits is necessary to determine why even bother in the first place. The projected foregone tax revenue over the years of 2012–2016 from the "meals and lodging"[18] component of "miscellaneous fringe benefits"[19] is $9.5 billion.[20] Other estimates, however, suggest the meal component of that category may be drastically underestimated.[21]

Despite having an arguably minor effect on foregone tax revenue, the debate over taxing employer-provided meals prevails through two primary positions. On one side, proponents of taxing these benefits claim current rules already mandate including employer-provided meals as part of taxable compensation since the meals are not provided for the "con-

13. This phrase is attributable to Professor Richard Kaplan, the Peer and Sarah Pedersen Professor of Law at the University of Illinois College of Law.

14. *See* JOINT COMM. ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2014–2018, Doc. JCX-97-14, 4, 30 (Aug. 5, 2014) (estimating the amount of revenue lost for "Miscellaneous fringe benefits" is $38.3 billion over a five-year period) [hereinafter FEDERAL TAX EXPENDITURES FOR 2014–2018].

15. DOT GUIDANCE PLAN 2014–2015, *supra* note 2, at 7.

16. *See* Mark Maremont, *Silicon Valley Cafeterias Whet Appetite of IRS*, WSJ (Sept. 1, 2014), http://online.wsj.com/articles/silicon-valley-cafeterias-whet-appetite-of-irs-1409612488; Richard Rubin, *No Free Lunch for Companies as IRS Weighs Meal Tax Rules*, BLOOMBERG (Sept. 4, 2014), http://www.bloomberg.com/news/2014-09-04/no-free-lunch-for-companies-as-irs-weighs-meal-tax-rules.html; Jeanne Sahadi, *IRS Eyes Tax on Silicon Valley's Free Lunches*, CNN (Sept. 4, 2014), http://money.cnn.com/2014/09/03/pf/taxes/irs-taxes-free-lunch.

17. *See* Maremont, *supra* note 16; Rubin, *supra* note 16; Sahadi, *supra* note 16.

18. JOINT COMM. ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2012–2017, Doc. JCS-1-13, 37 (Feb. 1, 2013) [hereinafter FEDERAL TAX EXPENDITURES FOR 2012–2017].

19. FEDERAL TAX EXPENDITURES FOR 2014–2018, *supra* note 14, at 4.

20. FEDERAL TAX EXPENDITURES FOR 2012–2017, *supra* note 18, at 37. This figure may not fully encompass the estimated value of foregone revenue from the meal component of the equation. De minimis fringe benefits, discussed in Part II.B.3 *infra*, include the value of "Employer-provided eating facilities." *Infra* Part II.B.3.

21. *See infra* Part III.A.

venience of the employer."[22] From this noncompliance stems a parade of tax horribles—economic inefficiency[23] that results in inequity[24] by benefitting some tech companies and their workers over others.[25] On the other side, opponents of taxing employer-provided meals take a policy stance that these meals are not merely an alternative form of cash compensation, but a benefit to both the employer and employee through increased productivity, comfort, and collaboration.[26] Thus, the primary issue features all three congressional concerns as follows:[27] whether or not, by allowing tax-free treatment of employer-provided meals, inequity and economic inefficiency are caused by noncompliance to obtain tax-free treatment.

A simple hypothetical will be used to flesh out the primary issue with tax treatment of employer-provided meals that involves two employees, Employee A, who works at Company X, and Employee B, who works at Company Y. Both employees work in the tech industry, make the same salary, and share similar job responsibilities. Their employers, however, differ in providing on-premise meals to employees. Company X houses a cafeteria on its premises that provides substantially all of its employees, including Employee A, free breakfast and lunch. Company Y does not provide its employees with on-premise food options. Instead, Employee B must use after-tax dollars to purchase a meal at a local eatery or bring a meal from home. With the same salary both are contributing equal amounts for payroll taxes without adjusting for the economic value of the employer-provided meals.

To further illustrate the causes leading to inequity, economic inefficiency, and noncompliance, a simple economic framework will be used in conjunction with the hypothetical. The employer-provided meal economic framework is encompassed in the following equation:

22. *See* Austin L. Lomax, Note, *Five-Star Exclusion: Modern Silicon Valley Companies are Pushing the Limits of Section 119 by Providing Tax-Free Meals to Employees*, 71 WASH. & LEE L. REV. 2077, 2082–83 (2014).

23. Economic efficiency is discussed in Part II.A.1 *infra*. *See also* C. EUGENE STEUERLE, U.S. DEP'T OF THE TREASURY, A PRIMER ON THE EFFICIENT VALUATION OF FRINGE BENEFITS (1982) [hereinafter STEUERLE, EFFICIENT VALUATION OF FRINGE BENEFITS].

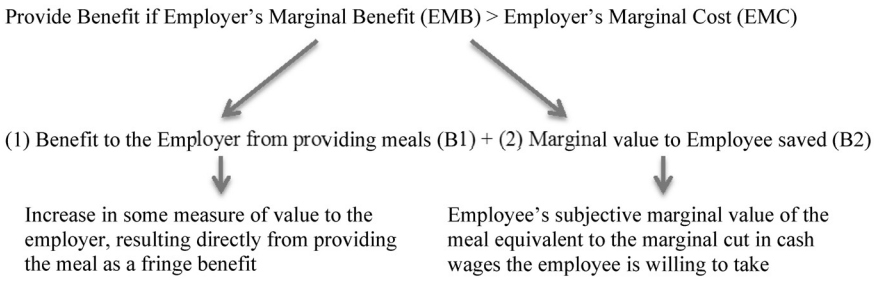
24. *See infra* Part II.A.1.

25. *See* Lomax, *supra* note 22, at 2113.

26. Susanne Gargiulo, *How Employee Freedom Delivers Better Business*, CNN (Sept. 21, 2011), http://edition.cnn.com/2011/09/19/business/gargiulo-google-workplace-empowerment/index.html.

27. *See supra* Part I.

FIGURE 1



Generally, the equation frames whether or not an employer will provide a meal in terms of an employer cost-benefit analysis. As long as the Employer's Marginal Benefit ("EMB") exceeds the Employer's Marginal Cost ("EMC") then providing the benefit is efficient.[28] The EMB consists of two components, B1 and B2. B1, for example, can be measured by increased revenue through more productive employees[29] as a direct result of providing meals. Also, B2 can be measured by the amount saved by reducing an employee's cash wages.[30] Lastly, the EMC is the direct cost incurred by the employer in providing the benefit.[31] This economic framework will be used to quantify the congressional concerns of economic inefficiency and inequity, both of which stem from noncompliance, in addition to serving as an assessment tool for tax solutions examined later in the Note.[32]

1. Economic Inefficiency[33]

In the realm of fringe benefits, such as employer-provided meals, efficiency is defined in terms of the difference between EMB and EMC when providing the fringe benefit.[34] To determine what is inefficient tax wise, there necessarily must be a benchmark for gauging such inefficiency. Thus, any tax regime seeking economic optimality should have the same effect on the number of times a meal was provided as if there were

28. *See* Avery Katz & N. Gregory Mankiw, *How Should Fringe Benefits be Taxed?*, 38 NAT'L TAX J. 37, 39 (1985).

29. *See* Gargiulo, *supra* note 26.

30. STEUERLE, EFFICIENT VALUATION OF FRINGE BENEFITS, *supra* note 23, at 7. This component can be calculated as: value of the fringe benefit to the employee plus tax savings based on the value of the fringe benefit. *Id.* For purposes of this Note, tax savings will not be considered. Also, it is assumed that the marginal value of the fringe benefit to the employee will decrease each time that benefit is received.

31. *Id.* at 3–8. Direct cost for employer-provided meals, for example, can be calculated from the cost of ingredients, salaries of chefs, and other overhead costs incurred in providing the meal.

32. *See infra* Part III.D.

33. Economic inefficiency can be defined numerous ways depending on the context. *See* Wayne M. Gazur, *Assessing Internal Revenue Code Section 132 After Twenty Years*, 25 VA. TAX REV. 977 (2006).

34. STEUERLE, EFFICIENT VALUATION OF FRINGE BENEFITS, *supra* note 23, at 5.

no taxes in existence and margins were affected by individual behavior only.[35] For employer-provided meals, the optimal benchmark is taxing (i.e. at twenty percent) the marginal value of the fringe benefit to the employee (B2),[36] compared to pure economic behavior, as follows:

TABLE 1

Pure Economic Behavior				
Meals	B1	B 2	> or <	EMC
1	60.00	30.00	>	30.00
2	50.00	18.00	>	30.00
3	25.00	9.00	>	30.00
4	23.00	6.00	<	30.00
5	10.00	3.00	<	30.00

TABLE 2

Tax on Employee's Marginal Value				
Meals	B1	B 2	> or <	EMC
1	48.00	24.00	>	24.00
2	40.00	14.40	>	24.00
3	20.00	7.20	>	24.00
4	18.40	4.80	<	24.00
5	8.00	3.20	<	24.00

The obvious takeaway is that when a twenty percent tax is placed on items in the equation, all values remain in the same proportion as if no tax was placed on the employer-provided meals.[37] Thus, when viewing the two scenarios in an economic vacuum, economic efficiency occurs when a meal is provided three times when tax is implemented.

35. *Id.* at 2–5.

36. *Id.*

37. The primary assumption here that elicits the optimal result is that each value in the equation is subject to a twenty percent income tax. Although this twenty percent tax rate is not necessarily reflected in reality, the fact that each variable in the equation is affected by income tax generally is a reflection of reality. B1 would be subject to the particular entity's income tax rate, reducing the economic benefit by the twenty percent tax rate. B2 is reduced by the twenty percent tax rate because the employee now pays this amount of tax which effectively lowers the equivalent value of the cash wage the employee is willing to forego to accept the meal. MCE is also lowered by the rate since the employer no longer has to foot that portion of the meal cost.

2. Inequity

Negative consequences such as "distort[ed] labor and consumer markets[,] . . . sizeable welfare losses in the economy . . . and [unbalanced] distribution of compensation across workers,"[38] can follow from the improper valuation of fringe benefits for tax purposes.[39] The inequity argument is grounded in the principle of horizontal equity, whereby parties who are situated equally[40] should contribute the same amount for tax purposes.[41] With employer-provided benefits, both employee and employer violate horizontal equity when cash wages are not adjusted to account for the economic value of the benefits.

Horizontal equity can be quantified through application of the employer-provided meals equation to the monthly compensation received by both Employees A and B. A tax on Employee A's marginal value of the employer-provided meals, as illustrated in Table 2, creates horizontal equity as long as Employee A's cash compensation is adjusted to reflect A's pre-tax marginal value of those meals. Thus, if Employee A makes an unadjusted pre-tax monthly salary of $1,000, the pre-tax economic marginal value (B2) of those meals is subtracted from that $1,000 to arrive at $943.00. After-tax salary would amount to approximately $754.40, with $188.60 contributed to taxes based on pre-tax salary adjusted for the economic value of the meals (B2). The tax on meals (approximately $11.40) must also be added to the total tax paid, equaling $200. In comparison, Employee B, who makes a monthly salary of $1,000, also pays $200 in tax based on the twenty percent rate. Both employees are receiving the same economic value after adding Employee A's marginal value of meals to monthly salary. Thus, horizontal equity is not violated when salary is adjusted to account for the marginal economic value of the meal benefits.

Conversely, general equity falls apart when salary is not adjusted to reflect the economic value of the meals and those meals are not taxed.[42] From an employee standpoint, when salaries are not adjusted to reflect the economic value of employer-provided meals without additional tax consequences, the omitted economic value of the meals represents a portion of untaxed income. Ignoring the economic effect on the benefit to the employer from providing the meals tax free, Employee A receives an

38. STEUERLE, EFFICIENT VALUATION OF FRINGE BENEFITS, *supra* note 23, at 2 (internal citations omitted).

39. Improper valuation encompasses more than including or not including fringe benefits in taxable income. The key issue with valuation is how to value fringe benefits for taxation purposes in the first place. Part III.D *infra* discusses this issue as it relates to alternative tax reform solutions on fringe benefits.

40. For purposes of this Note, being "situated equally" means being equal in terms of economic value received for the same job duties.

41. R. A. Musgrave, *In Defense of an Income Concept*, 81 HARV. L. REV. 44, 45 (1967) (stating horizontal equity requires that "people in equal position should pay equal amounts of tax . . . .").

42. This, in essence, is the scenario cited by those asserting employer-provided meals should be taxed. *See* Gazur, *supra* note 33, at 1020.

additional $57 through the economic value of the meals (B2), but Employee A only pays tax on the $1,000 monthly salary. Employee A technically has $57 of extra after-tax income to allocate to other purposes while Employee B will have expended roughly this amount in after-tax income purchasing the meals provided to Employee A tax-free. Viewed as a purely economic principle, horizontal equity is not violated since the employees are not in the same economic "position"[43] at the outset; however, when viewed as a matter of fairness, Employee A receives more than B for the same exact job and contributes less for tax purposes.

The employer's violation of horizontal equity parallels that of the employee. A's employer, Employer X, also contributes less to general welfare by decreasing payroll.[44] Additionally, Employer X can deduct the costs of providing those meals to Employee A,[45] lowering its taxable net income.[46] Thus, these benefits can be an enticing device to both draw in employees and mitigate tax liability.

3. Compliance[47]

Economic inefficiency and inequity necessarily stem from noncompliance. Noncompliance results from either relevant actors not complying with tax laws or from an authorized statutory exclusion permitting that economic inefficiency.[48] In the context of employer-provided meals, commentators suggest the former is all too common.[49]

The compliance issue narrows to whether noncompliance is willful or due to misapplication of ambiguous rules. Willful or not, however, the IRS will issue harsh penalties on both the employer and the employee.[50] Accordingly, the IRS has undertaken several large-scale efforts to clarify current rules in hopes to increase compliance, ultimately mitigating the disfavored "Tax Gap."[51] A brief examination of one such effort, the National Research Program ("NRP"), will unveil what the IRS searches for as bases for further rules as well as specific areas employers can exploit to avoid taxation on fringe benefits.

In 2009, the IRS implemented a six-thousand-employer audit through a series of NRP Examinations to "analyze taxpayer compliance and to assess the effectiveness of compliance programs and treatments in

43. *See* Musgrave, *supra* note 41, at 45.

44. I.R.S., TOPIC 751 – SOCIAL SECURITY AND MEDICARE WITHHOLDING RATES (last updated Aug. 27, 2015), *available at* http://www.irs.gov/taxtopics/tc751.html.

45. Provided that Employer X meets the requirements of Sections 119 and 132, discussed in Part II.B.2–3 *infra*.

46. *See infra* Part II.B.2–3.

47. *See* Gazur, *supra* note 33, at 1045.

48. Whether or not employer-provided meals comply with current tax law is analyzed in Part III.A–B *infra*.

49. *See generally* Gazur, *supra* note 33; Lomax, *supra* note 22.

50. *See* 26 U.S.C. §§ 3403, 6205, 6656, 6662, 6721, 6722 (2012).

51. I.R.S., IRM 4.22.1 (Oct. 1, 2008), *available at* http://www.irs.gov/irm/part4/irm_04-022-001.html [hereinafter *IRM Manual*].

use by the IRS."[52] The NRP is a "comprehensive effort by the IRS to measure compliance for different types of taxes and various sets of taxpayers."[53] A subsidiary program of the NRP, the Employment Tax Program, emphasizes "work streams and activities . . . [that] will reduce the tax gap across a broad spectrum of noncompliance, including . . . [f]ringe benefits . . . ."[54] Specifically, the IRS looks at the "filing, payment, and reporting"[55] processes used by the employer and employee relating to fringe benefits.[56]

To analyze fringe benefit compliance processes, the IRS engages in a formal audit where IRS tax specialists employ a variety of mechanisms to collect information and to test for compliance.[57] One such mechanism is Information Document Requests ("IDRs"), which elicit what fringe benefit sources use to flag the attention of the IRS.[58] Generally, IDRs will seek items such as a written employee benefits plan describing all benefits available to employees and the valuation method used for those benefits, a W-2 reconciliation of total earnings and benefits used to arrive at that employee's amount of wages, an opinion of why certain fringe benefits were not taxable, and employment contracts for highly compensated employees and rank-and-file employees.[59]

IDRs and other audit mechanisms are guided by Audit Technique Guides ("ATG") that provide broad general guidance to IRS tax specialists when analyzing information collected during the audit.[60] For example, an "Executive Compensation Fringe Benefit" ATG describes the primary issues with fringe benefits in the executive context, a three-step analysis when examining a particular fringe benefit, and the various rules for fringe benefits.[61] An IRS tax specialist is required to approach a fringe benefit with the assumption that it is taxable compensation to the employee; then the agent must search for a statutory or regulatory exception, and ascertain a value for that fringe benefit and any value that should have been included as compensation to the employee.[62] This means the IRS will further review accounts payable and cash disburse-

52. I.R.S., *National Research Program (NRP)* (last updated Aug. 18, 2012), http://www.irs.gov/uac/National-Research-Program-(NRP).

53. *IRM Manual*, *supra* note 51, at 4.22.1.3.

54. *Id.* at 4.23.2.2.

55. I.R.S., *SOI Tax Stats–IRS Compliance Activities* (Jan. 29, 2014), http://www.irs.gov/uac/SOI-Tax-Stats-IRS-Tax-Compliance-Activities.

56. *IRM Manual*, *supra* note 51, at 4.22.1.5.

57. *Id.* at 4.23.4.6. A full analysis of these audits is beyond the scope of this Note.

58. *Id.* at 4.23.4.6.5.

59. *Id.* at 4.23.4.

60. I.R.S., *Audit Technique Guides* (Sept. 4, 2015), http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Audit-Techniques-Guides-ATGs#M.

61. I.R.S., *Executive Compensation–Fringe Benefits Audit Techniques Guide (02-2005)* (Jan. 9, 2015), http://www.irs.gov/Businesses/Corporations/Executive-Compensation---Fringe-Benefits-Audit-Techniques-Guide-(02-2005) ("In the case of an employer-operated eating facility, the rules of I.R.C. §132(e)(2) must be met in order for the income to be excludable as a de minimis fringe. The four tests outlined in Treasury Regulation §1.132-7(a)(2) must be met in order for the value of the meals to be excluded from an employee's gross income.").

62. *Id.*

ment registers of employer-provided cafeterias serving meals in addition to traditional payroll records. Although these NRP examinations seek out specific items, it appears as if IRS tax specialists are operating under a surface-level understanding of the governing tax rules.[63] Understandably so given the IRS' acknowledgment of its scarce resources and massive breadth of the rule stockpile that covers all fringe benefits.[64] Thus, the IRS is using the same resources available to the general public, which are far from clear as to what constitutes a taxable employer-provided meal in most circumstances. This will inevitably lead to an incomplete solution that will likely mandate retroactive recognition of employer-provided meals as taxable compensation instead of a forward looking solution to eliminate noncompliance.

The compliance issue will continue to result from a broad lagging rule framework coupled with a limitless amount of circumstances that may or may not comply with this framework. If anything, the NRP audits will confirm the mounting use of fringe benefits as a favorable tax vehicle but will do little in laying the foundation for an effective solution. An overview of only a microcosm of the fringe benefit rules applicable to employer-provided meals in the next Section[65] will accentuate the compliance issue and hint at the growing need for reformation.

B. Rules of the Dinner Table: Rules and Policies on Employer-Provided Meals

The purpose of the following Section is to equip the reader with a fork and knife, so to speak. Having a basic grasp of the following I.R.C. sections, those sections' applicable regulations, and their accompanying policy rationales will provide utensils to dig into the analysis that will ultimately expose the weaknesses of the current rules. The Section will conclude with a more recent application of these rules to a case involving an employer-operated eating facility, a common feature of the target entities in the DOT's spotlight.[66]

1. I.R.C. § 61: An Exception?

Section 61 is the starting point in the analysis of the rule stockpile as it defines the sources that produce the money crop that the IRS reaps.[67] The language of Section 61 is relatively simple: "Except as otherwise provided . . . gross 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

63. *Id.*
64. *See IRM Manual*, *supra* note 51, at 4.22.1.5.
65. *See infra* Part II.B.
66. *See, e.g.*, Maremont, *supra* note 16.
67. 26 U.S.C. § 61 (2012).

items . . . ."[68] Clearly, the language of this section is intended to be incredibly broad. In determining the true scope of gross income one should note "the cardinal principle that Congress in creating the income tax intended to use the full measure of its taxing power."[69] Thus comes the most important point in the start of the taxation analysis for employer-provided meals: "Congress applied no limitations as to the source of taxable receipts, nor restrictive labels as to their nature, [but intended] to tax all gains except those specifically exempted."[70]

Employer-provided meals are not explicitly mentioned in Section 61,[71] indicating regulations are the next stop. The standout regulation is Section 1.61–21, the language of which first acknowledges "Section 61(a)(1) provides that . . . gross income includes . . . fringe benefits . . . ."[72] After paying heed to the almighty Section 61, Section 1.61–21(a)(2) provides the sought carve out for employer-provided meals: "Examples of excludable fringe benefits include . . . meals or lodging furnished to an employee for the convenience of the employer . . . and de minimis fringes . . . . "[73] Unfortunately this is not the end point of the excursion, but rather the point where things get rocky, especially regarding the language "for the convenience of the employer."[74]

2. I.R.C. § 119 and "Convenience-of-the-Employer" Doctrine[75]

Our next stop is Section 119 in the I.R.C., where the language plays a key role in allowing employers to take full advantage of providing meals to employees with no adverse tax consequences. Take special note of the "convenience of the employer" phrase in the language of Section 119:

> There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him, his spouse, or any of his dependents by or on behalf of his employer *for the convenience of the employer*, but only if . . . in the case of meals, the meals are furnished on the business premises of the employer . . . .[76]

The key requirements for the employee to reap the exclusionary benefits of Section 119 are threefold. First, the employee must be sure the employer is actually providing the meal.[77] Second, the meal is served on the employer's premises.[78] Third, the employee should make sure that free-riding relatives, other than a spouse and dependents, are not tagging

68. *Id.* at (a)(1).
69. Comm'r v. Kowalski, 434 U.S. 77, 82 (1977) (internal quotation marks omitted).
70. *Id.* at 82–83 (internal quotation marks omitted).
71. *See* 26 U.S.C. § 61 (2012).
72. 26 C.F.R. § 1.61–21(a)(1) (2014).
73. *Id.* at (a)(2).
74. *Id.*
75. 26 U.S.C. § 119(a)(1) (2012).
76. *Id.* (emphasis added).
77. *Id.*
78. *Id.*

along to these meals while at work.[79] The lurking requirement out of the employee's control is the "convenience of the employer" element.[80]

The regulations attempt to illustrate the coverage of Section 119 through the enumeration of a two-part test and additional examples to demonstrate circumstances where that two-part test applies.[81] The first part of the test requires that "meals [be] furnished on the business premises of the employer."[82] The second part requires that "the meals [be] furnished . . . for *the convenience of the employer*."[83] Unsurprisingly, the analysis for the second part is a totality-of-all-facts-and-circumstances test determined on a case-by-case basis.[84]

A further attempt at guidance comes in the requirements for "meals furnished without a charge."[85] Convenience is equivalent to meals "furnished for a substantial noncompensatory business reason of the employer."[86] A detailed instruction of how to determine a "substantial noncompensatory business reason" follows: "[T]he mere declaration that meals are furnished for [this reason] is not sufficient to prove [this reason]."[87] To paraphrase, this instruction basically says: find tangible support, whatever that support may be.

Looking to the regulation's examples, a "substantial noncompensatory business reason" is found under two relevant sets of circumstances, one set being related to the nature of the employer's operations and the other set being related to the employee's ability to obtain a proper meal in a reasonable period of time.[88]

79. *Id.*
80. 26 C.F.R. § 1.119-1 (2014).
81. *Id.*
82. *Id.*
83. *Id.* (emphasis added).
84. *Id.*
85. *Id.* § 1.119-1(a)(2).
86. *Id.* § 1.119-1(a)(2)(i).
87. *Id.*
88. *Id.* § 1.119-1(a)(2)(ii)(b)–(c).

TABLE 3

Nature of Employer's Operations	"Proper" Meal and "Reasonable" Time
(1) During "work hours" (2) the "employer's business" requires (3) the employee (4) to have a "short meal period" ("30 or 45 minutes") and (5) "the employee could not be expected to eat elsewhere" in (6) "30-45 minutes."	(1) During "working hours" (2) "the employee" (3) "could not secure proper meals" in a (4) "reasonable meal period."

As the numbers show, there are numerous conditions to satisfy a "substantial noncompensatory business reason" depending on the set of circumstances.[89] The conditions also sound the alert for ambiguity. What, exactly, is not a "substantial noncompensatory business reason?"[90] The example answering that question provides that when meals are provided to boost the "morale or goodwill of the employee, or to attract prospective employees" the conditions are not satisfied for a "substantial noncompensatory business reason."[91] Therefore, it is clear the spectrum is one without apparent end points for determining whether an employer-provided meal is convenient to the employer.

"The convenience-of-the-employer doctrine is [obviously] not a tidy one."[92] The doctrine was born into the tax world in 1919, through a ruling excluding from income the "board and lodging furnished [to] seamen aboard ship."[93] After its introduction, the doctrine's meaning took a turbulent journey over the succeeding ninety-five years. The scope of the Convenience-of-the-employer doctrine was first grappled with administratively during the 1920s in both an IRS Treasury Decision and IRS Office Decision.[94] The Office Decision described a set of circumstances whereby:

> Supper money paid by an employer to an employee, who voluntarily performs extra labor for his employer after regular business hours, such payment not being considered additional compensation and not being charged to the salary account, is considered as being paid for the *convenience of the employer* and for that reason does not represent taxable income to the employee.[95]

89. *Id.*
90. *Id.* § 1.119-1(a)(2)(iii).
91. *Id.*
92. Comm'r v. Kowalski, 434 U.S. 77, 84 (1977).
93. *Id.*
94. *See* T.D. 2992, 1920-2 C.B. 76, *available at* 1920 WL 48816; 1920-2 C.B. 90, *available* at 1920 WL 49099.
95. T.D. 2992, 1920 WL 49099 (emphasis added) (internal quotations omitted).

Concurrently, the Treasury Decision amended the then "Article 33 of Regulations 45" to address compensation other than cash.[96] The amendment provided insight on the valuation method applied to such non-cash payments and briefly noted "[w]hen living quarters . . . are furnished to employees for the *convenience of the employer*, the . . . value need not be added to . . . compensation of the employee . . . ."[97] A key distinction followed that provision that warned if services performed are compensated by a salary "in addition thereto living quarters" then the value of the employee's living space is included in his or her gross income.[98] The effect of these initial decisions set the precedent for requiring "designated circumstances"[99] where employer-provided benefits, even cash for supper,[100] would not be included in income.

Following the "designated circumstances" precedent[101] were administrative decisions that introduced three new considerations into the Convenience-of-the-employer doctrine.[102] First, and in close proximity to the initial decisions set forth above, the employer's characterization of the provided benefit as noncompensatory or compensatory was an additional factor outside of considering the circumstances surrounding the provision of that benefit.[103] Intent was the premise of the characterization test.[104] Second, the "necessity of the benefits" to the employer's operations was made the interpretational principle of the Convenience-of-the-employer doctrine through new regulations.[105] This interpretation seemed to focus on the "immedia[cy] [of] service" provided by the employee and the materiality of interference when the employee seeks meals or lodging outside the employer's premises.[106] The third consideration was introduced in the 1950s and modified previous "necessity" test rulings.[107] Additionally, a slight twist was placed on the "designated circumstances"[108] test by limiting its application of the Convenience-of the-employer doctrine to cases where "the compensatory character of . . . benefits is not otherwise determinable."[109] The characterization test[110] was left untouched.[111] At that point clarity was not in surplus.

96. T.D. 2992, 1920 WL 48816.
97. *Id.* (emphasis added).
98. *Id.*
99. Comm'r v. Kowalski, 434 U.S. 77, 85 (1977).
100. 1920-2 C.B. 90, *available* at 1920 WL 49099.
101. *Id.*
102. *See supra* note 94; 1922-2 C.B. 90, *available at* 1922 WL 51376; 1940-1 C.B. 14, *available at* 1940 WL 71932.
103. 1922-2 C.B. 90, *available at* 1922 WL 51376.
104. *Kowalski*, 434 U.S. at 85.
105. 1940-1 C.B. 14, *supra* note 102 ("For example, if an employee is subject to immediate service at any time during the 24 hours of the day and, therefore, can not obtain quarters or meals elsewhere without material interference with his duties and on that account is required by the employer to accept quarters or meals furnished by the employer, the value thereof need not be included in the gross income of the employee.").
106. *Id.*
107. *Kowalski*, 434 U.S. at 87.
108. *Id.* at 85.
109. *Id.* at 86 (quoting O.D. 915, 4 C.B. 84, 85–86 (1921)).

Cue the court decisions! With little additional guidance from the administrative rulings in the first half of the twentieth century, courts began to wrestle with the meaning of the Convenience-of-the-employer doctrine, to the point that recodification of the I.R.C. occurred in 1954.[112] The position emerging from the Court of Claims in the 1920s was the preference for a characterization test with a slight emphasis on necessity that allowed both cash reimbursements and non-cash benefits to be excluded from income.[113] A unanimous decision by the Tax Court in the 1950s favored business necessity and rejected any interpretation of the Convenience-of-the-employer doctrine based on employer intent.[114] The pillars supporting this rationale were a "but for" causation test, dominance and control of the employer over the benefits received by the employee, and the directness of the correlation of the benefits to the "personal wants and needs of the employee,"[115] versus the directness of the correlation of the benefits' necessity to employment.[116]

Finally, in 1977, the Supreme Court examined the Convenience-of-the-employer doctrine under the guidance of Section 119.[117] The Court dealt with the issue of whether or not bi-weekly cash meal allowances are included in gross income under Section 61 or otherwise excluded under Section 119's Convenience-of-the-employer doctrine.[118] The Court rejected the latter and held the value of the cash meal allowances should be included in gross income.[119] Five essential points supporting the Court's decision were: (1) the intent of Congress in ending the doctrine's confusion;[120] (2) the plain language of Section 119 rejecting the employer's characterization of the benefit even if under a contract or state statute;[121] (3) the Court's intentional avoidance of "creating a larger exclusion for cash than kind" unless necessity for properly performing duties could be demonstrated;[122] (4) the additional restriction of taking the meals on the employer's premises;[123] and (5) that "arguments of equity have little force in construing the boundaries of exclusions and deductions."[124] Moreover, two key interpretational takeaways emerged from the Court's decision that aid in forming the definition of the Convenience-of-the-employer doctrine. A bright line rule that meals must be furnished on employer

110. *Id.* at 85.
111. *Id.* at 87.
112. *Id.*
113. Jones v. U.S., 60 Ct. Cl. 552, 574–76 (Ct. Cl. 1925).
114. *See* Van Rosen v. Comm'r, 17 T.C. 834, 838 (T.C. 1951).
115. *Id.* at 835–38.
116. *Id.* at 838 (citing Benaglia v. Comm'r, 36 B.T.A. 838 (B.T.A. 1937)).
117. *Kowalski*, 434 U.S. at 84.
118. *Id.* at 84–85.
119. *Id.* at 80–81.
120. *Id.* at 92.
121. *Id.*
122. *Id.* at 95.
123. *Id.* at 92–93.
124. *Id.* at 95–96.

premises. Also, the "business-necessity rationale"[125] is the guiding test when viewing the totality of circumstances of any given case.[126]

The Convenience-of-the-employer doctrine has a history of definitional tension between necessity and characterization. A bright line rule or set of rules for the doctrine is far from illuminating. Further exploration is necessary to attempt to find some guiding structure for the modern Section 119 and Convenience-of-the-employer doctrine. An examination of sister Section 132 therefore is next on the analytical voyage.

3. I.R.C. § 132 and De Minimis Employer Eating Facilities

De minimis logically entails something of small size, or at least something other than an eating facility. Not according to Congress.[127] Lucky for Congress, no law requires it to be rational, much less non-arbitrary when it comes to taxes.[128] That lack of restriction is fully injected into Section 132 which provides a statutory exclusion to Section 61 for any "fringe benefit [qualifying] as a . . . de minimis fringe [benefit].[129] A de minimis fringe benefit is "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."[130]

Is a large cafeteria on an employer's premises really "unreasonable or administratively impracticable"[131] to account for? Congress certainly thinks so: "[A]n employer . . . eating facility for employees shall be treated as a de minimis fringe if . . . located on or near the business premises of the employer, and revenue derived from such facility normally equals or exceeds the direct operating costs of such facility."[132] Fear not, any "unreasonable or administratively impracticable" calculation is eliminated by the language of the following section referring back to Section 119: "[A]n 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."[133] The requirements for meeting the definition of an employer-operated eating facility and the makeup of operating costs are beyond the scope of this Note.[134] Nevertheless, it is safe to assume a cafeteria or restaurant run by an employer on its premises will meet these requirements.

125. *Id.* at 88.
126. *Id.* at 92–96.
127. 26 U.S.C. § 132(e)(2)(A)–(B) (2012).
128. *Kowalski*, 434 U.S. at 95–96.
129. 26 U.S.C. § 132(a)(4) (2012).
130. *Id.* § 132(e)(1).
131. *Id.*
132. 26 U.S.C. § 132(e)(2)(A)–(B) (2012).
133. *Id.* § 132(e)(2)(B).
134. *See* 26 C.F.R. § 1.132-7(a)(2), (b) (2012).

The takeaway from Section 132 is abundantly clearer than the takeaways from Section 119. If an employer is not charging employees for meals at the employer's cafeteria—then pick up your bags and march right back over to the nightmare that is the Convenience-of-the-employer doctrine in Section 119.[135] Thus, the primary issues with the tax treatment of employer-provided meals can be linked almost exclusively to Section 119. A relatively modern view of Section 119 is in order.

4. A Modern Application of Section 119 and Section 132: Boyd Gaming Corp.[136]

The Ninth Circuit bravely took on the issue of "whether there really is a free lunch."[137] This issue stemmed from 26 U.S.C. § 274, a statute placing "an 80% cap on the amount of deductions for business meals and entertainment" with various exceptions.[138] More specifically, the battle was over one of the exceptions nestled into Section 274, with Boyd Gaming Corporation ("Boyd") arguing it was entitled to a one-hundred percent deduction since the meals provided in its cafeteria fell under the statute's de minimis fringe benefit exception while the IRS argued the opposite based on Boyd's failure to furnish meals to "substantially all of its employees for the convenience of the employer."[139] Ultimately, the Ninth Circuit held Boyd was entitled to a full deduction under Section 274 since Congress "substituted a statutory threshold of more than half for the prior regulatory requirement of substantially all"[140] and the "convenience test" was met under Sections 119 and 132.[141]

The "test of [tax] deductibility"[142] was satisfied on the grounds of the Ninth Circuit finding Boyd had met the conditions of the "Catch-All Provision"[143] and the facts and circumstances constituted a "substantial noncompensatory business reason."[144] The "Catch-All Provision"[145] the court referenced was Section 119(b)(4), which was altered subsequent to the Tax Court's initial decision against Boyd.[146] The original language stated that meals must be furnished to "substantially all" employees to qualify under Section 119.[147] The provision was structurally modified and the phrase "substantially all" was replaced with "more than half."[148] The requisite number was deemed met through a "stay-on-premises" policy

135. *See supra* Part II.B.2.
136. Boyd Gaming Corp. v. Comm'r, 177 F.3d 1096 (9th Cir. 1999).
137. *Id.* (internal quotations omitted).
138. *Boyd Gaming Corp.*, 177 F.3d at 1097. *See* 26 U.S.C. § 274 (2012).
139. *Boyd Gaming Corp.*, 177 F.3d at 1098 (internal quotations omitted).
140. *Id.* (internal quotations omitted).
141. *Id.* at 1099–101.
142. *Id.* at 1098.
143. *Id.* at 1099–100.
144. *Id.* at 1100.
145. *Id.* at 1099.
146. *Id.* at 1098.
147. *Id.* at 1099 (emphasis in the original) (quoting repealed statute).
148. 26 U.S.C. § 119(b)(4) (2012).

that also sufficed for a "substantial noncompensatory business reason."[149] Deferring to the Supreme Court's decision in *Kowalski*,[150] the court held the Tax Court misread the "business-necessity" theory advocated in that case by substituting its own business judgment for that of Boyd's in fixing the degree of necessity required between the meals and employer's business.[151] Referring to a Ninth Circuit precedent consistent with *Kowalski*, the court confirmed "the Tax Court may not substitute a business judgment that is contrary to the unimpeached and uncontradicted evidence presented by the taxpayer."[152]

Thus, the court allowed Boyd's business rationale to stand and accordingly commented that "necessity" does not require that "meals must be linked to an employee's specific duties."[153] The Ninth Circuit, however, limited its holding by referencing the frowned-upon employer characterization of benefits as well as the importance of necessity in determining convenience to the employer:

> [I]t would not have been enough for Boyd simply to wave a "magic wand" and say it had a policy in order to be entitled to a deduction. . . . While reasonable minds might differ regarding whether a "stay-on-premises" policy is necessary . . . , the fact remains that [employers] here operate under this policy.[154]

Boyd Gaming Corp. stayed true to the "business necessity" theory that has survived, albeit with slight modifications, for over a half-century.[155] Yet, the Ninth Circuit certainly allowed characterization of the meals as part of a "stay-on-premises" policy that made the meals convenient to the employer as long as the characterization was supported by "adequate evidence of legitimate business reasons."[156] The analytical path under the Convenience-of-the-employer doctrine is far from concrete. Why then, is the DOT treading back into an area with such an unstable foundation?

III. ANALYSIS

Current rules[157] will be applied to the star child of the notorious dinner table guest, Silicon Valley, to unravel the inherent weaknesses of current tax rules on employer-provided meals. These weaknesses will illustrate the gaps that tax reformation solutions attempt to fill. A subsidiary purpose of a detailed application analysis is to counter the prevailing position that rules on employer-provided meals do apply to the tech in-

149. *Boyd Gaming Corp.*, 177 F.3d at 1100–01.
150. Comm'r v. Kowalski, 434 U.S. 77 (1977).
151. *Boyd Gaming Corp.*, 177 F.3d at 1100.
152. *Id.* (quoting Caratan v. Comm'r, 442 F.2d 606, 609–10 (9th Cir. 1971)).
153. *Id.* at 1101.
154. *Id.*
155. *See supra* Part II.B.2.
156. *Boyd Gaming Corp.*, 177 F.3d at 1101.
157. *See supra* Part II.

dustry and that these parties are willfully not complying.[158] Several alternative solutions[159] will then be analyzed as applied to the Googleplex scenario.[160] The Analysis will conclude with a discussion of the main challenge accompanying any solution involving taxation of fringe benefits, valuing those benefits.

A. The Googleplex[161]

Google Inc., the star child of Silicon Valley, has been identified as one of the employers potentially subject to the employer-provided benefits tax chopping block.[162] As of 2014, Google operates over seventy offices with nearly 54,000 employees[163] in more than forty countries throughout the world.[164] Google's headquarter office, located in Mountain View, California, is home of the awe-inciting Googleplex,[165] the meal-related amenities of which are to follow.

The Googleplex is not the average high-rise business tower, but rather spans across an entire city and rivals the best college campuses.[166] A sky view of the north end of the massive campus reveals "a park with tennis courts, soccer fields, fitness stations, and Frisbee golf,"[167] all of which are supplied with solar-powered lighting.[168] Juxtaposition to the park are "public lands with trails and an amphitheater" reserved for Google employee use.[169] Googleplex also has a volleyball court, several organic gardens, large parking lots equipped with solar panels and electric car refueling stations, scattered outdoor art, and a massive outdoor cafeteria.[170] The inside view is even more impressive and includes multiple indoor gym facilities, restaurants, gourmet kitchens, snack stations, massage parlors, and a bowling alley.[171]

Googleplex cafeterias, restaurants, and "micro-kitchens" are particularly awe inspiring among the amenities on campus.[172] In 2012, Goog-

158. *See* Gazur, *supra* note 33; Lomax, *supra* note 22.
159. *See infra* Part III.C.
160. *See infra* Part III.A–B.
161. Roberts, *supra* note 8.
162. Sahadi, *supra* note 16.
163. *2014 Financial,* GOOGLE INVESTOR RELATIONS, http://investor.google.com/financial/2014/tables.html (last visited Oct. 8, 2015); *Locations*, GOOGLE CAREERS, http://www.google.com/about/careers/locations/ (last visited Oct. 8, 2015). Google has an office page for each location but uses a riddle for the number of employees in each office. *See e.g.*, *Google Ann Arbor*, GOOGLE CAREERS, http://www.google.com/about/careers/locations/ann-arbor/ (last visited Oct. 8, 2015).
164. *Locations*, GOOGLE CAREERS, http://www.google.com/about/careers/locations/ (last visited Oct. 8, 2015).
165. Roberts, *supra* note 8.
166. Julie Bort, *Tour Google's Luxurious 'Googleplex' Campus in California*, BUS. INSIDER (Oct. 6, 2013, 10:21 AM), http://www.businessinsider.com/google-hq-office-tour-2013-10?op=1.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. Tanya Steel, *Inside Google's Kitchens*, GOURMET LIVE (Mar. 7, 2012), http://www.gourmet.com/food/gourmetlive/2012/030712/inside-googles-kitchens.html.

leplex housed over twenty-five cafés and enough mico-kitchens that "employees [were] always within 150 feet of food."[173] Chefs, "most [of whom] hail from the world of fine dining,"[174] manage the operations of each café.[175] The chefs create a daily menu according to established Google tenets of "healthy, sustainable, and local."[176] For example, on a random weekday the menu at one of the twenty-five cafés, the "Evolution Café," featured "Petaluma chicken cacciatore, porcini-encrusted grass-fed beef, whole-wheat spaghetti pomodoro, and Parmesan-creamed onions."[177] The micro-kitchens also offer food items such as "roasted seaweed, edamame, and multigrain baked chips as well as seasonal fruit, low-fat trail mix, squares of dark chocolate, and latte machines."[178] The ingredients for these meals are bought locally, with an estimated thirty percent of ingredients bought within one-hundred and fifty miles of Mountain View and nearly seventy percent of all ingredients bought within the state of California.[179] With the goal of making "it convenient for people to eat healthy" most of these cafés serve breakfast, lunch, and dinner Monday through Friday, with some extending open hours to weekends.[180] No wonder Google tops the list for best perks.[181]

What do these employer-provided meals cost Google on a yearly basis, and how much of an economic benefit is each Google employee receiving? For the sake of simplicity, Google's foreign offices will be ignored and only the thirty-two domestic offices will be used in estimating a value.[182] Over thirty thousand employees work in the domestic offices.[183] According to the estimates of an Executive at Aramark Business Dining Services, Google pays around $30 per employee at least 251 days a year for at least two meals a day.[184] This amounts to $150.6 million per year. Key variables not included in the cost calculation of Googlers' favorite

173. *Id.*

174. *Id.* For example, one of the first Google chef hires was Charlie Ayers, who formerly served as the personal chef for the band Grateful Dead. *Id.*

175. *Id.*

176. *Id.* ("As directed by Brin and Page, the company maintains that it's essential to feed the body—and mind—healthy fare. All foods served at Google, from snacks to salad dressings, are color-coded: Green signifies healthiest; yellow, good for you; and red, least healthy. As executive chef Scott Giambastiani puts it, 'We make it convenient for people to eat healthy. We're quietly nudging you with products like organic fruit and greens, and dried fruits.'").

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. Casey Kelly-Barton, *The Top 25 Companies for Pay and Perks*, USA TODAY (May 26, 2014, 1:57 PM), http://www.usatoday.com/story/money/business/2014/05/26/the-motley-fool-the-top-25-companies-for-pay-and-perks/9542969/.

182. *Locations*, GOOGLE CAREERS, *supra* note 164.

183. GOOGLE INC., EQUAL EMP'T OPPORTUNITY 2014 EMPLOYER INFO. REPORT 1 (2014), *available at* http://static.googleusercontent.com/media/www.google.com/en//diversity/pdf/google_2014_certified_eeo-1_reports_12-12-14.pdf.

184. Vasanth Sridharan, *Google's Ginormous Free Food Budget*, BUS. INSIDER (Apr. 23, 2008, 2:36 PM), http://www.businessinsider.com/2008/4/googles-ginormous-food-budget-7530-per-googler. Please note these estimates were taken in 2008 and may be significantly lower than 2015 prices.

perk are the third "dinner" meal Googlers can have free of charge and the additional amenities provided by the 24-hour micro-kitchens.[185]

The Googleplex example shows the IRS is not chasing after chump change. Meal perks are not exclusive to Silicon Valley tech companies[186] and in the aggregate, potentially billions of dollars are currently outside the reach of the IRS on an annual basis.[187]

B. Operative Facts and Applicable Rules: Challenges Revealed

The key facts in determining what tax rules apply to Googleplex center around the physical makeup of the campus eating facilities, location of Googleplex in relation to other eating facilities not on campus, the nature of the employees' work, and any policies restricting employees from leaving the employer's premises. Application of employer-provided meal rules[188] to these operative facts will not only reveal specific weaknesses in the current tax regime on employer-provided meals but also will hint at several policies that should factor into any tax reformation solution.

Why does the physical makeup of the eating facilities matter? Consider a 2011 IRS Memorandum where the issue was whether or not meals prepared by a third-party ground vendor for flight crew members to eat while performing job duties during flight were excludable from the flight employees' gross income under Section 132(e)(2).[189] Recall Section 132(e)(2) provides, "[A]n employer . . . eating facility for employees shall be treated as a de minimis fringe if . . . located on or near the business premises of the employer . . . ."[190] The IRS decided the meals were not excludable under Section 132(e)(2) even if the meals met the Section 119 convenience-of-the-employer test.[191] In support of the decision, the IRS noted that "[a]lthough the Code, Regulations, and cases never explicitly define the term 'eating facility,' they do imply that an 'eating facility' means an identifiable location that is designated for the preparation and/or consumption of meals."[192] The IRS concluded the meals were not

185. 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.

186. *See* Abby Rogers, *Google, Facebook & More: These are the Best Office Cafeterias in America*, BUS. INSIDER (Oct. 13, 2011, 11:12 AM), http://www.businessinsider.com/the-companies-with-best-food-2011-10?op=1.

187. *See* Rubin, *supra* note 16 (quoting Duke University tax law professor Lawrence Zelenak) ("There's really potentially a lot of tax revenue involved. It sounds like you're being inherently trivial, but I think this is not.").

188. *See supra* Part II.

189. I.R.S. Chief Couns. Mem. 2011-51-020 (Dec. 23, 2011) [hereinafter *Chief Couns. Mem.*]. Please note that IRS memorandums are non-binding and cannot be used as precedent.

190. 26 U.S.C. § 132(e)(2)(A) (2012).

191. *Chief Couns. Mem.*, *supra* note 189.

192. *Id.* Additionally, the Chief Counsel supported this implication with several other sources. *See* Treas. Reg. 1.132-7 (1989) (referring to "dining rooms"); *Id.* § (a)(1)(ii) ("[E]ach dining room . . . in which meals are served is treated as a separate eating facility."); *Id.* § (b)(ii) ("[D]irect operating costs test may be applied separately for each dining room. . . ."); *Id.* § (a)(1)(ii) ("[E]ach . . . cafeteria in

excludable as fringe benefits "because they [were] not provide[d] at eating facilities" in addition to the meals being "catered, . . . [and] prepared by an independent third party vendor at a facility on the ground [that was] not owned, leased, or operated by the employer."[193]

Thankfully, Googleplex is not the brick and mortar building of an airline company.[194] The twenty-five cafés[195] throughout the campus most likely meet the IRS' identifiable-eating-location implication.[196] Each café[197] has a "dining room . . . [and] individuals . . . employed to prepare and/or serve food."[198] Yet, the micro-kitchens and other snack stations[199] fall into a gray area. Certainly a snack station[200] cannot be considered a dining room as contemplated by the treasury regulations.[201] Further, it is unclear whether or not individuals paid to prepare the food have to serve it directly to the employees or place the food at a location, like a snack station, for the convenience of the employees.[202] It would appear from the 2011 IRS Memorandum that if a third party caters the food in the micro-kitchens or snack stations, and this food is not eaten in one of the twenty-five cafés, then employees would have to include at least fifty percent of the meal value[203] in their salary and wages.[204] Therefore, the current structure of food facilities at Googleplex would most likely render every food and drink item, except those served in the cafés, as part of taxable income. Such a requirement draws the question of unreasonable or administrative impracticability in accounting for the value of these items.[205] Hash this difficult distinction as a "simplicity" challenge when considering potential solutions.

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which meals are served is treated is a separate eating facility."); *Id.* § (b)(ii) ("[D]irect operating costs test may be applied separately for each . . . cafeteria."); *Id.* § (a)(4) Ex. 1) ("Assume that a not-for-profit hospital system maintains cafeterias for the use of its employees and volunteers."). "[R]egulations contemplate that an eating facility is a location at which individuals are employed to prepare and/or serve food . . . . [D]irect operating costs of an eating facility include 'personnel whose services relating to the facility are performed on the premises of the eating facility,' [and] "labor costs attributable to cooks, waiters, and waitresses." *Chief Couns. Mem.*, *supra* note 189. "No guidance raises the inference that the exclusion of section 132(e) extends to all meals provided on the employer's business premises, irrespective of whether or not they are provided at an eating facility." *Id.* (internal quotations omitted).

193. *Chief Couns. Mem.*, *supra* note 189.

194. Steel, *supra* note 172.

195. *Id.*

196. *Chief Couns. Mem.*, *supra* note 189.

197. Steel, *supra* note 172.

198. *Chief Couns. Mem.*, *supra* note 189.

199. *See* Steel, *supra* note 172.

200. *See id.*

201. *Chief Couns. Mem.*, *supra* note 189 (discussing Treas. Reg. § 1.132-7(a)(1)(ii)).

202. *See* Steel, *supra* note 172; Sophia Breene, *Why Are Google Employees So Damn Happy?*, GREATIST (May 28, 2013), http://greatist.com/happiness/healthy-companies-google.

203. *See Chief Couns. Mem.*, *supra* note 189.

204. *See* 26 U.S.C. § 274(n) (2012).

205. *See* H.R. REP. NO. 98-432(II) at 1603 (1984), *reprinted in* 1984 U.S.C.C.A.N. 697, 1227 ("Under the bill, if the market value of any property or a service that otherwise would be a fringe benefit includible in gross income is so small that accounting for the property or service would be unreasonable or administratively impracticable, the value is excluded for income and employment tax purposes.").

The next operative fact is Googleplex's proximity to other eating facilities. Googleplex is massive, with office space spanning over 3.8 million square feet.[206] The campus is approximately fifteen minutes from Stanford University and the city of Palo Alto[207] in addition to being located roughly twelve minutes away from the food epicenter of Mountain View where there are nearly 100 restaurants and cafés[208] (other than the Googleplex, of course).[209] Depending on what building a Googler works at, several locations are within walking distance: In-N-Out Burger,[210] Sunny Bowl,[211] and Shoreline Lake American Bistro.[212]

The proximity factor does not fall in Google's favor. Treasury regulations provide the equation that convenience of the employer is equivalent to meals "furnished for a substantial noncompensatory business reason to the employer."[213]

206. Google Inc., Annual Report (Form 10-K) 21 (Dec. 31, 2013), *available at* http://investor.google.com/pdf/20131231_google_10K.pdf.

207. Driving Directions from Googleplex, 1600 Amphitheatre Pkwy, Mountain View, CA to Stanford University, 450 Serra Mall, Stanford, CA, GOOGLE MAPS, http://maps.google.com (follow "Directions" hyperlink; click the car icon; search "Starting point" for "Googleplex" and search "Choose destination" for "Stanford University").

208. MOUNTAIN VIEW DOWNTOWN GUIDE, http://mountainviewdowntown.com/dining/ (last visited Oct. 8, 2015).

209. Google Maps view of Googleplex, GOOGLE MAPS, http://maps.google.com (Type "Googleplex" into search bar; click "magnifying glass"; then use zoom features in bottom right corner to see restaurants on the campus).

210. Walking Directions from Googleplex, 1600 Amphitheatre Pkwy, Mountain View, CA to In-N-Out Burger, GOOGLE MAPS, http://maps.google.com (follow "Directions" hyperlink; click the walking icon; search "Starting point" for "Googleplex" and search "Choose destination" for "In-N-Out Burger").

211. Walking Directions from Googleplex, 1600 Amphitheatre Pkwy, Mountain View, CA to Sunny Bowl, GOOGLE MAPS, http://maps.google.com (follow "Directions" hyperlink; click the walking icon; search "Starting point" for "Googleplex" and search "Choose destination" for "Sunny Bowl").

212. Walking Directions from Googleplex, Google Building 2081, Mountain View, CA to Shoreline Lake American Bistro, GOOGLE MAPS, http://maps.google.com (follow "Directions" hyperlink; click the walking icon; search "Starting point" for "Google Building 2081" and search "Choose destination" for "Shoreline Lake American Bistro").

213. 26 C.F.R. § 1.119–1(a)(2)(i) (2012).

TABLE 4[214]
NATURE OF EMPLOYER'S OPERATIONS

Nature of Employer's Operations
(1) During "work hours" (2) the "employer's business" requires (3) the employee (4) to have a "short meal period" ("30 or 45 minutes") and (5) "the employee could not be expected to eat elsewhere" in (6) "30-45 minutes."

Assuming a "proper meal"[215] can be provided by In-N-Out Burger,[216] Sunny Bowl,[217] and Shoreline Café,[218] the only condition in dispute is what constitutes a "reasonable meal period."[219] California law requires at least a thirty-minute meal period if an employee works over five hours in a day.[220] Even given the thirty-minute minimum, a "Googler," depending on what building he or she works in, could obtain a meal in a reasonable meal period from one of those locations. This ambiguity should be considered as part of the "simplicity" challenge when assessing potential tax solutions.

Another operative fact concerns the nature of Google's work. The issue is whether or not Google's business requires a Googler to have a short meal period and not be able to eat elsewhere in that short meal period.[221] The example elements hold a "substantial noncompensatory business reason" is found when:

214. *Id.* § 1.119–1(a)(2)(ii)(c).
215. *Id.*
216. *See supra* note 210.
217. *See supra* note 211.
218. *See supra* note 212.
219. *See* 26 C.F.R. § 1.119–1(a)(2)(ii)(c).
220. CAL. LAB. CODE § 512(a) (West 2014).
221. *See* 26 C.F.R. § 1.119–1(a)(2)(ii)(b).

TABLE 5: "PROPER" MEAL AND "REASONABLE" TIME[222]

"Proper" Meal and "Reasonable" Time
(1) During "working hours" (2) "the employee" (3) "could not secure proper meals" in a (4) "reasonable meal period."

To illustrate these elements the regulation provides a "bank teller" example where the employee works a regular nine-to-five schedule and the employer furnishes meals on its premises to limit lunch periods to thirty minutes since the "peak work load" occurs during the lunch period.[223] Obtaining the lunch elsewhere would take considerably longer than the thirty-minute time limit strictly enforced by the employer, thus, allowing the employee to exclude the value of the meals from income.[224]

The key take away from the bank teller example is two-fold: (1) there must be an enforced policy that requires employees to have a designated meal period and (2) the nature of the employee's work is busy to the extent that a longer lunch period would interfere with operations. This example is also consistent with *Boyd Gaming Corp*.'s deference to the "business-necessity" theory[225] and its holding that "necessity" does not encompass that "meals must be linked to an employee's specific duties."[226] Yet, the bank teller example[227] falls short in providing commentary related to the bank's internal policy. The company's policy requiring employee's to stay on-campus in *Boyd Gaming Corp*. is what supported the court's necessity reasoning.[228] Essential to the validity of the employer's characterization of the policy in *Boyd Gaming Corp*. was the fact that other similar businesses had the same type of policy for their employees.[229] The bank teller example is completely silent as to the policy practices of other banks.[230]

222. *Id.*
223. 26 C.F.R. § 1.119–1(f)(3).
224. *Id.*
225. Boyd Gaming Corp. v. Comm'r, 177 F.3d 1096, 1100 (9th Cir. 1999).
226. *Id.* at 1101.
227. 26 C.F.R. § 1.119-1(f)(3).
228. *See supra* Part II.B.4.
229. *Boyd Gaming Corp.*, 177 F.3d at 1101.
230. 26 C.F.R. § 1.119-1(f)(3).

The inquiry as to Google's nature of work can be tailored under the guidance of Ninth Circuit precedent[231] and the bank teller example in the regulations:[232] Does the nature of Google's work require a Googler to have a considerably shorter lunch period that can not be had if taken off premises, or is there a policy in place that is common among the industry requiring employees to stay on premises for meals?

The first part of the disjunctive inquiry can be answered with a solid "No," while the second part can be answered with a qualified, weak "Maybe." Google explicitly advertises its work culture.[233] This explicit advertising, however, leads to an article that almost directly negates the possibility that the nature of Google's work is busy to the extent it requires a shorter lunch period during "peak work load"[234] hours: "[T]hey're Google employees in Mountain View, south of San Francisco, and if you're an employee [there] you're encouraged to spend *twenty percent of your time* on a project of your choosing."[235] Testimony from a Google employee in the Manhattan office also elicits evidence that work at Google is quite dissimilar from the "peak work load" bank teller example:[236] "I came here from the New York agency model, where you work constantly, 24/7. You answer every e-mail, nights and weekends. Here, you don't have to show you're working, or act like you're working. The culture here is to shut down on weekends. People have a life."[237] If those excerpts were insufficient for a solid "No" then this observation will surely suffice: "Google doesn't require employees to work from the office. It doesn't even keep track of who's there."[238]

What about the latter inquiry? Does Google have any type of policy requiring employees to eat on campus? At first glance, at least in the Manhattan Google office, there is not even a policy requiring employees to work from the office: "I don't think we've ever had a policy on [requiring employees to work from the office], . . . [but] we do expect employees to figure out a work schedule with their team and manager. It's not a free-for-all."[239] Nevertheless, Google wants its employees to interact in order to promote ideas: "Anything that encourages cross-team interaction is what we're about . . . . Perhaps the best place to sit and mingle at Google is the employee cafeteria."[240] This statement is illustrative of one of the numerous means utilized by Google to implement "[t]hree

231. *Boyd Gaming Corp.*, 177 F.3d at 1101.

232. 26 C.F.R. § 1.119-1(f)(3).

233. *Life at Google*, GOOGLE CAREERS, https://www.google.com/about/careers/lifeatgoogle/ (last visited Oct. 8, 2015).

234. 26 C.F.R. § 1.119-1(f)(3).

235. Gargiulo, *supra* note 26.

236. 26 C.F.R. § 1.119-1(f)(3) (2012).

237. 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=2&_r=0.

238. *Id.*

239. *Id.*

240. Elaine Labalme, *Cool Perks! What Pittsburg Companies are Offering to Lure Top Talent*, POP CITY (May 4, 2011), http://popcitymedia.com/features/companieswithbenefits050411.aspx.

components of [Google] culture—mission, transparency and voice [in order to] create an environment that encourages our Googlers to come up with interesting and different ideas."[241]

But does this add up to a policy in place by the employer? "Policy" is defined as "[A] definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions."[242] Definiteness seems to be lacking when compared to the employer in *Boyd Gaming Corp*. who would "subject [employees] to disciplinary action, up to and including discharge" when employees left without prior authorization.[243] Nonetheless, the Ninth Circuit expressed that some degree of necessity was required for a "stay-on-premises" policy,[244] which could not be challenged if the employer provided adequate evidence "of legitimate business reasons."[245] Although Google by no means has a strict policy like in *Boyd Gaming Corp*.,[246] it nonetheless has resources in place[247] that promote a "policy" of employee interaction to facilitate creativity necessary for the success of Google's products and services.[248]

The degree of business-necessity appears remote and weak, but no nexus is required between the Googlers' duties and the employer-provided meals.[249] Certainly, fostering creativity that is at the heart of a company's success is a "legitimate business reason," but *Boyd Gaming Corp*. disallowed "second guessing" in the absence of questionably credible and contradicted evidence.[250] Also, it is customary of other Silicon Valley tech employers to provide their employees with meals.[251] This was a key part of the Ninth Circuit's ruling,[252] which further substantiates Google's policy of providing resources for employee collaboration.[253] Thus, it looks like rulemakers will be confronted with the challenge of setting new standards for determining what constitutes necessity or whether or not necessity should be a part of the Convenience-of-the-employer doctrine in the first place. Hash up determining working standards, rules, or standards to promote tax efficiency and equity among taxpayers as another major challenge when assessing potential tax solutions.

241. *Passion, not Perks*, GOOGLE CAREERS (last visited Oct. 8, 2015), https://www.google.com/about/careers/lifeatgoogle/passion-not-perks.html [hereinafter GOOGLE CAREERS].

242. *Definition of Policy*, M-W.COM, http://www.merriam-webster.com/dictionary/policy (last visited Oct. 8, 2015).

243. Boyd Gaming Corp. v. Comm'r, 177 F.3d 1096, 1097 (9th Cir. 1999).

244. *Id.* at 1101 ("As with the lodging in *Caratan,* the furnished meals here were, in effect, 'indispensable to the proper discharge' of the employees' duties.").

245. *Id.*

246. *Id.* at 1097–98.

247. Stewart, *supra* note 237.

248. *See* Laszlo Bock, *Passion, Not Perks*, THINK QUARTERLY: THE PEOPLE ISSUE (Sept. 2011), https://www.thinkwithgoogle.com/articles/passion-not-perks.html.

249. *Boyd Gaming Corp.*, 177 F.3d at 1101.

250. *Id.*

251. *See* Maremont, *supra* note 16; Rubin, *supra* note 16; Sahadi, *supra* note 16.

252. *Boyd Gaming Corp.*, 177 F.3d at 1101.

253. Stewart, *supra* note 237.

C. Alternative Solutions

Solutions for tax reform are generally geared toward creating a tax system that is "fairer, simpler, and more efficient than the one we have today."[254] Of particular emphasis, especially in the last five years, is a push on closing the "Tax Gap"[255] through more efficient collection procedures and increased taxpayer compliance.[256] The most common solutions, while serving some tax reformation goals more so than others, are "surrogate taxation,"[257] a flat retail tax,[258] and a comprehensive tax base.[259] The most obvious solution is including the value of employer-provided meals in the employee's income; however, this solution will be analyzed along with the major underlying issue that accompanies any tax solution following the discussion of alternative solutions. Each of the alternative solutions will be discussed and applied to the Googleplex in turn.

Surrogate taxation is a process by which one taxpayer bears the tax burden as a "proxy" for another taxpayer's receipt of income.[260] In the employer and employee context the employer assumes the role as taxpayer in handling the tax burden for the employer-provided meals. One of the primary advantages of this solution includes lessening the administrative burden on the IRS by shifting reporting and compliance to a single taxpayer,[261] placing the task of possibly complex valuation on the more sophisticated party, and incentivizing more accurate recordkeeping on behalf of the employer. Conversely, the main disadvantage falls on the employer in the form of an increased recordkeeping burden.[262] Moreover, a spillover effect could result from the employer's increased costs, leading to a decrease in the monetary (and more expendable) compensation received by the employee. This solution corresponds with the IDR items sought in NRP Examinations such as the method of valuation for fringe benefits, a copy of the employee benefit plan, and other relevant

254. OFFICE OF MGMT. AND BUDGET, FY 2014 ANALYTICAL PERSPECTIVES BUDGET OF THE U.S. GOV'T, 171 (2014); *see also* DEP'T OF THE TREASURY, STRATEGIC PLAN FY 2014–2017, 25 (2014) ("Treasury also leads the Administration's efforts to create a tax system that is simple, fair, and fiscally responsible. . . . We are committed to working with Congress in pursuing a tax reform plan that includes a balanced approach to deficit reduction that strengthens the U.S. government's fiscal position and promotes a simpler, more efficient tax code.") [hereinafter STRATEGIC PLAN 2014–2017].

255. *See IRM Manual*, *supra* note 51, at 4.22.1.

256. *See supra* Part II.A.3. *See also* STRATEGIC PLAN 2014–2017, *supra* note 254, at 24.

257. *See, e.g.*, Jay A. Soled, *Surrogate Taxation and the Second-Best Answer to In-Kind Benefit Valuation Riddle*, 2012 BYU L. REV. 153, 153 (2012).

258. Alice G. Abreu, *Untangling Tax Reform: Simple Taxes, Complex Choices*, 33 SAN DIEGO L. REV. 1355, 1403 n.140 (1996).

259. Boris I. Bittker, *A "Comprehensive Tax Base" as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925 (1967).

260. Soled, *supra* note 257, at 156.

261. Gazur, *supra* note 33, at 1035–36.

262. *Id.* For example, the employer would have to include the amount of the fringe benefit included in the employee's compensation on the W2 form issued to that employee. An employee would likely prefer transparency as to how that amount was derived forcing the employer to formulate an accounting system sufficiently tracing expenditures to an individual level. This would raise costs to the employer since it would require human capital to perform the accounting function and electronic infrastructure in order to maintain accurate accounting records.

documents substantiating the treatment of that employer's fringe benefits.[263] In other words, most employers likely have a foundation in existence to implement the surrogate tax solution.

Applying the surrogate taxation solution to the Googleplex example shows substantial structural changes would have to be made not only to establish the value of the meals, but also to integrate the accounting of twenty-five cafés.[264] Google employees do not employ the use of a meal card or similar functionality to track meals.[265] Thus, either Google or a third party would have to implement some type of tracking system for the meals which have no pricing element.[266] The cost of administering such a system for twenty domestic offices could be substantial in terms of time and money. Depending on those costs, Google would have to balance the possibility of closing operations at some of the smaller offices versus assuming extra tax expenditures in addition to implementation and ongoing operational costs associated with the tracking system. Overall, the surrogate taxation solution would require substantial structural modifications to operations relating to employer-provided meals, but the difficulty would fall on the party more capable of handling it.

The next alternative, the flat retail tax, is part of a broader taxation scheme as compared to the surrogate taxation solution that simply shifts the tax burden to another party under the existing tax code.[267] A flat retail tax is a uniform rate applied to goods and services sold to the ultimate consumers.[268] The "retail" characterization broadly encompasses numerous fringe benefits such as clothing allowances, sporting tickets, and food and beverages among others. The primary advantage of this approach is the elimination of many line drawing problems with what is and is not considered a fringe benefit. Perhaps a heavier disadvantage, however, is the potential shift to other allowable practices that shield fringe benefits from taxation. For example, an employer could provide more employee discounts on retail items to mitigate tax or otherwise provide other types of benefits that constitute de minimis fringe benefits. This solution would likely fuel the creation of new employer practices, an expressed congressional concern leading to the initial legislation of fringe benefits.[269] Otherwise, this solution simplifies the compliance process by including tax in the purchase of the retail item.

Similar to the application of the surrogate taxation solution, the implementation of a flat retail tax would require substantial structural changes relating to employer-provided meals in all domestic Google facilities. The cafés would transform into business entities similar to commercial restaurants. As a result, valuation will be ascertained prior to the

263. *See supra* Part II.A.3.
264. GOOGLE CAREERS, *supra* note 241.
265. *See* Maremont, *supra* note 16; Rubin, *supra* note 16; Sahadi, *supra* note 16.
266. Bort, *supra* note 166.
267. *See supra* Part II.C.
268. *See* Gazur, *supra* note 33, at 1038 n.347.
269. H.R. REP. No. 98-432, at 1591–92 (1984) (Conf. Rep.).

transaction to determine the amount of tax an employee would pay. This solution is flexible as to managing the structure of the transaction. Using a pure restaurant model at the Googleplex would require an exchange of cash or credit on the spot to pay the retail tax on the meals. Alternatively, Google could require deferred payment through accruing the retail tax owed on some periodic basis. Unlike the surrogate taxation solution, a flat retail tax would likely have the effect of sparking new employer practices to dodge additional taxes if the burden is shifted to the employee. Both solutions, however, require a value to be assigned to the benefit provided. How exactly should Google value Petaluma chicken cacciatore, porcini-encrusted grass-fed beef, whole-wheat spaghetti pomodoro, and Parmesan-creamed onions? This issue will be explored in more detail, but for now it suffices to conclude that a flat tax necessitates a defined tax base and consistent valuation rules to be viable.

The third solution, a comprehensive tax base, entails creating a "larger pie" whereby more, if not all, fringe benefits are included in the compensatory base used to draw employment taxes.[270] I.R.C. Section 61 is a primary example of a "comprehensive base" statute that requires income to be recognized from "whatever source derived."[271] Advantages of the comprehensive base solution include "a reduction in nominal tax rates, increased horizontal equity, increased economic efficiency, and a more progressive taxation structure."[272] The extent of these advantages depends on which fringe benefits are required to be included in income. For example, if on-premise meals were utilized by only rank-and-file employees versus higher-level managers who received non-taxable meal and lodging discounts on business trips, then vertical equity is violated since only certain members of the base are shouldering the tax burden. A major disadvantage with this solution is where to draw the line for inclusion in the tax base. Requiring inclusion of all fringe benefits would not only be infeasible, but it would also amplify the issue with noncompliance. When playing the "you're in, you're out" game, a comprehensive base solution mirrors the current, unsuccessful effort by Congress in defining any base whatsoever. This has proved an arduous task with a minimal return on the effort expended.[273] A comprehensive tax solution, while theoretically favorable, is not a practical approach to an area apt to constant innovation like fringe benefits.

The lack of practicality with the comprehensive tax base solution is accentuated when considering its application to the massive hoard of unique benefits offered at Google. If employer-provided meals from the twenty-five cafés[274] are required to be included in the employee's income, does this necessitate the meals and beverages from the snack stations lit-

270. Bittker, *supra* note 259.
271. 26 U.S.C. § 61 (2012).
272. Gazur, *supra* note 33, at 1039 (footnotes omitted).
273. FEDERAL TAX EXPENDITURES FOR 2012–2017, *supra* note 18, at 4.
274. Steel, *supra* note 172.

tered throughout the Googleplex campus[275] should also be included as income? What about the value of the other benefits such as the massage parlors, electric car refueling stations, and fitness stations? The former question shows the push and pull tension between Sections 119 and 132. It is almost equally as unclear whether meals reach the level of de minimis[276] as whether the meals are for the convenience of the employer.[277] The latter question concerning what other benefits would enter the base equation illustrates the numerous paths Google can use to avoid fringe benefit rules. To capture such benefits would necessitate broad statutory language such as "All benefits, not a condition of employment, are included in gross income." This mandates increased oversight of employer compliance, a task the IRS does not have the resources for.[278] Thus, the comprehensive base solution would only enhance the issue of taxpayer compliance as well as increase the work on an already full IRS plate.

Each solution has different advantages and drawbacks. Moreover, some goals of tax system reformation[279] are met by solutions while some are not. Rule imperfection is not only expected in the fringe benefit arena, but it is also expected as an inevitable consequence. A major underlying issue, however, couples with any solution and plays a substantial role in fulfilling the goals of tax system reformation. That issue is what value should be placed on those employer-provided meals for tax purposes.

D. How to Pay the Head of the Dinner Table: The Valuation Issue

All of the alternative solutions above[280] necessitate valuing employer-provided meals to establish a unit of measurement to gauge current tax liability. Why not use the standard valuation rule of the I.R.C. and its accompanying regulations—fair market value?[281] Although fair market value is one candidate among valuation methods, policy considerations such as equity, administrative simplicity, and efficiency[282] must be defined according to the unique nature of employer-provided meals. Consistent with the practical purpose of this Note, only two tax valuation alternatives will be considered in light of those policy considerations: (1) no tax (zero value) and (2) tax at the fair market value of the employer-provided meal.[283] Each alternative will be assessed against the optimal tax under the economic framework applied to the employee hypothetical described earlier in the Note.[284]

275. *Id.*
276. 26 U.S.C. § 132 (2012).
277. *Id.*
278. *See IRM Manual*, *supra* note 51, at 4.22.1.5.
279. *See supra* Part III.B.
280. *See supra* Part III.C.
281. *See* 26 U.S.C. § 83(a) (2012); Treas. Reg. § 1.61-2(d) (as amended in 2003).
282. STEUERLE, EFFICIENT VALUATION OF FRINGE BENEFITS, *supra* note 23, at 2.
283. *Id.* at 1–2.
284. *See supra* Part II.A.

1. No Tax

TABLE 6

No Tax on Employer-Provided Meals				
Meals	B1	B 2	> or <	EMC
1	48.00	30.00	>	24.00
2	40.00	18.00	>	24.00
3	20.00	9.00	>	24.00
4	18.40	6.00	>	24.00
5	8.00	3.00	<	24.00

The current status quo tax treatment on employer-provided meals is to allow provision of those benefits tax-free contingent upon meeting the requirements of Sections 119 and 132[285] leading to economically inefficient overprovision of employer-provided meals, a violation of horizontal equity, and decreased tax revenue. Applying the equation to tax-free, employer-provided meals, the efficiency cost derives from the overuse of employer-provided meals.[286] This results from (1) the income tax on both the EMB and EMC; (2) higher B2 value placed on the meal by the employee based on its tax-free status; (3) and the disproportion between (1) and (2) Thus, more times than not the EMB will exceed the EMC, leading to overuse of employer-provided meals as fringe benefits.

The extent of inequity depends on whether or not tax-free meals are provided in excess of cash salary or salary is adjusted to reflect the economic value of the employer-provided meals as a substitute for cash.[287] Using the monthly $1,000 salary for both Employees A and B, if Employer X adjusts Employee A's salary to reflect the economic value of the meals then pre-tax salary becomes $937.00.[288] After-tax salary equals $749.60, with a total of $187.40 paid toward taxes under the twenty percent hypothetical rate. From the perspective of economic value, Employees A and B are in the same pre-tax position at $1,000 in compensation per month after the value of A's meals are added back. Even with this salary adjustment, however, Employee A is contributing less in taxes despite being in an equal economic position with Employee B, effectively

285. *See supra* Part II.B.

286. In order to have inefficiency there must be an optimal level of efficiency. That optimal level in the fringe benefit arena is reached by taxing the decrease in the employee's marginal value equivalent to cash compensation. STEUERLE, EFFICIENT VALUATION OF FRINGE BENEFITS, *supra* note 23, at 5–7. For example, if an employee values a meal at $30 and is taxed at twenty percent, the marginal value of that meal becomes $24.

287. *See supra* Part II.A.2.

288. Monthly salary–(Sum of meals 1–4) = Pre-tax monthly adjusted salary.

violating horizontal equity.[289] On the other hand, when Employer X does not adjust Employee A's salary, both employees contribute the same amount for tax purposes. Although horizontal equity technically is not violated since the employees are not in an equal economic position at the outset, unfairness results from Employee A having more allocable after-tax income. Thus, not taxing employer-provided meals leads to economically inefficient overuse, violates horizontal equity even when salary is adjusted, and results in unfairness when salary is unadjusted.

2. Tax at Fair Market Value

TABLE 7

Tax on FMV of Employer-Provided Meals				
Meals	B1	B 2	> or <	EMC
1	48.00	24.00	>	24.00
2	40.00	8.40	>	24.00
3	20.00	1.20	<	24.00
4	18.40	-1.20	<	24.00
5	8.00	-2.80	<	24.00

When fringe benefits are taxed at fair market value it results in economically inefficient underuse, violation of horizontal equity when salary is adjusted to reflect the economic value of the meals received, and an increase in tax revenue. The primary component leading to these results is the substitution of fair market value for B2. In operation, the employee's would-be tax liability is computed based on the fair market value of the meal as if the meal was substituted as cash compensation. This would-be tax liability is then subtracted from the employee's subjective after-tax marginal value of the employer-provided meal. Since the employee's marginal value is depleted by a higher effective tax rate than the effective rate on both EMB and EMC, more likely than not the EMB will be less than EMC. This leads to economically inefficient underuse of employer-provided meals.

Horizontal equity is violated because both employees are in the same economic position of $1,000 after the economic value of A's meals are added back to cash compensation, but Employee A now pays a tax on a value almost always higher than an individual's subjective marginal value. This results in Employee A paying a higher effective tax rate on economic value than Employee B. When salary is unadjusted the amount

289. *See supra* Part II.A.2.

of tax increases since there is a proportional increase in economic value that results in increased tax revenue. This, however, does not result in unfairness since Employee A is paying tax on an increase in economic value.

Zero tax and fair market value tax are analogous to the two extreme points on the employer-provided meal tax spectrum. As such, various midpoints on that spectrum affect provision, equity, and tax revenue of employer-provided meals differently and can be implemented according to the policy adopted by the rulemaker. Two of those midpoints, taxing the employee at fifty percent of the fair market value and disallowing an employer deduction of fifty percent, will play a role in the recommendation that follows.

IV. RECOMMENDATION

A practical solution to employer-provided meals requires a dual-purpose approach to create a fringe-benefit taxation scheme that is "fairer, simpler, and more efficient than the one we have today."[290] One of those purposes is to implement a solution grounded in the policy reflecting the uniquely beneficial nature of employer-provided meals to employers and employees and the DOT's objective of increased taxpayer compliance. Efficiency and fairness underlie this purpose. Thus, the following solution will be based on the underlying presumption that, "[t]hrough the Internal Revenue Code, Congress implicitly defines, by design or by accident, what the nature of the employment relationship is, or can be."[291] The second purpose is to implement "approximat[e]"[292] legislation rationalized by tax-reformation goals of simplicity and efficiency. This purpose proceeds with the underlying presumption that "the more the law undertakes to handcraft a tailored result for every individual . . . the greater the obscurity to the general citizen and the greater the burden upon the system in money, manpower, time, and effectiveness."[293]

The Googleplex scenario shows the level of extravagance employer-provided meals can reach, triggering both criticism and praise from various commentators.[294] The criticism has been drawn out in detail,[295] while the praise has been shifted to the background of discussion. What is missing from headlines is Google's incredible effort to truly promote the well being of its employees through employer-provided meals.[296] Promoting the well being of employees is the basis of a feasible and common sense tax solution to an almost century-old fringe benefit problem.

290. *See supra* note 254.

291. William P. Kratzke, *The (Im)balance of Externalities in Employment-Based Exclusions from Gross Income,* 60 TAX LAW. 1 (2006).

292. Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767, 779–80 (1977).

293. *Id.*

294. *See supra* Part II.A.

295. *See supra* Parts I–III.

296. *See supra* note 16.

Current legislation and regulations allowing tax-free treatment of employer-provided meals should be amended to make tax-free status contingent on being merged into a "wellness program"[297] with a two-tier framework. The first step in this direction is for Congress to repeal the "Convenience of the employer" doctrine and maintain a "business necessity" scheme. After all, fringe benefits are nothing more than a matter of legislative grace.[298] Moreover, existing and proposed legislation under the ACA provides a framework designed for facilitating the integration of employer-provided meals under existing "wellness programs."[299] A two-tiered capped allowance on the value of meals, in addition to health-related requirements, will limit the use of employer-provided meals as a proxy for compensation. Each of these components will be discussed in light of the tax reformation goals they serve in turn.

A. Simplicity, Efficiency, and Fairness: Repeal and Shift to the ACA

The ACA provides the foundation for implementing the recommended tax framework for employer-provided meals. Specifically, the ACA adopted the Health Insurance Portability and Accountability Act's ("HIPAA") two types of wellness programs: Participatory and Health-Contingent.[300] The scope of participation will be limited to employees only, barring extension to their dependents. Over sixty percent of companies with three or more employees that offered health benefits also offered at least one wellness program.[301] Thus, most companies will be adequately prepared for the shift.

Employer-provided meals would be grouped into Participation Only wellness programs, which give rewards to employees based solely on their participation in the program, regardless of results. The reward to employees would be healthy meals, as defined by the appropriate rule-maker, free of charge up to a capped amount based on the fair market value of those meals. The fair market value of those meals would still be deductible to the employer up to the second capped amount per employee. If an employee exceeds the first-tier capped allowance then fifty percent of the fair market value of the meals making up the excess will be included in the employee's W-2 as taxable compensation. The second-tier capped allowance will trigger a disallowance of fifty percent of the

297. Under the Affordable Care Act an employer can institute a nondiscriminatory group health plan that promotes health among employees through various reward incentives such as payment for taking a health assessment, joining a fitness center, and meeting certain standards under health-contingent wellness programs (i.e. providing a reward for decreasing use of tobacco products). *The Affordable Care Act and Wellness Programs*, DEP'T OF LABOR, http://www.dol.gov/ebsa/newsroom/fswellnessprogram.html (last visited Oct. 8, 2015).

298. First Nat'l Bank & Trust Co. v. United States, 115 F.2d 194, 195 (5th Cir. 1940).

299. 42 U.S.C. § 280*l* (2012).

300. 29 C.F.R. § 2590.702(f) (2014).

301. KAISER FAMILY FOUNDATION, 2014 EMPLOYER HEALTH BENEFITS SURVEY 199–200 (Sept. 10, 2014), *available at* https://kaiserfamilyfoundation.files.wordpress.com/2014/09/8625-employer-health-benefits-2014-annual-survey6.pdf.

fair market value deduction taken by the employer in addition to maintaining the inclusion of fifty percent of the fair market value in the employee's compensation.

Simplicity stems from the elimination of the formidable "Convenience of the employer" doctrine and the implementation of a bright line fair market valuation standard. The "Convenience of the employer" doctrine created too much gray area that has contributed to a growing number of cases like Googleplex.[302] *Boyd Gaming Corp*[303] exemplified this growing trend under the "Convenience of the employer" doctrine. Current I.R.C. regulations only further compound confusion through various examples implicitly urging the use of business necessity as the applicable standard.[304] ACA health standards eliminate the unstable inquiry as to the convenience of employer in providing meals to employees. Mandating the use of fair market value mitigates numbers manipulation by the employer and provides a more clear-cut valuation method than looking to the employee's subjective marginal value[305] of an employer-provided meal. Moreover, the fair market value standard has been a primary feature of the I.R.C. since its inception,[306] mitigating unnecessary administrative costs to monitor its functionality.

Efficiency and equity will be preserved through the fair market valuation standard as well as the two-tier limitations. The fifty percent of fair market value included in the employee's income maintains provision efficiency and the proportional fifty-percent deduction disallowance on the employer curbs the use of employer-provided meals by implementing a tax scheme with the same effect as taxing employees on the full fair market value of employer-provided meals.[307] Both tiers have a fair impact on equity by making taxpayers who receive more economic value pay more tax.

B. Fairness: Interest Balancing

Several explicit interests are served by the recommended tax solution. On the congressional side, concerns of overall noncompliance, economic inefficiency through burden shifting, and inequity among taxpayers are addressed by giving Congress or other relevant rule makers the discretion to define where "good" crosses the line into a zone of extravagance. An express manifestation of this discretion is evident in two-tier limitation framework. The first-tier brings in increased tax revenue while preserving horizontal equity and fairness among taxpayers. The second-tier deduction disallowance effectively triggers the same affect as if an employee was taxed based on the full fair market value of the employer-

302. See *supra* Parts II.B.3, III.B.
303. Boyd Gaming Corp. v. Comm'r, 177 F.3d 1096 (9th Cir. 1999).
304. *See supra* Part II.B.3.
305. *See supra* Part II.A.1.
306. *See, e.g.*, 26 U.S.C. §§ 83(b), 1014, 1015, 1031 (2012).
307. *See supra* Part III.D.2.

provided meals. This will cause employers to curb the amount of employer-provided meals they provided in addition to bringing in more tax revenue while preserving economic equity and fairness. A subsidiary manifestation of such discretion is embodied in the mandatory fair market valuation method, which prevents employers from distorting the value of meals in order to stay below the two-tier limitation framework.

On the employee and employer side, a favorite "perk"[308] is allowed tax-free to a certain extent. Employers reap the direct benefits stemming from providing meals to employees in addition to maintaining a deductible expense. Even with the first tier limitation, employers will continue to efficiently provide meals as the marginal benefit exceeds the marginal cost. Employees will have the choice of how much, if any, employer-provided meals consume and will obtain a modest tax advantage if going beyond the specified tier limits.

An implicit interest also served through this solution is that of every American citizen and business. Through adding to the effort to turn the workplace into a health-friendly atmosphere, lower healthcare costs are bound to result. By addressing an area of foregone tax revenue with an eye on health policy, the largest of all tax expenditures can be mitigated.[309]

V. CONCLUSION

Silicon Valley, and Google in particular, serve as idealistic employment models where the employees are showered with perks, provided with resources to facilitate innovation, and consistently rewarded for their efforts, all to the point where the workplace becomes a place they truly want to be. Employer-provided meals are a component of this idealistic "work" world that flagged the attention of the American public and DOT alike. On the side claiming that these meals are taxable as a form of compensation, the argument makes the Silicon Valley giants as rule-breakers that have bent the rules of Sections 119 and 132 to the point of willful noncompliance.[310] Those on the side claiming these employer-provided meals should not be taxable argue the meals are indeed for the "convenience of the employer"[311] since they result in increased production, collaboration among employees, and comfort in the workplace.[312] An application of the existing rules to the Googleplex example illustrated the rules are not so clear as the noncompliance crowd makes them out to be.[313] Weaknesses such as line drawing issues, lack of guidance, and unintended noncompliance will remain if current rules are not reformed.

308. *See supra* Part III.A.
309. *See* FEDERAL TAX EXPENDITURES FOR 2014–2018, *supra* note 14, at 31.
310. *See supra* Part II.A.
311. 26 U.S.C. § 119 (2012).
312. *See supra* Part III.B.
313. *See id.*

Alternative solutions accentuated the obvious reality of creating rules for a constantly evolving area of fringe benefits such as employer-provided meals—perfection is unattainable.[314] Some goals of tax system reform were met by some of the solutions, while others were completely ignored.[315] No matter what solution is adopted by the DOT, however, consideration as to valuation of employer-provided meals is essential to meet any of the goals of tax system reform. These solutions coupled with the valuation issue illustrate the characteristics that should be sought by the DOT in creating new rules: clearly designating the burdened taxpayers, establishing meal-oriented boundaries, and limiting subsidization of meals for a predictable tax base.

The Recommendation built off of the sought characteristics for new rules through a dual-purpose approach underlying a practical structural reformation. By using policy to affect the nature of the employer-employee relationship and utilizing an "approximate" legislative standard, the Recommendation suggested repealing the Convenience-of-the-employer doctrine while maintaining a business necessity standard, integrating employer-provided meals into the ACA "wellness program" framework, and imposing clear provision limits based on the fair market value of the meals. By doing so employees retain their "favorite perk"[316] without incurring additional tax up to a capped amount, employers retain a deduction up to a capped amount, and Congress attains tax reformation goals by clearly defining the scope of meals eligible for a capped allowance. Not only does this solution meet the goals of tax system reformation but also effectively combats the issues of economic inefficiency, compliance, and valuation. Not to mention, the proposed solution serves bigger picture goals such as a healthier workforce, lower insurance costs, and an improved workplace environment.

Fairness, simplification, and efficiency are goals sought throughout the history of American tax law. While recognition of these goals has been commonplace, implementation has not. Fringe benefits, and employer-provided meals in particular, are areas where policy could be used to effect positive changes while preserving a modest tax base. Congress, DOT, and employers have the tools in place to implement an effective health-oriented taxation system on employer-provided meals. Now is the time to do so.

314. *See supra* Part III.C.
315. *See id*.
316. *See supra* Part IV.