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DEAR LITTLER: 'TIS THE SEASON...FOR EMPLOYER HOLIDAY GIFT-GIVING REMINDERS

By: Tom Cryan and William Weissman

Dear Littler: I'm in charge of our company's party-planning committee, but I'm ready to give up my title as Head Elf. We're working on choosing gifts for employees, and we'd like to raffle off nice prizes for employees and their families at our holiday party. We might also bring back our annual staff gift exchange. But people are already grumbling about taxes, coworker gifts they didn't appreciate last year, or being required to participate. Bah humbug, right? Should we just scrap the festivities this year?

- *Scrooge in Santa Monica*

Dear Scrooge in Santa Monica,

The holiday season might be the most wonderful time of the year, but it also brings challenges for employers. Despite the silver bells, boughs of holly, and roasting chestnuts, employers can't simply throw cares away.

Many employers host parties¹ or provide gifts to staff at the holidays. While generous, these gestures require some forethought. Your note raises several issues associated with employer gift-giving, so we'll take a closer look at those concerns in particular. But bear with us, Dear Scrooge—even the original Ebenezer came around in the end.

¹ See Helene Wasserman, [10 Considerations for Planning the 2016 Office Holiday Party](#), Littler Insight (Dec. 5, 2016).

The IRS: As Cuddly as a Cactus, as Charming as an Eel?

You might think you're a Scrooge, but you're no match for the IRS. As an important starting point, the Internal Revenue Code (Code) does not recognize "gifts" by employers at all. Any amount transferred from an employer to an employee, or for the benefit of an employee, generally is considered part of an individual's gross income.²

As some of your employees already heard and are grumbling about, the question becomes whether the gift is considered taxable income. If so, the value of the gift must be reported to the IRS, and will be subject to employment tax withholding.

The Code, however, includes an exception for "de minimis fringe benefits" that covers some employer holiday gifts. This exclusion typically applies if: (1) an item is small in value; (2) the item is infrequently provided; and (3) it is administratively impracticable for the employer to account for it.³ Thus, benefits such as occasional parties for employees or their guests, occasional sports or theater tickets, or coffee and doughnuts, would be excludable from income.⁴ Season tickets, on the other hand, would not be excludable. Nor would membership in a private country club, or the use of a company-owned lake house. The determination of whether a gift constitutes a de minimis fringe benefit will depend on all of the facts and circumstances.

That being said, cash gifts are not excludable as de minimis, no matter how frequent or valuable. In other words, even a one-time \$10 cash award should be treated as taxable income. Cash equivalents (*i.e.*, gift cards) are also generally not excludable, "even if the same property or service acquired (if provided in kind) would be excludable."⁵ For example, if an employer gave employees a certificate once a year during the holidays that could be exchanged only for a turkey, that gift likely would be excludable as a de minimis fringe benefit. But if the same employer handed out \$20 gift cards to the local grocery store for employees to buy a turkey, that benefit would not be considered de minimis; those gift cards would be treated as cash because they could be used like cash to buy any item at the store.⁶

Determining whether a gift is de minimis can be tricky. For example, what about a \$5 gift card to a coffee shop? The value is low, and the store only offers so many items—is it a cash equivalent or a de minimis benefit? Further complicating the issue, there is no set limit on the value of gifts for purposes of the de minimis exclusion. That is, the IRS has not announced a rule that the gift cannot exceed a certain amount (say, \$75) and qualify as de minimis. As you might expect, the IRS can be quite conservative in these gray areas. Employers might want to adopt a cautious approach as well, choosing tangible items that are lower in value (*e.g.*, no more than \$50).

With those principles in mind, let's get back to your party planning. You don't mention any specific ideas, but you'll want to consider whether your employees will care about the tax consequences of their gifts and whether your employer will be concerned with any additional reporting obligations. Given those complexities, a tangible item—think an old-fashioned, physical gift—may be the easiest option, as long as its value is not too high.

2 26 U.S.C. § 102.

3 26 U.S.C. § 132.

4 See 26 C.F.R. § 1.132-6(e).

5 26 C.F.R. § 1.132-6(c).

6 *Id.* ("For example, the provision of cash to an employee for a theatre ticket that would itself be excludable as a de minimis fringe . . . is not excludable as a de minimis fringe.")

The same approach applies for any raffle prizes made available to your employees or their guests at the holiday party. On the other hand, however, higher-end prizes (vacations, electronics, etc.) presumably fall outside the de minimis exclusion and will need to be taxed and reported.

Making a List, Checking it Twice...

Now that we've addressed the tax implications, let's review a few more tips for workplace gift-giving. Remember that your goal as an employer is to identify a thoughtful but appropriate gift as a token of your organization's gratitude.

- *Stick with Seasonal, not Religious, Themes*

While the holidays are centered around several major religious holidays, employer gifts should generally be secular in nature. For nearly all employers, the purpose of a gift is not to celebrate or promote any specific religion—it is to celebrate the employees, the organization, and hopefully the close of a successful business year. The employees might be a diverse crowd, with many varied religious and cultural traditions.

Accordingly, gifts with a religious theme are likely inappropriate and potentially offensive to recipients—which defeats the purpose of sharing a gift. In short, hold off on ordering Christmas tree ornaments or Advent calendars printed with the company logo. Relatedly, employers should refrain from decorating the workplace with religious imagery, such as nativity scenes or menorahs. (You're going to want to skip the mistletoe, too—but that is a lesson for another day.)

- *Merry Gentlemen, Let Nothing You Dismay*

For similar reasons, employers should attempt to give presents that are relatively neutral and of equal value, regardless of the recipient's sex, sexual orientation, or other protected characteristic. It would be inappropriate, for example, to purchase hardware store gift cards for men and shoe store gift cards for women. Employers also should be cognizant of the value of gifts distributed: are certain types of workers receiving nicer, more expensive items than others? If so, why? Employers will want to avoid creating any impression of discrimination or favoritism.

Plus, unless you have a small office and know everyone's individual tastes, it makes sense to choose a uniform item for consistency and your own sanity.

- *The Goose is Getting Fat*

Food gifts are extremely popular for the holidays—but these, too, should be chosen with care. Many people have food allergies, dietary concerns, or religious food restrictions. These issues arguably are a greater concern for smaller employers, which might be more attuned to an individual's limitations. It's just not very festive to give a ham to an employee who is Muslim or a mixed nut assortment to an employee with known allergies. Employers with the practical ability to eliminate that type of conflict should take the steps to do so.

- *Say, What's in This Drink?*

As with food items, gifts of alcohol can be problematic. Employees abstain from drinking alcohol for many reasons: pregnancy, substance abuse issues, medical conditions, medication side effects, religious principles, and personal preferences. Additionally, a gift of liquor, even if appreciated by staff, may or may not suit an employer's message or branding. In sum, employers might want to think twice about gifting employees with liquor, despite its prevalence this time of year.

Only a Hippopotamus Will Do...

Finally, let's briefly discuss some ground rules for coworker gift exchanges. First, employers should bear in mind that not every employee wants to join in some reindeer games. If an employer permits employees to participate in an exchange, it should be truly voluntary.

Second, employers should insist that gift themes are appropriate for the workplace. And while gag-gift exchanges and "Yankee swap" games might sound like fun, they can cause more trouble than three French hens in a one-horse open sleigh.

Third, employers should encourage monetary limits to level the playing field. Employers might also consider where and how the exchange will take place, to minimize disruption.

And the Whole Wide World is Filled with Cheer!

We hope these suggestions help with your party-planning duties, Dear Scrooge. Now, haul out the garland and slice up the fruitcake!