Bringing convenience to life

June 12, 2019

Amy DeBisschop
Acting Director, Division of Regulations, Legislation, and Interpretation
United States Department of Labor
Wage and Hour Division
Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

Submitted electronically via www.regulations.gov

Re: NAMA Comments on Proposed Rule: Regular Rate Under the Fair Labor Standards Act - (RIN) 1235-AA24

Dear Acting Administrator DeBisschop:

The National Automatic Merchandising Association (NAMA) appreciates the opportunity to submit comments in response to the Department of Labor, Wage and Hour Division's notice of proposed rulemaking on changes to Regular Rate Under the Fair Labor Standards Act.

Founded in 1936, the National Automatic Merchandising Association (NAMA) is the association representing the $25 billion U.S. convenience services industry, with its core membership being comprised of owners and operators of vending machine companies, office coffee, tea, water, and pantry services providers. With nearly 1,000-member companies – including many of the world's most recognized brands – NAMA provides advocacy, education and research for its membership.

The convenience services industry employs over 140,000 Americans – the majority employed by small businesses – contributing a total economic impact of over $25 billion to the U.S. economy annually.

NAMA fully supports the Agency's proposed rule to expand deduction of employer expenses from added benefits when calculating an individual's rate of pay. As an association representing an industry comprised a majority of small businesses, many of whom employ ten (10) full-time employees or less, the proposed changes offer NAMA members the opportunity to provide additional benefits for their employees otherwise out of financial reach such as; wellness programs, paid leave, paid sick leave, discretionary bonuses, and other benefits.

NAMA applauds the Agency's request for additional feedback and respectfully asks for its consideration to expand the rule to include employer sponsored office coffee, and pantry services in the final rule.

<u>Definitions:</u>

I. <u>Office Coffee Services (OCS):</u> Employer provided coffee and related products to a workplace.
II. <u>Pantry Services:</u> Employer provided food, beverage and related products to a workplace, including water, tea, and other beverages, as well as snacks and more substantial shelf-stable packaged foods.

Background:

In 2018, NAMA commissioned a comprehensive census of the convenience services industry. The goals of the study were to determine current industry size and makeup since 2016. Based on qualitative and quantitative research with operators and other key industry participants, the census produced key findings around office coffee service (OCS) and pantry services.

OCS account for 19% of total revenue in the convenience services industry, and growth is expected to accelerate considerably over the next several years. According to NAMA research, over 9,275 operators in the US service 1.5 million total locations with OCS, with average sales per operator equaling $532,494 annually.

Pantry services currently accounts for a sliver of the overall convenience services industry, but it is growing along with OCS with over 615 operators servicing 43,500 office locations with average sales per operator equaling $852,344 annually.

OCS and pantry services are on an upward trajectory. The NAMA census concluded that there is great optimism among operators for future growth of pantry and OCS by 2022.

Unclarity in the Tax Cuts and Jobs Act (TCJA)

NAMA members known as "operators" sell snacks and beverages to employers for the benefit of their employees. Employers provide these snacks and beverages free of charge as an added employee benefit. Typical OCS and pantry services include snacks and beverages such as coffee, soda, bottled water, granola bars, prepackaged pastries, yogurt and fresh fruit. These snacks and beverages are often provided in a pantry, break room or copy room as an employee benefit and are done so to increase productivity and morale, and retain talent.

Under law prior to the Tax Cuts and Jobs Act (TCJA), the value of employer-provided snacks and beverages was 100% deductible to the employer under the rules of section 274(e)(1) and 274(n)(2)(B). Upon enactment of the TCJA, under the rules of section 274 (n), certain employer-provided meals are 50% deductible from 2018 through 2025. Meals provided in employer operated eating facilities (described in section 132(e)(2)) or for the convenience of the employer (as described in section 119, under new section 274(o)) are non-deductible after December 31, 2025. Expenses for recreational, social or similar activities are not subject to these new disallowances. NAMA believes that the above referenced section removing the deductibility of meals provided by employers does not apply to employer provided snack and beverage expenses. However, it has not been clarified by the IRS whether the employer beverage and snack expenses meet the exception and are 100% deductible, 50% deductible as food or beverages provided under the de minimis rules, or disallowed under section 274(o). Therefore, the addition of OCS and pantry services to the regular rate rule will assist NAMA operators in marketing their services and providing advice to their client on the treatment of the snacks and beverages provided.

Incentivizing Employers and Employees

OCS and pantry services are a great tool utilized by employers to recruit and retain talented employees. The addition of OCS and pantry services originally started among tech businesses aiming to increase employee satisfaction. Today, pantry services are being embraced by employers across the nation as they seek non-financial incentives to compete for talent. From 2014-2016, there was a 16% increase in vending and convenience services operators providing OCS/pantry services.

The value of these snacks are de minimis, minimal, and the frequency by which individual employees partake in these employer provided snacks and beverages is irregular. Most employers do not track the number of snacks or beverages consumed by individual employees, but instead by total number of employees they are providing the benefit for.

The addition of OCS and pantry services to deductible benefits under the final rule will act as an incentive for employers to provide such benefits during this time of increased recruitment and retention difficulty. Due to prosperous economic growth and low unemployment, the convenience services industry is feeling the same workforce challenges as most industries. The ability to deduct OCS and pantry services from the determination of an employees' regular rate will incentivize employers to offer this and other non-financial benefits that boost morale and promote retention.

Conclusion

In conclusion, NAMA believes that the expansion to include OCS and pantry services to the final rule for determining regular rate, will promote an employer's ability to provide such benefits to their employees. Increased access to coffee, tea, water, beverages, and snacks will allow individuals to eliminate these items, consumed during the workday, from their personal budgets and help increase employee morale and retention.

We respectfully ask to expand DOL's final rule for Regular Rate Under the Fair Labor Standards Act and include OCS and pantry service. We appreciate your consideration of these comments and welcome the opportunity to discuss this issue further. If you have any questions, please contact me at 571-348-1214 or by email at mgoscinski@namanow.org.

Sincerely,

Michael Goscinski
Director, Federal and State Affairs