



State of Kansas
Legislative Administrative Services

300 SW 10th Ave Suite 551-S Topeka, Kansas 66612 Telephone: (785) 296-2391 Fax: (785) 296-1153 TTY: 711 Email: LegServ@las.ks.gov

Thomas A. Day
Director

House Committee on Elections
House Bill 2052
February 9, 2021

Chair Carpenter and members of the Committee,

Today, I am providing neutral testimony on House Bill 2052, as amended, which authorizes legislative assistants and committee assistants to accept gifts, each fiscal year, from an individual legislator, or legislative committee chair or vice-chair, for whom they work, not to exceed a total of \$150. House Bill 2052, as amended, may have unintended consequences to the taxable fringe benefit of an employee.

Within the past week, I have received a memo (attached) from the Department of Administration-Division of Accounts and Reports detailing the ramifications of session employees receiving gifts. As pointed out in the memorandum, Legislative Administrative Services (LAS) would be responsible to ensure that any cash, or cash equivalent, fringe benefit received by the employee be reported in the State's Statewide Human Resources and Payroll (SHARP) system to ensure compliance with Internal Revenue Service (IRS) guidelines. In order, for LAS to be compliant, each legislator giving gifts to session employees would have to report the type of gift and amount so the gift could be reported as a taxable fringe benefit to the session employee. Currently, any form of gift given to session employees is not reported to Legislative Administrative Services, and requiring such reporting would need guidance and language, within the statute, making it mandatory for all legislators.

Internal Revenue Service Publication 15-B (2021) specifies a fringe benefit as a form of pay for the performance of services. Any fringe benefit provided is taxable and must be included in the recipient's pay unless the law specifically excludes it. Per IRS Publication 15-B, "cash, and cash equivalent fringe benefits (for example, gift certificates, gift cards, and the use of a charge card or credit card), no matter how little, are never excludable as a de minimis benefit." Excludable gifts may include holiday or birthday gifts, other than cash, flowers, fruit, or similar items provided to employees under special circumstances (for example, on account of illness, a family crisis, or outstanding performance.)

As stated above, it appears the Internal Revenue Service has guidelines that would require most gifts, cash or cash equivalent, given to session employees, would be a taxable fringe benefit and must be reported as income, subject to federal income tax withholding, Social Security, Medicare, and KPERs (if applicable).

Thank you for your consideration. I will stand for questions at the appropriate time.

**To: Samir Arif, Director of Public Affairs, Dept. of Administration
KC Clowers, Chief of Staff, Legislative Administrative Services
Jana Stukesbary, Payroll, Legislative Administrative Services**

From: Jocelyn Gunter, Director, Office of Accounts and Reports

Date: February 3, 2021

Re: Gifts to Legislative and Committee Assistants – HB 2052

Legislation proposed in the 2021 session (HB 2052 as amended) seeks to formalize the authority for legislative assistants and committee assistants to accept one gift not to exceed \$150 per session from an individual legislator or legislative committee member. In authorizing the receipt by an employee of a gift based on the employee's position, this legislation authorizes a gift that would be considered a taxable fringe benefit to the employee per IRS guidelines included as references below.

It is the responsibility of Legislative Administrative Services to ensure that any cash or cash equivalent (i.e. gift card) fringe benefit received by an employee of the legislative branch, due to their position as a state employee, is accurately reported as fringe benefit income through the Statewide Human Resources and Payroll (SHARP) system to ensure the State of Kansas is in compliance with IRS guidelines. It is recommended that appropriate policies and reporting processes be established by LAS to ensure complete and accurate reporting of fringe benefit income for all legislative staff members.

Please be aware that taxable fringe benefit income has the following budget/reporting impacts:

- Employee: Income is subject to - Federal income tax withholding, Social Security, Medicare, and KPERS
- Employer (agency): Budgetarily responsible for – Employer taxes/fringes including Social Security, Medicare, Unemployment Compensation Insurance, Worker's Compensation Insurance, State Leave Payment Reserve Fund, and KPERS

IRS References – Taxable Fringe Benefits:

IRS Publication 15-B (2020) – Employer's Tax Guide to Fringe Benefits specifies the following:

- A fringe benefit is a form of pay for the performance of services.
- Any fringe benefit you provide is taxable and ***must be included in the recipient's pay unless the law specifically excludes it. [emphasis added]***
- Any tangible personal property given to an employee as an award is only excludable under an IRS qualified plan for either length of service or safety achievement.
- In addition, the exclusion for length of service or safety achievement does not apply to awards of cash, cash equivalents, gift cards, gift coupons, or gift certificates. The exclusion also doesn't apply to vacations, meals, lodging, tickets to theater or sporting events, stocks, bonds, other securities, and other similar items.

Source: <https://www.irs.gov/publications/p15b>

IRS Publication 5137 - IRS Office of Federal, State, and Local Governments Fringe Benefit Guide further states:

- Cash awards to employees are always taxable. Generally, the value of an award or prize given by an employer is taxable to an employee as wages, included on Form W-2, and subject to Federal income tax withholding, social security and Medicare. IRC 74; IRC 3121(a)(20)
- Awards other than for safety or for length-of-service are always nonqualified awards, unless they are qualifying non-cash or non-cash equivalent *de minimis* fringe benefits.
- A *de minimis* fringe benefit may be excludable from wages if it is nominal value and provided infrequently. Examples of excludable *de minimis* fringe benefits include nominal gifts for birthday/holiday or flowers, plaques or coffee mugs for a special occasion.
 - In guidance to government entities on employer and pay related issues the IRS states: “In general, a *de minimis* benefit is one for which, considering its value and the frequency with which it is provided, is so small as to make accounting for it unreasonable or impractical.”
Source: <https://www.irs.gov/government-entities/federal-state-local-governments/de-minimis-fringe-benefits>
- There is no set dollar amount in the law for nominal prizes and awards, however, the IRS gave advice in ILM200108042 that a benefit of \$100 did not qualify as *de minimis*.
Source: <https://www.irs.gov/pub/irs-pdf/p5137.pdf>

4. Employees provide reasonable substantiation that payments or reimbursements are for qualifying expenses.

For this exclusion, a highly compensated employee for 2021 is an employee who meets either of the following tests.

1. The employee was a 5% owner at any time during the year or the preceding year.
2. The employee received more than \$130,000 in pay for the preceding year.

You can choose to ignore test (2) if the employee wasn't also in the top 20% of employees when ranked by pay for the preceding year.

You must exclude all payments or reimbursements you make under an adoption assistance program for an employee's qualified adoption expenses from the employee's wages subject to federal income tax withholding. However, you can't exclude these payments from wages subject to social security, Medicare, and FUTA taxes.

You must report all qualifying adoption expenses you paid or reimbursed under your adoption assistance program for each employee for the year in box 12 of the employee's Form W-2. Report all amounts including those in excess of the \$14,440 exclusion for 2021. Use code "T" to identify this amount.

Exception for S corporation shareholders. For this exclusion, don't treat a 2% shareholder of an S corporation as an employee of the corporation. A 2% shareholder is someone who directly or indirectly owns (at any time during the year) more than 2% of the corporation's stock or stock with more than 2% of the voting power. Treat a 2% shareholder as you would a partner in a partnership for fringe benefit purposes, but don't treat the benefit as a reduction in distributions to the 2% shareholder. For more information, see Revenue Ruling 91-26, 1991-1 C.B. 184.

More information. For more information on adoption benefits, see Notice 97-9, which is on page 35 of Internal Revenue Bulletin 1997-2 at [IRS.gov/pub/irs-irbs/irb97-02.pdf](https://www.irs.gov/pub/irs-irbs/irb97-02.pdf). Advise your employees to see the Instructions for Form 8839.

Athletic Facilities

You can exclude the value of an employee's use of an on-premises gym or other athletic facility you operate from an employee's wages if substantially all use of the facility during the calendar year is by your employees, their spouses, and their dependent children. For this purpose, an employee's dependent child is a child or stepchild who is the employee's dependent or who, if both parents are deceased, hasn't attained the age of 25. The exclusion doesn't apply to any athletic facility if access to the facility is made available to the general public through the sale of memberships, the rental of the facility, or a similar arrangement.

On-premises facility. The athletic facility must be located on premises you own or lease and must be operated by you. It doesn't have to be located on your business premises. However, the exclusion doesn't apply to an athletic facility that is a facility for residential use, such as athletic facilities that are part of a resort.

Employee. For this exclusion, treat the following individuals as employees.

- A current employee.
- A former employee who retired or left on disability.
- A widow or widower of an individual who died while an employee.
- A widow or widower of a former employee who retired or left on disability.
- A leased employee who has provided services to you on a substantially full-time basis for at least a year if the services are performed under your primary direction or control.
- A partner who performs services for a partnership.

De Minimis (Minimal) Benefits

You can exclude the value of a de minimis benefit you provide to an employee from the employee's wages. A de minimis benefit is any property or service you provide to an employee that has so little value (taking into account how frequently you provide similar benefits to your employees) that accounting for it would be unreasonable or administratively impracticable. Cash and cash equivalent fringe benefits (for example, gift certificates, gift cards, and the use of a charge card or credit card), no matter how little, are never excludable as a de minimis benefit. However, meal money and local transportation fare, if provided on an occasional basis and because of overtime work, may be excluded as discussed later.

Examples of de minimis benefits include the following.

- Personal use of an employer-provided cell phone provided primarily for noncompensatory business purposes. See *Employer-Provided Cell Phones*, later in this section, for details.
- Occasional personal use of a company copying machine if you sufficiently control its use so that at least 85% of its use is for business purposes.
- Holiday or birthday gifts, other than cash, with a low fair market value. Also, flowers or fruit or similar items provided to employees under special circumstances (for example, on account of illness, a family crisis, or outstanding performance).
- Group-term life insurance payable on the death of an employee's spouse or dependent if the face amount isn't more than \$2,000.
- Certain meals. See *Meals*, later in this section, for details.
- Occasional parties or picnics for employees and their guests.

- Occasional tickets for theater or sporting events.
- Certain transportation fare. See *Transportation (Commuting) Benefits*, later in this section, for details.

Some examples of benefits that aren't excludable as de minimis fringe benefits are season tickets to sporting or theatrical events; the commuting use of an employer-provided automobile or other vehicle more than 1 day a month; membership in a private country club or athletic facility, regardless of the frequency with which the employee uses the facility; and use of employer-owned or leased facilities (such as an apartment, hunting lodge, boat, etc.) for a weekend. If a benefit provided to an employee doesn't qualify as de minimis (for example, the frequency exceeds a limit described earlier), then generally the entire benefit must be included in income.

Employee. For this exclusion, treat any recipient of a de minimis benefit as an employee.

Dependent Care Assistance

This exclusion applies to household and dependent care services you directly or indirectly pay for or provide to an employee under a written dependent care assistance program that covers only your employees. The services must be for a qualifying person's care and must be provided to allow the employee to work. These requirements are basically the same as the tests the employee would have to meet to claim the dependent care credit if the employee paid for the services. For more information, see *Can You Claim the Credit?* in Pub. 503.

Employee. For this exclusion, treat the following individuals as employees.

- A current employee.
- A leased employee who has provided services to you on a substantially full-time basis for at least a year if the services are performed under your primary direction or control.
- Yourself (if you're a sole proprietor).
- A partner who performs services for a partnership.

Exclusion from wages. You can exclude the value of benefits you provide to an employee under a dependent care assistance program from the employee's wages if you reasonably believe that the employee can exclude the benefits from gross income.

An employee can generally exclude from gross income up to \$5,000 of benefits received under a dependent care assistance program each year. This limit is reduced to \$2,500 for married employees filing separate returns.

However, the exclusion can't be more than the smaller of the earned income of either the employee or employee's spouse. Special rules apply to determine the earned income of a spouse who is either a student or not able to care for himself or herself. For more information on the earned income limit, see Pub. 503.

Exception for highly compensated employees. You can't exclude dependent care assistance from the

wages of a highly compensated employee unless the benefits provided under the program don't favor highly compensated employees and the program meets the requirements described in section 129(d) of the Internal Revenue Code.

For this exclusion, a highly compensated employee for 2021 is an employee who meets either of the following tests.

1. The employee was a 5% owner at any time during the year or the preceding year.
2. The employee received more than \$130,000 in pay for the preceding year.

You can choose to ignore test (2) if the employee wasn't also in the top 20% of employees when ranked by pay for the preceding year.

Form W-2. Report the value of all dependent care assistance you provide to an employee under a dependent care assistance program in box 10 of the employee's Form W-2. Include any amounts you can't exclude from the employee's wages in boxes 1, 3, and 5. Report in box 10 both the nontaxable portion of assistance (up to \$5,000) and any assistance above that amount that is taxable to the employee.

Example. Oak Co. provides a dependent care assistance FSA to its employees through a cafeteria plan. In addition, it provides occasional on-site dependent care to its employees at no cost. Emily, an employee of Oak Co., had \$4,500 deducted from her pay for the dependent care FSA. In addition, Emily used the on-site dependent care several times. The fair market value of the on-site care was \$700. Emily's Form W-2 should report \$5,200 of dependent care assistance in box 10 (\$4,500 FSA plus \$700 on-site dependent care). Boxes 1, 3, and 5 should include \$200 (the amount in excess of the nontaxable assistance), and applicable taxes should be withheld on that amount.

Educational Assistance

This exclusion applies to educational assistance you provide to employees under an educational assistance program. The exclusion also applies to graduate-level courses.

Educational assistance means amounts you pay or incur for your employees' education expenses. These expenses generally include the cost of books, equipment, fees, supplies, and tuition. However, these expenses don't include the cost of a course or other education involving sports, games, or hobbies, unless the education:

- Has a reasonable relationship to your business, or
- Is required as part of a degree program.

Education expenses don't include the cost of tools or supplies (other than textbooks) your employee is allowed to keep at the end of the course. Nor do they include the cost of lodging, meals, or transportation. Your employee must be able to provide substantiation to you that the