



EXPEDITED RULE MAKING

CR-105 (June 2004)
(Implements RCW 34.05.353)
EXPEDITED RULE MAKING ONLY

Agency: Department of Revenue

Title of rule and other identifying information: WAC 458-20-119 (Rule 119) *Sales of meals* currently explains the business and occupation (B&O), retail sales, and use tax reporting responsibilities for persons selling meals, or providing meals and services for a lump sum charge. It also explains the tax-reporting responsibilities of caterers and food service contractors, and of persons providing meals to employees.

WAC 458-20-124 (Rule 124) *Restaurants, cocktail bars, taverns and similar businesses* explains Washington's B&O and retail sales tax applications to sales by restaurants and similar businesses. It includes how taxes apply to discounted meals, promotional meals, and meals provided without specific charge to employees.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO

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AND RECEIVED BY: February 20, 2012

Purpose of the proposal and its anticipated effects, including any changes in existing rules: (see attachment)

Reasons supporting proposal: To recognize provisions of chapter 55, Laws of 2011 (SB 5501).

Statutory authority for adoption: RCW 82.32.300 and 82.01.060(2)

Statute being implemented:
Chapter 55, Laws of 2011

Is rule necessary because of a:

Federal Law?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Federal Court Decision?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
State Court Decision?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

If yes, CITATION:

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Date
December 20, 2011

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Signature

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Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:

None.



STATE OF WASHINGTON

DEPARTMENT OF REVENUE

**Attachment for CR105 filing for
WACs 458-20-119 and 458-20-124**

Rules 119 and 124 currently explain that the retailing B&O and retail sales taxes apply to meals provided without charge to employees. The Department is proposing to amend these rules to recognize chapter 55, Laws of 2011 (SB 5501), which provides a B&O, retail sales, and use tax exemption for meals provided without specific charge to employees of restaurants. The proposed Rule 124 incorporates this legislation, and the proposed Rule 119 refers readers to Rule 124 for guidance on this subject.

Rule 119 also currently contains other tax-reporting information that is addressed in other documents. For example, Rule 119 provides tax-reporting information regarding sales of meals in school, college, and university dining rooms and by hospitals, nursing homes, and other similar institutions. Tax-reporting guidance for these sales is currently provided in WAC 458-20-167 *Educational institutions, school districts, student organizations, and private schools* and WAC 458-20-168 *Hospitals, nursing homes, boarding homes, adult family homes, and similar health care facilities*. The Department is proposing to remove this information from Rule 119, and change the rule title from *Sales of meals* to *Sales by caterers and food service contractors* to more accurately reflect the information retained in the proposed rule.

Copies of draft rules are available for viewing and printing on our website at [Rules Agenda](#)

This rule draft is being proposed under an expedited rule-making process that does not require the agency to hold public hearings. Under no circumstances is this proposed rule to be used as a basis for determining tax liability or eligibility for a tax deduction, exemption, or credit.

AMENDATORY SECTION (Amending WSR 10-06-069, filed 2/25/10, effective 3/28/10)

WAC 458-20-119 ((Sales of meals.)) Sales by caterers and food service contractors. ~~((1) Introduction.~~ This section explains Washington's B&O and retail sales tax applications to the sales of meals. This section also gives tax reporting information to persons who provide meals without a specific charge. It explains how meals furnished to employees are taxed. Persons in the business of operating restaurants should also refer to WAC 458-20-124 and persons operating hotels, motels, or similar businesses should refer to WAC 458-20-166.

~~(2) Business and occupation tax.~~ The sales of meals and the providing of meals as a part of services rendered are subject to tax as follows:

~~(a) Retailing.~~ The retailing B&O tax applies as follows.

~~(i) Restaurants, cafeterias and other eating places.~~ Sales of meals to consumers by restaurants, cafeterias, clubs, and other eating places are subject to the retailing tax. (See WAC 458-20-124 restaurants, etc.)

~~(ii) Caterers.~~ Sales of meals and prepared food by caterers are subject to the retailing tax when sold to consumers. "Caterer" means a person who provides, prepares and serves meals for immediate consumption at a location selected by the customer. The tax liability is the same whether the meals are prepared at the customer's site or the caterer's site. The retailing tax also applies when caterers prepare and serve meals using ingredients provided by the customer. Persons providing a food service for others should refer to the subsection below entitled "Food service contractors."

~~(iii) Hotels, motels, bed and breakfast facilities, resort lodges and other establishments offering meals and transient lodging.~~ Sales of meals by hotels, motels, and other persons who provide transient lodging are subject to the retailing tax.

~~(iv) Boarding houses, American plan hotels, and other establishments offering meals and nontransient lodging.~~ Sales of meals by boarding houses and other such places are subject to retailing tax.

~~(A) Except for guest ranches and summer camps, when a lump sum is charged to nontransients for providing both lodging and meals, the fair selling price of the meals is subject to the retailing tax. Unless accounts are kept showing the fair~~

~~selling price, the tax will be computed upon double the cost of the meals served. This cost includes the price paid for food and drinks served, the cost of preparing and serving meals, and all other incidental costs, including an appropriate portion of overhead expenses.~~

~~(B) It will be presumed that guest ranches and summer camps are not making sales of meals when a lump sum is charged for the furnishing of lodging, and meals are included.~~

~~(v) **Railroad, Pullman car, ship, airplane, or other transportation company diners.** Sales of meals by a railroad, Pullman car, ship, airplane, or other transportation company served at fixed locations in this state, or served upon the carrier itself while within this state, are subject to the retailing tax.~~

~~Where no specific charge is made for meals separate and apart from the transportation charge, the entire amount charged is deemed a charge for transportation and the retailing tax does not apply to any part of the charge.~~

~~(vi) **Hospitals, nursing homes, and other similar institutions.** The serving of meals by hospitals, nursing homes, sanitariums, and similar institutions to patients as a part of the service rendered in the course of business by such institutions is not a sale at retail. However, many hospitals and similar institutions have cafeterias or restaurants through which meals are sold for cash or credit to doctors, visitors, nurses, and other employees. Some of these institutions have agreements where the employees are paid a fixed wage in payment for services rendered and are provided meals at no charge. Under those circumstances, all sales of meals to such persons are subject to the retailing tax, including the value of meals provided at no charge to employees. Refer to the subsection below entitled "Meals furnished to employees."~~

~~(vii) **School, college, or university dining rooms.** Public schools, high schools, colleges, universities, or private schools operating lunch rooms, cafeterias, dining rooms, or snack bars for the exclusive purpose of providing students and faculty with meals or prepared foods are not considered to be engaged in the business of making retail sales of meals. However, if guests are permitted to dine with students or faculty in such areas, the sales of meals to the guests are retail sales.~~

~~(A) Unless the eating area is situated so that it is available only to students and faculty, the lunch room, cafeteria, dining room, or snack bar must have a posted sign stating that the area is only open to students and faculty. In the absence of such a sign, there will be a presumption that the facility is not exclusively for the use of students and faculty. The actual policy in practice in these areas must be consistent with the posted policy.~~

~~(B) If the cafeteria, lunch room, dining room, or snack bar is generally open to the public, all sales of meals, including meals sold to students, are considered retail sales.~~

~~(C) For some educational institutions, the meals provided to students is considered to be part of the charge for tuition and may not be subject to the B&O tax. Public schools, high schools, colleges, universities, and private schools should refer to WAC 458-20-167 to determine whether the retailing B&O tax applies to the sales of meals described above. (See also WAC 458-20-189 for a discussion of B&O tax for schools operated by the state.)~~

~~(viii) **Fraternalities and sororities.** Fraternalities, sororities, and other groups of individuals who reside in one place and jointly share the expenses of the household including expense of meals are not considered to be making sales when meals are furnished to members.~~

~~(b) **Wholesaling other.** Persons making sales of prepared meals to persons who will be reselling the meals are subject to the wholesaling other tax classification. Sellers must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from their customers to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.~~

~~(c) **Service and other business activities.** Private schools, which do not meet the definition of "educational institutions," operating lunch rooms, cafeterias, or dining rooms for the exclusive purpose of providing meals to students and faculty are subject to the service and other business activities B&O tax on the charges to students and faculty for meals. (See WAC 458-20-167 for definitions of the terms "private school" and "educational institution.") Persons managing a food service operation for a private school should refer to the subsection below entitled "Food service contractors."~~

~~(3) **Retail sales tax.** The sales of meals, upon which the retailing tax applies under the provisions above, are generally subject to tax under the retail sales tax classification. However, a retail sales tax exemption is available for the following sales of meals:~~

~~(a) Prepared meals sold under a state-administered nutrition program for the aged as provided for in the Older Americans Act (Public Law 95-478 Title III) and RCW 74.38.040(6).~~

~~(b) Prepared meals sold to or for senior citizens, disabled persons, or low income persons by a not for profit organization~~

~~organized under chapter 24.03 or 24.12 RCW. However, this exemption does not apply to purchases of prepared meals by not-for-profit organizations, such as hospitals, which provide the meals to patients as a part of the services they render.~~

~~(c) Prepared meals sold to the federal government. (See WAC 458-20-190.) However, meals sold to federal employees are taxable, even if the federal employee will be reimbursed for the cost of the meals by the federal government.~~

~~(4) **Deferred sales or use tax.** If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the deferred sales or use tax directly to the department.~~

~~(a) Purchases of dishes, kitchen utensils, linens, and items which do not become an ingredient of the meal, are subject to retail sales tax.~~

~~(b) Retail sales tax or use tax applies to purchases of equipment, repairs, appliances, and construction.~~

~~(c) The retail sales or use tax does not apply to purchases of food or beverage products which are ingredients of meals being sold at retail or wholesale.~~

~~(d) Purchases of food products and prepared meals by persons who are not in the business of selling meals at retail or wholesale are subject to the retail sales tax. However, certain food products are statutorily exempt of retail sales or use tax. (See WAC 458-20-244 Food and food ingredients.)~~

~~(e) Private schools, educational institutions, nursing homes, and similar institutions who are not making sales of meals at retail or wholesale are required to pay retail sales tax on all purchases of paper plates, paper cups, paper napkins, toothpicks, or any other articles which are furnished to customers, the first actual use of which renders such articles unfit for further use. However, purchases of such items by restaurants and similar businesses which are making retail or wholesale sales of meals are not subject to the retail sales or use tax.~~

~~(f) Transportation companies not segregating their charges for meals, and transporting persons for hire in interstate commerce, generally will be liable to their sellers for retail sales tax upon the purchase of the food supplies or prepared meals to the extent that the meals will be served to passengers in Washington. Certain food items are statutorily exempt of retail sales or use tax. (See WAC 458-20-244 Food and food ingredients.)~~

~~(5) **Food service contractors.** The term "food service contractor" means a person who operates a food service at a kitchen, cafeteria, dining room, or similar facility owned by an institution or business. Food service contractors may manage the food service operation on behalf of the institution or business, or may actually make sales of meals or prepared foods.~~

~~(a) Sales of meals. Food service contractors who sell meals or prepared foods to consumers are subject to the retailing B&O and retail sales taxes upon their gross proceeds of sales. For example, the operation of a cafeteria which provides meals to employees of a manufacturing or financial business is generally a retail activity. The food service contractor is considered to be making retail sales of meals, whether payment for the meal is made by the employees or the business, unless the business itself is reselling the meals to the employees.~~

~~In all cases where the meals are prepared at offsite facilities not owned by the institution or business, the food service contractor is considered to be making sales of meals and the retailing B&O and retail sales taxes apply to the gross proceeds of sale, or gross income for sales to consumers.~~

~~(b) Food service management. The gross proceeds derived from the management of a food service operation are subject to the service and other business activities B&O tax. These tax reporting provisions apply whether the staff actually preparing the meals or prepared foods are employed by the institution or business hiring the food service contractor, or by the food service contractor itself. If the food service contractor merely manages the food service operation on behalf of an institution or business, that institution or business is considered to be selling meals or providing the meals as a part of the services the institution or business renders to its customers. These institutions and businesses should refer to the subsections (2) and (3) above to determine their B&O and retail sales tax liabilities.~~

~~Food service management includes, but is not limited to, the following activities:~~

~~(i) Food service contractors operating a cafeteria or similar facility which provides meals and prepared food for employees and/or guests of a business, but only where the business owning the facility is the one actually selling the meals to its employees.~~

~~(ii) Food service contractors managing and/or operating a cafeteria, lunch room, or similar facility for the exclusive use of students or faculty at an educational institution or private school. The educational institution or private school provides these meals to the students and faculty as a part of its educational services. The food service contractor is managing a food service operation on behalf of the institution, and is not making retail sales of meals to the students, faculty, or institution. Sales of meals or prepared foods to guests in such areas are, however, subject to the retailing B&O and retail sales taxes. (Refer also to the subsection above entitled "School, college, or university dining rooms.")~~

~~(iii) Food service contractors managing and/or operating~~

~~the dietary facilities of a hospital, nursing home, or similar institution, for the purpose of providing meals or prepared foods to patients or residents thereof. These meals are provided to the patients or residents by the hospital, nursing home, or similar institution as a part of the services rendered by the institution. The food service contractor is managing a food service operation on behalf of the institution, and is not considered to be making retail sales of meals to the patients, residents, or institution. Meals sold to doctors, nurses, visitors, and other employees through a cafeteria or similar facility are, however, subject to the retailing B&O and retail sales taxes. (Refer also to the subsection above entitled "Hospitals, nursing homes, and other similar institutions.")~~

~~(c) The following examples explain the application of the B&O and retail sales taxes to typical situations involving food service contractors managing a food service operation. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances.~~

~~(i) GC Inc. is a food service contractor managing and operating an on site cafeteria for B College. This cafeteria is operated for the exclusive use of students and faculty. Guests of students or faculty members, however, are allowed to use the facilities. All moneys collected in the cafeteria are retained by B College. College B pays GC's direct costs for managing and operating the cafeteria, including the costs of the unprepared food products, employee salaries, and overhead expenses. GC also receives a management fee.~~

~~GC Inc. is managing a food service operation. The measure of tax is the gross proceeds received from B College. GC Inc. may not claim a deduction on account of cost of materials, salaries, or any other expense. GC Inc.'s proceeds are subject to the service and other activities B&O tax classification. B College is considered to be making retail sales of meals to the guests and must collect and remit retail sales taxes on the gross proceeds of these sales. B College should refer to WAC 458-20-167 to determine whether the retailing B&O tax applies.~~

~~(ii) DF Food Service contracts with Hospital A to manage and operate Hospital A's dietary and cafeteria facilities. DF is to receive a per meal fee for meals provided to Hospital A's patients. DF Food Service retains all proceeds for sales of meals to physicians, nurses, and visitors in the cafeteria.~~

~~The gross proceeds received from Hospital A in regards to the meals provided to the patients is derived from the management of a food service operation. These proceeds are subject to the service and other activities B&O tax classification. DF, however, is making retail sales of meals to physicians, nurses, and visitors in the cafeteria. DF Food Service must pay retailing B&O, and collect and remit retail~~

~~sales tax, on the gross proceeds derived from the cafeteria sales.~~

~~(6) **Meals furnished to employees.** Sales of meals to employees are sales at retail and subject to the retailing B&O and retail sales taxes. This is true whether individual meals are sold, whether a flat charge is made, or whether meals are furnished as a part of the compensation for services rendered.~~

~~(a) Where a specific and reasonable charge is made to the employee, the measure of the tax is the selling price.~~

~~(b) Where no specific charge is made, the measure of the tax will be the average cost per meal served to each employee, based upon the actual cost of the food.~~

~~(c) It is often impracticable to collect the retail sales tax from employees on such sales. The employer may, in lieu of collecting such tax from employees, pay the tax directly to the department of revenue.~~

~~(d) Where meals furnished to employees are not recorded as sales, the tax due shall be presumed to apply according to the following formula for determining meal count:~~

~~(i) Those employees working shifts up to five hours, one meal; and~~

~~(ii) Employees working shifts of more than five hours, two meals.~~

~~(7) **Sales of meals, beverages, and food at prices including sales tax.** Persons who advertise and/or sell meals, alcoholic or other beverages, or any kind of food products upon which retail sales tax is due should refer to WAC 458-20-244 (Food and food ingredients), WAC 458-20-124 (restaurants, etc.), and WAC 458-20-107 (Advertised prices including sales tax). The taxability of persons operating class II licensed restaurants is specifically addressed in WAC 458-20-124.~~

~~(8) **Gratuities.** Tips or gratuities representing donations or gifts by customers under circumstances which are clearly voluntary are not part of the selling price subject to tax. However, mandatory additions to the price by the seller, whether labeled service charges, tips, gratuities, or otherwise must be included in the selling price and are subject to both the retailing classification of the B&O tax and the retail sales tax.~~

~~(9) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances.~~

~~(a) ABC Hospital operates a cafeteria and sells meals to physicians and to persons who are visiting patients in the hospital. Meals are also provided to its employees at no charge. However, there is no accounting for the number of meals consumed by the employees. Payroll records do record the number~~

~~of hours worked. On average, employees working shifts of up to five hours consume one meal while those working shifts of more than five hours consume two meals.~~

~~ABC Hospital is subject to retailing and retail sales taxes on the gross proceeds derived from the sales of meals to physicians and visitors. The retailing and retail sales taxes also apply to the value of meals consumed by ABC's employees. The value subject to tax is determined by the average cost of meals consumed by the employees, based upon the actual cost of the food items, multiplied by the number of meals as determined through a review of the payroll records. While the presumption is that employees working shifts of up to five hours consume one meal with those working shifts of five to eight hours consuming two, this presumption may be rebutted under particular circumstances.~~

~~(b) X operates a boarding house and provides lodging and meals to ten nontransient residents. Each resident is charged a lump sum to cover both lodging and meals with no accounting for a fair selling price for the meals. X is making retail sales of meals to its residents. Retailing and retail sales taxes are due on the value of the meals served. This value must be computed as double the cost of the meal, including the cost of the food and drink ingredients, costs of meal preparation, and other costs associated with the meal preparation such as overhead expenses.~~

~~(c) Y Motor Inn contracts with Z Company to provide catering services for a function to be held at the motor inn. During discussions concerning the services to be provided, Z Company is informed that a 15% gratuity is generally recommended. Z Company negotiates the gratuity percentage to 10% and signs a catering contract stating that the agreed gratuity will be added. The gratuity charged to Z Company is subject to both the retailing B&O and retail sales taxes. This is not a voluntary gratuity since it is required to be paid as a condition of the contract. Gratuities are not part of the selling price only when they are strictly voluntary.) (1) **Introduction.** This section explains Washington's business and occupation (B&O) tax and retail sales tax applications for sales by caterers and food service contractors.~~

~~(a) **Examples.** This section contains examples that identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances.~~

~~(b) **What other sections might apply?** The following sections may contain additional relevant information:~~

~~ WAC 458-20-107 Requirement to separately state sales tax--Advertised prices including sales tax.~~

~~ WAC 458-20-124 Restaurants, cocktail bars, taverns and~~

similar businesses.

✍ WAC 458-20-166 Hotels, motels, boarding houses, rooming houses, resorts, summer camps, trailer camps, etc.

✍ WAC 458-20-167 Educational institutions, school districts, student organizations, and private schools.

✍ WAC 458-20-168 Hospitals, nursing homes, boarding homes, adult family homes and similar health care facilities.

✍ WAC 458-20-175 Persons engaged in the business of operating as a private or common carrier by air, rail or water in interstate or foreign commerce.

✍ WAC 458-20-189 Sales to and by the state of Washington, counties, cities, towns, school districts, and fire districts.

✍ WAC 458-20-190 Sales to and by the United States--Doing business on federal reservations--Sales to foreign governments.

✍ WAC 458-20-244 Food and food ingredients.

(2) **Sales by caterers.** Sales of meals and prepared food by caterers are subject to the retailing B&O and retail sales taxes when sold to consumers. "Caterer" means a person who provides, prepares, and serves meals for immediate consumption at a location selected by the customer. The tax liability is the same whether the meals are prepared at the customer's site or the caterer's site. The retailing B&O and retail sales taxes also apply when caterers prepare and serve meals using ingredients provided by the customer.

(3) **Food service contractors.** The term "food service contractor" means a person who operates a food service at a kitchen, cafeteria, dining room, or similar facility owned by an institution or business. Food service contractors may manage the food service operation on behalf of the institution or business, or may actually make sales of meals or prepared foods.

(a) **Sales of meals.** Food service contractors who sell meals or prepared foods to consumers are subject to the retailing B&O and retail sales taxes on their gross proceeds of sales. For example, the operation of a cafeteria which provides meals to employees of a manufacturing or financial business is generally a retail activity. The food service contractor is considered to be making retail sales of meals, whether payment for the meal is made by the employees or the business, unless the business itself is reselling the meals to the employees.

In all cases where the meals are prepared at off-site facilities not owned by the institution or business, the food service contractor is considered to be making sales of meals and the retailing B&O and retail sales taxes apply to the gross proceeds of sale, or gross income for sales to consumers.

(b) **Food service management.** The gross proceeds derived from the management of a food service operation are subject to the service and other business activities B&O tax. These tax reporting provisions apply whether the staff actually preparing

the meals or prepared foods is employed by the institution or business hiring the food service contractor, or by the food service contractor itself. If the food service contractor merely manages the food service operation on behalf of an institution or business, that institution or business is considered to be selling meals or providing the meals as a part of the services the institution or business renders to its customers. These institutions and businesses should refer to subsections (4) and (5) in this section to determine their B&O tax and retail sales tax liabilities.

Food service management includes, but is not limited to, the following activities:

(i) Food service contractors operating a cafeteria or similar facility which provides meals and prepared food for employees and/or guests of a business, but only where the business owning the facility is the one actually selling the meals to its employees.

(ii) Food service contractors managing and/or operating a cafeteria, lunch room, or similar facility for the exclusive use of students or faculty at an educational institution or private school. The educational institution or private school provides these meals to the students and faculty as a part of its educational services. The food service contractor is managing a food service operation on behalf of the institution, and is not making retail sales of meals to the students, faculty, or institution. Sales of meals or prepared foods to guests in such areas are, however, subject to the retailing B&O and retail sales taxes.

(iii) Food service contractors managing and/or operating the dietary facilities of a hospital, nursing home, or similar institution, for the purpose of providing meals or prepared foods to patients or residents thereof. These meals are provided to the patients or residents by the hospital, nursing home, or similar institution as a part of the services rendered by the institution. The food service contractor is managing a food service operation on behalf of the institution, and is not considered to be making retail sales of meals to the patients, residents, or institution. Sales of meals to doctors, nurses, visitors, and other employees through a cafeteria or similar facility are, however, subject to the retailing B&O and retail sales taxes.

(c) **Examples.**

(i) GC Inc. is a food service contractor managing and operating an on-site cafeteria for B College. This cafeteria is operated for the exclusive use of students and faculty. Guests of students or faculty members, however, are allowed to use the facilities. All moneys collected in the cafeteria are retained by B College. B College pays GC's direct costs for managing and operating the cafeteria, including the costs of the unprepared

food products, employee salaries, and overhead expenses. GC also receives a management fee.

GC Inc. is managing a food service operation. The measure of tax is the gross proceeds received from B College. GC Inc. may not claim a deduction on account of cost of materials, salaries, or any other expense. GC Inc.'s proceeds are subject to the service and other activities B&O tax classification. B College is considered to be making retail sales of meals to the guests and must collect and remit retail sales tax on the gross proceeds of these sales. B College should refer to WAC 458-20-167 to determine whether the retailing B&O tax applies.

(ii) DF Food Service contracts with Hospital A to manage and operate Hospital A's dietary and cafeteria facilities. DF is to receive a per meal fee for meals provided to Hospital A's patients. DF Food Service retains all proceeds for sales of meals to physicians, nurses, and visitors in the cafeteria.

The gross proceeds received from Hospital A in regards to the meals provided to the patients are derived from the management of a food service operation. These proceeds are subject to the service and other activities B&O tax classification. DF, however, is making retail sales of meals to physicians, nurses, and visitors in the cafeteria. DF Food Service must pay retailing B&O tax, and collect and remit retail sales tax, on the gross proceeds derived from the cafeteria sales.

(4) Retailing B&O and retail sales taxes. The sales of meals to consumers are subject to the retailing B&O tax and generally subject to retail sales tax. However, a retail sales tax exemption is available for the following sales of meals:

(a) Prepared meals sold under a state-administered nutrition program for the aged as provided for in the Older Americans Act (Public Law 95-478 Title III) and RCW 74.38.040(6).

(b) Prepared meals sold to or for senior citizens, disabled persons, or low-income persons by a not-for-profit organization organized under chapter 24.03 or 24.12 RCW. However, this exemption does not apply to purchases of prepared meals by not-for-profit organizations, such as hospitals, which provide the meals to patients as a part of the services they render.

(c) Prepared meals sold to the federal government. (See WAC 458-20-190.) However, meals sold to federal employees are taxable, even if the federal employee will be reimbursed for the cost of the meals by the federal government.

(5) Wholesale sales of prepared meals. Persons making sales of prepared meals to persons who will be reselling the meals are subject to the wholesaling B&O tax classification. Sellers must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from their customers to document the wholesale

nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(6) **When is deferred sales or use tax due?** If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the deferred sales or use tax directly to the department.

(a) Purchases of dishes, kitchen utensils, linens, and items which do not become an ingredient of the meal, are subject to retail sales tax.

(b) Retail sales tax or use tax applies to purchases of equipment, repairs, appliances, and construction.

(c) The retail sales or use tax does not apply to purchases of food or beverage products which are ingredients of meals being sold at retail or wholesale.

(d) Purchases of food products and prepared meals by persons who are not in the business of selling meals at retail or wholesale are subject to the retail sales tax. However, certain food products are statutorily exempt of retail sales or use tax. (See WAC 458-20-244.)

This rule draft is being proposed under an expedited rule-making process that does not require the agency to hold public hearings. Under no circumstances is this proposed rule to be used as a basis for determining tax liability or eligibility for a tax deduction, exemption, or credit.

AMENDATORY SECTION (Amending WSR 10-06-069, filed 2/25/10, effective 3/28/10)

WAC 458-20-124 Restaurants, cocktail bars, taverns and similar businesses. (1) **Introduction.** This section explains Washington's business and occupation (B&O) tax and retail sales tax applications to sales by restaurants and similar businesses. It discusses the sales of meals, beverages, and foods at prices inclusive of the retail sales tax. This section also explains how discounted and promotional meals are taxed. (~~Persons operating restaurants and similar businesses should also refer to WAC 458-20-119 and 458-20-244.~~) Caterers and persons who merely manage the operations of a restaurant or similar business should refer to WAC 458-20-119 to determine their tax liability.

(a) **Restaurants, cocktail bars, and taverns.** The term "restaurants, cocktail bars, taverns, and similar businesses" means every place where prepared foods and beverages are sold and served to individuals, generally for consumption on the premises where sold.

(b) **Examples.** This section contains examples that identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances.

(c) **What other sections might apply?** The following sections may contain additional relevant information:

. WAC 458-20-107 Requirement to separately state sales tax--Advertised prices including sales tax.

. WAC 458-20-119 Sales by caterers and food service contractors.

. WAC 458-20-131 Gambling activities.

. WAC 458-20-183 Amusement, recreation, and physical fitness services.

. WAC 458-20-187 Coin operated vending machines, amusement devices and service machines.

. WAC 458-20-189 Sales to and by the state of Washington, counties, cities, towns, school districts, and fire districts.

. WAC 458-20-190 Sales to and by the United States--Doing business on federal reservations--Sales to foreign governments.

. WAC 458-20-244 Food and food ingredients.

(2) (~~**Business and occupation tax.** The tax liability of restaurants, cocktail bars, taverns and similar businesses is as~~

follows:

(a)) **Retailing B&O and retail sales taxes.** Sales to consumers of meals and prepared foods by restaurants, cocktail bars, taverns and similar businesses are subject to the retailing tax classification and generally subject to retail sales tax. (~~Meals provided to employees are presumed to be in exchange for services received from the employee and are retail sales and also subject to the retailing tax. (See WAC 458-20-119, Sales of meals.)~~)

(b)) A retail sales tax exemption is available for the following sales of meals:

(a) Prepared meals sold under a state-administered nutrition program for the aged as provided for in the Older Americans Act (Public Law 95-478 Title III) and RCW 74.38.040(6);

(b) Prepared meals sold to or for senior citizens, disabled persons, or low-income persons by a not-for-profit organization organized under chapter 24.03 or 24.12 RCW;

(c) Prepared meals sold to the federal government. (See WAC 458-20-190.) However, meals sold to federal employees are taxable, even if the federal employee will be reimbursed for the cost of the meals by the federal government;

(d) Effective July 1, 2011, chapter 55 (SB 5501), Laws of 2011, exempts meals from retail sales tax when provided without specific charge to employees by a restaurant. The legislation also exempts such meals from B&O tax and use tax. If any charge is made for meals to employees, retailing B&O tax and retail sales tax apply.

For the purposes of (d) of this subsection, the following definitions apply:

(i) "Meal" means one or more items of prepared food or beverages other than alcoholic beverages. For the purposes of (d) of this subsection, "alcoholic beverage" and "prepared food" have the same meanings as provided in RCW 82.08.0293.

(ii) "Restaurant" means any establishment having special space and accommodation where food and beverages are regularly sold to the public for immediate, but not necessarily on-site, consumption, but excluding grocery stores, mini-markets, and convenience stores. Restaurant includes, but is not limited to, lunch counters, diners, coffee shops, espresso shops or bars, concession stands or counters, delicatessens, and cafeterias. It also includes space and accommodations where food and beverages are sold to the public for immediate consumption that are located within:

. Hotels, motels, lodges, boarding houses, bed and breakfast facilities;

. Hospitals, office buildings, movie theaters; and

. Schools, colleges, or universities, if a separate charge is made for such food or beverages.

Restaurants also include:

. Mobile sales units that sell food or beverages for immediate consumption within a place, the entrance to which is subject to an admission charge; and

. Public and private carriers, such as trains and vessels, that sell food or beverages for immediate consumption if a separate charge is made for such food or beverages.

A restaurant is open to the public for purposes of this subsection if members of the public can be served as guests. "Restaurant" does not include businesses making sales through vending machines or through mobile sales units such as catering trucks or sidewalk vendors of food or beverage items.

(3) Wholesaling B&O tax. Persons making sales of prepared meals to persons who will be reselling the meals are subject to the wholesaling(~~(-other)~~) B&O tax classification. Sellers must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from their customers to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

~~((+e))~~ (4) Service B&O tax. Compensation received from owners of (~~(coin-operated)~~) vending machines for allowing the placement of those machines at the restaurant, cocktail bar, tavern, or similar business is subject to the service and other business activities tax. Persons operating games of chance should refer to WAC 458-20-131.

~~((3))~~ Retail sales tax. Sales to consumers of meals and prepared foods by restaurants, cocktail bars, taverns and similar businesses are generally subject to retail sales tax. This includes the meals sold or furnished to the employees of the business. A retail sales tax exemption is available for the following sales of meals:

~~(a)~~ Prepared meals sold under a state-administered nutrition program for the aged as provided for in the Older Americans Act (Public Law 95-478 Title III) and RCW 74.38.040(6);

~~(b)~~ Prepared meals sold to or for senior citizens, disabled persons, or low-income persons by a not-for-profit organization organized under chapter 24.03 or 24.12 RCW;

~~(c)~~ Prepared meals sold to the federal government. (See WAC 458-20-190.) However, meals sold to federal employees are taxable, even if the federal employee will be reimbursed for the cost of the meals by the federal government.

~~(4))~~ (5) Deferred sales or use tax. If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the deferred sales or use tax directly to the

department.

(a) Purchases of dishes, kitchen utensils, linens, and items which do not become an ingredient of the meal, are subject to retail sales tax.

(b) Retail sales tax or use tax applies to purchases of equipment, repairs, appliances, and construction.

(c) The retail sales or use tax does not apply to purchases of food or beverage products which are ingredients of the meals being sold.

(d) Purchases of paper plates, paper cups, paper napkins, toothpicks, or any other articles which are furnished to customers, the first actual use of which renders such articles unfit for further use, are not subject to retail sales tax when purchased by restaurants and similar businesses making actual sales of meals.

~~((5))~~ **(6) Combination ((businesses)) business.** Persons operating a combination of two kinds of food sales (~~((businesses))~~), of which one is the sale of prepared food (~~((for immediate consumption))~~) (i.e., ~~((a bakery))~~ an establishment, such as a deli, selling food products ready for consumption and in bulk quantities), ~~((are required to keep their accounting records and sales receipts segregated between taxable and tax exempt sales. Persons operating a combination business))~~ should refer to WAC 458-20-244 for taxability information.

~~((6))~~ **(7) Discounted meals, promotional meals, and meals given away.** Persons who sell meals on a "two for one" or similar basis are not giving away a free meal, but rather are selling two meals at a discounted price. Both the retailing B&O and retail sales taxes should be calculated on the reduced price actually received by the seller.

~~((a))~~ Persons who provide meals free of charge to persons other than employees are consumers of those meals. Persons operating restaurants or similar businesses are not required to report use tax on food and food ingredients given away, even if the food or food ingredients are part of prepared meals. For example, a restaurant providing meals to the homeless or hot dogs free of charge to a little league team will not incur a retail sales or use tax liability with respect to these items given away. A sale has not occurred, and the food and food ingredients exemption applies. Should the restaurant provide the little league team with soft drinks free of charge, the restaurant will incur a deferred retail sales or use tax liability with respect to those soft drinks. Soft drinks are excluded from the exemption for food and food ingredients. (See WAC 458-20-244 ~~((Food and food ingredients))~~.)

~~((b))~~ ~~Meals provided to employees are presumed to be in exchange for services received from the employee and are not considered to be given away. These meals are retail sales. (See WAC 458-20-119 on employee meals.)~~

~~(7))~~ **(8) Sales of meals, beverages and food at prices including retail sales tax.** Persons may advertise and/or sell meals, beverages, or any kind of food product at prices including sales tax. Any person electing to advertise and/or make sales in this manner must clearly indicate this pricing method on the menus and other price information.

If sales slips, sales invoices, or dinner checks are given to the customer, the sales tax must be separately stated on all such sales slips, sales invoices, or dinner checks. If not separately stated on the sales slips, sales invoices, or dinner checks, it will be presumed that retail sales tax was not collected. In such cases the measure of tax will be gross receipts. (~~Refer also to~~) See WAC 458-20-107.)

~~((8) **Class H restaurants.**)~~ **(9) Spirits, beer, and wine restaurant licensees.** Restaurants operating under the authority of a ~~((class H liquor))~~ license from the liquor control board to sell spirits, beer, and wine by the glass for on-premises consumption generally have both dining and cocktail lounge areas. Customers purchasing beverages or food in lounge areas are generally not given sales invoices, sales slips, or dinner checks, nor are they generally provided with menus.

(a) Many ~~((class H restaurants))~~ spirits, beer, and wine restaurant licensees elect to sell beverages or food at prices inclusive of the sales tax in the cocktail lounge area. If this pricing method is used, notification that retail sales tax is included in the price of the beverages or foods must be posted in the lounge area in a manner and location so that customers can see the notice without entering employee work areas. It will be presumed that no retail sales tax has been collected or is included in the gross receipts when a notice is not posted and the customer does not receive a sales slip or sales invoice separately stating the retail sales tax.

(b) The election to include retail sales tax in the selling price in one area of a location does not preclude the restaurant operator from selling beverages or food at a price exclusive of sales tax in another. For example, ~~((an operator of a class H))~~ a spirits, beer, and wine restaurant licensee may elect to include the retail sales tax in the price charged for beverages in the lounge area, while the price charged in the dining area is exclusive of the sales tax.

(c) ~~((Class H))~~ Spirits, beer, and wine restaurant ~~((s))~~ licensees are not required to post actual drink prices in the cocktail lounge areas. However, if actual prices are posted, the advertising requirements expressed in WAC 458-20-107 must be met.

~~((9))~~ **(10) Gratuities.** Tips or gratuities representing donations or gifts by customers under circumstances which are clearly voluntary are not part of the selling price subject to tax. However, mandatory additions to the price by the seller,

whether labeled service charges, tips, gratuities or otherwise must be included in the selling price and are subject to both the retailing B&O and retail sales taxes. (~~Refer also to WAC 458-20-119.~~)

~~(10) **Vending machines and amusement devices.** Persons owning and operating vending machines and amusement devices should refer to WAC 458-20-187 (Coin operated vending machines, amusement devices and service machines).~~)

~~(11) **Examples.** (The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax status of each situation must be determined after a review of all of the facts and circumstances.~~

~~(a) ABC Coffee Shop has its own bakery and also a counter and tables where it sells pastries and coffee for immediate consumption. ABC also sells donuts and other bakery items for consumption off the premises. No beverages are sold in unsealed containers except for consumption on the premises. ABC accounts separately for its sales of products which are not intended for immediate consumption through a coding maintained by the cash register. ABC is operating a combination business. It is required to collect retail sales tax on items sold for consumption on the premises, but is not required to collect retail sales tax on baked goods intended for consumption off the premises.~~

~~(b))~~ (a) XYZ Restaurant operates both a cocktail bar and a dining area. XYZ has elected to sell drinks and appetizers in the bar at prices including the retail sales tax while selling drinks and meals served in the dining area at prices exclusive of the sales tax. There is a sign posted in the bar area advising customers that all prices include retail sales tax. Customers in the dining area are given sales invoices which separately state the retail sales tax. As an example, a typical well drink purchased in the bar for \$2.50 inclusive of the sales tax, is sold for \$2.50 plus sales tax in the dining area. The pricing requirements have been satisfied and the drink and food totals are correctly reflected on the customers' dinner checks. XYZ may factor the retail sales tax out of the cocktail bar gross receipts when determining its retailing and retail sales tax liability.

~~((e))~~ (b) RBS Restaurant operates both a cocktail bar and a dining area. RBS has elected to sell drinks at prices inclusive of retail sales tax for all areas where drinks are served. It has a sign posted to inform customers in the bar area of this fact and a statement is also on the dinner menu indicating that any charges for drinks includes retail sales tax. Dinner checks are given to customers served in the dining area which state the price of the meal exclusive of sales tax, sales tax on the meal, and the drink price including retail

sales tax. Because the business has met the sign posting requirement in the bar area and has indicated on the menu that sales tax is included in the price of the drinks, RBS may factor the sales tax out of the gross receipts received from its drink sales when determining its taxable retail sales.

~~((d))~~ (c) Z Tavern sells all foods and drinks at a price inclusive of the retail sales tax. However, there is no mention of this pricing structure on its menus or reader boards. The gross receipts from Z Tavern's food and drink sales are subject to the retailing and retail sales taxes. Z Tavern has failed to meet the conditions for selling foods and drinks at prices including tax. Z Tavern may not assume that the gross receipts include any sales tax and may not factor the retail sales tax out of the gross receipts.