



How Employers Can Calculate Nondeductible Employee Parking Expenses, and Possibly Reduce them by March 31, 2019

Summary

Employer business deductions for qualified

transportation fringes ended in 2018. The 2017 tax reform known as the Tax Cuts and Jobs Act (TCJA), P.L. 115-97, amended Sec. 274(a)(4) by eliminating employer business deductions for employee¹ qualified transportation fringe (QTF) benefit expenses, including qualified parking², mass transit and van pool benefits (although such benefits continue to be excluded from employee income).

Increased cost for tax exempt employers started in 2018. TCJA also amended Sec. 512(a)(7) to require tax exempt employers to increase their unrelated business taxable income (UBTI) for such QTF expenses.

How to calculate employee parking expenses was unclear. These changes were effective for amounts paid or incurred after December 31, 2017, but TCJA did not explain how to determine the amount that is nondeductible or treated as an increase in UBTI. Although the IRS intends to propose regulations under Sec. 274(a)(4) and 512(a)(7) (and under Sec. 6012 for tax exempt employers' related filing requirements), in the interim, the IRS recently issued [Notice 2018-99](#) (December 10, 2018), providing limited guidance on how to calculate nondeductible parking expenses.

¹ The term "employee" for these purposes is defined in Treas. Regs. Sec. 1.132-1(b)(2)(i) and 1.132-9(b), Q/A-5, as any individual currently employed by the employer, including common law and statutory employees, such as corporate officers. Treas. Regs. Sec. 1.132-9(b), Q/A-24 explains that partners, 2-percent shareholders of S Corporations, sole proprietors, and independent contractors are not employees for purposes of Sec. 132(f).

Employers may rely on Notice 2018-99 until further guidance is issued.

For simplicity, in this article, we'll use "nondeductible parking expenses" which tax exempt employers should read to include UBTI increases, since the new UBTI inclusion rules for tax-exempt organizations generally mirror the new Sec. 274(a)(4) rules. But tax exempt employers should also note that in [Notice 2018-100](#), the IRS provided relief from the estimated tax penalty in 2018 for parking QTF benefits for entities that were not previously required to file a Form 990-T or that will not exceed the \$1,000 threshold below which a tax exempt organization is not required to file a Form 990-T or pay UBIT.

IRS guidance and transition relief

How to determine an employer's nondeductible parking expense depends on whether the employer owns (or leases) the parking facility or pays a third party for employee parking. Importantly, Notice 2018-99 says that employers who own or lease parking facilities that have "reserved" parking spaces for employees have until **March 31, 2019**, to reduce the reserved employee spaces to qualify for the "general public" parking exception to the nondeductible employee parking rules (discussed below). If that change is timely made, the

² Qualified parking is defined in Sec. 132(f)(5)(C) as parking provided to an employee on or near the employer's business premises or on or near a location from which the employee commutes to work. It includes indoor and outdoor garages and other structures, as well as parking lots and other areas, where employees may park on or near the employer's business premises or on or near a location from which the employee commutes to work. It does not include any parking on or near property used by the employee for residential purposes.



IRS will treat the change as being in effect since January 1, 2018.

Employers who use third party parking areas

If the employer pays a third party (either directly or through reimbursement) for employee parking, the amount of the nondeductible parking expense is fairly straightforward. It is the lesser of (i) the employer's total annual cost of employee parking paid to the third party; or (ii) the Sec. 132(f)(2) monthly per employee parking limit (i.e., \$260 for 2018; \$265 for 2019). If an employer pays more than the Sec. 132(f)(2) limit, the excess is treated as employee wages (and therefore, the excess is deductible as compensation and is not subject to the Sec. 274(a)(4) disallowance). The calculation of the nondeductible expense is more complicated for employers who own or lease employee parking areas.

Employers who own/lease parking areas

Safe harbor. According to the Notice, until further guidance is issued, employers who own employee parking areas or have a property lease that includes employee parking may use any reasonable method to calculate nondeductible employee parking expenses. But the Notice deems a four-step safe harbor method (described below) to be a "reasonable method" for determining the nondeductible expense amount. The Notice also includes eight examples of how the safe harbor methodology applies to both for-profit and tax exempt employers, as well as two additional examples for tax exempt employers.

Step 1. Calculate the disallowance for reserved employee spots. If the parking facility owned or leased by the employer has a reserved area for employee parking but also has other parking areas, the employer must determine the percentage of the reserved employee spots compared to total parking spots, then multiply that percentage to the total parking area expenses. The employer would then subtract the nondeductible amount for reserved employee parking from the total expenses in Step 3 below.

For tax years beginning on or after January 1, 2019, a method that fails to allocate expenses to reserved employee spots cannot be a reasonable method. But

until March 31, 2019, employers can change their signage, access, etc. to decrease or eliminate reserved employee spots and the IRS will disregard them as reserved employee spots retroactively to January 1, 2018.

Step 2. Determine the primary use of remaining spots (the "primary use test"). Employers should next determine if greater than 50 percent of the unreserved parking spots are available for the general public (even if not actually used). If the primary use of the remaining parking spots is for the general public, the remaining parking expenses remain deductible. If the unreserved parking spots are not primarily for the general public, see step 3 below.

"General public" includes (but is not limited to), customers, clients, visitors, individuals delivering goods or services, patients of a health care facility, students of an educational institution, and congregants of a religious organization. The general public does not include the employer's employees, partners or independent contractors.

"Primary use" is tested during normal business hours on a typical work day. Employers can use any reasonable method to determine average or estimated usage of the parking spots if such usage varies significantly between days of the week or times of the year.

Step 3. Calculate the allowance for reserved nonemployee spots (if any). Employers who reserve parking spots for designated nonemployees — such as visitors, customers or partners, sole proprietors, or 2-percent shareholders of S-corporations — will need to determine the percentage of such parking spots (if any) in relation to the remaining total parking spots. The employer would then multiply that percentage by the employer's remaining total parking expenses after subtracting the nondeductible amount determined in Step 1. The result is the amount of the employer's allowable deduction for the remaining total parking expenses.



Step 4. Determine remaining use and allocable expenses. Employers who have remaining parking expenses that are not specifically categorized as deductible or nondeductible under Steps 1-3 above must allocate those expenses based on the employer's reasonable determination of employee usage of such parking areas during normal work hours on a typical business day. Employers can identify the number of employee parking spots based on actual or estimated usage, taking into account the number of spots, number of employees, hours of use and other factors.

FAQs for Calculating Expenses

The Notice also answers some commonly asked questions about to how to calculate the amount of nondeductible employee parking expenses.

1. What counts as an expense? The Notice clarifies which costs can or cannot be included as an employee parking expense. Expenses are based on employer cost, not "value" — so employers can't simply use fair market value because Sec. 274(a)(4) disallows a deduction for the expense of providing a QTF (regardless of its value). For example, depreciation cannot be included as a parking expense because it is not an actual "paid" expense (since depreciation simply recovers the original investment). Also, expenses paid for items not located on or in the parking facility — including items related to property next to the parking facility, such as landscaping or lighting — are not included.

Permissible expenses include (but aren't limited to) rent or lease payments, insurance, property taxes, interest, utility costs, repairs and maintenance, cleaning, removal of snow, ice, leaves and trash, parking lot attendant expenses and security costs.

2. What if the employer has multiple parking areas? According to the Notice, if an employer owns or leases more than one parking facility in a single geographic location, the employer may aggregate the number of parking spots when calculating nondeductible parking expenses. But if the employer owns or leases parking facilities in more than one

geographic location, the employer may not aggregate those parking spaces.

Other laws still apply

Regardless of these changes in federal tax law, keep in mind that employers must continue to comply with local laws regarding commuter benefits — for example, in New York City and San Francisco.