



# MAINE REVENUE SERVICES SALES, FUEL & SPECIAL TAX DIVISION INSTRUCTIONAL BULLETIN NO. 27

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## SALES OF PREPARED FOOD

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This bulletin is intended solely as advice to assist persons in determining and complying with their obligations under Maine tax law. It is written in a relatively informal style and is intended to address issues commonly faced by restaurants, caterers, sandwich shops, snack bars and other businesses that make sales of prepared food products.

Taxpayers are responsible for complying with all applicable tax statutes and rules. Although Maine Revenue Services (“MRS”) bulletins do not have the same legal force and effect as rules, justifiable reliance upon this bulletin will be considered in mitigation of any penalties for any underpayment of tax due. This bulletin is current as of the last revision date shown at the end of the document.

The Sales and Use Tax Law is found in Part 3 of the Maine Revised Statutes in Title 36. Both Title 36 and all MRS rules may be seen by clicking on “Laws and Rules” at the left side of the MRS website: [www.maine.gov/revenue/](http://www.maine.gov/revenue/).

Title 36, section 1811 imposes sales tax on sales of prepared food at a separate higher rate (the “prepared food rate”) than the generally applicable sales tax rate (the “general sales tax rate”). Sales of grocery staples are exempt from sales tax. “Grocery staples” means food products ordinarily consumed for human nourishment, but excludes prepared food and certain other products intended for internal human consumption. See also Instructional Bulletin No. 12 (“Retailers of Food Products”).

### 1. TAXABLE SALES OF PREPARED FOOD

#### A. Prepared food defined.

Sales of prepared food, as defined in Title 36, section 1752(8-A), are subject to sales tax regardless of the location from which it is sold, whether for consumption on the premises or for take-out. The definition of “prepared food” contains three categories:

- (1) All meals served on or off the premises of the retailer. This category includes sandwiches (whether prepared by the retailer or by someone else) and heated food. However, fully-cooked frozen sandwiches are not considered “prepared food” and are therefore subject to the general sales tax rate. See Instructional Bulletin No. 12 (“Retailers of Food Products”) for more information.

(2) All food and drink prepared by the retailer and ready for consumption without further preparation. This category includes:

- a. Food products that are not individually prepackaged for resale and that are served from self-serve areas (such as salad bars and “coffee nooks”) designed to offer customers food for immediate consumption;
- b. Food prepared for sale in a heated state regardless of cooling that may have occurred, such as pizza, pieces of chicken, convenience meals, or rotisserie chicken;
- c. Bakery items such as cookies, donuts, bagels, etc., that are prepared by the retailer;
- d. Deli and bakery platters, such as cold cuts, cheeses, appetizers, finger rolls, bakery products, crackers, and fruits or vegetables.

“Without further preparation” means that the product does not require boiling, frying, grilling, baking or cooking. “Further preparation” does not include toasting, microwaving, or otherwise heating a product for palatability (rather than for the purpose of cooking the product).

(3) All food and drink sold by a retailer at a particular retail location when the sales of food and drinks at that location that are prepared by the retailer account for more than 75% of the gross receipts reported with respect to that location by the retailer. See Paragraph C(2) below for details on how to calculate the “75% rule.”

The definition of “prepared food” excludes “bulk sales of grocery staples.” See Section 4 below. Other than deli and bakery platters, “prepared food” does not include cutting and repackaging a grocery staple. For example, a pound of ham sliced from the deli case as requested by the customer, or fruits/vegetables that are cut and repackaged in cups or bowls, are exempt “grocery staples.”

## **B. Sale price of prepared food.**

“Sale price” means the total amount of a retail sale valued in money, whether received in money or otherwise. “Sale price” includes “any consideration for services that are a part of a retail sale and all receipts, cash, credits and property of any kind or nature and any amount for which credit is allowed by the seller to the purchaser, without any deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses or any other expenses.” “Sale price” does not include “discounts allowed and taken on sales.” See 36 MRSA § 1752(14) and Instructional Bulletin No. 39 (“Sale Price Upon Which Tax is Based”).

Charges that are directly in connection with the sale of prepared food (charges for labor, linen, place settings, utensils, etc.) are included in the sale price and subject to tax at the prepared food rate, even if separately stated. Other incidental charges such as charges for tables, chairs, rentals of equipment, use of centerpieces, etc., are not subject to tax. Sales of items such as centerpieces and decorations are subject to sales tax at the general sales tax rate.

**C. Application of tax to specific businesses.**

The following addresses the application of tax to specific types of businesses:

**(1) Restaurants.** All sales of drinks and prepared foods from restaurants are subject to sales tax at the prepared food rate. This includes all meals served on or off the premises as well as food and drinks sold on a “take-out” or “to go” basis.

Although sales of meals by a restaurant are not considered bulk sales of a grocery staple, a restaurant may also be engaged in selling food products that qualify as “grocery staples” and are therefore exempt from sales tax. Examples of valid exempt sales are:

- a. Loaves of bread;
- b. Quarts of milk, or larger;
- c. Coffee (whole beans or ground); and
- d. Meat, fish, and poultry.

All sales of beer, wine, and other alcoholic beverages for consumption on the premises of the retailer are subject to sales tax at the prepared food rate.

**(2) Sandwich Shops, Pizza Shops, Dairy Bars, Bakeries, Donut and Bagel Shops.** Sandwich shops, pizza shops, dairy bars, bakeries, donut and bagel shops may be engaged in selling meals as well as food and drink prepared by them and ready for consumption without further preparation. These entities whose sales of prepared food constitute 75% or more of their total gross receipts are required to charge the prepared food rate on all of their sales of food and drinks that require no further preparation, whether the preparation was done by the retailer or by someone else. This includes, but is not limited to, items such as chips, milk, soda, juice, pastries, ice cream and candy, but does not include bulk sales of grocery staples (see Section 4 below.) The prepared food rate must be charged on all sales of food and drinks that require no further preparation regardless of whether seating facilities are provided on the premises.

In calculating whether 75% of gross receipts are attributable to the sale of prepared food, only two factors are considered: (1) the sales of food prepared by the retailer, and (2) total sales. If dividing (1) by (2) generates a percentage of more than 75%, the retailer is required to collect tax at the prepared food rate on all sales of food and drinks that require no further preparation. Food prepared by the retailer does not include items that qualify as bulk grocery staples. For example, a bakery should not include sales of loaves of bread in calculating its “food prepared by the retailer.” “Total sales” includes **all** receipts by the retailer, including grocery staples, taxable food products, prepared food, cigarettes, beer, wine, soda, candy, gasoline, and rental income from the rental of space at the retailer’s site, such as space for vendors, room rentals, campsite rentals, admission fees, and equipment rentals.

Ice cream novelties, bulk ice cream, and ice cream cakes are subject to tax at the prepared food rate as are all sales of beer, wine and other alcoholic beverages for on-premises consumption in licensed establishments.

English muffins, bagels, dinner rolls, and sandwich rolls, other than those sold as part of deli or bakery platters, are not subject to tax at the prepared food rate when sold in quantities of 6 or more. The sale is exempt as the sale of a bulk grocery staple (see Section 4 below).

When a franchised restaurant facility is located within a convenience store, all sales that are made from the restaurant facility are subject to tax at the prepared food rate even if the overall facility does not meet the 75% rule. For example, sales of containers of 100% juice or milk are subject to tax at the prepared food rate when the sales are made from the restaurant section of the facility, but are exempt when made from the convenience store section.

**(3) Caterers.** Caterers are typically engaged in selling meals as well as food and drink prepared by them and ready for consumption without further preparation. Caterers must charge sales tax at the prepared food rate on all sales of prepared food, regardless of where the food is being served. Sales of meals by a caterer are not considered bulk sales of a grocery staple.

If a caterer contracts with a person to serve a meal and the purchase by the person is for resale, the sale is exempt from tax. The sales tax responsibility with respect to the subsequent retail sale rests on the entity purchasing the meal. If the person does not present a resale certificate or if the meal is not being purchased for resale, the caterer must charge tax.

**(4) Street Vendors.** Sales of food products from roadside stands and other locations such as food carts, wagons, and trucks, as well as sales at carnivals, fairs, and athletic events will normally fall under all of the categories within the definition of prepared food. Thus, sales of all food and drink by street vendors are taxable at the prepared food rate.

**(5) Grocery and Convenience Stores.** Grocery and convenience stores and supermarkets may make sales of hot soups, individual salads, sandwiches, steamed hot dogs, and other prepared foods. Heated food or drinks and sandwiches requiring no further preparation are taxable at the prepared food rate when sold by a grocer or a convenience store. Items available at salad bars and “coffee nooks” are also subject to tax at the prepared food rate. Sales of grocery staples are exempt from sales tax.

Note: Fully-cooked frozen sandwiches, although not considered “prepared food”, are subject to the general sales tax rate. See Instructional Bulletin No. 12 (“Retailers of Food Products”) for more information.

**(6) Personal Chef.** A personal chef that comes to a customer’s home and prepares one or more meals may be selling prepared food. When the personal chef does no more than prepare the food using the ingredients provided by the customer, the chef’s labor is not taxable. However, if a personal chef provides the ingredients and prepares a meal ready for consumption without further preparation, the chef is selling prepared food and must collect tax at the prepared food rate. A meal is “ready for consumption without further preparation” even if it needs to be toasted, microwaved, or otherwise heated for palatability rather than for the purpose of cooking or baking the product. If the personal chef prepares

meals and places them in a freezer for the customer to boil, fry, grill, bake, or otherwise cook at a later time, the food is not “ready for consumption without further preparation” and would be exempt from tax.

**(7) Retailers providing cooking demonstrations.** Persons engaged in preparing food may provide “cooking demonstrations” or “cooking schools” where the participants may or may not be involved in the preparation of the food. The following provides guidance for how the prepared food is taxed in certain situations:

Example 1. In a class where the preparation is demonstrated to the participants and the participants can “sample” the prepared food, but a meal is not prepared for each participant, any charge for observing the preparation is not subject to tax. However the person that purchased the items used at the demonstration is subject to use tax at the prepared food rate on the ingredients used in preparing the food.

Example 2. In a class where all participants have a hands-on preparation class and can eat what they prepared, any charge for participation is not subject to tax. However, the person that purchased the items used at the demonstration is subject to use tax at the prepared food rate on the ingredients included in the class fee. If participants purchase their own ingredients, the exemption provided for grocery staples applies.

Example 3. In a class where the preparation is demonstrated to the participants and a meal is then served to each participant, a sale of prepared food is being made to each participant and the entire “class fee” is subject to sales tax at the prepared food rate unless a reasonable demonstration fee is separately stated from the sale price of the meal.

## **2. EXEMPT SALES OF MEALS**

For general information on sales to governmental agencies and exempt organizations, including important information on the required documentation of exempt sales, see Rule 302 (“Sales to Government Agencies and Exempt Organizations”) and Instructional Bulletin No. 36 (“Exempt Organizations and Government Agencies”).

### **A. School meals.**

Sales of meals served to the students or teachers of a school by public or private schools, school districts, student organizations and parent-teacher associations are exempt from sales tax. This exemption applies to:

- (1) Sales of meals made in the school cafeteria during the normal school day;
- (2) Sales of meals by a post-secondary school as part of a student “meal plan”;
- (3) Sales of meals by a school or student organization at a school event where those in attendance are mainly students and teachers; and
- (4) Sales of meals by a caterer when contracted by the school to provide student and teacher meals.

The law also provides an exemption for sales of goods and services by schools, student organizations, booster clubs, and parent-teacher associations. Sales of meals by any of these organizations, even to customers other than students or teachers, qualify for exemption, provided that the proceeds are used to benefit the school or student organization or are donated to charity.

**B. Hospital meals.**

Sales of meals, food, and drink to patients of hospitals licensed by the State for the care of human beings are exempt from sales tax. Also exempt are sales of meals, food, and drink by other institutions licensed by the State for the hospitalization or nursing care of human beings.

**C. Meals for the elderly.**

Sales of meals by hospitals, schools, long-term care facilities, food contractors, and restaurants to incorporated nonprofit area agencies on aging for the purpose of providing meals to the elderly are exempt from sales tax. The seller of these meals is required to obtain an exemption certificate issued by Maine Revenue Services from the incorporated nonprofit area agency purchasing the meals.

**D. Congregate housing facilities.**

Sales of meals to residents of incorporated nonprofit church-affiliated congregate housing facilities for the elderly in which at least 75% of the units are available for leasing to eligible lower-income residents are exempt from sales tax.

**E. College employees.**

Sales of meals to college employees when the meals are purchased with college-issued debit cards are exempt from sales tax.

**F. Sales by auxiliary organizations of American Legion.**

Sales of meals and related items and services by a nonprofit auxiliary organization of the American Legion in connection with a fund-raising event sponsored by the auxiliary organization are exempt from sales tax if the meals and related items and services are provided in a room that is separate from the lounge facilities and customers are prohibited from taking alcoholic beverages from the lounge facilities to the separate room where the meals and related items and services are provided.

**G. Certain sales by civic, religious or fraternal organizations.**

Sales of prepared food by a civic, religious or fraternal organization, including an auxiliary of such an organization, at a public or member-only event, except when alcoholic beverages are available for sale at the event are exempt from sales tax. This exemption is limited to the first 24 days during which such sales are made in a calendar year and does not apply to sales made at private functions such as weddings.

**H. Youth camps.**

Sales of meals served by youth camps licensed by the Department of Health and Human Services and defined in 22 M.R.S. § 2491(16) are exempt from sales tax.

## **I. Retirement facilities.**

A sales and use tax exemption applies to sales of meals served by a retirement facility to its residents when participation in the meal program is a condition of occupancy or the cost of the meals is included in or paid with a comprehensive fee that includes the right to reside in a residential dwelling unit and meals or other services, whether that fee is charged annually, monthly, weekly or daily. A “retirement facility” is a facility that includes residential dwelling units where, on an average monthly basis, at least 80% of the residents of the facility are persons 62 years of age or older.

### **3. COMPLIMENTARY MEALS AND MEALS PROVIDED AT REDUCED PRICE**

#### **A. Meals provided to employees.**

When the value in money of a meal furnished by an employer to an employee at the place of employment is credited toward the wages of the employee, the meal is exempt from sales tax. See 36 MRSA § 1760(75). This occurs only when the meal is provided at the place of employment and an amount for meals is credited toward the wages of the employee regardless of whether meals are actually consumed. The furnishing of these employee meals will be considered exempt from sales tax if the employer was required by the Internal Revenue Code and IRS regulations to report the value of the meals as taxable wages, regardless of whether or not the employer actually did. If no amount is credited for meals and the employer charges the employee for meals, the charge is subject to sales tax at the prepared food rate, whether paid in cash or by payroll deduction.

If a meal served to an employee is not part of the employee’s compensation, the employer is not required to report the meal as compensation. If the employer provides the meal at no charge to the employee, the employer is subject to use tax at the prepared food rate on its cost of ingredients.

#### **B. Meals to contract staff.**

When a retailer hires an entertainer and provides a meal to the entertainer as part of the contractual arrangement between the two parties, a bartered transaction has occurred (a meal in exchange for services). The value of the meal should be reported as a taxable sale. When a complimentary meal is provided to a hired entertainer outside of any contractual obligation, use tax is due at the prepared food rate on the retailer’s cost of ingredients.

#### **C. Meals provided to dissatisfied customers.**

When a dissatisfied customer is not charged at all for a meal, it is considered a canceled sale and no sales or use tax is due. If a dissatisfied customer is given a free meal on the next visit, the complimentary meal is subject to use tax at the prepared food rate on the seller’s cost of ingredients. If the customer is given a discount on the next visit, a discounted sale occurs and sales tax must be collected on the reduced amount.

**D. Complimentary meals.**

If a complimentary meal is provided when one or more meals are purchased, a discounted sale occurs and sales tax must be collected on the reduced amount. For example:

- (1) Complimentary meal on a special occasion such as to a mother on Mother's day, to a father on Father's day or to a person on their birthday.
- (2) Complimentary meal to a tour group such as a bus driver, tour guide or banquet planner.
- (3) Complimentary meal to a special guest such as a dignitary, public official, actor or entertainer.
- (4) A two-for-one meal coupon.

If a complimentary meal is provided without the purchase of any other tangible personal property or taxable service, for instance a public official and spouse being provided a free meal, the complimentary meal is subject to use tax at the prepared food rate on the seller's cost of ingredients.

**E. Gift certificates.**

When a person purchases a gift certificate, the person is simply exchanging cash for a form of credit. No sales tax applies to the sale of a gift certificate because no tangible personal property or taxable service is being purchased at that time. When the certificate is later redeemed, sales tax is collected at that time (unless a specific exemption applies).

When a gift certificate is purchased for less than its face value, the difference between the face value and the purchase value may be treated as a retailer discount since that value will not be recovered from any other source. When the certificate is later redeemed, the retailer discount would reduce the taxable sale price of the transaction provided the retailer is able to document or otherwise reliably establish the value paid for the certificate and is treating the difference as a retailer discount.

Example 1: Customer purchases a "Deal of the Day" certificate, valued at \$100, for \$75. When the certificate is redeemed, the retailer, having made prior arrangements for this offer to occur, has documentation that the amount paid for the certificate was \$75. If the customer's meal check amounted to \$150, \$25 of the certificate (\$100 less the amount paid of \$75) is treated as retailer discount, reducing the taxable sale price to \$125 (\$150 - \$25). The amount paid for the certificate, \$75, is treated as cash toward payment of this transaction.

Example 2: A non-profit organization is given a \$50 certificate free of charge to use in a raffle contest. The winner of the raffle redeems the certificate on a meal valued at \$125. Provided the retailer has documentation that this certificate was provided free of charge and will not be reimbursed for the certificate value from any other source, the retailer can treat the \$50 as a retailer discount and reduce the taxable sale price to \$75 (\$125-\$50).



See Instructional Bulletin No. 39 (“Sale Price Upon Which Tax is Based”) for additional information.

**F. Continental breakfast and free coffee/cookies in hotel lobby.**

When sales of prepared food and drink items are made in conjunction with the rental of a hotel room (as with, for example, “bed and breakfast accommodations” and hotels offering continental breakfast), the entire charge is taxable at the rate applicable to the rental of living quarters, and the hotel would not pay use tax on the ingredients of the meal. When a hotel provides “complimentary” food and drink items to guests in a common area, such as coffee and cookies in the lobby, these items are not considered to be included in the charge for the room, and the hotel must therefore either pay tax on its purchase of these items, or accrue use tax.

**4. BULK SALES OF GROCERY STAPLES**

Sales of the following items, when prepared by a retailer and sold in bulk quantities, are considered tax-exempt sales of grocery staples:

- A.** Bread and bread products such as loaves of bread (with the exception of quick breads, such as banana bread, which are bakery items), Italian sandwich rolls, French bread, and bread bowls;
- B.** Dinner rolls, finger rolls, English muffins, and bagels, other than those sold as part of deli or bakery platters, sold in quantities of 6 or more (these items must be of like kind); and
- C.** Maple syrup, jam, jellies, pickles and other condiments, honey, salad dressing, bags or other packages of coffee (either whole beans or ground), quart or larger containers of milk, and pasta sauce.

Food products that are excluded from the definition of “grocery staples” are taxable even if sold in bulk. Examples of non-qualifying food products that may be sold in bulk are:

- A.** Food prepared by the retailer and ready for consumption without further preparation;
- B.** Sandwiches and salads;
- C.** Bakery and dessert items, such as quick breads, doughnuts, muffins, pastries, cookies, pies, and cakes;
- D.** Ice cream novelties; and
- E.** Potato chips, corn chips, and similar items.

**5. GRATUITIES AND SERVICE CHARGES**

When a customer provides a tip for an employee of a seller, the tip is not part of the sale price and is exempt from sales tax whether given directly to the employee in cash or added by the customer to a charge account, as long as the tip is provided wholly in the discretion or judgment of the customer. If added to a charge account, the tip is exempt only if the full amount of the tip is turned over to the employee by the employer.

An amount or flat percentage charged or collected in lieu of a gratuity, and designated as a service charge by the seller, is not part of the taxable sale price when it is disbursed by the seller to employees as wages. Otherwise, service charges must be included in the seller's gross sales subject to tax even though the amount or flat percentage may be paid over in part to the employees.

## **6. PURCHASES**

When a restaurant or caterer make purchases for use in its business, some purchases are exempt as purchases for resale (e.g., items sold as part of a meal), some are exempt as purchases of packaging material (e.g., polystyrene meal containers, paper plates), and some purchases are taxable (e.g., cleaning supplies, dishes, cooking utensils).

### **A. Purchases for resale.**

A retailer may make tax-free purchases of tangible personal property that it intends to resell only if the retailer holds a current valid resale certificate and presents it to the supplier at the time of the purchase. See Rule 301 ("Sales for Resale and Sales of Packaging Materials") and Instructional Bulletin No. 54 ("Resale Certificates") for details.

The broadest category of purchases for resale by food preparers consists of food products that become part of a meal sold to customers. For food products that do not qualify as "grocery staples," a food preparer must furnish a resale certificate to the supplier in order to purchase these items without paying sales tax.

There are items that may be purchased by a food preparer that are otherwise taxable but become part of the meal being sold. The following is a non-exclusive list of items that are considered to be included as part of the sale price of the meal.

Condiments	Disposable bibs	Disposable utensils
Disposable napkins	Disposable tablecloths	Moist hand towelettes
Disposable placemats	Stirrers	Straws
Toothpicks served in food	Trayliners	

These items are eligible to be purchased for resale by providing a resale certificate to the supplier.

### **B. Packaging Materials.**

Purchases by food preparers of containers and packaging materials used to package the goods that they sell to their customers are not taxable. Food preparers may purchase items that fall into this category without payment of tax by furnishing the supplier with a resale certificate as provided in Rule 301 ("Sales for Resale and Sales of Packaging Materials"). Packaging material qualifies for this exemption only if it is transferred to the customer with the product sold. Products used for storage or containment solely within the food preparer's business do not qualify for this exemption.

Here is a non-inclusive list of examples of items that are generally considered to qualify as exempt packaging materials for food preparers:

Coated wrapping paper	Paper, plastic, or sandwich bags
Disposable cups, plates, or containers	Tape and rubber bands
Foil or plastic wrap	

If any of the above items is purchased for storage or containment solely within the food preparer's business or any use other than packaging food for sale to customers, it does not qualify for the exemption and tax should be paid to the supplier. If tax is not paid to the supplier at the time of purchase, the food preparer will be responsible for payment of use tax directly to the State.

### **C. Taxable Purchases.**

Purchases of tangible personal property, other than those discussed in subsections A and B above, made by the food preparer are subject to sales tax. These items include, but are not be limited to the following:

Dishes	Cleaning supplies	Maintenance supplies
Furniture	Cooking utensils	Appliances
Linens	Complimentary trinkets	Silverware
Guest checks	Office supplies	Menus
Serving trays	Uniforms	Safety products
Disposable gloves		

If a food preparer finds that in the course of doing business it purchases products that are used for both taxable and exempt purposes (for example, plastic wrap, which could be used to wrap products sold to customers but also to cover and store food), it is the responsibility of the food preparer to account for the tax based on the average percentage that is used for taxable purposes and pay the use tax directly to the State.

## **7. ADDITIONAL INFORMATION**

The information in this bulletin addresses some of the more common questions regarding the Sales and Use Tax Law faced by your business. It is not intended to be all-inclusive. Requests for information on specific situations should be in writing, contain full information as to the transaction in question, and be directed to:

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