

Federal Income Tax Treatment of Workplace Electric Vehicle Charging as a Fringe Benefit

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Introduction

As more and more drivers are purchasing plug-in electric vehicles (PEVs) for daily commutes, employers are increasingly providing access to PEV charging as a benefit for employees—in many cases without cost to the employee. A 2015 report by the U.S. Department of Energy (DOE) found that eighty percent of the employers participating in the U.S. DOE’s EV Everywhere Workplace Charging Challenge² provide workplace charging to their employees on a complimentary basis.³ Electric vehicle advocates and the U.S. DOE have promoted workplace charging as an effective incentive to encourage the adoption of electric vehicles. However, employers currently face a federal tax uncertainty regarding whether complimentary or discounted workplace charging constitutes a taxable fringe benefit.

Generally, employers must report fringe benefits provided to an employee as taxable income.⁴ However, complimentary workplace PEV charging may potentially fall under one of two exemptions in the tax code that would avoid the need to report or pay federal income tax on this benefit. Unfortunately, the tax code and current Internal Revenue Service (IRS) regulations and guidance do not explicitly answer whether complimentary workplace PEV charging qualifies as a tax-exempt fringe benefit, although an IRS letter has provided some indication of how the IRS might assess the issue.

This issue brief will examine the current statutory and regulatory framework governing the federal taxability of fringe benefits and analyze two potential exemptions under which employer-provided PEV charging may qualify. The brief will then discuss potential options that policymakers could take to resolve the current ambiguity.

This issue brief provides an overview of a policy issue and does not offer legal advice. Employers offering complimentary workplace charging should consult a tax professional regarding their specific workplace charging practices to determine whether to report workplace charging as a taxable fringe benefit.

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² The U.S. Department of Energy’s EV Everywhere Workplace Charging Challenge is a federal government initiative aiming to have 500 employers offer workplace electric vehicle charging by 2018. As of January 2016, the Workplace Charging Challenge has over 250 partner employers. EV Everywhere Workplace Charging Challenge, U.S. Department of Energy, <http://www.energy.gov/eere/vehicles/workplace-charging-challenge-join-challenge>.

³ U.S. Department of Energy, U.S. Department of Energy’s EV Everywhere’s Workplace Charging Challenge Mid-Program Review: Employees Plug In (December 2015), http://www.energy.gov/sites/prod/files/2015/12/f27/105313-5400-BR-0-EERE%20Charging%20Challenge-FINAL_0.pdf. Similarly, a survey by CALSTART found that 75 percent of the 36 employers responding to the survey did not charge employees for the use of a charging station. See Best Practices for Workplace Charging, CALSTART (September 2013) http://www.calstart.org/Libraries/Publications/Best_Practices_for_Workplace_Charging.sflb.ashx

⁴ Employers generally must report fringe benefits as employee income on applicable tax forms for reporting wages or other business payments (e.g., Form W-2, Form 1099). See, e.g., Internal Revenue Service, 2016 General Instructions for Forms W-2 and W-3, 9 (“Include all taxable fringe benefits in box 1 of Form W-2 as wages, tips, and other compensation...”).

Taxability of Fringe Benefits Generally

According to the U.S. Internal Revenue Code, all sources of income—including salary, fees, commissions, and fringe benefits—are generally considered as part of an individual’s gross income used to calculate federal income tax.⁵ A fringe benefit is defined by the IRS as a “form of pay for the performance of services,”⁶ such as a company car provided to an employee.⁷ Fringe benefits are generally taxable unless specifically excluded by law.⁸

The Internal Revenue Code lists certain categories of benefits as “items specifically excluded from gross income”⁹ (and therefore not subject to federal income tax), including “certain fringe benefits.”¹⁰ Under Section 132 of the code, eight categories of fringe benefits are excluded from gross income.¹¹ The following sections of this paper analyze whether complimentary workplace PEV charging may qualify as an exempt fringe benefit under two of these categories: de minimis fringe¹² and qualified transportation fringe.¹³

The U.S. Internal Revenue Code does not directly address whether workplace charging should be taxed as a fringe benefit or qualifies for either the de minimis fringe or qualified transportation benefit exemptions.¹⁴ Current IRS regulations and guidance documents provide clarifying information about the taxability of fringe benefits generally and for numerous specific applications, but do not provide an explicit answer regarding the taxability of complimentary workplace electric vehicle charging.¹⁵ Further, the IRS has not issued a Revenue Ruling¹⁶ or private letter ruling¹⁷ addressing whether complimentary electric vehicle charging is taxable as a fringe benefit or qualifies under the de minimis fringe or qualified transportation benefit exemptions.¹⁸

Recognizing the importance of complimentary workplace PEV charging to promoting PEV adoption and the importance to employers of resolving this federal tax law ambiguity, U.S. Senator Ron Wyden (D-OR) sent a letter to IRS Commissioner John Koskinen in March 2015 requesting that the IRS issue guidance explicitly including complimentary workplace PEV charging as a de minimis fringe benefit.¹⁹ IRS Commissioner Koskinen

⁵ 26 U.S.C. § 61(a). The underlying policy behind taxing fringe benefits is to curtail excessive fringe benefit compensation and self-dealing (such as a company that provides executives with the use of company cars and vacation properties).

⁶ I.R.S. Publication 15-B Employer’s Tax Guide to Fringe Benefits (2016). Although this white paper uses the terms “employee” and “employer,” the tax law and regulations governing fringe benefits generally apply more broadly to any person who performs services, including independent contractors, partners, or directors.

⁷ I.R.S. Publication 15-B Employer’s Tax Guide to Fringe Benefits (2016).

⁸ *Id.*

⁹ 26 U.S.C. Subt. A, Ch. 1, Subch. B, Pt. III.

¹⁰ 26 U.S.C. § 132.

¹¹ 26 U.S.C. § 132(a).

¹² 26 U.S.C. § 132(a)(4); *see* 26 U.S.C. § 132(e).

¹³ 26 U.S.C. § 132(a)(5); *see* 26 U.S.C. § 132(f).

¹⁴ *See* 26 U.S.C. § 61; 26 U.S.C. § 132.

¹⁵ *See* Treasury Regulations 26 CFR 1.132-6; I.R.S. Publication 15-B Employer’s Tax Guide to Fringe Benefits (2016).

¹⁶ A Revenue Ruling is an “official interpretation” of the tax law by the IRS as applied to a specific set of facts. Revenue Rulings are published in the Internal Revenue Bulletin and can be relied upon as precedent for other taxpayers. 26 C.F.R. § 601.601(d).

¹⁷ Private letter rulings are interpretations of a taxpayer’s specific circumstances; they are binding for the taxpayer who requests the private letter ruling, but do not have precedential value for other taxpayers. Internal Revenue Bulletin: Rev. Proc. 2016–1, Section 15, https://www.irs.gov/irb/2016-01_IRB/ar07.html#d0e4687. A search of a subscription database of IRS private letter rulings did not reveal any private letter rulings explicitly addressing this issue. Search conducted using RIA Checkpoint, available <https://checkpoint.riag.com/app/login?lastCpReqId=6556398&lkn=loginAllParms>.

¹⁸ The IRS has issued several Revenue Rulings related to the Qualified Parking component of the Qualified Transportation Benefit exemption, but none of these directly address workplace PEV charging. For example, Revenue Ruling 2004-98 holds an employer withholding employee pay for parking must treat that pay as wages for accounting purposes. Rev. Rul. 2004-98 (IRS RRU), 2004-42 I.R.B. 664.

¹⁹ Letter from U.S. Senator Ron Wyden to IRS Commissioner John Koskinen (March 23, 2015)

<https://www.finance.senate.gov/newsroom/ranking/release/?id=a8d62953-f0fe-449c-bd40-93f953d6af77>.

responded to Senator Wyden in a letter that addressed how the IRS might assess complimentary workplace charging under current guidance and noted that the IRS may provide additional guidance in the future on this issue.²⁰

Possible Exemption 1: De Minimis Fringe Benefit

The relevant tax law in the Internal Revenue Code and the regulations developed to enact the law both define de minimis fringe as a benefit for which the value of the property or service, “taking into account the frequency with which similar fringes are provided,” is so small that accounting for the benefit would be “unreasonable or administratively impracticable.”²¹

In Treasury regulations and the Publication 15-B Employer’s Tax Guide to Fringe Benefits, the IRS provides examples of benefits that would qualify as de minimis. These include an occasional meal or office party, coffee and doughnuts, or the personal use of an office copy machine²² or company cell phone.²³ Treasury Regulations also provide examples of benefits that do not qualify as de minimis fringe. These include company cars, season tickets for a sports team, and country club memberships.²⁴ The following sections provide more explanation of the factors the IRS would consider in determining whether complimentary workplace charging provided by an employer constituted a de minimis fringe benefit.

A. Value of benefit

Treasury regulations do not provide a dollar figure under which a fringe benefit would automatically be considered de minimis.²⁵ However, the value of the fringe benefits listed as examples of de minimis benefits (such as an occasional meal or theater tickets) provide a useful reference point for employers determining whether workplace charging would be considered de minimis fringe.²⁶

The value of workplace charging provided by an employer will vary significantly depending on the type of vehicle and charger, electricity rates, and the charging habits of the employee. Most PEV charging occurs at home, and many employees with access to workplace charging will not rely on the workplace as the primary source of charging. A U.S. DOE study of PEV usage patterns found that for drivers with access to workplace charging, fewer than 40 percent of charging events occurred at work.²⁷ The U.S. DOE projects the annual fuel

²⁰ IRS Commissioner John Koskinen letter to U.S. Senator Wyden (April 9, 2015). More information about the letter from Senator Wyden and the letter from IRS Commissioner Koskinen is included in the section Requests for IRS Clarification, below.

²¹ 26 U.S.C. § 132(e)(1); *see also* Treasury Regulations 26 CFR 1.132-6(a).

²² 26 C.F.R. § 1.132-6; I.R.S. Publication 15-B Employer’s Tax Guide to Fringe Benefits (2016). IRS Publication 15-B explains that use of a company copying machine would be considered de minimis if the company had taken reasonable measures to assure that the personal use of the machine only constituted approximately fifteen percent of the total usage.

²³ I.R.S. Publication 15-B Employer’s Tax Guide to Fringe Benefits, 11 (2016). For treatment as a de minimis fringe benefit, a cell phone must be provided primarily for non-compensatory business purposes, that is, provided to the employee primarily to conduct business and not as compensation.

²⁴ Treasury Regulations 26 CFR 1.132-6.

²⁵ IRS Commissioner John Koskinen letter to U.S. Senator Wyden (April 9, 2015). *See* Treasury Regulations 26 CFR 1.132-6. Treasury regulations state that if a benefit is found not to be de minimis (due to frequency or value), then no portion of the benefit is considered de minimis and the full value must be included as taxable income. 26 C.F.R. § 1.132-6.

²⁶ Treasury regulations explicitly state that the value of the benefits provided by IRS as examples of de minimis fringes should not be used to establish general rules about what may qualify as de minimis. 26 C.F.R. § 1.132-6(d)(3).

²⁷ U.S. Department of Energy, Idaho National Laboratory, Plugged In: How Americans Charge Their Electric Vehicles, 11 (2015) <http://energy.gov/eere/articles/plugged-understanding-how-and-where-plug-electric-vehicle-drivers-charge> An earlier study conducted by Advanced Energy found that most weekday charging for PEV drivers with access to workplace charging currently takes place outside of standard working hours, between 4 a.m. and 9 a.m. and after 5 p.m. *See* Advanced Energy, Project Insights: Real-World Charging Behavior at the Workplace, 16 (June 2013),

costs of an electric vehicle²⁸ to be approximately \$600.²⁹ However, this annual fuel cost estimate includes all charging, including weekends and vacation days—times when employees likely would not charge their vehicles at the workplace. Even when including the total \$600 annual fuel cost, the cost of PEV charging breaks down to less than \$2 per day, which may be comparable in value to benefits such as coffee and donuts that the IRS lists as examples of de minimis fringe.³⁰

B. Frequency with which benefit is conferred

In determining whether a benefit is de minimis, employers generally must assess “the frequency with which the employer provides the fringes to each individual employee.”³¹ Treasury regulations provide an example of an employer who provides one employee with a meal on a daily basis, but does not provide the meal to other employees. In that example, meals are not considered de minimis for the employee who frequently receives it, even though the benefit is provided infrequently to the workforce as a whole, but might be considered de minimis for the employees who receive the benefit infrequently.³²

A 2013 survey of PEV owners found that 52 percent of drivers with access to workplace charging charge at work on a daily basis, 20 percent every other day, and 28 percent weekly.³³ It is possible that if workplace PEV charging is provided as a daily benefit (even to a few individual employees), the IRS may determine that because the benefit is not occasional, it does not constitute a de minimis fringe for those employees.

This determination will be specific to each employer, as the frequency that employees charge at work (both the number who drive PEVs and the charging patterns of PEV drivers who wish to charge at work) will vary. IRS Commissioner Koskinen stated in his letter to Sen. Wyden that an employer would need to “consider the value and frequency of electronic vehicle charging provided to each employee” in determining whether complimentary workplace PEV charging is a de minimis fringe.³⁴ However, Treasury regulations do provide that when “it would be administratively difficult to determine frequency with respect to individual employees,” an employer can measure frequency with respect to the entire workforce.³⁵ In cases where “employer-measured” frequency is used, the frequency that an individual receives a benefit is not relevant, and it is possible that a benefit frequently conferred upon a single employee may be considered de minimis.³⁶

C. Administrability of accounting for benefit

In assessing whether a benefit is de minimis, an employer must evaluate the administrability of accounting for the benefit relative to the value of the benefit. Treasury regulations, which state that cash or cash equivalents are never de minimis (due to the ease of accounting for such benefits), do not provide clear guidance on how to assess

http://www.advancedenergy.org/portal/ncpev/resources/PEVUsageStudyIR_WorkplaceCharging.pdf.

²⁸ The fuel cost projection for an average plug-in hybrid electric vehicle is approximately \$900. However, because these vehicles run in part on gasoline, the value of the electricity used by these vehicles would not reach this amount.

²⁹ U.S. Department of Energy <https://www.fueleconomy.gov/feg/label/learn-more-electric-label.shtml>. The annual fuel cost projection assumes an annual mileage of 15,000 miles and a projected electricity price from the U.S. Energy Information Administration.

³⁰ The IRS may determine that even a benefit of low value is not de minimis if it is provided with high frequency. I.R.S. Tech. Adv. Mem. 9148001 (Nov. 29, 1991); *see also* Mertens Law of Fed. Income Tax'n § 7:162.

³¹ Treasury Regulations 26 CFR 1.132-6(b).

³² *Id.*

³³ Advanced Energy, Project Insights: Real-World Charging Behavior at the Workplace, AdvancedEnergy.org (June 2013), http://www.advancedenergy.org/portal/ncpev/resources/PEVUsageStudyIR_WorkplaceCharging.pdf.

³⁴ IRS Commissioner John Koskinen letter to U.S. Senator Wyden.

³⁵ 26 C.F.R. § 1.132-6(b)(2).

³⁶ *Id.*

administrability.³⁷ An IRS Field Service Advisory notes that it would be administratively impractical to account for the benefit conveyed to employees if coffee and doughnuts were brought to a staff meeting.³⁸ However, a court has found that the failure to establish a system to account for benefits does not “constitute administrative impracticability.”³⁹

In his letter to the IRS, Senator Wyden expressed his opinion that, because the value of PEV charging is small, the expense and administrative difficulty would make accounting for the benefit “unreasonable and administratively impractical for employers.”⁴⁰ Indeed, accounting for an employee’s PEV charging may require additional administrative and financial costs for employers. Employers may need to install charging equipment with more sophisticated software, which generally is significantly more expensive than available alternatives.⁴¹

In addition to the added equipment expense, accounting for the charging of individual users may require employers to incur administrative costs or monthly service fees.⁴² Employers may also have difficulty accounting for charging if they share parking facilities with other businesses or rent parking from a third-party provider. However, it is unclear whether the high cost of a system of administration would be sufficient to show the difficulty of determining frequency of charging with respect to individual employees.

D. Considerations for employers

The IRS has not provided a definitive answer on whether workplace charging constitutes a de minimis fringe benefit. The IRS letter to Sen. Wyden emphasized that, under current IRS guidance, the determination of whether complimentary workplace charging would qualify as de minimis fringe would be made on a “case-by-case basis” depending on individual facts and circumstances.⁴³ An employer who provides workplace charging free of charge to employees would likely need to consider the value and frequency of the charging benefit provided to each employee, unless an employer is able to show that it would be administratively difficult to do so.⁴⁴

Employers who wish to have more certainty on the tax treatment of complimentary workplace charging can request a private letter ruling from the IRS to ensure workplace charging satisfies the fringe benefit exclusion. Private letter rulings are binding for the specific taxpayer who requests the ruling, but do not bind the IRS in interactions with other taxpayers.⁴⁵ Taxpayers must pay a fee to receive a private letter ruling.⁴⁶

³⁷ See Treasury Regulations 26 CFR 1.132-6(c).

³⁸ Field Serv. Advisory, IRS FSA 200219005 (May 10, 2002).

³⁹ See *American Airlines, Inc. v. United States*, 204 F.3d 1103, 1111-1113 (Fed. Cir. 2000). The U.S. Court of Appeals for the Federal Circuit found that American Airlines did not show evidentiary support for their claim that accounting for and tracking restaurant vouchers given to company employees would be administratively impractical.

⁴⁰ Letter from U.S. Senator Ron Wyden to IRS Commissioner John Koskinen.

⁴¹ Additional features for PEV charging equipment that may be necessary for monitoring employee charging include access control, point-of-sale capability, and energy monitoring. U.S. DOE estimates that Level 2 charging equipment costs range from \$400 to \$6,500 per unit, depending on which features are included. See U.S. Department of Energy, *Costs Associated with Non-Residential Electric Vehicle Supply Equipment*, 10-12 (November 2015).

http://www.afdc.energy.gov/uploads/publication/evse_cost_report_2015.pdf,

⁴² Sophisticated charging equipment (such as equipment that monitors energy use or access) often requires service fees assessed by equipment providers for system support and data access. Such fees vary, but have been estimated at \$1,000 per year. PEV Workplace Charging Costs and Employee Use Fees, Jim Francfort, U.S. Department of Energy, Idaho National Laboratory, 14-15 (February 2016) <https://avt.inl.gov/sites/default/files/pdf/phev/PEVWorkplaceChargingCostsAndEmployeeUseFeesFeb2016.pdf>.

⁴³ IRS Commissioner Koskinen letter to U.S. Senator Wyden.

⁴⁴ 26 C.F.R. § 1.132-6(b)(2).

⁴⁵ Internal Revenue Bulletin: 2016-1 Rev. Proc. 2016-1 (January 4, 2016) https://www.irs.gov/irb/2016-01_IRB/ar07.html#d0e4687; see 26 U.S.C. 6110(k)(3).

⁴⁶ Internal Revenue Bulletin: 2016-1 Rev. Proc. 2016-1, Section 15 https://www.irs.gov/irb/2016-01_IRB/ar07.html#d0e4687.

Possible Exemption 2: Qualified Transportation Fringe Benefit

As an alternative to the de minimis fringe exemption, complimentary workplace PEV charging could potentially be excluded from gross income under the “qualified parking” provision of the “qualified transportation” exemption. The Internal Revenue Code explicitly exempts qualified transportation fringe benefits from taxable gross income.⁴⁷ Qualified transportation fringes include four specific commuting activities: (1) “vanpooling” in an employer-provided “commuter highway vehicle,” (2) transit passes, (3) qualified parking, and (4) qualified bicycle commuting.⁴⁸

Complimentary workplace charging may potentially be included under the qualified parking provision of the exempted qualified transportation fringes.⁴⁹ The Internal Revenue Code defines qualified parking as “parking provided to an employee on or near the business premises” or at certain carpooling sites.⁵⁰ Parking is considered “provided by an employer” if the employer owns or leases the parking lot, pays for the parking, or reimburses an employee⁵¹ for parking.⁵²

Complimentary workplace charging may qualify under the qualified parking exemption because the applicable statute and regulations place relatively few restrictions on what constitutes “qualified parking.” The definition in the Internal Revenue Code is very broad, and the Treasury regulations, IRS guidance, and applicable revenue rulings do not explicitly preclude electric vehicle charging under the qualified parking fringe.⁵³

Electric vehicle charging provided at a parking facility may be analogous to other services generally included with parking, such as protection from the weather or provision of security. It is possible that if parking is bundled with electric vehicle charging availability, the bundle might be an excludable benefit under the qualified parking exemption. Employers could offer PEV charging at a parking facility owned by the employer, reimburse employees who use a parking garage that bundles parking and charging costs, or contract with a third-party vendor that bundles parking and charging.

The value of the parking benefit is assessed by determining the fair market value of the benefit—the cost of the benefit if offered by a third-party provider.⁵⁴ This cost is based on the value of access to parking, not on actual use of parking by an employee.⁵⁵ A search of parking garages in the Washington, DC, metro area identified multiple examples of PEV chargers in public garages where charging was provided at no additional cost above the standard parking rates.⁵⁶ However, in some cases, additional fees applied for PEV charging.

One potential limitation is that Treasury regulations cap the value of qualified parking that may be excluded from an employee's gross income to \$255 per month (for 2016).⁵⁷ However, if the total cost of the parking and charging

⁴⁷ 26 U.S.C. § 132(a)(5); see 26 U.S.C. § 132(f).

⁴⁸ 26 U.S.C. § 132(f).

⁴⁹ See 26 U.S.C. § 132(f).

⁵⁰ 26 U.S.C. § 132(f)(5)(C).

⁵¹ For purposes of the qualified parking fringe, “employee” does not include self-employed individuals. See 26 U.S.C.A. § 132(f)(5)(E).

⁵² Treas. Reg. § 1.132-9 (b), Q&A(4). Qualified parking cannot include any parking on or near an employee’s residence.

⁵³ See 26 U.S.C. § 132(f)(5)(C); Treas. Reg. § 1.132-9; I.R.S. Publication 15-B Employer’s Tax Guide to Fringe Benefits (2016).

⁵⁴ Internal Revenue Service Notice 1994-3 I.R.B. 14, *Qualified Transp. Fringes Under Section 132* (1993); see also 26 C.F.R. § 1.61-21.

⁵⁵ Internal Revenue Service Notice 1994-3 I.R.B. 14, *Qualified Transp. Fringes Under Section 132* (1993).

⁵⁶ See, e.g., Colonial Parking garage, 1326 H St NW Washington, DC 20005. Fees determined from survey of parking garage PEV charging fees using PlugShare. <http://www.plugshare.com/?latitude=38.895185&longitude=-77.036366&spanLat=0.335077&spanLng=0.986023>.

⁵⁷ I.R.S. Publication 15-B Employer’s Tax Guide to Fringe Benefits (2016).

exceeds the \$255 monthly qualified parking limit, only the benefit in excess of \$255 would need to be reported as gross income.⁵⁸ This could still provide workplace charging at a discounted rate if the value of the parking benefit (independent of the vehicle charging benefit) does not exceed \$255.⁵⁹

It is less clear that complimentary workplace charging could be exempted as a qualified transportation fringe than that it might be considered a de minimis fringe. In the letter responding to Sen. Wyden, IRS Commissioner Koskinen specifically addressed how the IRS would evaluate whether a specific instance of complimentary workplace charging would be exempted as a de minimis fringe,⁶⁰ but there is no analogous IRS statement or guidance on how complimentary workplace charging might be exempted as a qualified transportation fringe. (Sen. Wyden’s letter to the IRS did not address workplace charging qualifying as a qualified transportation fringe.)

Requests for IRS Clarification

As discussed above, U.S. Senator Ron Wyden, as well as former Rep. Dave Camp (R-MI), sought clarification from the IRS on the taxability of complimentary workplace PEV charging. Senator Wyden, ranking member of the Senate Committee on Finance, sent a letter to the IRS in March 2015 that discussed the importance of complimentary workplace charging as a policy that promotes widespread PEV adoption and requested that the IRS issue guidance explicitly identifying complimentary workplace PEV charging as a de minimis fringe benefit.⁶¹ IRS Commissioner John Koskinen replied to Sen. Wyden in an April 2015 letter (‘IRS Letter’), which clarified how the IRS might assess whether complimentary workplace charging would qualify as a de minimis fringe under current regulations and guidance.⁶²

The IRS Letter also noted that the IRS may provide guidance in the future to clarify this issue, and that the IRS would include Sen. Wyden’s letter as a recommendation to provide guidance in its 2015-2016 Priority Guidance Plan, which identifies tax issues that the IRS should address through published guidance.⁶³ To date, the IRS has not included the taxability of complimentary workplace electric vehicle charging as a priority issue in its 2015-2016 Priority Guidance Plan.⁶⁴

The IRS also addressed the taxability of workplace PEV charging in a letter to former U.S. Representative Dave Camp.⁶⁵ In December 2011, the IRS Office of the Chief Counsel responded to a request for clarification by Representative Camp by stating that, while “all accessions to wealth” (including benefits) are generally taxable as gross income, some benefits can be excluded if they qualify under a “specific exclusion for certain benefits that the Congress chose not to tax.”⁶⁶ The letter then provides the Internal Revenue Code definition of a de minimis fringe and provides examples from statute and IRS guidance of fringes that do and do not qualify as de minimis.⁶⁷

⁵⁸ If the combined value of the parking and free workplace charging exceeds \$255, the employer must report the difference between the exempt value (\$255) and the value of the benefit provided as taxable income, unless the employer charges the employee for difference in value.

⁵⁹ Employees cannot “bank” unused qualified parking value from month to month. Treas. Reg. § 1.132-9.

⁶⁰ IRS Commissioner John Koskinen letter to U.S. Senator Wyden.

⁶¹ Letter from U.S. Senator Ron Wyden to IRS Commissioner John Koskinen.

⁶² IRS Commissioner John Koskinen letter to U.S. Senator Wyden.

⁶³ *Id.*

⁶⁴ Department of the Treasury, 2015-2016, Second Quarter Update Priority Guidance Plan (released February 5, 2016). <https://www.irs.gov/uac/Priority-Guidance-Plan>.

⁶⁵ Letter from Internal Revenue Service to Representative Dave Camp (December 23, 2011) <https://www.irs.gov/pub/irs-wd/12-0008.pdf>; Info. Letters, IRS INFO 2012-0008 (Mar. 30, 2012).

⁶⁶ *Id.*

⁶⁷ The letter noted that it was not binding legal advice or a definitive ruling. *Id.*

Regulatory Options for Policymakers

The current ambiguous tax treatment of complimentary workplace electric vehicle charging creates an uncertainty for employers who wish to offer charging as a benefit to employees. Under current law, regulation, and agency guidance, it is unclear whether complimentary workplace electric vehicle charging may qualify as a de minimis fringe or qualified transportation fringe and whether the value of the charging must be reported as taxable employee income. There are several statutory and regulatory actions that could be taken to provide employers with clarity on this issue.

Internal Revenue Service Guidance

The April 2015 letter from IRS Commissioner Koskinen noted that the IRS may provide guidance to clarify whether complimentary workplace charging qualifies as a de minimis fringe. The IRS likely would provide guidance in the form of the annual Publication 15-B Employer's Tax Guide to Fringe Benefits. The IRS annually publishes the Employer's Tax Guide to Fringe Benefits to provide more detailed information and examples to employers on the employment tax treatment of fringe benefits.⁶⁸

The IRS could explicitly include workplace charging as an example of a de minimis fringe benefit. Alternatively, the IRS could explicitly state that electric vehicle charging may be bundled with parking under the qualified transportation fringe benefit. The IRS did not include any explicit mention of workplace electric vehicle charging in the 2016 update to its annual fringe benefit guidance. As discussed above, the IRS has not included the taxability of complimentary workplace electric vehicle charging as a priority issue in its 2015-2016 list of tax issues that the IRS should address through published guidance.⁶⁹

Internal Revenue Service Revenue Ruling

The IRS could issue a revenue ruling, which provides an official interpretation of the Internal Revenue Code. A revenue ruling applies the tax law to a specific set of facts, and may be relied on by other taxpayers with similar circumstances.⁷⁰ For example, the IRS could issue a revenue ruling that examines a scenario for workplace charging and finds that in that circumstance, the employer could treat the benefit as a de minimis fringe. This would provide clarity to other employers in similar circumstances.

Treasury Department Rulemaking

The U.S. Department of the Treasury and the IRS could promulgate a regulation that explicitly includes complimentary workplace charging as either a de minimis fringe or qualified transportation benefit.⁷¹ The IRS generally conducts rulemaking by publishing a proposed regulation in the Federal Register, accepting public comment, and proceeding with a final rule. Final regulations are published in the Federal Register and Internal Revenue Bulletin as Treasury Decisions.⁷²

The IRS could add a provision to Treasury regulation section 1.132-6 that explicitly states if and under what circumstances complimentary workplace charging qualifies as a de minimis fringe. This could be added to section

⁶⁸ See, e.g., I.R.S. Publication 15-B Employer's Tax Guide to Fringe Benefits (2016).

⁶⁹ Department of the Treasury, 2015-2016, Third Quarter Update Priority Guidance Plan (released April 29, 2016). <https://www.irs.gov/uac/Priority-Guidance-Plan>.

⁷⁰ Internal Revenue Service, Understanding IRS Guidance - A Brief Primer, <https://www.irs.gov/uac/Understanding-IRS-Guidance-A-Brief-Primer>.

⁷¹ The Secretary of the Treasury has authority to promulgate regulations under 26 U.S.C. § 132(o).

⁷² See Internal Revenue Service, Tax Code, Regulations and Official Guidance, <https://www.irs.gov/Tax-Professionals/Tax-Code,-Regulations-and-Official-Guidance>.

1.132-6(e), which provides examples of fringes that are excludable from income.⁷³ Alternatively, the IRS could add a clarifying provision to Treasury regulation section 1.132-9 stating that the qualified parking benefit may include electric vehicle charging bundled with parking.⁷⁴

Legislative Action

The United States Congress could amend the Internal Revenue Code to codify workplace charging as either a de minimis fringe or qualified transportation benefit under 26 U.S.C. § 132. Congress could amend the statutory definition of “qualified parking” under the qualified transportation benefit to explicitly include electric vehicle charging.⁷⁵ Alternatively, Congress could add electric vehicle charging as an additional qualified transportation benefit (the existing qualified transportation benefits are for vanpooling, transit passes, qualified parking, and qualified bicycle commuting).⁷⁶

Conclusion

The increased availability of workplace charging will be a key component to the widespread adoption of plug-in electric vehicles in the United States. Employers who already offer workplace charging as a benefit to employees have indicated that their workforces have responded very favorably to charging station installation. However, the current federal tax uncertainty faced by employers may limit employers’ willingness to offer complimentary charging to their employees.

Under current U.S. tax law, Treasury regulations, and IRS guidance, it is unclear whether and under what circumstances complimentary workplace charging may qualify for either the de minimis fringe or qualified transportation benefit exemptions. Under current IRS guidance, this determination likely must be made by employers on a case-by-case basis.

It will likely require action by the Internal Revenue Service or the U.S. Congress to provide employers with clarity on the federal tax treatment of complimentary workplace electric vehicle charging as a fringe benefit. Under the current regulatory structure, employers should consult a tax professional before making a determination of the tax treatment of complimentary workplace electric vehicle charging.

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<http://www.georgetownclimate.org/support>.

Please contact Matthew Goetz (goetz@law.georgetown.edu) with any questions.

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⁷³ See 26 CFR § 1.132-6(e).

⁷⁴ For example, this clarifying language could be added to 1.132-9(b)(4).

⁷⁵ See 26 U.S.C. § 132(f)(5)(C).

⁷⁶ See 26 U.S.C. § 132(f).