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Employer Provided Cell Phone Reality

The IRS has determined that personal usage of an employer-provided cell phone is taxable as a ‘listed property’ benefit. The premise of this paper is that the record keeping necessary to document this benefit is neither burdensome nor unreasonable. Employer-provided cell phones create a need for the IRS to determine the tax implications of the personal usage on these phones. Since it is fair to assume that personal use of these devices will occur, the IRS must decide whether that personal usage is valuable enough to tax. Whereas the early stages of cell phone adoption were marked by high-cost but low penetration and therefore a relatively small benefit overall, the current situation is exactly opposite – lower cost, but much higher penetration and larger overall benefit for employees.



There appears to be a consensus that personal usage of employer-provided cell phones should be considered a taxable benefit. The problem is twofold. First, the IRS has yet to establish and enforce clear rules for proper record keeping. The second is that employers will then be required to implement a cost-effective means of addressing those requirements. These two issues constitute the “Employer Provided Cell Phone Reality”.

IRS/Treasury Position - As stated above, employer-provided cell phones are classified as ‘listed property’, thus requiring an employer to treat any personal usage as a taxable benefit. Congress has proposed two bills to change this, however both appear to be dead in the water. In response to considerable pressure from various interest groups the IRS has requested comments from the public. Specifically, the IRS requested suggestions for “alternative approaches to simplify the procedures under which employers substantiate an employee’s business use of employer-provided cell phones”.

Cell phones are specifically defined as “listed property” by the IRS ⁽¹⁾. This is very clearly stated and leaves no room for “interpretation”. It states that “listed property” includes “*any cellular telephone (or other similar telecommunications equipment)*”. Proper taxing to IRS specifications on cell phone service expenses requires detailed documentation ⁽²⁾. In the employer provided cell phone environment it is up to the employer to document and make provisions for the employee to pay for personal usage.

The following comes from an IRS page defining “Employee Cell Phones” for Government Entities. It appears as though this would cover both private and public sector employees since it primarily focuses on the tax implications to employees of employer provided cell phones.

Substantiation Requirements⁽⁴⁾

To be able to exclude the use by an employee from taxable income from an employer-owned cell phone, the employer must have some method to require the employee to keep records that distinguish business from personal phone charges. If the telephone is used exclusively for business, all use is excludable from income (as a working condition fringe benefit). The amount that represents personal use is included in the wages of the employee. This includes individual personal calls, as well as a pro rata share of monthly service charges.

In general, this means that unless the employer has a policy requiring employees to keep records, or the employee does not keep records, the value of the use of the phone will be income to the employee.

At a minimum, the employee should keep a record of each call and its business purpose. If calls are itemized on a monthly statement, they should be identifiable as personal or business, and the employee should retain any supporting evidence of the business calls. This information should be submitted to the employer, who must maintain these records to support the exclusion of the phone use from the employee’s wages.

The following situations illustrate the application of the rules:

Example 1: A municipal government provides an employee a cell phone for business purposes. The government’s written policy prohibits personal use of the phone. The government routinely audits the employee’s phone billings to confirm that personal calls were not made. No personal calls were actually made by the employee. The business use of the phone is not taxable to the employee.

Example 2: A municipal government provides an employee a cell phone for business purposes. The government’s written policy prohibits personal use of the phone. However, the government does not audit phone use to verify exclusive business use. The fair market value of the phone, plus each monthly service charge and any individual call charges are taxable income to the employee, reportable on Form W-2.

Example 3: A state agency provides an employee with a cell phone and pays the monthly service charge. The employee is required to highlight personal calls on the monthly bill. The employee is then required to timely reimburse the agency for the cost of the personal calls, and the employee is charged a pro rata share of the monthly charge. The value of the business use portion of the phone is not taxable to the employee.

Employer Position - Many employers and interest groups have criticized the IRS position referenced above saying it is too burdensome on both the employer and employees. The argument is that the IRS is expecting too much record keeping and that alternate methods for taxing must be developed. Alternate methods have been proposed that are thought to be less burdensome. In response, the IRS has provided a summary description of three simplified methods it is considering as a result of comments issued in response to IRS Notice 2009-46 - *Substantiating Business Use of Employer-Provided Cell Phones*⁽⁵⁾. Others have since critiqued those methods and modified or tweaked them to address perceived shortcomings. All the methods attempt to find a compromise solution that is equitable but not burdensome. All of the alternate methods are lacking for one common reason: they attempt to estimate the amount of benefit without doing any real or meaningful accounting. The result for the IRS is that it still gets its tax revenue and the employer is still liable for enforcing one of the methods.

IRS Response - All three Simplified Substantiation Methods referenced above require management and accountability from the employer. The employer is also responsible for publishing and enforcing a 'cell phone personal use' policy.

In the '***Minimal Personal Use Method***', an employer is required to "*prove with sufficient records*" that "*the employee maintains and uses a personal cell phone for personal purposes during employee work hours.*" The IRS is reviewing 2 approaches to this. One approach requires the employee to provide sufficient records to his employer to establish that he or she uses a personal cell phone for personal calls during work hours. Another approach would be to allow minimal usage such as so many minutes per billing period or certain types of calls. Both approaches maintain the employer as liable for managing the tax implications of personal usage on employer provided cell phones during work hours.

In the '***Safe Harbor Substantiation Method***', the employer "*would treat a certain percentage of each employee's use of an employer-provided cell phone as business usage.*" The employer establishes a single percentage distribution of usage between business and personal usage for all employees. They use 75% business and 25% personal as an example. This is a simple solution, but creates an interesting issue. It implies that the employer has accepted the fact that the employee will spend 25% of their cell phone minutes making personal calls. Is this something employers want to imply? That assumption penalizes employees that seldom or never make personal calls by forcing them to pay taxes for a fringe benefit they do not use, while rewarding those that abuse the unmanaged personal use policy.

In the '***Statistical Sampling Method***', the IRS will "*allow employers to use statistical sampling techniques to measure an employee's personal use*". The results of such a sampling would then be used by the employer as a basis for calculating the ratio of personal versus business usage for each employee. If calculated on an individual basis, this method would address the potential problem that arises from an employee paying taxes on a fringe benefit they do not use. It may require periodic adjustments for changes in usage patterns. Both the Safe Harbor and Statistical Sampling Methods require management commitment and effort for implementation.

Employer Solutions - Out of their desire to be in compliance with tax legislation and avoid an IRS audit, many employers have elected to pay their employees a stipend. They correctly believe that providing employees a negotiated corporate discount (from the cell phone carrier) and a sufficient cell phone stipend, employees should be satisfied with using their personal cell phone for business. The employee is in effect more than reimbursed for the business usage. This addresses the IRS audit concerns and appears to work from the employee's perspective, but can be an expensive solution as we will see later.

Other employers have taken more of a "***Modified Minimal Personal Use***" approach. They may tell employees officially that they are not to use the phone for personal use, though enforcement and auditing are rare. These employers have taken the stance that personal use of these phones is a petty item not worthy of corporate or IRS concern. Other employers fall into the stricter enforcement group that audits and manages personal use of the cell phones more closely and/or enforces a 'no personal use' policy.

Effect of Employer Solutions - When the employer provides cell phone stipends, the employee's personal cell phone is used for both business and personal communications. In this case, the responsibility for documenting shifts from the employer to the employee, who is then left with two choices. The first and probably most common choice is for the employee to ignore the tax implications, believing that they have been 'more than compensated' for the business use of the phone. This choice could provide the government an annual tax revenue windfall of \$203.04 per cell phone, as documented in the in the example below because 1) taxes were paid, but not reclaimed on deductible business expenses, and 2) it is clearly burdensome for an employee to log all their business calls in order to legitimately quantify and therefore deduct the business portion of their cellular phone expense. The second choice is where the business expense portion of a personal cell phone is fully accounted for and claimed on the personal income tax filing. Even then it is impossible for all of the income related taxes

already paid through the employer to be recouped due to rules regarding itemization and employer-paid FICA.

The following table indicates the magnitude of the problem with stipends and unmanaged employer provided cell phone plans. With a stipend, the entire payment to the employee is taxable as income, thereby requiring the \$203.04 in state and federal income-related taxes paid to be shared by the employer and employee. In the stipend environment the employers place the burden of proof on the employee, presuming that the employee will ultimately recoup taxes paid on any business cell phone use via an itemized tax filing⁽³⁾.

Policy Comparison for \$39.99 Carrier Plans (see Attachment A for full disclosure)

Basic 450 Min Plan \$39.99	MONTHLY					ANNUAL				
	Discounted Plan Cost (15% IL) (25% CL)	Carrier Billing w/Taxes	Income Related Taxes	Employer Portion of Cost	Employee Portion of Cost	Income Related Tax Cost	Employer Cost	Employee Cost	Total Cost	Employer Savings
Stipend Policy (\$40 Stipend)	\$33.99	\$40.79	\$16.92	\$43.06	\$14.65	\$203.04	\$516.72	\$175.80	\$692.52	\$0.00
Employer Paid Plan - 20% personal	\$29.99	\$35.99	\$3.04	\$29.34	\$9.69	\$36.54	\$352.12	\$116.31	\$468.43	\$164.60
Employer Paid Plan - 40% personal	\$29.99	\$35.99	\$6.09	\$22.70	\$19.38	\$73.08	\$272.35	\$232.62	\$504.97	\$244.37
Employer Paid Plan - 80% personal	\$29.99	\$35.99	\$12.18	\$9.40	\$38.77	\$146.15	\$112.81	\$465.23	\$578.04	\$403.91
Employer Paid Plan - 90% personal	\$29.99	\$35.99	\$13.70	\$6.08	\$43.62	\$164.42	\$72.92	\$523.39	\$596.31	\$443.80

The above table indicates that it is in the employer’s interest to manage the cell phones they provide given the current IRS tax policy. Employers are able to save \$16,460.00 more per year (versus issuing a stipend) for every 100 cell phone plans, assuming only 20% personal use by the employee. If employee use reaches 40%, the savings can jump to over \$24,000 per year on the same 100 phones! In light of this analysis, stipends seem a very expensive, undesirable solution.

Will the IRS change its determination on personal usage of employer provided cell phones? It is always difficult to say what the government will do in a particular situation. If the question is “Will the government choose not to collect legitimate tax revenue?”, the answer is obvious. The government is going to get its ‘pound of flesh’ one way or another. It will not walk away from what it deems to be a reasonable tax, regardless of the burden it places on the employer to adhere to the rules. The only way to avoid the added burden required for an employee to recoup the expense when he/she is paid a stipend is by over-paying on taxes.

Employer Options – As the focus of employers is usually on making a profit, they are primarily focused on controlling their cell phone expenses, and secondarily meeting the IRS criteria for reporting the taxable benefit for personal usage. The more ways the process can benefit the employer and possibly even benefit the employee, the better it is. Employers need to take control of the situation, keeping the following in mind:

1. It is in the employer’s interest for selected employees to have cell phones during work hours.
2. Cell phone expenses are sizable enough to warrant management.
3. Cell phone usage and expenses in business will continue to increase.
4. Personal usage is currently, and likely will continue to be a taxable benefit.
5. A zero tolerance for personal use is impractical.
6. It is undesirable for employees to use personal, unmanaged cell phones during work hours.

Accepting the aforementioned facts, it follows that the employers who address and manage cell phone usage within their organization will be on the right track insofar as this issue is concerned.

One important question regarding the topic at hand is ‘What is it about cell phone usage that makes it difficult to manage?’ The answer, quite simply, is this: lots of data! An average user may make 140 calls per month or more. An organization with 500 cell phones would have 70,000 call records per month to log and analyze. Text messaging could double that amount. On top of that there is the monthly recurring subscriber charges for minutes of service purchased, text messaging, data service, directory service, ring tones, etc. Add all of this to the fact that most organizations use multiple carriers on different billing cycles, all of whom generate unbelievably complex billing data files. What organization wants to deal with that? Further analysis will provide insight into the magnitude and resolution of these issues as they apply to beneficially managing the employer cell phone environment.

Some Analysis - Given that the employer has access to massive amounts of data the carriers produce, they are in a much better position to streamline or systematize the classification of calls as being either business-related or personal. Certainly this process needs to be automated, especially given the quantity of data, and what follows is a suggestion for doing just that.

Managed services are available that take billing data from multiple carriers and combine it into a single database, thereby allowing employers to have better management of their cellular phones. In the simplest implementation, once the carrier sends the data (either via media or internet download) the service provider processes the data against a managed database of subscribers. The service then notifies employee subscribers that they may now log into the system in order to properly classify their usage as either business or personal. Variations of the service would also allow for individual employees to see all of the charges levied to their employer’s account for their subscription, thereby providing a subscriber audit of the charges. Another benefit to employers who make use of such a system is that they can easily distribute the costs to departments, and even automatically integrate this into their accounting system.

Regarding the actual classification of cell phone usage, the author suggests that the determination as to business or personal usage be made on the basis of the number dialed. Though not perfect, most would agree that it is very rare that an individual would make several calls to the same number that classified as business in some cases, but personal in others. Basing the classification on the number dialed is also attractive from another perspective. On a month-to-month basis, the number of ‘new’ numbers dialed decreases dramatically, meaning that after only a few months, most employee/subscribers would see roughly 10 new numbers each month – hardly a burden!

Whereas the data from the carriers is voluminous and complex, it is also comprehensive, generally well organized, and manageable. Matsch Systems, Software as a Service (SaaS) solution provider out of Grand Rapids, Michigan, has developed a substantial amount of expertise in analyzing cellular billing data. In the case of one Midwest university, Matsch analyzed the billing data from 146 users of employer-provided cell phones. The following is a synopsis of the analysis, which spanned better than one year.

Analysis of Voice Connections by Month (146 Employer Provided Cell Phone Subscribers over 13 Month Period)

Average Per Month	1	2	3	4	5	6	7	8	9	10	11	12	13
Calls Per Subscriber	145	150	140	135	138	127	124	129	118	137	144	148	132
Unique Numbers	27	28	26	25	26	24	25	26	24	27	27	28	26
New Numbers	27	16	12	10	10	8	8	8	7	9	8	12	8

Over the period in question, individual subscribers averaged 136 voice connections per month, connecting to twenty-six unique phone numbers, ten of which were connections to numbers appearing for the first time. Having built a database containing each employee’s business and personal numbers dialed, Matsch

was able to process each month's billing detail against the accumulated data in that database. Doing so allowed employees to classify only those numbers that they had not already classified. As mentioned, after a few short months, each subscriber needed only to classify approximately ten new numbers each month as personal or business. (Note: As indicated by the data presented, there was a slight drop in numbers during the summer months due to the seasonal nature of most colleges and universities.) Though not considered in this study, it is reasonable to assume that the monthly average of new number connections could be reduced even further by pre-defining (as business use) all calls to known employer DID and other employer provided cell phone numbers.

Conclusion - Cellular management services/systems enable employers to manage their cell phone services properly, comply with IRS rules, and likely save money in the process. Investments in services like those provided by Matsch provide a fast, quantifiable, ROI. Cellular management systems enable employers to take advantage of the carrier's best discounts, while at the same time providing excellent business information often suitable for better managing a mobile workforce. Of course, these benefits are not available when a stipend policy is in place.

Well-managed cellular services facilitate employers purchasing only that combination of subscriptions that provides them the best value for their needs. Probably the best example of this is an employer setting up a shared minute pool for each selected carrier. In this case, the employer would order a combination of base plans (those with actual minutes attached) and a number of zero-minute, or 'add-a-phone' subscriptions. Tracking actual usage allows the employer to very quickly estimate the number of minutes needed in the 'pool'. They can then modify the base plans accordingly. In these pooled environments the employer is not only able to minimize the cost per purchased minute, but also able to virtually eliminate overage charges. This is all possible because with such a service the employer is able to bill subscriptions internally that differ from the subscription ordered from the carrier. The carrier bills the employer the normal way based on the subscriptions it sees in place, the employer uses an internally developed chargeback and management scheme of their own design to distribute subscription charges internally.

Other benefits of cellular management systems result from combining all of the cellular billing data in a single, carrier agnostic database. The wealth of information contained in the database is accessible to management and accounting personnel. Reporting possibilities are virtually limitless. Organizations taking advantage of these systems can also audit carrier bills against their own internal policies and procedures.

Matsch Systems believes that the nature of managing employer-provided cell phones is ideally suited for a SaaS (Software as a Service) solution provider like Matsch. Matsch has developed the CMS SaaS Suite of Services to provide employers a cost effective service for addressing their cellular management needs.

About Matsch Systems - Matsch Systems, (<http://www.matsch.com/>) provides turnkey systems and services for managing telecommunication information. Matsch telemanagement solutions are used for call accounting, traffic analysis, directory management, equipment and feature tracking, work order and trouble ticket processing, cable and circuit tracking, charge back billing, the resale of telephone service, rebilling of cellular services, cellular management, and smart-phone call record generating applets. Matsch customers include Fortune 500 Companies, small businesses, state and local governments, hospitals, utilities, banks, colleges and universities. Established in 1978, Matsch has installations throughout the United States and several foreign countries. Utilizing the latest in service models, Matsch has developed a comprehensive suite of SaaS (Software as a Service) telecommunication management applications that it hosts for its clients. Matsch's leading services include: NET-Phacs Call Accounting, NET-Phacs Plus Enhanced Call Accounting, NET-Bill Telephone Services Resale, CMS / Cellular Management Service, CMS+ / Cellular Management Plus Services, CRS / Cellular Rebilling Service, MobilNow / Cellular Call Record Generator Applet. Matsch Systems is a subsidiary of Matsch Financial Systems, LTD of Grand Rapids, Michigan, USA.

ATTACHMENT A

Detailed Comparison of Stipend vs. Managed Employer Paid Plan Model

	Discounted Plan Cost (15% IL) (25% CL)	Projected Carrier Bill (est. 20% Tax)	Employer FICA 7.65%	Employee FICA 7.65%	State Income Tax 2%	Federal Income Tax 25%	Total Income Related Taxes	Total Monthly Plan Cost	Employer Portion of Cost	Employee Portion of Cost	Annual Tax Cost	Annual Employer Cost	Annual Employee Cost	Total Annual Cost	Employer Savings Annually
Basic \$39.99 450 Minute Plan															
Stipend Policy (\$40 Stipend)	\$33.99	\$40.79	\$3.06	\$3.06	\$0.80	\$10.00	\$16.92	\$57.71	\$43.06	\$14.65	\$203.04	\$516.72	\$175.80	\$692.52	\$0.00
Employer Paid Plan - 20% personal	\$29.99	\$35.99	\$0.55	\$0.55	\$0.14	\$1.80	\$3.04	\$39.04	\$29.34	\$9.69	\$36.54	\$352.12	\$116.31	\$468.43	\$164.60
Employer Paid Plan - 40% personal	\$29.99	\$35.99	\$1.10	\$1.10	\$0.29	\$3.60	\$6.09	\$42.08	\$22.70	\$19.38	\$73.08	\$272.35	\$232.62	\$504.97	\$244.37
Employer Paid Plan - 80% personal	\$29.99	\$35.99	\$2.20	\$2.20	\$0.58	\$7.20	\$12.18	\$48.17	\$9.40	\$38.77	\$146.15	\$112.81	\$465.23	\$578.04	\$403.91
Employer Paid Plan - 90% personal	\$29.99	\$35.99	\$2.48	\$2.48	\$0.65	\$8.10	\$13.70	\$49.69	\$6.08	\$43.62	\$164.42	\$72.92	\$523.39	\$596.31	\$443.80

NOTES:

- With a Stipend plan the employee may be able to recoup some, but not all, income related taxes paid by using itemized deductions on their tax filing
- With the Employer Paid Plans any portion not defined as personal would be business by default, income related taxes were paid in the normal payroll process

Discounted Plan Cost	- Basic 450 Minute Plan less 15% discount for (IL) individual liable and 25% for (CL) corporate liable
Projected Carrier Bill	- Discounted plan cost plus an 20% for estimated taxes and surcharges
Employer FICA Tax	- 7.65% of stipend benefit paid by employer on employee's taxable income
Employee FICA Tax	- 7.65% of stipend benefit paid by employee on their taxable income
State Income Tax	- Based on a 2% state income tax assumption (some States are considerably higher and others have not tax)
Federal Income Tax	- Based on a federal income tax rate of 25% for taxpayers with from \$33,950 to \$82,250 in taxable income
Total Inc. Rel. Taxes	- Total of FICA, State, and Federal taxes based on taxable income from Stipend or employee's portion of bill paid with after-tax employee dollars
Total Mthly Plan Cost	- Carrier Bill plus Total Income Related Taxes for a Total Monthly Plan Cost
Employer Portion	- The portion of the Total Monthly Plan Cost paid by the employer (the actual monthly plan cost to the employer)
Employee Portion	- The portion of the Total Monthly Plan Cost paid by the employee (the actual monthly plan cost to the employee)
Annual Tax Cost	- The Total Income Related Taxes for a month projected out for 12 months
Annual Employer Cost	- The Employer Portion of Total Monthly Plan Cost projected out for 12 months
Annual Employee Cost	- The Employee Portion of Total Monthly Plan Cost projected out for 12 months
Total Annual Cost	- The Total Monthly Plan Cost projected out for 12 months
Employer Savings	- The Employer Savings Annual is the difference between the Annual Employer Cost with Stipend and with the other Employer Paid Plan options

Notes:

- (1) - see IRC Section 280F (d)(4)(A)(v)

Sec. 280F. Limitation on depreciation for luxury automobiles; limitation where certain property used for personal purposes

(d) Definitions and special rules
For purposes of this section -

(4) Listed property

(A) In general
Except as provided in subparagraph

(B), the term "listed property" means -

(i) any passenger automobile,

(ii) any other property used as a means of transportation,

(iii) any property of a type generally used for purposes of entertainment, recreation, or amusement,

(iv) any computer or peripheral equipment (as defined in section 168(i)(2)(B))

(v) any cellular telephone (or other similar telecommunications equipment), and

(vi) any other property of a type specified by the Secretary by regulations.

- (2) - see IRC Section 274(d) (4)

Sec. 274. Disallowance of certain entertainment, etc., expenses

(d) Substantiation required
No deduction or credit shall be allowed -

(4) with respect to any listed property (as defined in section 280F(d)(4)), unless the taxpayer substantiates by adequate records or by sufficient evidence corroborating the taxpayer's own statement (A) the amount of such expense or other item, (B) the time and place of the travel, entertainment, amusement, recreation, or use of the facility or property, or the date and description of the gift, (C) the business purpose of the expense or other item, and (D) the business relationship to the taxpayer of persons entertained, using the facility or property, or receiving the gift. The Secretary may by regulations provide that some or all of the requirements of the preceding sentence shall not apply in the case of an expense which does not exceed an amount prescribed pursuant to such regulations. This subsection shall not apply to any qualified nonpersonal use vehicle (as defined in subsection (i)).

- (3) - see Treasury Reg 1.274-5T(e)

Sec. 1.274-5T Substantiation requirements (temporary).

(e) Substantiation of the business use of listed property made available by an employer for use by an employee--(1) Employee--(i) In general. An employee may not exclude from gross income as a working condition fringe any amount of the value of the availability of listed property provided by an employer to the employee, unless the employee substantiates for the period of availability the amount of the exclusion in accordance with the requirements of section 274(d) and either this section or Sec. 1.274-6T.

- (4) - see the IRS page last updated on 12/03/08 regarding Government "Employee Use of Cell Phones"
<http://www.irs.gov/govt/fslg/article/0,,id=167154,00.html>

Notes: *continued*

(5) - **Direct quote from IRS Notice 2009-46 - *Substantiating Business Use of Employer-Provided Cell Phones***

The IRS and Treasury Department contemplate that any taxpayer who wishes to use a simplified cell phone substantiation method will be required to implement a written policy that requires employees to carry and use the employer-provided cell phones in connection with the employer's trade or business and that prohibits personal use of employer-provided cell phones, except for minimal personal use, similar to the requirements currently applicable to employer-provided automobiles in § 1.274-6T. In addition, the IRS and Treasury Department anticipate requiring that the employer must reasonably believe that the cell phone is not used for personal purposes except for minimal personal use.

1. Minimal Personal Use Method

The IRS and Treasury Department are considering two proposals that would allow an employer to deem all of an employee's usage of an employer-provided cell phone as business usage. Under the first proposal, the entire amount of an employee's use of an employer-provided cell phone would be deemed to be for business purposes if the employee can account to his or her employer with sufficient records to establish that the employee maintains and uses a personal (non-employer-provided) cell phone for personal purposes during the employee's work hours.

Alternatively, the second proposal would define a specified amount or type of "minimal" personal use that would be disregarded in determining the amount of personal use of an employer-provided cell phone. For example, "minimal" could be defined by reference to a particular number of minutes of use or for certain personal purposes.

2. Safe Harbor Substantiation Method

The IRS and Treasury Department are considering a safe harbor method under which an employer would treat a certain percentage of each employee's use of an employer-provided cell phone as business usage. The remaining percentage of use would be deemed to be for personal purposes. For this proposal, the IRS and Treasury Department propose a business use percentage of 75 percent.

3. Statistical Sampling Method

The IRS and Treasury Department are considering a proposal that would allow employers to use statistical sampling techniques to measure an employee's personal use of an employer-provided cell phone. In general, an employer could use an approved statistical sampling methodology similar to that provided in Rev. Proc. 2004-29, 2004-1 C.B. 918, to determine the percentage of personal use of employer-provided cell phones. The employer would multiply that percentage times the value of each employee's total usage to determine the value of personal usage. The remaining portion of the employee's usage would be deemed to be for business purposes.

B. Simplified Fair Market Value Determination

To the extent that an employee's use of an employer-provided cell phone does not qualify as a working condition fringe benefit (because the employer does not satisfy § 274(d) or the cell phone is used partially for personal purposes), the fair market value of an employee's use of the employer-provided cell phone is a taxable fringe benefit that is includable in the employee's gross income. An employer's cost to provide the cell phone is not determinative of the fair market value of an employee's fringe benefit. The IRS and Treasury Department are interested in understanding the methods employers currently use to arrive at the fair market value to an employee of an employer-provided cell phone. The IRS and Treasury Department are considering whether a simplified valuation method would be helpful and appropriate to determine such fair market value.