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Subject: IRS Update

We have received important news from the IRS regarding states who jointly employ workers in state self direction programs and therefore make third party overtime and travel time payments.

Per the IRS, states who serve as third party employers under the FLSA are likely to be considered statutory employers under Section 3401(d)(1) of the Internal Revenue Code.

States have sought to separate payments they make as 3401(d)(1) statutory employers to workers in self direction programs from payments they make as common law employers to state employees. Specifically, states sought to obtain a second EIN to be used solely for third party payments made to workers in self direction programs. States considered it important to make clear that workers in self direction programs were not common law employees of the state.

However, it was not clear as to whether obtaining a second EIN was allowable for this purpose.

NRCPDS brought this question to IRS counsel and has worked extensively with them to reach a definitive answer to this question.

IRS counsel recently confirmed that states are permitted to obtain a second EIN and that there is no legal reason states may not obtain a second EIN for purposes of making third party payments as a 3401(d)(1) employer. However, states who obtain a second EIN should proceed with caution.

IRS counsel stated that obtaining a second EIN is a business decision to be made by a state, and having a second EIN may have unforeseen legal consequences if not used carefully.

If a second EIN is obtained, use it only for third party payments made as a 3401(d)(1) employer. Do not use the second EIN for any purposes other than reporting third party payments and filing and paying associated taxes.

States who obtain a second EIN to make third party payments can appoint a reporting agent to handle payroll and tax procedures associated with that EIN.

NRCPDS is available to provide technical assistance on this topic by request. Please

contact us at info@participantdirection.org for more information.

Sincerely,

Your team at the National Resource Center for Participant-Directed Services (NRCPDS).

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