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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

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Attention:

Dear _____ :

I am responding to your request dated May 22, 2023, for a letter ruling in which you discussed your concerns about _____ performing work as independent contractors instead of as employees under close and ongoing supervision.

This letter calls your attention to certain general principles of the law under IRC § 3121 and to procedural requirements for ruling requests. It is intended for informational purposes only and does not constitute a ruling. See Rev. Proc. 2023-1, §2.04, 2023-1 IRB 9 (Jan. 3, 2023).

Section 3121(d)(2) of the Internal Revenue Code (the Code) defines “employee” as any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

The question of whether an individual is an employee under the common law rules or an independent contractor is one of fact to be determined upon consideration of the facts and the application of the law and regulations in a particular case. Guidance for determining that status is found in two substantially similar sections of the applicable Employment Tax Regulations: section 31.3121(d)-1 relating to the Federal Insurance Contributions Act (FICA), and section 31.3401(c)-1 relating to federal income tax withholding.

Section 31.3121(d)-1(c)(2) of the regulations provides that, generally, the relationship of employer-employee exists when the person for whom the services are performed has the right to direct and control the individual who performs the services not only as to the

result to be accomplished by the work, but also as to the details and means by which that result is accomplished. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he or she has the right to do so. Section 31.3401(c)-1 of the regulations has a similar provision.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, it is of no consequence that the employee is designated as partner, co-adventurer, agent, or independent contractor or the like.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or autonomy must be considered. In doing so, one must examine the relationship of the worker and the business. Relevant facts generally fall into three categories: (1) behavioral controls, (2) financial controls, and (3) the relationship of the parties.

Behavioral controls are evidenced by facts which illustrate whether the service recipient has a right to direct or control how the worker performs the specific tasks for which he or she is hired. Facts which illustrate whether there is a right to control how a worker performs a task include the provision of training, the issuance of instruction, or the completion of an evaluation.

Financial controls are evidenced by facts which illustrate whether the service recipient has a right to direct or control the financial aspects of the worker's activities. These factors include the method of payment, the worker's opportunity for profit or loss, and whether a worker has made a significant investment, incurred unreimbursed expenses, or made services available to the relevant market.

The relationship of the parties is generally evidenced by the parties' agreements and actions with respect to each other, including facts which show not only how they perceive their own relationship but also how they represent their relationship to others. Facts which illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts, the provision of or lack of employee benefits, the right of the parties to terminate the relationship, the permanency of the relationship, and whether the services performed are part of the service recipient's regular business activities.

As you had indicated, we can only consider issuing a letter ruling to a taxpayer or authorized representative on a proposed or completed transaction regarding the tax consequences of a transaction in which that taxpayer is directly involved. See Rev. Proc. 2023-1, §6.06. Moreover, the Service generally does not issue letter rulings or determination letters to business, associations or groups trade, or industrial associations or to similar groups concerning the application of the tax laws to members of the group. *Id.*, §6.05.

Also, the Service cannot rule, for purposes of determining prospective employment status, whether an individual will be an employee or an independent contractor. See Rev. Proc. 2023-3, §3.01(118), 2023-1 IRB 144 (Jan. 3, 2023). However, a ruling with regard to prior employment status may be issued. Letter ruling requests regarding employment status (employer/employee relationship) generally must be submitted to the Internal Revenue Service as set forth in the current instructions for Form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*. The letter ruling will apply to any individuals engaged by the firm under substantially similar circumstances. Section 12.04 of Rev. Proc. 2023-1 provides information on requests regarding employment status made by taxpayers other than federal agencies and instrumentalities or their workers.

Your letter also requested official guidance on this matter. Please be aware that Section 530(b) of the Revenue Act of 1978 prohibits the Service from issuing regulations or revenue rulings with respect to the employment status of any individual for purposes of employment taxes.

I hope this information is helpful. If you have any additional questions, please contact our office at

Sincerely,

Senior Technician Reviewer
Office of the Associate Chief Counsel
(Employee Benefits, Exempt Organizations, and
Employment Taxes)