

## **EMPLOYEE BORROWING AGREEMENT**

This Employee Borrowing Agreement (this "Agreement") is entered into effective as of the \_\_\_\_ day of \_\_\_\_\_, 2020 (the "Effective Date") between and among \_\_\_\_\_ (the "Supplier Agency"), and \_\_\_\_\_ (the "User Agency"). Collectively, the Supplier Agency and the User Agency are referred to herein as the "Parties" and each a "Party."

### **WITNESSETH:**

WHEREAS, the Supplier Agency employs individuals with differing areas of expertise and skills ("Employees") who provide day services to consumers in Ohio with developmental disabilities;

WHEREAS, the User Agency primarily provides residential services to consumers in Ohio with developmental disabilities;

WHEREAS, the United States in general, and the State of Ohio in particular, is experiencing a public health crisis growing out of the spread of the COVID-19 virus and, as a result, staffing shortfalls may occur in the operations of User Agency and Supplier Agency may experience a drastic reduction in services provided;

WHEREAS, the Parties desire to agree upon an arrangement for borrowing employees of Supplier Agency to work for User Agency which is anticipated to be mutually beneficial for the purpose of meeting the direct care needs of the consumers served as well as offering the Employees the opportunity to continue employment rather than face layoff;

WHEREAS, the Supplier Agency is willing to allow the User Agency to borrow Employees upon the terms and conditions set forth herein; and

WHEREAS, the Parties wish to set forth in writing their agreement as to the borrowing of the Employees and the associated expenses.

NOW THEREFORE, for and in consideration of the premises and promises set forth herein, the parties hereto agree as follows:

1. Borrowing of Employees. Supplier Agency agrees to allow User Agency to borrow the services of such individuals as the Parties shall mutually agree from time to time (the "Borrowed Employees"). To borrow an Employee, the User Agency must provide written notice (email is acceptable) to the Supplier Agency of the type and number of individuals it needs, the location of the worksite where the individual(s) is (are) needed, any physical demands that will be part of the essential work functions of the individual, and the date and time the individual needs to report for the first time (the "Notice"). Within an agreed upon timeframe by the Parties, the Supplier Agency shall instruct one of the Employees to report and will provide to the User Agency the name and contact information (cell phone number preferred) for the Employee who has been assigned. User Agency will have no role in the assignment of Employees to become Borrowed Employees other than as set forth in the content of the Notice. Supplier Agency must ensure that every Borrowed Employee has the legal authorization to work in the United States.

2. Expense Rate. The User Agency shall pay to the Supplier Agency the hourly rate of \_\_\_\_\_ (as same may be amended or supplemented from time-to-time by mutual agreement of the Parties) [INTERNAL NOTE TO USER AGENCY/PLEASE REMOVE AFTER REVIEWING: USERS

OF AGREEMENT MAY NEED TO MODIFY IF A BUSINESS REASON EXISTS FOR SOME EMPLOYEES TO HAVE A HIGHER RATE THAN OTHERS – USER AGENCY MUST EXERCISE CAUTION TO NOT GET INVOLVED IN SETTING SUPPLIER AGENCY’S WAGE RATES], multiplied by the hours, or fractions thereof, actually worked by the Borrowed Employee pursuant to this Agreement. The Supplier Agency shall provide to the User Agency a detailed monthly written invoice itemizing all hours worked pursuant to this Agreement by each Borrowed Employee and the applicable hourly rate, and the Party shall pay such invoiced amount to the other Party as provided for in such invoice.

3. Required Training, Background Checks, and Testing. In accordance with memorandum entitled, “Guidance: Providers of Waiver-Funded Services,” issued by the Ohio Department of Developmental Disabilities on March 14, 2020, the Supplier Agency shall provide a written statement to the User Agency that the Borrowed Employee has training, background checks, and drug testing (if applicable) required under applicable rules and regulations for the specific position, prior to the Borrowed Employee providing services. Ensuring that the Borrowed Employee has the required training, background checks, and testing shall be the sole obligation of the Supplier Agency, which shall be responsible for any associated costs of same. The Borrowed Employee must still receive person-specific training (including crisis intervention, if necessary) and site emergency response training by the User Agency prior to providing services. The User Agency shall have the sole obligation to provide (and cost of providing) person-specific training. Because the User Agency controls the facilities in which Borrowed Employees work, it is agreed that the User Agency is primarily responsible for compliance with the Occupational Safety and Health Act (“OSHA”) and any comparable state law or regulation to the extent those laws apply to Borrowed Employees assigned to the User Agency’s workplaces.

4. Employment Relationship. The Parties acknowledge that the Supplier Agency is the employer of every Borrowed Employee and not the User Agency. The Supplier Agency, therefore, shall be responsible for all employment related costs and expenses, including all compensation, and all applicable federal, state and local income and withholding taxes, and social security taxes, and any employment related insurance and/or workmen’s compensation obligations and other employment costs. The Supplier Agency shall also be responsible for compliance, at its sole expense, with all applicable laws and regulations applicable to the Borrowed Employees, including without limitation regulatory, wage/hour, immigration, recordkeeping, and accommodation obligations. Borrowed Employees shall not be entitled to holidays, vacations, disability, insurance, or any other benefits offered or provided by the User Agency to its employees, and will be informed by Supplier Agency that they are employees of the Supplier Agency and are not employees of User Agency. The User Agency, however, will provide reasonable cooperation and assistance, to the extent necessary, to the Supplier Agency in connection with the Supplier Agency’s compliance with the obligations mentioned in this paragraph. By way of example and not of limitation, the User Agency will provide to the Supplier Agency during each workweek of the Supplier Agency the total number of hours the Borrowed Employee has worked at a User Agency’s worksite. The Parties recognize that the User Agency has the absolute right, as a property owner and licensed provider of services to a disadvantaged population, to control who is permitted access to its property. Accordingly, the Parties understand and agree that the User Agency shall have the right, notwithstanding any other provision of this Agreement to the contrary, to prohibit any Borrowed Employee from returning to the User Agency’s property for any reason.

5. Administration. The Supplier Agency shall be responsible for hiring, replacing, disciplining and terminating the employment of all of its Employees and the Borrowed Employees. The User Agency will provide such day-to-day direction of the work of the Borrowed Employees as necessary with respect to the services provided by the Borrowed Employees under this Agreement. Under no circumstances will Borrowed Employees have any supervisory, management, or decision making authority with respect to the User Agency’s business. Moreover, User Agency shall have no authority, on

behalf of Supplier Agency or otherwise, to transfer, discharge, promote, suspend, or otherwise discipline any Borrowed Employee placed with User Agency pursuant to this Agreement. Nor shall User Agency have the authority to make, suggest, or influence any employment decision with respect to the Borrowed Employees, or any individual Borrowed Employee.

6. Notifications. User Agency will notify the Supplier Agency immediately of any complaint of unlawful discrimination, retaliation, or harassment by or any workplace injury, accident or illness of the Borrowed Employee related to the Borrowed Employee's assignment to or work for the User Agency. Supplier Agency will do the same for the User Agency.

7. Hold Harmless. Each Party shall indemnify, defend and hold the other Party harmless from and against any and all tort claims made by or on behalf of a person against a Party as a result of any act, error or omission of any other Party, and any liability arising from or in connection with a Party's business. The Supplier Agency shall indemnify, defend and hold harmless the other Parties from and against any and all claims made by or on behalf of a Borrowed Employee or any government agency as a result of any alleged non-compliance by a Party with any law or regulation applicable to the Borrowed Employees, except for those claims that are solely related to an alleged violation of a law or regulation by an agent of User Agency.

8. Breach of Contract.

- a. User Agency Breach - The following will constitute a breach of this Agreement by the User Agency: (1) failure to pay any agreed fee within time provided under Paragraph 2; (2) failure to comply with any reasonable request of the Supplier Agency or any regulatory agency with respect to the Borrowed Employees or this Agreement; (3) the commission of any act that interferes with the Supplier Agency's rights as the employer of the Borrowed Employees; or (4) appointment of a receiver or conservator for a Party or its assets.
- b. Supplier Agency Breach - The following shall constitute a breach of this Agreement by the Supplier Agency: (1) failure to pay the Borrowed Employees any and all wages and benefits with respect to services performed under this agreement when due; (2) failure to pay all payroll taxes relating to compensation of Borrowed Employees relating to services performed under this Agreement when due; (3) failure to comply with any reasonable request of a using Party or any regulatory agency with respect to the Borrowed Employees or this Agreement; or (4) appointment of a receiver or conservator for a Party or its assets.

9. Term. This Agreement shall commence on the Effective Date and shall continue until terminated as follows:

- a. Any Party may terminate this Agreement for any reason by giving thirty (30) days prior written notice of such termination to the other parties;
- b. The Supplier Agency may terminate this Agreement upon fifteen (15) days prior written notice to the User Agency in the event of the failure of the User Agency to make any payment owed to the Supplier Agency pursuant to Paragraph 2 of this Agreement when due, and the failure to make such payment continues for a period of thirty (3) days after written demand to the User Agency for such payment has been made by the Supplier Agency; or

c. The Parties may terminate this Agreement by their mutual written consent.

10. Governing Law. This Agreement shall be governed by and construed pursuant to the laws of the State of Ohio.

11. Entire Agreement. This Agreement constitutes the entire agreement between the parties and supersedes any and all other agreements between them relating to the subject matter hereof.

12. Successors and Assigns. This Agreement and all of its terms, covenants, and provisions shall inure to the benefit of and be binding upon the parties and their respective successors and assigns.

13. Amendment. This shall be amended only by a written instrument signed by both Lessor and Lessee.

14. Assignment. Neither this Agreement, nor the rights and duties of the parties hereunder, may be assigned by Lessor or Lessee without the prior written consent of the other.

15. Confidentiality. The Parties acknowledge that their respective employees and the Borrowed Employees may be given access to or acquire information which is proprietary or confidential to the User Agency or the Supplier Agency or their affiliated companies, clients, or consumers. Any and all such information obtained by either Party shall be deemed to be confidential and proprietary information. Both Parties agree to hold such information in strict confidence and not to disclose such information to third parties or to use such information for any purposes whatsoever other than in connection with the provision of services under this Agreement. Borrowed Employees may be required to execute any confidentiality agreement the User Agency may reasonably require. If such an agreement is required, Borrowed Employees who refuse to execute such agreement will not be assigned to work for User Agency.

16. ACA Obligations. Consistent with this Agreement, Supplier Agency acknowledges that, for purposes of The Patient Protection and Affordable Care Act (“ACA”), it, rather than User Agency, is the common-law employer of the Borrowed Employees. As the common-law employer, Supplier Agency is the employer responsible for complying with the ACA and all rules and regulations thereunder (including without limitation the employer’s shared responsibility provisions, as codified in Internal Revenue Code (“Code”) Section 4980H and its implementing regulations, and the reporting requirements as codified in Code Sections 6055 and 6056) with respect to the Borrowed Employees. Consistent with its obligations in this Agreement, Supplier Agency shall offer minimum essential coverage that is affordable and provides minimum value and otherwise complies with all ACA requirements (“ACA Coverage”) to all Borrowed Employees who would be classified as full-time, under the 30 hours or more per week standard of the ACA, based on the work coordinated by Supplier Agency. User Agency shall notify Supplier Agency in writing if any Borrowed Employee performs additional services for User Agency and any related entity that is not arranged through Supplier Agency. Although Supplier Agency and User Agency both agree that Supplier Agency is the common-law employer of the Borrowed Employees, User Agency shall pay an additional monthly fee for each Borrowed Employee during the term of this Agreement and who elects to enroll in ACA Coverage offered by Supplier Agency so that, pursuant to Treasury Regulation Section 54.4980H-4(b)(2), Supplier Agency’s offer of ACA Coverage to the Borrowed Employee shall be treated as being made on behalf of User Agency for purposes of Code Section 4980H. If User Agency is determined by any applicable third party (including, without limitation, any government body, entity or agency) to have been the common-law employer of any Borrowed Employee such that User Agency would be responsible for compliance with the ACA and all rules and regulations thereunder (including without limitation Code Sections 4980H, 6055 and 6056), Supplier Agency agrees to indemnify, defend, and hold harmless User Agency and its parent, subsidiaries,

directors, officers, agents, representatives, and employees from and against all claims, losses, penalties, liabilities, expenses and costs (including attorneys' fees and court costs) resulting from such determinations, including but not limited to, any penalties, excise taxes or assessable payments that might be assessed with respect to the Borrowed Employees, to the extent such penalties would not be assessed if the Borrowed Employees had not been determined to be the common-law employees of User Agency.

17. Limitations on Hire of Borrowed Employees. User Agency acknowledges that Supplier Agency incurs substantial expenses for recruiting, testing, training and retaining the Borrowed Employees and User Agency therefore agrees to obtain the services of each Borrowed Employee only through the process described in this Agreement. If User Agency desires to hire directly a Borrowed Employee, either during the Borrowed Employee's assignment at User Agency or for a period of one year after such assignment ends, it must pay to Supplier Agency a fee of \_\_\_\_\_ within thirty (30) days of the individual beginning full-time, direct employment with User Agency.

IN WITNESS WHEREOF, the undersigned have set their hands effective as of the Effective Date.

\_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

\_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_