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The Honorable Duncan Hunter
U.S. House of Representatives
Washington, DC 20515

Attention:

Dear Mr. Hunter:

This letter responds to your inquiry dated August 22, 2011, on behalf of your constituent, . works as a caregiver for her disabled adult daughter and asked about employment taxes for individuals providing care to disabled adult children.

Generally, an employment relationship exists for federal tax purposes if the service recipient has the right to direct and control the worker. The service recipient does not have to actually direct or control the manner in which the worker performs the services but must have the right to do so. [See Treasury Regulation sections 31.3121(d)-1, 31.3401(c)-1]. If an employment relationship exists, the law may require that the service recipient (employer) withhold and pay federal employment taxes. Employment taxes include Federal Insurance Contributions Act (FICA) tax and federal income tax withholding.

If a worker does household work, she or he may be a household employee and the service recipient may be an employer whom the law requires to withhold and pay household employment taxes. See Publication 926, *Household Employer's Tax Guide*, available on www.irs.gov. Household work is work done in or around a home, such as by caretakers, health aides, nannies, private nurses, and yard workers. If no employment relationship exists, employment taxes are not owed. If an employment

relationship exists, the employer and the household employee are each subject to FICA tax if the wages exceed a threshold amount. For 2011, the threshold amount is \$1,700. However, the employer and employee will not owe FICA tax if the household employee is:

- The employer's spouse
- The employer's child under the age 21
- The employer's parent, with an exception for certain household services provided by grandparents
- A person under the age of 18 if not the person's principal occupation

[sections 3121(b)(3) and (21) of the Internal Revenue Code (the Code)].

The law does not require employers to withhold federal income tax from wages paid to household employees [section 3401(a)(3) of the Code]. However, if the employee requests withholding and the employer agrees, the employer must withhold income tax from wages [section 3402(p) of the Code]. In this case, the employee must complete Form W-4, Employee's Withholding Allowance Certificate, to instruct the employer on how much income tax to withhold.

Employers generally use Schedule H (Form 1040), Household Employment Taxes, to report employment taxes for household employees. The employer must also file Form W-2, Wage and Tax Statement and furnish copies to the employee. However, the employer may designate another party to act as its agent for employment tax purposes [section 3504 of the Code]. In other cases, the third party may be liable for any applicable employment taxes, if the third party controls the payment of wages [section 3401(d)(1) of the Code]. In both cases, however, the identity of the service recipient employer determines whether any employment taxes are due.

If a worker is not an employee, the compensation received for performing services may be self-employment income subject to tax under the Self-Employment Contributions Act (SECA taxes). Self-employment income generally consists of the net earnings from a trade or business carried on by the individual [section 1402 of the Code]. An individual carries on a trade or business if they engage in the activity with continuity and regularity, and their primary purpose is for income or profit. If an individual does not carry on a trade or business, SECA taxes do not apply.

If FICA or SECA taxes do not apply, individuals cannot contribute to the social security system; nor can another entity, such as the state, contribute on their behalf.

I hope this information is helpful. Please contact me or _____ of my staff
at () _____ if we can further assist you.

Sincerely,

Paul J. Carlino
Chief, Employment Tax, Branch 1
Office of the Division Counsel/Associate
Chief Counsel (Tax Exempt & Government
Entities)