

TELEMARKETERS (TELEPHONE SOLICITORS)

The purpose of this information sheet is to provide the telemarketing industry with guidance regarding who should be reported to the Employment Development Department (EDD) as employees. The primary focus of this information is on telephone solicitors. A telephone solicitor is an individual that contacts prospective customers by telephone to sell goods or services or to seek a donation.

WHO IS AN EMPLOYEE?

An "employee" includes all of the following:

- Any officer of a corporation.
- Any worker who is an employee under the usual common law rules.
- Any worker whose services are specifically covered by law. (Refer to Information Sheet: *Statutory Employees* [DE 231SE].)

An employee may perform services on a less than full-time or permanent basis. The law does not exclude services from employment that are commonly referred to as day labor, part-time help, casual labor, temporary help, probationary, or outside labor.

Who Is a Common Law Employee?

Whether an individual is an employee for the purpose of Section 621(b) of the California Unemployment Insurance Code (CUIC) will be determined by the usual common law rules applicable in determining an employer-employee relationship. To determine whether one performs services for another as an employee, the most important factor is the right of the principal to control the manner and means of accomplishing a desired result. The right to control, whether or not exercised, is the most important factor in determining the relationship. The right to discharge a worker at will and without cause is strong evidence of the right to control. Other factors to take into consideration are:

1. Whether or not the one performing the services is engaged in a separately established occupation or business.
2. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of a principal without supervision.

3. The skill required in performing the services and accomplishing the desired results.
4. Whether the principal or the person providing the services supplies the instrumentalities, tools, and the place of work for the person doing the work.
5. The length of time for which the services are performed to determine whether the performance is an isolated event or continuous in nature.
6. The method of payment, whether by the time, a piece rate, or by the job.
7. Whether or not the work is part of the regular business of the principal, or whether the work is not within the regular business of the principal.
8. Whether or not the parties believe they are creating the relationship of employer and employee.
9. The extent of actual control exercised by the principal over the manner and means of performing the services.
10. Whether the principal is or is not engaged in a business enterprise or whether the services being performed are for the benefit or convenience of the principal as an individual.

Another consideration relative to employment is whether or not the worker can make business decisions that would enable him or her to earn a profit or incur a financial loss. Investment of the worker's time does not show a risk of loss.

The numbered factors above are evidence of the right to control. These factors are described more fully in Section 4304-1 of Title 22, California Code of Regulations. A determination of whether an individual is an employee will depend upon a grouping of factors that are significant in relation to the service being performed, rather than depending on a single controlling factor.

The courts and the California Unemployment Insurance Appeals Board (CUIAB) have held that the existence of a written contract is not, by itself, a determining factor. The actual practices of the parties in a relationship are more important than the wording of a contract in determining whether a worker is an employee or independent contractor.

Examples

The CUIAB has previously considered the status of telemarketers. The CUIAB has generally held that telemarketers are employees and not independent contractors in cases where they work under some or all of the following circumstances:

- The telemarketers are given a sheet to follow when arranging appointments.
- The telemarketers are not engaged in a distinct occupation or business of their own.
- The telemarketers are working for the benefit of the principal's business.
- The telemarketers do not require any prior experience and are trained by the principal.
- The principal pays the cost of the telephones and provides the tools necessary for the telemarketers.
- The employment relationship can be terminated by the telemarketers or the principal without any liability incurred by either party.
- The telemarketers are paid at the end of each week based on the amount of appointments they make.

In *Smith v. Department of Employment* (1976) 62 Cal. App. 3d 206, the court held that telephone solicitors were employees and enumerated the following additional factors indicating employment:

1. The work done does not constitute a distinct occupation or business.
2. The work is unskilled, requiring no special training, experience, or education.
3. Although the telephone solicitors pay for the room, supplies, and telephones they do not provide these instrumentalities, and are liable for such payments only by way of deductions from their gross commissions, if sales are made.
4. The work is part of the regular business of the principal.

The above-mentioned cases may not encompass the entire set of factors used in establishing an employee status and are presented here as examples only. The status will be determined on a case-by-case basis by applying the applicable CUIC sections to the specific facts existing in a particular working relationship.

ADDITIONAL INFORMATION

For further assistance, please contact the Taxpayer Assistance Center at (888) 745-3886 or visit the nearest Employment Tax Office listed in the *California Employer's Guide* (DE 44) and on the EDD's Web site at www.edd.ca.gov/Office_Locator/. Additional information is also available through EDD's no-fee payroll tax seminars and online courses. View the in-person and online course offerings on the EDD's Web site at www.edd.ca.gov/Payroll_Tax_Seminars/.

The following EDD resources are also available to help determine the correct classification of the workers.

Employment Determination Guide (DE 38)

The guide asks a series of "Yes" or "No" questions regarding the treatment of workers to help determine if a worker is most likely an employee or an independent contractor and whether you need to seek additional guidance. To obtain this guide, access the EDD's Web site at www.edd.ca.gov/pdf_pub_ctr/de38.pdf.

Determination of Employment Work Status for Purposes of California Employment Taxes and Personal Income Tax Withholding (DE 1870)

The form provides a series of questions regarding the working relationship between the principal and the workers. After the form has been completed and returned, EDD will issue a written determination stating whether the workers are employees or independent contractors based on the facts provided. To obtain this form, access the EDD's Web site at www.edd.ca.gov/pdf_pub_ctr/de1870.pdf.

The EDD is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Requests for services, aids, and/or alternate formats need to be made by calling (888) 745-3886 (voice) or TTY (800) 547-9565.

This information sheet is provided as a public service and is intended to provide nontechnical assistance. Every attempt has been made to provide information that is consistent with the appropriate statutes, rules, and administrative and court decisions. Any information that is inconsistent with the law, regulations, and administrative and court decisions is not binding on either the Employment Development Department or the taxpayer. Any information provided is not intended to be legal, accounting, tax, investment, or other professional advice.