

EMPLOYMENT

Generally, employment occurs when an employer engages the services of an employee for pay. An “employer” can be any employing unit, such as a sole proprietor, joint venture, partnership, limited liability company, or corporation. An “employer” can also include associations, trusts, charitable foundations, nonprofit organizations, public entities, and other organizations. An individual is determined to be an “employee” under the usual common law rules or by application of specific statutes.

WHO IS AN EMPLOYER?

Under Section 675 of the California Unemployment Insurance Code (CUIC), a business becomes an employer when it employs one or more employees and pays wages in excess of \$100 during any calendar quarter. Wages are compensation for personal services performed, including, but not limited to, cash payments, commissions, bonuses, and the reasonable cash value of nonmonetary payments for services, such as meals and lodging.

Once a business becomes an employer, a registration form from the DE 1 series must be completed and submitted within 15 days to the Employment Development Department (EDD). Employers are responsible for reporting wages paid to their employees and paying Unemployment Insurance (UI) and Employment Training Tax (ETT) on those wages, as well as withholding and remitting State Disability Insurance* (SDI) and Personal Income Tax (PIT) due on wages paid.

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.

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 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 result.
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 is not sufficient to 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 relationship to the service being performed, rather than depending on a single controlling factor.

The courts and the California Unemployment Insurance Appeals Board 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.

* Includes Paid Family Leave (PFL).

Who Is an Employee/Employer by Specific Statute of Law? (Refer to Information Sheet: *Statutory Employees* [DE 231SE])

A worker not considered to be a common law employee may be a statutory employee by law for purposes of UI, ETT, and SDI under circumstances which include, but are not limited to, the following:

- An agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry cleaning services for his or her principal. See **Note** below.
- A traveling or city salesperson, other than an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his or her principal (except for sideline sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations. See **Note** below.
- A home worker performing services according to the specifications furnished by the person for whom the services are performed on materials or goods furnished by such person which are required to be returned to such person or a person designated by him or her. See **Note** below.

Note: For the above statutory provisions to apply, the contract of hire must contemplate that substantially all the services are to be performed personally by the worker. In addition, an individual performing services in the above three occupational categories would not be considered a statutory employee if the individual has a substantial investment in facilities used in connection with the performance of such services, other than facilities for transportation, or if the services are in the nature of a single transaction not part of a continuing relationship with the employing unit for which the services are performed.

- An author engaged to create a work of authorship that was specially ordered or commissioned by another party. The parties must expressly agree in writing that the work shall be considered a work made for hire and that the ordering or commissioning party obtains ownership of all the rights comprised in the copyright in the work.
- Any member of a limited liability company that is treated as a corporation for federal income tax purposes. Refer to Information sheet: *Limited Liability Entities* (DE 231LLC).
- An unlicensed construction worker engaged to perform services for which a contractor's license is required (i.e., a contractor who hires unlicensed construction workers or subcontractors is the employer of those workers or subcontractors). Refer to Information Sheet: *Construction Industry* (DE 231G).

WHO IS NOT AN EMPLOYEE?

Independent contractors are not employees. They are engaged in separately established bona fide businesses. A bona fide business is subject to profit or loss. They usually contract to perform a specific task and have the right to control the way the work is to be accomplished. They have a substantial investment in the business and customarily perform services for more than one business. Generally speaking, they are anyone who is not an employee under the common law rules unless they are statutory employees.

SERVICES OF EMPLOYEES THAT ARE NOT COVERED (Refer to Information Sheet: *Exempt Employment* [DE 231EE]).

Services of certain employees are specifically excluded by law, and their wages are not subject to UI, ETT, and SDI. Examples of such employees include, but are not limited to, the following:

- Family members, but restricted to:
 1. A child under 18 years of age in the employ of his or her biological or adoptive parent or parents;
 2. An adult in the employ of his or her biological or adopted child or children; or
 3. An individual in the employ of his or her spouse or registered domestic partner (defined in Section 297 of the Family Code).

This exclusion can apply only to sole proprietorships and partnerships where the worker has one of the above referenced relationships with all partners. The wages paid to such workers are subject to PIT withholding and reportable as PIT wages.

- Students under the age of 22 enrolled full-time in an academic institution and performing services for credit under a work experience program. Wages paid to such workers are subject to PIT withholding and reportable as PIT wages.
- Direct salespersons. Refer to Information Sheet: *Salespersons* (DE 231N).

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) or 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_Seminar/.

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.

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