

## REPORTING WAGES AND MAKING PAYMENTS FOLLOWING AN ASSESSMENT FOR MISCLASSIFIED WORKERS

When the Employment Development Department (EDD) determines that one or more workers classified by the employer as independent contractors should have been classified as employees, the determination applies to both past and future periods. The EDD's Notice of Assessment serves as official notice of the EDD's determination to the employer as provided by the California Unemployment Insurance Code (CUIC). The employer should begin to report misclassified workers for State payroll tax purposes. The following information will assist employers making business decisions regarding tax payments and wage reporting.

### BUSINESS DECISION OPTIONS

As a result of the EDD's determination that workers are employees rather than independent contractors, the employer is faced with the following decisions with respect to State payroll tax responsibilities.

#### 1. Should the assessment for payroll taxes be paid?

Generally, the employer will pay the assessment if the employer agrees with the audit determination.

Note: If the assessment includes liabilities for failure to withhold Personal Income Tax (PIT) from employee wages, the employer may be able to reduce the amount of PIT and associated penalties and interest that are owed. Please refer to Information Sheet: *Personal Income Tax Adjustment Process* (DE 231W) for additional information.

The EDD recognizes that an audit assessment may represent a large liability that cannot be paid immediately. Therefore, the EDD will consider an installment agreement to pay a liability resulting from an assessment. Entering into an installment agreement does not prevent the issuance of a Notice of State Tax Lien. Please refer to Information Sheet: *Installment Agreement* (DE 631P) for additional information.

If the employer disagrees with the determination and files a petition for reassessment, the employer may decide not to pay the assessment until the California Unemployment Insurance Appeals Board (CUIAB)

issues a decision on the case. Any decision to delay payment of the assessed liability will normally increase interest charges.

If the employer disagrees with the assessment and files a petition for reassessment, the assessment can be prepaid to avoid the cost of accruing interest. With this prepayment, the employer's petition converts automatically to a claim for refund of the disputed amount.

If the employer pays the liability to avoid accruing interest and the petition for review of a claim for refund is resolved in the employer's favor, the EDD will refund any amount that has been overpaid plus interest, as provided in Section 1181 of the CUIC.

#### 2. Should a petition for reassessment be filed with the CUIAB to appeal the audit determination(s) and assessment(s)?

Every employer has the right to file a petition for reassessment, which generally must be filed within 30 days after an assessment is issued to be timely (see the Notice of Assessment for specific petition rights and procedures). The employer may file a petition for reassessment when the employer disagrees with the EDD's determination that the workers are employees, that they are the actual employer, or with the amount or period of the assessment(s). Petitions are filed with the CUIAB, which is an independent body established to hear and render decisions on petitions filed. Refer to Information Sheet: *Petition for Reassessment or Review* (DE 1009) for additional information.

To assist the employer in deciding whether to file a petition, the auditor explains the basis for the audit assessment and the employer's petition rights. The auditor will also offer the employer a pre-assessment conference, which is attended by the auditor and the auditor's supervisor. If the employer does not fully understand the reasons for the assessment or otherwise wishes to meet and discuss the audit results, the employer should contact the auditor or supervisor to schedule a conference prior to the expiration of the period for filing a petition. The final decision to file a petition rests solely with the employer.

**3. Should the workers be reported as employees for payroll tax purposes after the period of the assessment?**

Whether the employer agrees or disagrees with the audit determination, the EDD's position is that the workers held to be employees in the audit should be reported as employees for periods following the assessment. The employer must decide whether to report the workers' wages for the subsequent periods. The EDD may issue assessments for periods subsequent to the assessment and, if the employer disagrees with these assessments, the employer would need to file a separate petition for reassessment to avoid liens and other collection activity while the original petition is pending.

The EDD routinely conducts follow-up audits when a petition for reassessment is resolved and the CUIAB upholds the EDD's determination. If the employer did not report the workers' wages for the periods following the original assessment, the employer will be subject to back taxes (including amounts that should have been withheld from employee wages), plus any applicable penalties and interest.

If, however, the employer reports the workers' wages and the petition is resolved in the employer's favor, the employer may file a claim for refund of the taxes paid for periods after the assessment. The

EDD will generally approve these claims for refund when the workers, for whom taxes were paid, are determined to have performed services under the same conditions as the workers covered by the assessment and CUIAB decision.

The attached decision chart has been developed to assist the employer in evaluating the various options available for both the periods covered by the assessment and future periods.

**ADDITIONAL INFORMATION**

For questions regarding this information sheet or the time limits for filing a claim for refund, 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/](http://www.edd.ca.gov/Office_Locator/). Additional information is also available through EDD's no-fee payroll tax seminars. View the in-person course offerings on the EDD's Web site at [www.edd.ca.gov/Payroll\\_Tax\\_Seminars/](http://www.edd.ca.gov/Payroll_Tax_Seminars/).

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.

## Decisions to Make With Respect to the Assessment

Options	Effect on Interest	Effect on Penalties	Effect on EDD Collection Actions	Effect on PIT Adjustments**	Petition Results
Pay the assessment in full or enter into an approved installment agreement with the EDD,* and do not file a petition for reassessment.	Interest charged on the unpaid balance to date of payment.	Additional 10% penalty under Section 1135 of the CUIIC will be charged on any unpaid balance after 30 days from the date of the Notice of Assessment.	If paid in full, there is no collection action.	Properly completed form(s) DE 938P and/or DE 6028P may result in a refund and/or credit for PIT and associated penalties and interest.	Not applicable.
File a petition for reassessment, and pay the assessment in full, make voluntary payments, or enter into an approved installment agreement with the EDD.*	Interest charged on the unpaid balance to date of payment.	Additional 10% penalty under Section 1135 of the CUIIC will not be charged if paid in full within 30 days from a final CUIAB decision or, if the CUIAB is "Granted in Part," within 30 days from the EDD billing.	The EDD may not institute collection action unless the employer fails to maintain the installment agreement and 30 days have elapsed following a final CUIAB decision.	Properly completed form(s) DE 938P and/or DE 6028P may result in a refund and/or credit for PIT and associated penalties and interest.	If the final CUIAB decision is in your favor, the assessment will be canceled and the amounts paid refunded with interest as provided in Section 1181 of the CUIIC. If the decision is not in your favor, the assessment becomes final 30 days from the date of the decision. At that time, an additional 10% penalty under Section 1135 of the CUIIC is charged on any unpaid contributions. Collection action may begin unless full payment is made or arrangements are made to pay the liability through an approved installment agreement.*
File a petition for reassessment and do not pay the assessment.	Interest continues to accrue on unpaid liability.	Additional 10% penalty under Section 1135 of the CUIIC does not apply until 30 days from a final CUIAB decision or, if the CUIAB is "Granted in Part," within 30 days from the EDD billing.	The EDD may not institute collection action on a petitioned liability until 30 days after a final decision is issued by the CUIAB.	Properly completed form(s) DE 938P and/or DE 6028P may result in credit for PIT and associated penalties and interest.	If the final CUIAB decision is in your favor, the assessment will be canceled. If the decision is not in your favor, the assessment becomes final 30 days from the date of the decision. At that time, an additional 10% penalty under Section 1135 of the CUIIC is charged on any unpaid contributions. Collection action may begin unless full payment is made or arrangements are made to pay the liability through an approved installment agreement.*
Do not pay the assessment nor file a petition for reassessment.	Interest continues to accrue on unpaid liability.	Additional 10% penalty under Section 1135 of the CUIIC will be charged when not paid in full within 30 days from date of the Notice of Assessment.	The EDD may institute collection action unless full payment is made or arrangements are made to pay the liability through an approved installment agreement.*	Properly completed form(s) DE 938P and/or DE 6028P may result in credit for PIT and associated penalties and interest.	Not applicable.

\*Please refer to Information Sheet: *Installment Agreement* (DE 631P), for additional information about, and qualifications for, installment agreements.

\*\*Please refer to Information Sheet: *Personal Income Tax Adjustment Process* (DE 231W), for information about seeking relief from assessed PIT.

**SEE PAGE 4 FOR ADDITIONAL INFORMATION**

## Treatment of Workers' Wages Subsequent to the Assessment

Options	Effect on Interest	Effect on Penalties	Effect on EDD Collection Actions	Effect on PIT Adjustments**	Petition Results
<p>Deduct SDI and PIT, report workers' wages, remit workers' deductions, and pay employer contributions for subsequent periods.</p>	<p>No interest charges apply if paid by due dates.</p>	<p>No penalty charges apply if paid by due dates.</p>	<p>No collection action.</p>	<p>Not applicable.</p>	<p>If you petitioned the original assessment, you should request a refund in writing with each payment to fully protect your right to a refund. If the services are performed <u>under the same circumstances</u>, a final decision in your favor will generally result in a refund and/or credit of employer contributions, worker contributions that you are able to refund to the workers, and interest thereon. The PIT deductions are not refundable when included on a Form W-2.</p>
<p>Do <u>not</u> deduct SDI and PIT, or report and pay for subsequent periods.</p> <p>Note: The EDD monitors subsequent periods and the results of petitions.</p> <p>If you have not reported the misclassified workers subsequent to the original audit, a follow-up audit may be scheduled prior to a final decision being issued or if the CUIAB decision is not in your favor.</p>	<p>If a subsequent audit is conducted, you will be assessed interest charges from due dates to the date of payment.</p>	<p>If a subsequent audit is conducted, the EDD may charge additional penalties depending on the facts and circumstances of the case. The potential penalty sections that may be charged include Sections 1112.5, 1114, 1117, 1126, 1126.1, 1127, 1128(a), 1128(b), 1128.1, 13052, and 13052.5 of the CUIC.</p>	<p>If a subsequent audit is conducted and an assessment is issued, the EDD may institute collection action unless full payment is made, a timely petition for reassessment is filed, or arrangements are made to pay the liability through an approved installment agreement.* However, an installment agreement does not prevent the issuance of a Notice of State Tax Lien.</p>	<p>If a subsequent audit is conducted and an assessment is issued, properly completed form(s) DE 938P and/or DE 6028P may result in credit for PIT and associated penalties and interest.</p>	<p>If you petitioned the original assessment and the final decision is <u>not</u> in your favor, the EDD may conduct an audit of the period subsequent to the original audit period. If the circumstances and/or laws have not changed, the EDD will issue an audit assessment covering the subsequent period.</p>

\*Please refer to Information Sheet: *Installment Agreement* (DE 631P), for additional information about, and qualifications for, installment agreements.

\*\*Please refer to Information Sheet: *Personal Income Tax Adjustment Process* (DE 231W), for information about seeking relief from assessed PIT.

**Special Note:** If you are making payments on an approved installment agreement, did not file a timely petition for reassessment, and intend to file a claim for refund, you must file a claim for refund with each payment. Your claim(s) for refund will be addressed when the assessed liability is paid in full.