

## SALESPERSONS

A salesperson is an individual engaged in the selling of merchandise or services. The salesperson can be a common law employee, an independent contractor, an employee by specific statute, or an excluded employee by specific statute.

### WHO IS AN EMPLOYEE UNDER THE USUAL COMMON LAW RULES?

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 be taken into consideration are:

1. Whether or not the one performing 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 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.

### Salespersons as Common Law Employees

In Precedent Tax Decision No. P-T-346, the California Unemployment Insurance Appeals Board (CUIAB) held the following circumstances were indications of employment:

- The salespersons received training.
- The salespersons were assigned quotas.
- The salespersons were required to follow leads.
- The salespersons were required to furnish reports.
- The salespersons were required to attend sales meetings.
- The salespersons were given expense allowances or a guaranteed salary.
- The salespersons performed services of a continuous nature.
- The salespersons' services were a direct and essential part of the business operation.

However, where the salespersons paid their own expenses, established their own hours of work and itineraries of travel, were not required to attend sales meetings or

make reports, and received direction from the principal consisting only of establishing selling prices, terms and conditions of the sale, approval of credit, and furnishing samples, literature, or order blanks, the salespersons were determined to be independent contractors.

The following is an example of salespersons who were determined to be independent contractors. In this case, the CUIAB concluded that the salespersons were not subject to control regarding the manner and means of selling the principal's merchandise (Precedent Tax Decision No. P-T-346):

The salespersons maintained their own offices and showrooms and paid their own expenses. They belonged to salespersons' organizations which promoted sales shows several times a year. All expenses in displaying and selling the petitioner's merchandise at these shows were borne by the salespersons. However, one of the salespersons occasionally used the principal's showroom and the principal's office facilities were available to him.

### **Retail Salespersons**

Retail salespersons are individuals engaged in the sale of goods or commodities directly to the consumer. Typically, they are under the direction and control of the principal and are employees of that principal. Retail salespersons may be paid by commission, salary, or by the hour. They typically perform services at a retail establishment, such as a department store, automobile showroom, etc.

### **Telemarketers (Telephone Solicitors)**

Telemarketers are individuals engaged in the sale of goods or commodities directly to the consumer through the use of the telephone. Typically, they are under the direction and control of the principal and are employees of that principal. Telemarketers may be remunerated by commission, salary, or by the hour.

The following is an example of telemarketers held to be employees of the principal:

The telemarketers were given a sheet to follow in arranging appointments. The telemarketers were not engaged in a distinct occupation or business of their own. The telemarketers were working to the benefit of the principal's business, as they arranged appointments for the principal's sales staff. The telemarketers were not required to have prior experience and were trained by the principal. The principal paid the cost of telephones and provided the tools necessary. The relationship could be

terminated by the telemarketer or the principal without any liability incurred by either party. The telemarketers were paid based on the number of appointments they made. The telemarketers were working in the regular business of the principal and the principal established the pay rate.

### **AGENT-DRIVERS OR COMMISSION-DRIVERS AND TRAVELING OR CITY SALESPERSONS**

To determine if an agent-driver or commission-driver or a traveling or city salesperson is performing services as an employee, it first must be determined whether the driver or the salesperson is an employee under the usual common law rules. If the driver or the salesperson is determined not to be an employee under the usual common law rules, the worker may still be an employee by statute if it is contemplated that substantially all of the services are to be performed personally and under either of the following conditions:

1. As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or drycleaning services for his or her principal. Refer to Section 621(c)(1)(A) of the CUIC.
2. As a traveling or city salesperson, other than as 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. Refer to Section 621(c)(1)(B) of the CUIC.

However, an agent-driver or commission-driver or a traveling or city salesperson is not an employee by statute if he or she has a substantial investment in facilities used in connection with the performance of services (other than in facilities for transportation), if the contract of service does not contemplate that substantially all of the services will be performed personally, or if the services are in the nature of a single transaction not part of a continuing relationship with the principal for whom the services are performed.

If the services of an agent-driver or commission-driver or a traveling or city salesperson are those of an employee by statute, the driver's or the salesperson's wages are subject to Unemployment Insurance (UI), Employment Training Tax (ETT), and the withholding of State Disability Insurance (SDI)\*. Their wages are not subject to California Personal Income Tax (PIT) withholding or reportable as PIT wages.

\*Includes Paid Family Leave (PFL)

The following is an example of a salesperson who was determined not to be an employee under the usual common law rules from facts not stated, but who was an employee by statute:

Salesperson A's principal business activity is the solicitation of orders from retail pharmacies on a continuing full-time basis on behalf of the X wholesale drug company. Salesperson A does, however, occasionally solicit orders on behalf of the Y and Z companies. Salesperson A's contract of service with the X company contemplates that substantially all of the services to which the arrangement relates are to be performed by him personally and he has no investment in facilities other than in an automobile.

Sideline sales activities would not overturn the "full-time" relationship with the salesperson's principal. The CUIAB has held that a salesperson who spends 80 percent of his or her time selling for one principal is engaged on a full-time basis. (Precedent Tax Decision No. P-T-329)

The above-mentioned cases may not encompass the entire set of factors used by the CUIAB in establishing an employee or independent contractor status in salespersons cases, and are presented here as examples only. The EDD and the CUIAB will determine status on a case-by-case basis by applying the applicable CUIC Sections to the specific facts existing in a particular working relationship.

## **SALESPERSON AND BROKER SERVICES THAT ARE NOT IN EMPLOYMENT**

The services of real estate, yacht, mineral, oil and gas, or cemetery brokers or real estate, cemetery, yacht, or direct sales salespersons who are employees under common law rules are excluded by statute from UI, ETT, and SDI coverage if the salesperson is an employee and all of the following conditions are met:

1. The salesperson is licensed under specific provisions of the Business and Professions Code or the Harbors and Navigation Code or is engaged in the business of primarily in-person demonstration and sales of consumer products (including services or other intangibles) in the home or sales to any buyer for resale in the home or otherwise than from a retail or wholesale establishment.
2. Substantially all of the remuneration for the services is directly related to sales rather than to the number of hours worked.

3. The services are performed under a written contract expressly providing that the individual will not be treated as an employee for state tax purposes.

Earnings for the above salespersons, except cemetery brokers, are not subject to PIT withholding or reportable as PIT wages if the above conditions are met. However, when the above criteria are met for cemetery brokers who are also common law employees, their earnings are not subject to UI, ETT, or SDI but are subject to PIT withholding and reportable as PIT wages.

### **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 access EDD's Web site at [www.edd.ca.gov/Payroll\\_Taxes/](http://www.edd.ca.gov/Payroll_Taxes/).

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 EDD's Web site at [www.edd.ca.gov/pdf\\_pub\\_ctr/de38.pdf](http://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 send a written determination stating whether the workers are employees or independent contractors based on the facts provided. To obtain this publication, access EDD's Web site at [www.edd.ca.gov/pdf\\_pub\\_ctr/de1870.pdf](http://www.edd.ca.gov/pdf_pub_ctr/de1870.pdf).

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 non-technical 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.