

TOUR OPERATOR INDUSTRY

The purpose of this information sheet is to provide guidance to the tour operator industry on properly classifying workers for employment tax purposes.

WHO IS AN EMPLOYEE?

Under Section 621(b) of the California Unemployment Insurance Code (CUIC), an employee is “any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.”

A common law employee is an individual who is hired by an individual or entity (the *principal*) to perform services and the principal has the right to exercise control over the manner and means by which the individual performs his or her services.

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 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. When those factors are considered, 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.

WHO IS NOT AN EMPLOYEE?

Independent contractors are not employees. They are engaged in a separately established, bona fide business and are subject to profit or loss. They usually contract to perform specific tasks and have the right to control the way the work is to be accomplished. They have a substantial investment in their 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.

EMPLOYEE OR INDEPENDENT CONTRACTOR?

Tax decisions by the California Unemployment Insurance Appeals Board (CUIAB) provide some guidance as to whether workers in the tour operator industry will be classified as employees or independent contractors.

For example, in a case addressing tour guides/directors, workers were found to be employees when services were provided under the following conditions:

- The principal furnished a manual for the tour guides to establish procedures or rules for dealing with various situations when performing services on a tour.
- The tour guides had very little investment in time and money and no investment in the principal's business.
- The principal reserved the right to reassign the tour guides if there were unsatisfactory evaluations.
- The tour guides/directors did not operate their own business. The work performed was a direct and essential part of the principal's business.

Conversely, an administrative law judge in a different case held tour directors to be independent contractors when working under the following circumstances:

- The tour directors exhibited the special skill of fluency in a foreign language and maintained their own library of specialized books on the regions in which they provided tour services.
- The tour directors had essentially no supervision and could modify the tour or travel arrangements without prior approval from the principal.
- The tour directors were free to provide services for others without informing the principal.
- The tour directors arranged for their own substitutes, if they were unable to complete their tour.

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 tour operator industry 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.

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 the EDD Web site at 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 problem may exist 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.

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 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.

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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