

## SERVICE INDUSTRIES

The purpose of this information sheet is to provide guidance to the services industry on properly classifying workers for California payroll taxes, which consist of Unemployment Insurance, Employment Training Tax, State Disability Insurance, and Personal Income Tax unless otherwise stated.

The services industry is based on performing work for others as an occupation or business. It includes establishments primarily engaged in providing a wide variety of services to individuals, businesses, government, and other organizations. The establishments included are hotels and other lodging places; establishments providing personal, business, repair, and amusement services; health, legal, engineering, and other professional services; educational institutions; membership organizations, and other miscellaneous services.

### WHO IS AN 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 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](#). 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.

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.

Tax decisions by the CUIAB provide some guidance as to whether the workers in the services industry will be classified as employees or independent contractors.

- (1) A janitorial service engaged the services of janitors to clean a church and office buildings. The workers performed the services under the following circumstances:
  - The janitorial service did not exercise much control after initial instruction because the work was primarily unskilled and the workers had been performing the work for a long period of time and needed no further instruction.
  - The business could have terminated the relationship with any of the workers without prior notice and without reason and the workers would have no recourse.

- The workers were not engaged in distinct businesses.
- Their work was an integral part of the janitorial business.
- The supplies and instrumentalities were provided by the owners of the building with whom the janitorial service had contracts.
- The workers were paid by salary or hourly, not by the job.
- The work was performed in furtherance of the janitorial service's regular business.

The janitorial service had the right to control the manner and means by which these workers accomplished the desired result, the result of cleaning. The business and these workers may have desired to establish a relationship of "independent worker" and may have thought they were doing so, but there was no reasonable basis for this belief. The workers were determined to be common law employees.

(2) A pet grooming and pet supplies business engaged the services of pet groomers. The pet groomers performed the services under the following circumstances:

- All services performed by the pet groomers were done in furtherance of the business.
- The business and the pet groomers made appointments for the pet groomers. The business determined the systems for assigning new work in the shop.
- The business provided the work place, all major equipment, furniture, shampoo, and dip.
- The business had a fee schedule; however, the pet groomers could charge more than the schedule depending on the work that needed to be done.
- The business determined the hours of business.
- The pet groomers reported to work daily and were expected to call in case of absence.
- Appointments were made through the petitioner and the pet groomers.
- The business determined the form of payments acceptable from customers.
- The business took the loss for bad checks. The pet groomers were paid by the business even if the customer's checks bounced.
- Checks were made payable to the business and cash payments were received through the business' cash register.
- In addition to their pet grooming duties, the pet groomers answered the phones, made appointments, did the laundry, and, in at least one instance, trained an inexperienced pet groomer and acted as store manager.
- Pet groomers could leave without notice.
- Pet groomers did not have individual business cards and did not advertise as individuals. The business provided business cards containing the business name, but no individual's name.

It is clear that the business exercised a significant and substantial degree of control over the manner and means of providing the pet grooming services. The weight of the evidence supports the conclusion that the pet groomers were employees under the usual common law rules.

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 the services industry 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 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.