

TEMPORARY SERVICES AND EMPLOYEE LEASING INDUSTRIES

Employment occurs when an employer engages the services of an employee for pay. Under the California Unemployment Insurance Code (CUIC), employee is defined as any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. In general, a worker is a common law employee when the employer has the right to direct and control the manner and means of accomplishing the desired result.

Section 606.5 of the CUIC specifies who shall be considered the employer of common law employees in the temporary services and employee leasing industries.

WHAT ARE TEMPORARY SERVICES AGENCIES AND EMPLOYEE LEASING AGENCIES, AND ARE THEY THE EMPLOYERS OF THE WORKERS THEY PLACE IN EMPLOYMENT?

Determining who is the actual employer of a worker is a two-part process. First, the worker must be an employee under the usual common law rules. If the worker is determined to be a common law employee, then the employer must be identified.

A temporary services employer and an employee leasing employer are employing units that contract with clients or customers to supply workers to perform services for the client or customer and perform **all** of the following functions:

- 1) Negotiate with clients or customers for such matters as time, place, type of work, working conditions, quality, and price of the services.
- 2) Determine assignments or reassignments of workers, even though workers retain the right to refuse specific assignments.
- 3) Retain the authority to assign or reassign a worker to other clients or customers when a worker is determined unacceptable by a specific client or customer.
- 4) Assign or reassign the worker to perform services for a client or customer.
- 5) Set the rate of pay of the worker, whether or not through negotiation.
- 6) Pay the worker from their own account or accounts.

*Includes Paid Family Leave (PFL).

- 7) Retain the right to hire and terminate workers.

If an individual or entity contracts to supply workers to perform services for a customer or client and **all** of the above seven functions are met, the individual or entity is the employer of the workers who perform the services and is required to pay unemployment insurance (UI) contributions and employment training tax (ETT). Additionally, the individual or entity is required to withhold state disability insurance (SDI)* and California personal income tax (PIT) from the wages of the employee.

Example

A temporary services company hired employee inspectors to provide quality assurance inspection services to buyers of electronic components. The inspectors performed services in suppliers' plants by following test procedures specified in purchase orders issued by the buyers. The temporary services company performed the following functions:

- Negotiated with clients (buyers) for time, place, type of work, and price of the service.
- Assigned inspectors to perform services for clients.
- Determined assignments of inspectors.
- Retained the authority to assign or reassign inspectors to other clients when an inspector was not satisfactory to a particular client.
- Set the rate of pay of the inspectors.
- Paid the inspectors directly from its business account(s).
- Retained the right to hire and terminate the inspectors.

The company providing inspection workers was the employer responsible for reporting because it performed all the functions as specified in Section 606.5 of the CUIC (refer to California Unemployment Insurance Appeals Board Tax Decision T-86-27). NOTE: Section 4304-1 of Title 22, California Code of Regulations, referred to in T-86-27 has since been incorporated into Section 606.5 of the CUIC.

Under What Circumstances Is the Client or Customer of the Agency the Employer of the Workers?

If an individual or entity who contracts to supply workers to perform services for a customer or client is not a leasing employer or temporary services employer (as described above), the client or customer would be the employer for UI/ETT/SDI and PIT purposes. If the individual or entity contracting to provide the worker pays the worker, the individual or entity would merely be the agent of the client or customer, who would still be the employer. Refer to Section 606.5(c) of the CUIC.

When Employers Loan Employees to Other Employers, Who Is the Employer of the Loaned Employees?

In circumstances where an employee is loaned by one employer to another employer, the loaning employer remains the employer responsible for paying UI and ETT and withholding SDI and PIT if the loaning employer continues to pay remuneration to the employee, whether or not reimbursed by the other employer. However, if the employer to whom the employee is loaned pays remuneration directly to the employee for services performed, that employer shall be considered the responsible employer for tax purposes for any remuneration paid to the employee by such employer. This is true regardless of whether the loaning employer also pays remuneration to the employee. Refer to Section 606.5(d) of the CUIC.

WHO IS THE EMPLOYER OF A HOUSEHOLD WORKER PLACED BY AN EMPLOYMENT AGENCY?

Additional analysis is required to determine who is the actual employer of a household worker placed in a private home by an employment agency. First, it must be established that the worker is a common law employee. Then, it must be determined whether the individual or company that placed the worker in the home is an employment agency, defined in California law* as either:

- 1) A person who, for compensation, provides or attempts to provide (a) household employment for workers or (b) household employees for private homes.
- 2) An agency that provides or attempts to provide employment by placing household workers in private homes.

If the worker is a common law employee and was placed by an employment agency, the law says the agency will not be the employer of the worker if all of the following factors exist:

*Section 1812.501 of the Civil Code

- 1) There's a signed agreement between the agency and the worker that specifies the agency will assist the worker in securing work and the worker is free to sign with other agencies.
- 2) The worker:
 - Establishes when work will be accepted and is free to reject assignments.
 - Is free to renegotiate the pay rate with the client.
 - Performs the work without training from the agency and without any direction, control, or supervision by the agency.
 - Does not pay the agency a fee for finding the job if the client does not pay.
- 3) The agency:
 - Does not train the worker.
 - Does not direct, control, or supervise the worker.
 - Is not required to pay the worker if the client does not pay.
 - Does not provide the tools, supplies, and equipment to perform the work.
 - Cannot terminate the working relationship between the worker and the client. Only those two parties may terminate the relationship.
 - Must deposit payment for the worker's services in a trust account if the client pays the agency directly. The agency cannot pay the worker from a business account.

When all of the factors above exist, the employment agency will not be the household worker's employer. The agency's client may be the employer. If one or more of the factors is not present, the person or business that placed the worker is not an employment agency under the law.* The identity of the worker's employer will be determined using Section 606.5 of the CUIC and Precedent Tax Decision P-T-473.

ADDITIONAL INFORMATION

If you have questions, you may visit your local Employment Tax Office listed in the *California Employer's Guide* (DE 44) and on our Web site at www.edd.ca.gov/taxrep/taxloc.htm#taxloc. You may also call us at 1-888-745-3886.

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