

PRODUCT DEMONSTRATORS

The purpose of this Information Sheet is to provide the product demonstrator industry with standards to be used in conjunction with Section 4304-1, Title 22 of the California Code of Regulations (CCR), to determine whether a product demonstrator should be classified as an employee or independent contractor.

What is a Product Demonstrator?

A "product demonstrator" is an individual who distributes coupons, demonstrates or gives away samples of products as part of an advertising or sales promotion for the product.

What is a Principal?

A "principal" is any principal or their agent, e.g., manufacturer, wholesaler, broker, marketing firm, demonstration company, or retail store.

Employee or Independent Contractor?

Section 4304-1 CCR provides that the most important factor is the right of the principal to control the manner and means of accomplishing the desired result, whether or not that right is exercised, an employer-employee relationship exists. Section 4304-7 CCR says, "The purpose of this Section is to provide the product demonstrator industry with standards to be used in conjunction with Section 4304-1 (to determine) whether a product demonstrator is performing services as an employee or independent contractor."

Product Demonstrator Determination Factors

The Table of Determination Factors, which follows, includes examples indicating an employee and an independent contractor as well as an explanation of the weight given to each factor or the elements of a factor as provided in Section 4304-7 CCR. It is not necessary that all factors apply to one classification

or another in order to make a determination that a particular relationship exists. A determination of whether services are performed as an employee or independent contractor will depend upon a grouping of factors that are significant in relation to the services being performed.

Ruling Request

If you would like to request a formal ruling, you may download the Determination of Employment Work Status (DE 1870) form from our Web site at www.edd.ca.gov/taxrep/de1870.pdf, access our Fax on Demand at 1-877-547-4503, or contact the Taxpayer Assistance Center at 1-888-745-3886. For more information, refer to Information Sheet: Employment Work Status Determination (DE 231ES) available at www.edd.ca.gov/taxrep/de231es.pdf or contact the above listed telephone numbers. The completed DE 1870 should be mailed to:

Employment Development Department
FACD – Central Operations, MIC 94
P.O. Box 826880
Sacramento, CA 94280-0001

Additional information

Specific questions or assistance regarding the employment status of product demonstrators may be directed to the nearest Employment Tax Office listed in the California Employer's Guide (DE 44), from our Web site at www.edd.ca.gov/taxrep/taxloc.htm#taxloc, or contact our Taxpayer Assistance Center at 1-888-745-3836.

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

TABLE OF DETERMINATION FACTORS - PRODUCT DEMONSTRATORS

FACTORS	EXAMPLES OF:		WEIGHT
	EMPLOYEE	INDEPENDENT CONTRACTOR	
1. EXTENT OF CONTROL (a) Policies or Rules of Conduct	Set by principal or retail establishment and followed by demonstrator.	Requirement that product demonstrators follow safety and security rules in store does not infer employment.	The factors of policy setting, procedures, instructions, supervision, and review carry great weight. The right of the principal or principal's agent to direct and control the services performed, even as to the details of the work, is the primary test. If that right exists, whether or not exercised, an employment relationship exists. (cont'd on next page)
(b) Procedures in Product Demonstrating or Marketing	Established by principal or agent and followed by demonstrator.	Demonstrator establishes procedures of work.	

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FACTORS	EXAMPLES OF:		<u>WEIGHT</u>
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1. EXTENT OF CONTROL (Cont'd.)			
(c) Instructions for Conduct of Demonstration	Instructions given by principal or agent to demonstrator regarding site within store, customer relationships, dress code, dates, hours, or product.	Demonstrator uses "professional" judgment to choose site to maximize sales.	To the extent that the principal, or his or her agent, exercises control over the services through rules, procedures, supervision, review of work, etc., it is evidence that the principal has the right to control the services, and that this right to control is complete and authoritative. This alone will create an employer-employee relationship.
(d) Supervision on the Job	Demonstrator subject to supervision from store personnel and/or demonstration company personnel ("Coordinators").	Details of work not supervised.	
(e) Review of Work	Principal or agent reviews the performance of the demonstrator as to how the demonstrator conducted himself or herself on the job.	No reviews of work processes or behavior.	
(f) Training	Training provided by principal. Attendance is expected. Orientation and/or ongoing new product training. Training on sales pitch. Demonstrator paid for time at training.	Attendance at training is not required. Demonstrators are not paid for time at training. Demonstrators who do not attend specific product training are allowed equal opportunity to promote those products.	Training given by principal that includes instructions about how to do the work, e.g., dress code, product presentation, sales pitch, customer relations, infers that principal or agent has the right to control services and carries high weight.
(g) Meetings	Demonstrator expected to attend. Demonstrator's time is paid for. Meetings discuss products, appearance, and conduct.	Attendance not mandatory and non-attendance is viewed without negative consequence. Time at meetings is not paid for or meetings are not held.	The act of holding informational meetings, by itself, is not a strong indication of employment. Like training, if the intent and conduct of the meeting conveys rules, procedures, and instructions to do the work, it infers the demonstrators are not in control of services and not self-employed, and carries high weight.
(h) Reports	Reports are required regarding activities, e.g., number of demonstrations, number of people who came by, amount of product demonstrated, hours worked, inventories, customer reactions.	No reports required.	Reporting requirements can be viewed as an extension of the factor "review of work" and would be given medium to high weight depending on the purpose and content of the reports (verbal or written). Reports that are used to monitor demonstrator's performance are considered principal controls. Reports related only to end results are not an indication of employment or independence.
(i) Work Schedules	Set by principal, principal's agent, or store management, e.g., dates, times, total hours, breaks, and lunch.	Set by demonstrator.	"When and where" the service is performed is considered an aspect of the "details of the work." These factors would be given medium to high weight. It tends to show independence if the demonstrator controls these aspects, and accomplishes an end result for the principal by operating his or her own separate business.
(j) Location of Work	Principal, or its agent, product demonstrator company, or manufacturer makes arrangements, assigns demonstrator to store.	Demonstrator chooses store, makes arrangements for demonstration.	

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FACTORS	EXAMPLES OF:		<u>WEIGHT</u>
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1. EXTENT OF CONTROL (Cont'd.) (k) Principal/Demonstrator Contract	Agreement between demonstrator and principal gives principal or principal's agent control over manner and means of work.	Agreement forbids principal and/or agent from directing worker as to details. Demonstrator is not subject to control of principal or agent.	Terminology used in a written agreement is not conclusive of the relationship, but is evidence of the relationship intended. Written agreements do not necessarily depict the actual relationship. The actual practices of the parties in a relationship are more important than the wording of an agreement in making a determination.
(l) Written Agreement Between Principal and Third Party	Principal acknowledges employment or right of control in agreement with client(s) or labor organization. Written Agreement: <ul style="list-style-type: none"> Asserts right of principal to direct manner and means of work. Otherwise shows intent to create employment. Provides detailed rules for conduct or performance that principal or principal's agent shall enforce on demonstrator. 	Principal contract with third parties precludes exercise of control by principal or third party. No control of demonstrator is considered neutral. Written Agreement: <ul style="list-style-type: none"> Clearly shows intent to create independent relationship. Reserves the demonstrator's right to control how work is done. Demonstrator must operate in manner described in agreement.	An agreement in which principal expresses only an interest in an end result and abandons the right to control the details of the work (manner and means) is evidence of independence. An agreement not followed would have little weight in a determination.
2. TERMINATION	Both principal and agent have the right to terminate relationship at will without prior notice, and without any further contractual liability (except for work already performed or to end of shift or workday).	By agreement or practice, principal is required to pay for work not performed, if principal unilaterally terminates relationship other than for cause.	The right to terminate at will is strong evidence of employment. The right to terminate conveys an inherent power of the principal over the demonstrator. With this right, the principal can demand many things of the demonstrator, and the demonstrator, fearing fiscal repercussions, would be obliged to follow such demands.
3. ENGAGEMENT IN A DISTINCT BUSINESS	Demonstrator does not operate own business. <ul style="list-style-type: none"> Services performed are regular part of principal's business. Demonstrator does not offer services to distributor or retail establishments as a separate business. Demonstrator does not promote business venture of his or her initiative. Principal or agent may inhibit use of substitutes or require approval of substitutes. Principal or agent pays substitutes. 	Demonstrator operates an independent demonstration business. <ul style="list-style-type: none"> Contracts with distributors and retail establishments. Has business license where required. Has phone directory listing. Advertises. Registered with government agencies. Demonstrator may engage substitutes without firm's approval and pays substitutes.	If the demonstrator is in a separate business, distinct from that of the principal, and the services in question are performed in the furtherance of that business, high weight would be given toward independence. Medium weight is given to evidence showing the demonstrator is in a distinct occupation, which would also point to independence.

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4. CUSTOM IN INDUSTRY AND LOCATION	Work traditionally done by employees of manufacturer, distributor or store employees as part of sales activity. Work is usually done under direction of principal or principal's agent. Close supervision is not needed to control work.	Recognized experts or celebrities (guest appearance for special promotion).	This factor, by itself, is not controlling. This is because each determination must stand on its own facts regarding the principal's right to direct and control. Industry custom merely gives an inference or direction to the determination.
5. REQUIRED LEVEL OF SKILL OF DEMONSTRATOR	Little skill or experience required. No particular education needed. Anyone with sales talent could do the work.	Demonstrator has an expertise about the product other than demonstration.	Level of skill, by itself, generally does not weigh heavily. However, a high level of technical skill will weigh more heavily when combined with other factors such as separate and distinct business. A low level of technical skill weighs heavily in favor of employment, since as skill level declines the demonstrator has less room to exercise the discretion necessary to independence.
6. DURATION OF SERVICES	Demonstrator services are on a continuous basis that are: <ul style="list-style-type: none"> • Recurring in nature. • At regular intervals at regular times. • At irregular intervals. 	Short durations and not recurring.	This factor, by itself, is not controlling. It tends to reflect whether a person is employed or self-employed. Contractors usually perform work on a job basis for shorter and for predesignated periods of time. Employment is usually of open-ended duration.
7. WHETHER PRINCIPAL OR WORKER SUPPLIES INSTRUMENTALITIES, TOOLS, AND PLACE OF WORK	Provided or paid by principal, e.g., trade name, office, facilities, store space, tables, counters, appliances, booths, advertising, merchandise, inventory, or communication.	<p>Provided or paid for by demonstrator without reimbursement. Demonstrator provides tools or equipment with significant financial investment.</p> <p>Hand tools commonly used by demonstrator (i.e., card tables, skillets, mixers, portable ovens, etc.) or an automobile for transportation do not infer employment or independence.</p>	The weight given to whether the principal or demonstrator supplies the instrumentalities or tools will vary depending on the value of such items. As the value of the instrumentalities and tools increases heavier weight is given to this factor. The place of work is always provided by the principal or its agent, so this factor is given little weight in demonstrator determinations.

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8. METHOD OF PAYMENT	Based on time worked. Payment by shift, hour, or piece rate. Payment at regular intervals and in regular amounts. Payment by salary. Benefits provided. Compensation set by principal. Expenses reimbursed. Billings and collections by principal.	Payment based on end result: <ul style="list-style-type: none"> • Commission based on sales volume. • Commission based on volume of product demonstrated. No benefits provided. Demonstrator purchases product demonstrated and/or sold, and compensation based on gross sales less cost of merchandise.	This factor, by itself, as with written agreements, is not controlling. It is only an indication of the type of relationship. This is because many times it is difficult to determine if payment is by the job or commission versus some method based on time worked or a salary.
9. BELIEF OF PARTIES	Both the parties believe the relationship is employment.	All parties agree that relationship is one of independence.	This factor, by itself, is not controlling. The belief of parties only infers a relationship intended.
10. PART OF REGULAR BUSINESS OF PRINCIPAL	Services are an integral or normal part of the principal or agent's regular business activities. Activities are central to producing the products or delivering the services provided by the business.	Demonstrator assumes entrepreneurial risk and investment. Services only supportive of business activity/purpose and are not integral part of business.	This factor is given medium to high weight. The presumption is that if the service is an integral part (regular/normal/central) of the principal's business, the principal, by business necessity, needs to maintain control over the service.