

TELEMARKETERS (TELEPHONE SOLICITORS)

The purpose of this information sheet is to provide the telemarketing industry with guidance regarding who should be reported to the Employment Development Department as employees. The primary focus of this information is on telephone solicitors. A telephone solicitor is an individual that contacts prospective customers by telephone to sell a product or service or to seek a donation.

Who Is a Common Law Employee?

An employer-employee relationship exists when a person hires an individual to perform services and has the right to exercise control over the manner and means by which the individual performs his or her services. The right of 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 of direction and control. If it cannot be readily determined whether the person who hires the worker has the right to direct and control the manner and means of accomplishing the work, the following factors will be taken into consideration:

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 (person hiring worker) without supervision.
3. The skill required in performing the particular occupation.
4. Whether the principal or the person providing the services supplies the equipment, 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 hour, 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 of 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.

Who Is a Common Law Employee in the Telemarketing Industry?

Based on Tax Decisions No. T-86-69 and T-86-70, which address telephone solicitors in the telemarketing industry, a worker is an employee if his or her services are provided under conditions which include, but are not limited to, the following:

- The telephone solicitors are trained and supervised by the principal.
- The telephone solicitors perform their services at the principal's place of business.
- The principal provides the telephones and desks.

- Sales leads are provided by both the telephone solicitors and the principal.
- The telephone solicitors set their own hours between the principal's business hours.
- The telephone solicitors identify themselves as representing the principal or principal's client.
- The principal sets the rate of pay.
- The principal pays for any advertising.
- The telephone solicitors are paid a guaranteed salary.
- The principal provides a script for the telephone solicitor's presentation to the public.
- The telephone solicitors are assigned quotas.
- The telephone solicitors' services are a direct and essential part of the business operation.

In Smith v. Department of Employment (1976) 62 Cal. App. 3d 206, the court held that telephone solicitors were employees and enumerated the following additional factors indicating employment:

1. Work is unskilled, requiring no training or experience.
2. Work done does not constitute a distinct occupation or business.
3. Although the telephone solicitors pay for the room, supplies, and telephones they do not provide these instrumentalities, and are liable for such payments only by way of deductions from their gross commissions, if sales are made.
4. The telephone solicitors have no investment in the business.

Tax Decision T-94-260 says telephone solicitors were determined to be independent contractors when working under the following circumstances:

- Telephone solicitors are paid by commission.
- Telephone solicitors set their work hours and break times.
- Telephone solicitors are not required to attend meetings, submit reports, or meet quotas established by the principal.
- The principal provides no training or script.
- Telephone solicitors provide their calling lists.
- Telephone solicitors have a choice of whether to work at home or the principal's office.

Additional Information

For additional information regarding the employment status of telephone solicitors, visit the nearest 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, or call us toll-free at 1-888-745-3886.

You may also request a formal ruling by submitting a *Determination of Employment Work Status for Purposes of State of California Employment Taxes and Personal Income Tax Withholding* (DE 1870), which is also available on our Web site or by request.

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 1-888-745-3886 (voice) or TTY 1-800-547-9565.