

Business &amp; Tax Team

June 16, 2016

## AALRR Alert



## ARE YOUR OUTSIDE SALESPERSONS TRULY INDEPENDENT CONTRACTORS?

(Employee vs. Independent Contractor Analysis - California)

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With Employment Development Department (EDD) and other worker classification audits on the rise, it is important for businesses to closely scrutinize whether they have properly classified workers as independent contractors or employees. One area of concern is the classification of outside salespersons.

In addition to having employees who perform services related to business operations, many businesses also have outside salespersons who work outside the office speaking with potential customers at their stores or other places of business, typically within an assigned geographical area. If your business model includes paying individuals to provide outside sales services, you should make certain that you are properly classifying each such individual as an employee or an independent contractor. Otherwise, your business risks audit and reassessment of the payments made to such individuals by the EDD and/or other governmental agencies.

### 1. Common Law.

#### (a) Control Analysis.

When the EDD audits a business, a significant portion of the audit often will focus on whether workers have been appropriately characterized as independent contractors. The EDD generally performs its common law analysis first when making a determination on whether a worker is an employee or independent contractor. While the most important factor the EDD considers when determining whether one performs services for another as an employee is the right of the principal to control the manner and means of accomplishing a desired result, if it cannot be decisively determined whether the principal has such right to control, the EDD considers ten (10) factors that it considers “indicia of the right to control.”<sup>1</sup>

These factors include, among other things, whether the individual is engaged in a separately established

occupation or business; the skill required in performing the services and accomplishing the desired result; who supplies the instrumentalities, tools, and place of work for the person doing the work; the method of payment; and whether or not the parties believe they are creating the relationship of employer and employee.

#### (b) Precedent Decision

Applicable to Salespersons.

Specific to the classification of salespersons, the EDD may find support for an employer/employee relationship determination in California Unemployment Insurance Appeals Board (CUIAB)

*--> “Even where a salesperson is determined not to be an employee under the common law rules, the salesperson may still be an employee by statute if it is contemplated that substantially all of the services are to be performed personally and under specific conditions.”*

<sup>1</sup> These factors are enumerated in CCR Title 22 § 4304-1, and case law such as S. G. Borello & Sons, Inc. v. Department of Industrial Relations, 48 Cal.3d 341 (1989).

Precedent Decision No. P-T-346, which sets forth additional circumstances that are indications of employment for salespersons:

- The salespersons received training.
- The salespersons were assigned quotas.
- The salespersons were required to follow leads.
- The salespersons were required to furnish reports.
- The salespersons were required to attend sales meetings.
- The salespersons were given expense allowances or a guaranteed salary.
- The salespersons performed services of a continuous nature.
- The salespersons' services were a direct and essential part of the business operation.

Conversely, salespersons who were determined to be independent contractors paid their own expenses, established their own hours of work and itineraries of travel, were not required to attend sales meetings or make reports, and received direction from the principal consisting only of establishing selling prices, terms and conditions of the sale, approval of credit, and furnishing samples, literature, or order forms.

## 2. Statutory Law.

Even where a salesperson is determined not to be an employee under the common law rules, the

salesperson may still be an employee by statute if it is contemplated that substantially all of the services are to be performed personally and under specific conditions.

Pursuant to California Unemployment Insurance Code § 621(c)(1)(B), a salesperson engaged on a full-time basis in the solicitation on behalf of his principal of orders from retailers for merchandise for resale or supplies for use in the retailers' business operations is an employee of the principal, not an independent contractor. For example, an individual whose services consist purely of visiting retail stores and obtaining orders for products sold in those retail stores on behalf of only one manufacturer would be classified as an employee under the statute.

However, such salesperson is not an employee by statute (i) if he has a substantial investment in facilities used in connection with the performance of services, (ii) if the contract of service does not contemplate that substantially all of the services will be performed personally, or (iii) if the services are in the nature of a single transaction not part of a continuing relationship with the principal. Also, the salesperson may not be an employee if he represents more than one principal. However, sideline sales activities would not overturn the "full-time" relationship with the salesperson's principal, as the CUIAB has held that a salesperson who spends eighty

percent (80%) of his time selling for one principal engage in a full-time basis.<sup>2</sup>

## Need More Information?

If your business uses the services of outside salespersons and you are unsure of whether you have been properly classifying those individuals as independent contractors and would like to discuss your current options, or if you have been notified of an audit or recently contacted by the EDD and would like more detailed guidance, or please contact the attorneys listed above.

<sup>2</sup> CUIAB Precedent Decision No. P-T-329.