



2016 REALTOR® BROKER SUMMIT

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- Independent Contractor Status of Agents
- *Hawkes v. U.S.*
- RESPA/MSA's
- Website Accessibility
- HUD Guidance on Use of Criminal Records

Independent Contractor Status of Agents

- Industry preference, tradition of treating agents as independent contractors rather than employees.
- Challenging for agents to be I/Cs under common law.
- Recent challenges to worker classification in other industries: Uber, truck drivers, others.
- I.R.C. §3508 establishes Federal “statutory non-employees”; state law varies.
- 2013-15: Litigation involving in real estate agents in MA, CA.

Takeaway for Brokers

- Have a written agreement with agents.
- Know your state law and comply.
- Be sure your business practices are consistent with I/C status of agents.
 - Limit mandating meetings, administrative office duties, use of certain tools.
 - Allow salespeople to work where, when, and how they deem best.
 - Office manuals, documents, etc.
- If state law insufficient, consider seeking amendments.

Resources

- *NAR White Paper* at: <http://www.realtor.org/law-and-ethics/state-statutory-approaches-to-worker-classification>
- *Key Provisions for Independent Contractor Agreements:* <http://www.realtor.org/law-and-ethics/key-provisions-for-independent-contractor-agreements>
- *Ten Ways to Manage the IC Relationship:* <http://www.realtor.org/articles/ten-ways-to-successfully-manage-your-independent-contractor-relationships>
- *FAQs:* <http://www.realtor.org/law-and-ethics/independent-contractor-status-frequently-asked-questions>

Hawkes v. United States

- May 31, 2016 decision by U.S. Supreme Court.
- Clean Water Act “Waters of the United States” permit requirement.
- WOTUS broadly defined.
- Corps may issue WOTUS “Jurisdictional Determination”.
- 2012 *Sackett* decision regarding compliance orders.
- Is JD “final agency action” reviewable in court?

Justice Kennedy concurrence

- "...the ominous reach" of the CWA, is "notoriously unclear...."
- "...the reach and systemic consequences of the CWA remain a cause for concern" and "consequences to landowners even for inadvertent violations can be crushing."
- "The Act...continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property...."

RESPA/MSA Update

- 8(a): No person shall give ... any fee, kickback, or thing of value (based on an) agreement ... that (any) real estate settlement service... shall be referred to any person.
- 8(c)(2): Nothing in this section shall be construed as prohibiting (1) the payment of a fee ... for goods or facilities actually furnished or for services actually performed,....
- Marketing Service Agreements.
- OK to receive compensation from one to whom referrals are made? CFPB equivocal.
- *Lighthouse Title; CFPB v. PHH.*

MSAs – Broker Takeaway

- Use MSAs, if at all, with caution.
- **NO** relationship between referrals and compensation paid for marketing services.
- Establish objective basis of FMV compensation paid to for marketing services.

Website Accessibility

- Is a website a place of public accommodation required to comply with the ADA of 1990?
- Case law inconsistent whether a connection to a physical location necessary for site to be required to accessible.
- DOJ: All websites offering goods/services must be accessible; 2010 ANPR, rules: 2016-2018?
- Claims asserted against brokers and others.
- What does it mean for a website to be compliant with the ADA?

WCAG 2.0 AA Guidelines

- Maximize compatibility with assistive technologies.
- Make text content readable and understandable;
Text alternatives for any non-text content.
- Offer content that can be presented in different ways without losing information or structure.
- Separate foreground from background.
- Maximize functionality available from a keyboard.

Broker Takeaway: Prudential Steps

- Alert website users to your willingness to accommodate. For example: <http://www.realtor.org/accessibility>.
- Consult with website provider or web accessibility consultant.
- *Accessible Websites and the ADA* video: <http://www.realtor.org/videos/window-to-the-law-accessible-websites-and-the-ada>.
- REALTOR® Magazine: *Is Your Website ADA Compliant?*: <http://realtormag.realtor.org/technology/feature/article/2016/04/your-website-ada-compliant>.

HUD Guidance on Use of Criminal Records

- Use of criminal history by providers of housing and housing-related services.
- “Disparate impact” theory of liability under Federal FHA.
- Disproportionate incarceration rates for certain protected classes.
- May use criminal history carefully, thoughtfully.

Broker Takeaway

Treat all applicants/clients similarly.

- ❖ Crime involve safety/risk to person/property?
- ❖ Severity of prior offense.
- ❖ Time since offense .
- ❖ Other mitigating factors.
- ❖ Drug offenses – exclude for manufacture/sale; not for possession.

Resources

- *Analysis of HUD Guidance on Criminal History:*
<http://www.realtor.org/articles/fair-housing-act-criminal-history-based-practices-and-policies>
- *Disparate-Impact Liability Explained:*
<http://www.realtor.org/videos/window-to-the-law-disparate-impact-liability-and-fair-housing>
- *FHA Disparate-Impact Liability Upheld:*
<http://www.realtor.org/legal-case-summaries/fha-disparate-impact-theory-upheld>