

INDEPENDENT CONTRACTOR CLASSIFICATION FOR REAL ESTATE PROFESSIONALS

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WORKER CLASSIFICATION

- Employee v Independent Contractor
- Federal v. State Law
- Classification of Real Estate Salespeople

IRS STATUTORY NON-EMPLOYEE:

- 1) The individual must be a licensed real estate professional;
- 2) Substantially all of their payments must be directly related to sales or other output, rather than the number of hours worked; and
- 3) Their services must be performed under a written contract providing that they will not be treated as employees for federal tax purposes.

* If these three elements are met, federal income taxes do not need to be withheld from the worker's pay.

THE COMMON LAW 20 FACTORS TEST:

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|---------------------------------|---------------------------------|
| 1. Actual instruction of worker | 11. Submitting Reports |
| 2. Training | 12. Method of Payment |
| 3. Integration of Services | 13. Payment of Expenses |
| 4. Personal Nature of Services | 14. Tools and Materials |
| 5. Similar workers | 15. Investment |
| 6. Continuing Relationship | 16. Profit or Loss |
| 7. Hours of work | 17. Exclusivity of Work |
| 8. Full-time Work | 18. Available to General Public |
| 9. Work on Premises | 19. Right of Discharge |
| 10. Order of Performance | 20. Right to Quit |
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At the federal level, the IRS has recently refined this test for clarity. Please see the section marked “Common Law Rules” at the following IRS page for more details: <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee>

THE ABC TEST:

- A. Whether the business controls the worker's performance of services;
- B. Whether the worker is operating an independent enterprise or business;
and
- C. Whether the work is outside the usual course of business operations
OR whether the worker is free to exercise discretion as to where the
service will be performed.

THE ECONOMIC REALITY TEST:

- The extent to which the work performed is an integral part of the employer's business.
- Whether the worker's managerial skills affect his or her opportunity for profit and loss.
- The relative investments in facilities and equipment by the worker *and* the employer.
- The worker's skill and initiative.
- The permanency of the worker's relationship with the employer.
- The nature and degree of control by the employer.

For more information on the Economic Reality Test, visit The U.S. Department of Labor's webpage on this topic:
<http://www.dol.gov/whd/regs/compliance/whdfs13.htm>

RECENT WORKER CLASSIFICATION LITIGATION

Monell v. Boston Pads, LLC, (unpublished), No. 11-3756 (Mass. Super. Ct. July 15, 2013).

Barasani v. Coldwell Banker, No. BC495767 (Cal. Sup. Ct.), complaint filed Nov. 15, 2012.

Cruz v. Redfin, No. RG13707955 (Cal. Supt. Ct.), complaint filed Dec. 23, 2013

GOOD BUSINESS PRACTICES FOR BROKERS
WITH INDEPENDENT CONTRACTOR
SALESPEOPLE

FOR BROKERS WHO CLASSIFY THEIR SALESPEOPLE AS INDEPENDENT CONTRACTORS,

DO:

- ✓ Have an independent contractor agreement in place.
- ✓ Have salespeople provide their own tools and materials, such as a car, computer, and mobile devices.
- ✓ Have salespeople cover their own expenses, including travel, gas, and mobile phone bills.
- ✓ Keep compensation commission-based.
- ✓ Have salespeople pay for and maintain their own health insurance*.
- ✓ Become familiar with all applicable state and federal laws.

* Broker E&O insurance can cover independent contractors without affecting worker classification. Check with an attorney licensed in your state regarding insurance-specific issues related to independent contractors.

**FOR BROKERS WHO CLASSIFY THEIR
SALESPEOPLE AS INDEPENDENT CONTRACTORS,
AVOID:**

- Requiring salespeople to provide non-essential reports or attend meetings.
- Making “manning the phones” or “desk duty” mandatory.
- Calling salespeople “employees” or “staff”.

RESOURCES

- www.REALTOR.org: Materials on our Independent Contractor resources page:
<http://www.realtor.org/topics/independent-contractor>
 - “Ten Ways to Successfully Manage Your Independent Contractor Relationships”
 - Legal Affairs video discussing recent worker classification litigation
 - State labor law chart detailing states’ various approaches to classifying real estate professionals
 - Independent contractor FAQ
- Other Resources
 - IRS Website’s guide to worker classification: <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee>
 - US Department of Labor – Wage and Hour Division:
<http://www.dol.gov/WHD/workers/Misclassification/index.htm>
 - Your state’s Department of Labor website
 - Your state’s real estate licensing authority’s website.