



Are Agents Independent Contractors or Employees?

CALIFORNIA ASSOCIATION OF REALTORS®

Legal Department

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March 15, 2024

Are Agents Independent Contractors or Employees? The U.S. Department of Labor's New Regulations Effective March 11, 2024

Background: 2020 -- The 3-part test under California law

In 2020, California passed Assembly Bill 5 (the "Uber law") which seemingly settled the issue of whether agents are considered independent contractors for purposes of wage and hour law. AB 5 clarified that a simple 3-part test was all that was required. If an agent 1) has a real estate license, 2) is compensated based on output rather than hours worked, and 3) has entered into a written independent contractor agreement, then an agent will be treated as an independent contractor for various purposes, including minimum wage and overtime pay laws.

2024 -- The U.S. Department of Labor's new federal regulations

However, the U.S. Department of Labor (DOL) has recently adopted new regulations, effective March 11, 2024, that mark a return to the more ambiguous "factors" test to distinguish independent contractors from employees. Since it is possible that federal law, including federal regulations, may supersede California law, brokers once again could be vulnerable to lawsuits over wage and hour law. If agents are designated employees under federal rules, the broker may be required to meet federal minimum wage, overtime pay, and recordkeeping requirements.

Under the new regulations, the DOL uses a "totality-of-the-circumstances" test to determine a worker's status. The test relies on six key factors designed to ferret out the "economic realities" of the job. If the factors show that the worker is economically dependent on the potential employer for work, then the worker is an employee. But if the factors show that the worker is in business for themselves, then the worker is an independent contractor. All factors are considered, and no one factor is more controlling than another.

Briefly, the six key factors are:

- The opportunity for profit or loss depending on managerial skill
- Investments by the worker and the potential employer
- The degree of permanence of the work relationship
- The nature and degree of control

- The extent to which the work performed is an integral part of the potential employer's business
- Skill and initiative
- Additional factors, if indicative of economic dependence or of independence

The DOL stresses that this is not an exhaustive list. Additional factors may be relevant in determining whether a worker is an employee or independent contractor.

But isn't there a special federal tax rule that allows real estate agents to be classified as independent contractors based on entering into an independent contractor agreement and receiving substantially all pay through commissions?

Yes, there is. However, the federal tax rule doesn't necessarily control the determination of employment status for purposes of wage and hour laws. The existence of an independent contractor agreement may be a factor, but by itself, it does not guarantee an agent's independent contractor status.

Unfortunately, the special tax rule and the Fair Labor Standards Act (FLSA) regulations demand seemingly contradictory protocols. The tax rules ask that the agent be compensated only based on performance. The FLSA regulations require detailed record keeping of all hours devoted to work.

Practical advice for brokers to help ensure that agents are independent contractors.

The practical advice to brokers and agents is, first and foremost, to follow the work-related provisions in paragraph 3 of C.A.R.'s independent contractor form. These include:

- A broker shall not restrict or dictate the agent's activities regarding hours, leads, open houses, opportunity or floor time, production, prospects, sales meetings, schedule, inventory, time off, vacation, or similar activities, except to the extent required by law.
- The agent shall not be required to accept any assignments by the broker to service a particular listing or client. An agent should decide at their sole discretion whether to take a listing, what clients to work for, their working time and schedule, and what activities related to the services will be provided, including when to schedule open houses, meetings, time off, or similar activities.
- Agents should pay for their own advertising, lead generation, space rental, office supplies, career development, MLS, and other fees. Brokers should not impose costs on agents. However, the broker should carefully review and approve the advertisements to comply with California law.
- An agent should engage in marketing, advertising, and other efforts to expand their business, rent their own space, and (to the extent possible) hire others to assist.
- Each agent should negotiate the compensation to charge clients, consistent with any parameters outlined in the terms of the independent contractor agreement. California law requires that all compensation for real estate activity must be paid to a broker. However, brokers should remain as flexible as possible in allowing salespersons to determine the appropriate compensation for each client. The broker may determine how much the broker retains for the broker's services, including whether and how much, if any, compensation is credited against a salesperson's compensation to ensure the broker retains the contractually agreed-upon amount.

- Brokers may consider limiting the term of their independent contractor agreement to a fixed ending date (such as one or several years) and then renewing it or entering another agreement for a specified period of time.

It is important to point out that this practical advice does not guarantee that, if followed, agents will meet the criteria for independent contractor status under the FLSA. Because no one factor or set of factors is controlling, there is still a chance the agent could be deemed an employee despite strict adherence to these protocols.

In California, by law, agents may work for and receive payment from only one broker at a time. The broker must also adopt policies and procedures and supervise their agents.

How does this fit into the DOL's rules?

The DOL rule says that policies adopted for the *sole* purpose of compliance with the law are not indicative of control over the worker. However, a broker's chosen compliance methods might indicate a level of control over the agent.

California law requires a broker to adopt rules to supervise agents; if they do not, they may run afoul of DRE regulations. Going beyond what the DRE requires and imposing too many requirements on their agents may be a factor in making them an "employee" per federal wage and hour law. Given the new federal rule, brokers should consider consulting with an attorney specializing in employment law to evaluate whether there are recommended changes to the broker's procedures.

NAR's efforts at the national level and other challenges to the DOL's regulations

NAR has engaged with the DOL and requested a delay in implementation until further industry-specific guidance is issued. NAR submitted two letters to the U.S. Department of Labor (DOL)—one **standalone letter** and one **joint letter** with the Direct Seller Association (DSA)—to express concerns regarding the new regulations and how they may impact real estate professionals.

NAR also supports **H.R. 5419**, the Direct Seller and Real Estate Agent Harmonization Act, which provides direct sellers and real estate agents with an exemption under the FLSA.

In addition, several lawsuits are already challenging the new DOL regulations in court. If any of those challenges is successful, the DOL's new rule may become a legally unenforceable dead letter.

For additional information on the DOL's new employment regulations, please see the following:

- The DOL's Fact Sheet #13 "**Employee or Independent Contractor Classification Under the Fair Labor Standards Act (FLSA)**"

- DOL's **"Frequently Asked Questions - Final Rule: Employee or Independent Contractor Classification Under the FLSA."**
- C.A.R.'s Quick Guide **"Are Agents Independent Contractors or Employees? U.S. Department of Labor's New Regulations."**