

NAR Issue Summary

Business / Worker Classification (independent contractor v. employee)

NAR Committee:

Business Issues Policy Committee

What is the fundamental issue?

The longstanding business arrangement for real estate brokerages includes real estate agents classified as independent contractors rather than employees. While real estate agents have been specifically considered independent contractors for federal taxation purposes since 1984, there have been occasional challenges to that classification in state courts for purposes other than federal taxation, such as overtime pay and other benefits.

Calls for federal action to address employer abuses of the independent contractor classification have been ongoing for many years. In July 2015, an Administrator's Interpretation by the U.S. Department of Labor's Wage and Hour Division Administrator stated that the bias under existing definitions of independent contractor should be in favor of most workers being considered employees for purposes of wage and hour determinations. By expanding the "economic realities" test used to define the term "employee" for purposes of the *Fair Labor Standards Act* (FLSA), the Department was reducing the ability of employers to classify workers as independent contractors. On June 7, 2017, U.S. Department of Labor Secretary Alexander Acosta withdrew the 2015 Administrator's Interpretation.

I am a real estate professional. What does this mean for my business?

Losing the independent contractor status for real estate agents would drastically change the structure of the industry. The Administrator's Interpretation itself did not have the force of law, as it was informal guidance, but illustrates how policy decisions issued by the Wage and Hour Division are impactful and could be cited in legal challenges in state and federal courts.

NAR Policy:

NAR strongly supports the continued right of brokers to choose whether to classify agents as employees or independent contractors. NAR supports actions at the state level to strengthen the rights of brokers to make these determinations and will resist efforts at the federal level to weaken those rights.

Opposition Arguments:

Those calling for a crackdown on improper worker classification believe that many employers classify workers as independent contractors simply to avoid existing requirements of state and federal labor law, *i.e.* overtime pay, employer Social Security contributions, workers compensation requirements, health insurance employer mandate, etc.

Legislative/Regulatory Status/Outlook

On June 7, 2017, U.S. Department of Labor Secretary Alexander Acosta withdrew the 2015 informal

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guidance on independent contractor misclassification that raised the issue of a federal Department of Labor bias in favor of classifying nearly all workers as employees for the purpose of determining wages, hours, and benefits. Removal of this guidance does not change the legal responsibilities of employers under the FLSA and NAR will continue to monitor federal and state action on these issues.

In recent months, Congressional committees with jurisdiction over workplace issues have also been reviewing the use of the independent contractor model in the developing shared ("gig") economy business models, such as Lyft. NAR continues to track and participate in discussions that have the potential to impact the independent contractor model used by real estate brokerages.

Outside of the federal realm, there has been an increase in court cases brought at the state level, notably in California and Massachusetts, contesting the independent contractor status of real estate professionals. For complete information on pending litigation and the legal status of independent contractor designation go to: <http://www.nar.realtor/topics/independent-contractor>.

Current Legislation/Regulation (bill number or regulation)

H.R. 3825, the *Harmonization of Coverage Act of 2017*, sponsored by Reps. Diane Black (R-TN) and Elise Stefanik (R-NY).

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