

Department of Labor Proposed Rule: Determining Independent Contractor Classification Under the Fair Labor Standards Act (FLSA) October 2022

On October 11, 2022, the U.S. Department of Labor released a [proposed rule](#) updating how a worker is classified under the *Fair Labor Standards Act (FLSA)*. The proposed rule does NOT impact the classification of real estate professionals as independent contractors under the Internal Revenue Code ([26 U.S.C. §3508](#)).

“[T]he Department believes this proposal will help protect workers from misclassification while at the same time recognizing that independent contractors serve an important role in our economy and providing a consistent approach for those businesses that engage (or wish to engage) independent contractors.”

Of the 1.5 million members of the National Association of REALTORS®, approximately 87 percent are classified as independent contractors. This classification is essential to the real estate industry and NAR will continue to advocate for the ability to work as an independent contractor, as currently recognized and protected by the IRC and many state laws.

BACKGROUND: The misclassification of workers, primarily “gig workers,” as independent contractors rather than “employees,” has been a growing concern for the U.S. Department of Labor (DOL) Wage and Hour Division (WHD). With the proposed FLSA rule, the goal is to provide workplace protections and benefits to more workers, by having them classified as “employees” rather than independent contractors. Under the FLSA, covered employers must follow minimum wage and overtime pay requirements for employees. The DOL has proposed the rule under the FLSA to ensure consistency with existing judicial precedent and the Department’s longstanding guidance in an effort to limit confusion and disruption for workers and businesses alike.

PROPOSED RULE: The [proposed rule](#) adopts an “economic realities test,” where the standard for determining if a worker is an employee or an independent contractor is based on whether the worker is economically dependent on the employer for work or is in business for themselves. To determine the economic dependence, the proposed rule conducts a “totality-of-the-circumstances” analysis, considering multiple factors, rather than isolated criteria to determine employment status. While there are a number of factors considered in this analysis, they generally include:

- The opportunity for profit or loss depending on managerial skill;
- Investments by the worker and the employer;
- Degree of permanence of the work relationship;
- Nature and degree of control by the employer over the worker;
- Extent to which the work performed is an integral part of the employer’s business; and,
- Skill and initiative.



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Under the totality-of-circumstances analysis, the economic reality factors are not exhaustive, are not assigned a predetermined weight, and are each given full consideration. The DOL has also provided additional analysis of the control factor including discussion of how scheduling, supervision, discipline, price-setting, rates for and marketing of services, and the ability to work for others, should be considered.

The proposed rule does not adopt the “ABC test” or the “common law test” for classifying independent contractors, due to “legal limitations [that] prevent the Department from adopting either of those alternatives.” The ABC test in particular makes it more challenging to classify real estate professionals as independent contractors due to the compliance with various controls set forth in real estate licensing statutes. (See [here](#) for more background.) According to the DOL, “[t]his proposed rulemaking is not intended to disrupt the businesses of independent contractors who are, as a matter of economic reality, in business for themselves.”

The public comment period to provide formal feedback before a final rule is issued is open for 45 days from publication in the Federal Register (scheduled for October 13, 2022).

IMPACT ON REAL ESTATE PROFESSIONALS: The DOL’s proposed rule under the FLSA does not impact real estate professionals explicit protection in the Internal Revenue Code (IRC), [26 U.S.C. §3508](#), which provides the framework to classify them as statutory non-employees for federal tax purposes.¹ The federal tax treatment of real estate professionals has been in place since 1982 and demonstrates the federal government’s long-standing recognition of the unique nature of the real estate industry and, as such, the need to treat it differently than other industries.²

State statutes often follow the federal lead and specifically address how real estate salespersons may be classified as independent contractors. While these state statutes range from workers’ compensation laws to real estate specific statutes, each are explicit in qualifying a licensed real estate agent (or salesperson or licensee) as an independent contractor based on certain criteria and/or are expressly permitting the ability of a real estate broker to treat their real estate sales agents as independent contractors. (See [here](#)

¹ According to the IRC, real estate agents are “statutory nonemployees” if three factors are met. First, the real estate agent must be licensed. Second, substantially all payments for the licensed real estate agent’s services must be directly related to their sales or other output rather than based on number of hours worked. Lastly, the real estate agent’s services must be performed pursuant to an agreement that states the real estate agent will not be treated as an employee for federal tax purposes.

² Similarly, the *Affordable Care Act*’s “Shared Responsibility for Employers” provision recognizes that “qualified real estate agents” are statutory nonemployees under the IRC and thus are also not counted as employees for purposes of the provision that requires certain employers to provide health care coverage to full-time employees. 26 C.F.R. §54.4980H-1(a)(15).

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for a comprehensive list of state real estate laws.) Therefore, any new federal standards proposed could set the stage for potential litigation challenging real estate professionals' ability to be classified as independent contractors or influence more states to adopt a similar interpretation.

NAR ADVOCACY: NAR strongly opposes any erosion of [26 U.S.C. §3508](#) and supports the protection of, and efforts to further secure, the right of real estate sales people to work as independent contractors and for brokers to choose to classify real estate salespeople as independent contractors. NAR will resist efforts at the federal level to weaken those rights while also supporting actions at the state level to strengthen the rights of brokers to make these determinations. In response to the proposed rule, NAR will submit a comment on the impact of a final rule on the industry for consideration by the DOL.

RESOURCES:

- [NAR's Advocacy Efforts to Protect Independent Contractors](#)
- [NAR Issue Brief: Real Estate Professionals Classification as Independent Contractors](#)
- [NAR Issue Summary: Worker Classification](#)
- [NAR's FAQs on Independent Contractor Status](#)
- [NAR Hot Topic Alert: Independent Contractors in the Real Estate Industry](#) (August 2021)
- [NAR Comment Letters to the Department of Labor on Independent Contractor Rules](#)
- [NAR Focus Brief: Independent Contractors and Real Estate Exemptions](#) (March 4, 2021)
- [IRS Website: Guide to Worker Classification](#) (October 4, 2022)
- [State Laws: Independent Contractor Survey Table](#) (June 15, 2020)

