

May 2, 2023

Representative Kevin Kiley
Chair, Subcommittee on Workforce Protections
U.S. House Committee on Education and the Workforce
2176 Rayburn House Office Building
Washington, DC 20515

Representative Alma S. Adams
Ranking Member, Subcommittee on Workforce Protections
U.S. House Committee on Education and the Workforce
2101 Rayburn House Office Building
Washington, DC 20515

Dear Chair Kiley and Ranking Member Adams:

On behalf of the more than 1.5 million members of the National Association of REALTORS® (NAR), we thank you for holding the Workforce Protections Subcommittee hearing examining independent contractor issues on April 19, 2023. Approximately 87 percent of REALTORS® are classified as independent contractors, with a majority being affiliated with an independent real estate company. The housing industry and specifically the real estate professionals that serve buyers and sellers are vital to promoting homeownership that is the foundational bridge to financial security for consumers. With their independent contractor classification, real estate professionals can continue to provide excellent service to consumers, manage the multifaceted sales transaction, and maintain stability in the housing market.

The National Association of REALTORS® is America's largest trade association, including NAR's five commercial real estate institutes and its societies and councils. REALTORS® are involved in all aspects of the residential and commercial real estate industries and belong to one or more of some 1,200 local associations or boards, and 54 state and territory associations of REALTORS®. NAR represents a wide variety of housing industry professionals, including approximately 25,000 licensed and certified appraisers, committed to the development and preservation of the nation's housing stock, along with its availability to the widest range of potential homebuyers.

NAR supports the protection of, and efforts to further secure, the right of real estate salespeople to work as independent contractors and for brokers to choose to classify real estate salespeople as independent contractors. Being classified as an independent contractor is why many individuals are attracted to the real estate sales industry – it empowers entrepreneurship, maximizes flexibility, and promotes autonomy. On average, REALTORS® have eight years of experience in the real estate industry and are remaining within real estate as a career choice for a longer duration. The ability to be classified as an independent contractor is a primary reason the real estate profession is so appealing and preserving that structure is integral to the functioning of the housing market.

The *U.S. Internal Revenue Code* (IRC) has long recognized the treatment of “qualified real estate agents” as non-employees and we have encouraged the Department of Labor (DOL) to incorporate this provision into their proposed rule examining worker status under the *Fair Labor Standards Act* (FLSA).¹ The IRC provision (26 U.S.C. §3508) that has been law since 1982, specifically provides for the ability to classify real estate professionals as independent contractors using three simple and clear factors for all purposes of the Code. 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.

While satisfaction of the aforementioned IRC test relates only to the federal tax treatment of qualified real estate agents, it 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 Similarly, there are also a number of state statutes that follow the federal lead and address how real estate salespersons are 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.

For example, following the California Supreme Court decision in *Dynamex v. Superior Court*,³ applying the “ABC test” statewide, the state legislature enacted laws exempting occupations, including for real estate licensees, recognizing the unworkable nature of such a test and the importance of maintaining choice in independent contractor classification.⁴ With nearly 500,000 real estate practitioners working in this state alone, adoption of a more stringent classification test would significantly disrupt the current certainty that exists under state law. These examples, and numerous others, illustrate the longstanding protections excluding real estate professionals’ classification as employees.

With increased litigation challenging worker classification, and with businesses seeking greater flexibility in order to modernize and operate their businesses, NAR is also championing clarity within the FLSA. We are supporting a new effort to include a provision in the law that mirrors the IRC, along with the Direct Sellers Association, similar to advocacy conducted with DOL’s rulemaking.⁵ Such an interpretation would

¹ 87 FR 62218. Read NAR’s Comment Letter to the Department of Labor: <https://narfocus.com/billdatabase/clientfiles/172/3/4685.pdf>.

² The *Affordable Care Act*’s “Shared Responsibility for Employers” provision also 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).

³ 4 Cal. 5th 903 (2018).

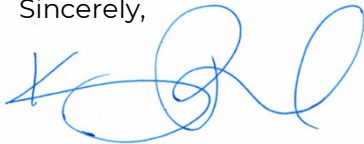
⁴ California Labor Code 2778(c), 2779-2784.

⁵ Read the NAR and DSA Comment Letter to the Department of Labor: <https://narfocus.com/billdatabase/clientfiles/172/3/4686.pdf>.

provide much needed consistency, to reduce confusion for workers and employers by having a uniform position across federal laws on classification within a particular industry.

We thank the Committee for recognizing the integral work provided by independent contractors in the economy and your efforts to ensure that all legislative and regulatory actions promote a workers' ability to create opportunities for themselves as entrepreneurs. Such support within the real estate industry will allow residential, commercial, and industrial development to proceed without jeopardizing the livelihoods of the independent contractor workforce that supports these transactions and without unreasonable encumbrances that could cause legal uncertainty. With the current market challenges of low inventory, rising prices, and varying interest rates, the federal government must support consumers' seeking the American Dream and the broad economic growth that stems from achieving that dream. If you have any questions, please contact me, or Christie DeSanctis, Director of Business, Insurance, and Federal Financing Policy, at 202-383-1102 or CDeSanctis@NAR.REALTOR.

Sincerely,



Kenny Parcell
2023 President, National Association of REALTORS®