

October 19, 2023

The Honorable Roger Williams
Chairman
House Committee on Small Business
2361 Rayburn House Office Building
Washington D.C., 20515

The Honorable Nydia Velázquez
Ranking Member
House Committee on Small Business
2069 Rayburn House Office Building
Washington D.C., 20515

Dear Chairman Williams and Ranking Member Velázquez,


On behalf of the more than 1.5 million members of the National Association of REALTORS® (NAR), I thank you for holding this hearing examining the rulemaking effects out of the U.S. Department of Labor. The Department of Labor has jurisdiction over employment opportunities for workers across the country and its policies impact all industries, including the hardworking professionals supporting consumers in the real estate 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.

Policies issued by the Department of Labor (DOL) not only set federal standards, but they influence action at the state and local level for the benefit of workers and their families. However, oftentimes state and local policy may already be well settled, and conflicting positions out of DOL may add unnecessary confusion, especially if such policies also fail to incorporate other existing federal authority. The Department's position on independent contractor classification is one example of how existing federal and state laws should be acknowledged when it comes to classifying real estate professionals as independent contractors. Given the role of real estate professionals in the housing market, and the housing market's role in the economy, federal policymakers should aim for clarity and consistency, minimizing disruption and uncertainty when rulemaking around worker classification.

THE HOUSING MARKET'S IMPACT ON THE ECONOMY

The current state of the economy and the impact on the housing market influences how real estate professionals are best able to advocate for the needs of consumers. Likewise, consumers' real estate transactions help promote economic growth. The real estate industry comprises of \$3.9 trillion or 17 percent of the economy, and as a result, is



greatly impacted by a magnitude of factors including rising inflation, increasing interest rates, spiking home prices, and new federal regulations. The Federal Reserve's rate hiking cycle has resulted in increased mortgage interest rates to levels not seen since the 1970's. With mortgage rates hovering over 7.5 percent and home prices remaining elevated due to lack of supply, a homebuyer for the current median home price of \$400,000 is looking at a monthly payment of over \$2,250.¹ Demand for homes continues to outpace supply and affordability for many consumers remains an ongoing concern, especially for first-time homebuyers. Eighty-five percent of first-time homebuyers reported using a real estate professional to help them understand the homebuying process. These new market participants rely on the guidance and insight from their agents to navigate these intense market challenges for one of the biggest and most complex financial transactions of their lives.

Most real estate professionals are small business owners – 65 percent of whom are women – who exemplify the entrepreneurial spirit of this country. They are experts in their field, deciphering the legal and regulatory details to provide consumers with the most useful information necessary to manage the home buying and selling process. Rather than increasing federal regulatory burdens that may impact their ongoing business operations, clear and consistent guidance from federal agencies should be paramount to best support these professionals in order to instill confidence in consumers and boost economic growth. To that end, DOL's upcoming final rule interpreting "Employee or Independent Contractor Classification Under the Fair Labor Standards Act," should recognize the integral work provided by real estate professionals working as independent contractors.² The Department should promote entrepreneurship and autonomy through its rulemaking, especially within the real estate industry given the importance of housing within the economy.

PROMOTING INDEPENDENT CONTRACTOR CLASSIFICATION

The ability to be classified as an independent contractor is crucial to real estate practitioners' ability to serve consumers and which has been protected under existing federal law for decades. Approximately 89 percent of REALTORS® are classified as independent contractors, with a majority being affiliated with an independent real estate company.³ 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 and wealth building 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.

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 11 years of experience in the real estate industry and are

¹ Jessica Lautz, *Instant Reaction: Mortgage Rates, October 12, 2023*,

<https://www.nar.realtor/blogs/economists-outlook/instant-reaction-mortgage-rates-october-12-2023>

² 87 Fed. Reg. 62,218 (Oct. 13, 2022) (to be codified at 29 C.F.R. pts. 780, 788, and 795).

³ NAR Research Group, *2023 Member Profile*, <https://www.nar.realtor/research-and-statistics/research-reports/highlights-from-the-nar-member-profile>.

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 DOL to incorporate this provision into their proposed rule examining worker status under the *Fair Labor Standards Act* (FLSA).⁴ 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. Last month, bipartisan legislation was introduced that would mirror the IRC language in the FLSA, the “Direct Seller and Real Estate Agent Harmonization Act” (H.R. 5419). NAR, alongside the millions of direct sellers working across the country, have advocated for this legislative harmonization and encouraged DOL to reflect the IRC provision in the recent rulemaking so that individuals in these industries can continue to prosper on their own terms.⁵ Preserving the ability to be classified as an independent contractor is integral to the functioning of these professions for the benefit of the consumer sales and housing markets. Direct sellers contributed \$42.7 billion to the United States economy in 2021 and for every home sale, more than \$100,000 is generated in local economic activity. Also, every two home sales support one American job.

There are also many 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*,⁶ 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

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

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

⁶ 4 Cal. 5th 903 (2018).

classification.⁷ With over 400,000 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.

In Texas, there is a general exclusion in the labor code that states “employment” does not include services performed by an individual as a real estate broker or salesperson if engaged in certain activities, such as those defined by “broker,” when remuneration of those services is directly related to sales or other output rather than hours worked, and there is a written contract between the individual and the person for whom the service is performed.⁸ In New York, there is statutory language in workers compensation and employment security law, plus a real estate specific statute. Each of these are explicit in outlining the definition of “employment” and exclusions of licensed real estate broker or sales associates, when certain conditions are met.⁹ In Michigan, there is an existing real estate statute defining an “independent contractor relationship” as a relationship between a real estate broker and an associate broker or real estate salesperson where there is both a written agreement between the parties stating that the associate broker or real estate salesperson is not considered an employee for federal and state income tax purposes and also clarity around the financial structure of that relationship.¹⁰

These examples, and numerous others, illustrate the longstanding protections *excluding* real estate professionals’ classification as employees.¹¹ DOL’s final rule must not erode any of these existing protections enacted at the federal or state level, but more importantly, should recognize and incorporate this industry standard, which is of critical importance to real estate practitioners supporting consumers all over the country. Referencing 26 U.S.C. §3508 within the final rule would specifically define qualified real estate agents as independent contractors, mirroring other laws, and eliminating any uncertainty posed by differing definitions or analyses.

With increased litigation challenging worker classification, and with businesses seeking greater flexibility to modernize and operate their businesses, NAR remains steadfast in championing clarity within the FLSA. Regulatory certainty through a uniform position across federal laws and regulations ensures much needed consistency for workers and employers.

REDUCING REGULATORY UNCERTAINTY

As federal agencies contemplate new regulations and guidance, we encourage recognition of the compliance burdens placed on small businesses, especially independent contractors. The average real estate professional may not be closely tracking the day-to-day activities of federal agencies and the potential rulemakings coming down the pipeline. Many are laser focused on running their businesses, serving consumers, navigating the local housing market, and complying with the myriad of existing federal, state, local, and industry standards to make homeownership a reality

⁷ California Labor Code 2778(c), 2779-2784.

⁸ Tex. Lab. Code Ann. §201.072 (West).

⁹ N.Y. Workers’ Comp. Law §2 (McKinney); N.Y. Workers’ Comp. Law §201 (McKinney); N.Y. Comp. Codes R. & Regs. Tit. 19, §175.27; and N.Y. Lab. Law §511 (McKinney).

¹⁰ Mich. Comp. Laws Ann. §339.2501 (West).

¹¹ See a comprehensive list of state real estate laws here: <https://www.nar.realtor/advocacy/nar-issue-brief-real-estate-professionals-classification-as-independent-contractors>.

for more families. These small entities may lack teams of compliance personnel to track, implement, and maintain fulfillment with comprehensive regulations. Further, such regulatory overhauls may actually upend longstanding business practices that may be structured to meet other existing federal and state laws.

When agencies seek to add additional regulations or modify existing rules, an initial step should be to analyze where an issue may already be resolved and when there is clear congressional authority on a matter, incorporate that wherever possible. Consistency and harmonization with other federal laws and regulations that small businesses and independent contractors may already be familiar with would increase recognition and compliance, minimizing the overall burdens for these entities.

For the Department's FLSA rulemaking, we encourage the acknowledgement of the integral work provided by independent contractors in the economy and hope that the final rule will promote workers' ability to create opportunities for themselves. An authoritative interpretation that recognizes and incorporates the uniqueness of different industries will offer needed clarity and reduce uncertainty for the real estate industry and others. With spending in the housing market supporting our country's economic growth, it is very critical that the Department works to minimize any disruption to this industry. Any shifts in the way the real estate industry have historically done business would drastically impact the overall services provided to consumers and the stability of the housing market.

CONCLUSION

We thank the Committee for holding this hearing in upholding the vital role independent contractors play in today's economy and your efforts to ensure that all legislative and regulatory actions promote 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 and without unreasonable regulatory encumbrances that could cause legal uncertainty. We appreciate your actions in recognizing consumers' needs when seeking to reach the American Dream and the broad economic growth that stems from achieving that dream.

Sincerely,



Tracy Kasper
2023-2024 President, National Association of REALTORS®