

February 24, 2021

Charlie Oppler
2021 President

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Amy DeBisschop
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

Re: RIN1235-AA34, Proposed Delay of Effective Date; Independent Contractor Status Under the Fair Labor Standards Act; Via Electronic Submission

Dear Ms. DeBisschop:

On behalf of the 1.4 million members of the National Association of REALTORS® (NAR), I submit the following comments in response to the Department of Labor's (Department) proposed delay of the effective date of the final rule on independent contractor status under the *Fair Labor Standards Act* (FLSA). Businesses across the country are adapting their needs to promote sustainability in light of the ongoing economic challenges posed by the pandemic. It is therefore important to maintain the final rule's current effective date of March 8, 2021, which provides needed clarity and certainty for how an employer may classify a worker.

The National Association of REALTORS® is America's largest trade association, including NAR's five commercial real estate institutes, and various 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 while ensuring its availability to the widest range of potential homebuyers. Of NAR's 1.4 million members, approximately 87 percent are classified as independent contractors.

The Department's final rule recognizes and incorporates the uniqueness of different industries by mitigating threats to worker classification. Such clarity provides a wide variety of businesses with the confidence needed to hire workers, including within the real estate industry. In fact, being an independent contractor is why many individuals are attracted to the real estate sales industry – it empowers entrepreneurship, maximizes flexibility, and promotes autonomy within a dynamic and flourishing field. 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. When the Department proposed the rule, NAR submitted comments in support of the “economic reality” test, which when applied to the work of a real estate professional, unequivocally results in the independent contractor classification.¹

Without such a federal standard, ongoing litigation and new state legislation will continue to threaten the ability to classify a worker as an independent contractor, including challenges to the long-established ability to classify real estate agents as independent contractors. An authoritative interpretation that enables an employer to identify and distinguish different industry practices, as outlined in the Department’s final rule, abates these threats, and should not be further delayed. Now more than ever, the Department should be encouraging opportunities for more entrepreneurs and businesses to have flexibility in their ownership and operations, by setting the standard with the finalized economic realities test.

Real estate professionals are already classified as independent contractors under many state laws and some federal laws, but continue to face ongoing scrutiny and challenges to this status. NAR supports the Department’s final rule in providing a dynamic and consistent standard for evaluating a worker’s status, while preserving existing worker classification authority to allow real estate professionals to continue to provide excellent service to Americans around the country, support the dream of homeownership, and maintain stability in the housing market.

Importantly, the Department’s final rule also does not attempt to erode any of the existing protections enacted at the federal or state level, which are of critical importance to the real estate industry. The U.S. Internal Revenue Code (IRC) specifically provides for the ability to classify real estate professionals as independent contractors using three simple and clear factors.² The rule has been in place for almost forty years, and NAR strongly opposes any erosion of this protection that classifies real estate agents as statutory nonemployees. The IRC test relates to the federal tax treatment of real estate agents 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.³

There are 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. Should the Department take any action on this final rule, it must not erode any of the existing classification clarifications already in existence at the federal and state levels.

We appreciate the Department’s efforts to provide certainty on the independent contractor relationship with employers, which is integral to the functioning of the housing market. As spending within this market makes up over 15 percent of the GDP, we must minimize disruption to this industry that continues to support our country’s economic recovery. If you have any questions, please contact me, or Christie DeSanctis, Director of Business and Conventional Finance Policy, at 202-383-1102 or CDeSanctis@NAR.REALTOR.

Sincerely,



Charlie Oppler
2021 President, National Association of REALTORS®

¹ See <https://narfocus.com/billdatabase/clientfiles/172/3/4170.pdf>.

² 26 U.S.C. §3508. In order to meet the Internal Revenue Code definition, three criteria must be met: (1) the real estate agent must be licensed; (2) 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, and; (3) 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.

³ 26 C.F.R. §54.4980H-1(a)(15). Similarly, the Affordable Care Act’s “Shared Responsibility for Employers” provision recognizes that “qualified real estate agents” are statutory non-employees 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.