

April 12, 2021

Charlie Oppler
2021 President

Bob Goldberg
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ADVOCACY GROUP

Shannon McGahn
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The Honorable Marty J. Walsh
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: RIN1235-AA34, Independent Contractor Status Under the Fair Labor Standards Act; Withdrawal; Via Electronic Submission

Dear Secretary Walsh:

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) withdrawal of the final rule on independent contractor status under the *Fair Labor Standards Act* (FLSA). In light of the ongoing challenges posed to businesses across the country because of the pandemic, we encourage the Department not to withdraw the final rule that provides needed clarity and certainty for how an employer may classify a worker.

NAR is America's largest trade association, including its 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.

Many individuals are attracted to the real estate sales industry because of the ability to classify as an independent contractor and its ability to empower entrepreneurship, maximize workplace flexibility, and promote 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. We encourage the Department to also recognize and support the uniqueness of this industry by mitigating threats to worker misclassification.



When the Department proposed the rule, NAR submitted comments in support of the “economic reality” test.¹ Without such a federal standard, ongoing litigation and new federal and 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. NAR has specific concerns with the adoption of the “ABC test” used for classifying workers, unless there is an explicit exemption for real estate professionals. Should any new federal legislation or regulation adopt this particular test, without an exemption, the real estate industry could be detrimentally impacted. States may also mirror the action, which could encourage more legal challenges that may affect real estate professionals’ independent contractor status.


Real estate professionals are classified as independent contractors under many state laws and some federal laws but continue to face ongoing scrutiny and litigation threats to this status. Preserving existing worker classification authority to allow real estate professionals to continue to provide excellent service to consumers is key to supporting the American Dream of homeownership and maintaining stability in the housing market.

Should the Department move forward with withdrawing the final rule, we encourage the continued recognition and support of existing protections for real estate professionals already in place at the federal and state levels, which are of critical importance to the 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 for federal tax purposes. This IRC test 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.⁴ 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, including replacement proposals in the future, it must not erode any of the existing classification clarifications already in existence at the federal and state levels.

As America recovers from the COVID-19 pandemic, it is important to recognize the long-standing role that small businesses owners, the self-employed, and independent contractors—including real estate agents—have played in contributing to the nation’s economy. Rather than withdrawing the final rule, the Department should be encouraging opportunities for more entrepreneurs and businesses to have flexibility in their ownership and operations, such as through the final rule’s economic realities test. Such a dynamic and consistent standard for evaluating a worker’s status is critical for employers who are adapting to new working and business conditions. 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.

⁴ See <https://cdn.nar.realtor/sites/default/files/documents/Independent-Contractor-Survey-Table-June-2020-Updated-10-19-20.pdf>.