



February 7, 2024

Ms. Jessica Looman
Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: DOL's Final Rule Regarding Employee or Independent Contractor Classification Under the Fair Labor Standards Act

Dear Administrator Looman:

On behalf of the more than 1.5 million members of the National Association of REALTORS® (NAR), we write to express our concerns with the Department of Labor's final rule for "Employee or Independent Contractor Classification Under the Fair Labor Standards Act (FLSA)." The Department's rule, as issued, will lead to greater confusion and disruption within the labor sector given the rule's vagueness and lack of clarity. NAR is respectfully requesting a delay in implementation of the final rule until the Department issues industry specific guidance for the real estate sector that both takes into consideration nuances within the industry and provides clarity for how the rule should be applied. Without additional guidance, workers across many industries may be improperly classified as employees instead of independent contractors under labor law.

The National Association of REALTORS® is a major real estate trade association, including NAR's five commercial real estate institutes, 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. Approximately 87 percent of NAR members are classified as independent contractors, with a majority being affiliated with an independent real estate company.

The housing industry serves a key role in the global economy and makes up nearly 20 percent of the U.S. gross domestic product. Real estate professionals similarly serve a unique role in helping buyers and sellers in real estate transactions, including working to make homeownership a reality for many families. Many real estate

professionals choose to be classified as independent contractors, because of the autonomy, freedom, and flexibility that independent work offers, including working nontraditional hours to accommodate the needs of consumers and clients. Independent work within real estate is critical to the workforce, and since 1982, the Internal Revenue Code¹ has recognized real estate agents as non-employees for tax purposes. NAR believes that real estate agents should be provided a similar carve out protecting the independent contractor status for agents under the FLSA as they are under the Internal Revenue Code.

Pursuant to the Internal Revenue Code, real estate agents are “statutory non-employees” if three distinct factors are met. First, the real estate agent must be licensed. Second, substantially all payments for the license real estate agent’s services must be directly related to their sales or other output rather than based upon the number of hours worked. Third, 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. Again, NAR recognizes that this is the standard for tax purposes, however the Labor Department should consider and give deference to this standard in assessing real estate agents for FLSA purposes.

NAR respects the Department’s position and role in seeking to protect all workers and to address various types of work relationships within today’s economy. The Department’s adoption of the Economic Realities test does not comprehensively account for the many types of diverse work arrangements that exist and the state laws that may conflict with this new rule depending on the industry. The rule’s adoption of the totality of the circumstances analysis with six factors considered in assessing a worker’s classification status may lead to conflicting and inconclusive outcomes. The rule also allows for the option of a seventh factor to be considered; however, this is not practical, because it is unclear what additional information or factors may be considered in the analysis. It is prudent for the Department to consider a couple factors as determinative of a worker’s classification status to ensure greater predictability and consistency.

Three of the factors when applied to certain sectors, including the real estate sector will lead to ambiguity. The following factors as outlined in the final rule will likely lead to greater confusion and a lack of clarity when applied to real estate work relationships: factor (3): the degree of permanence of relationship²; factor (4) nature and degree of control³; and factor (5)⁴: the extent to which the work performed is an integral part of the employer’s business.

¹ 26 U.S.C. Section 3508

² § 795.110(b)(3)

³ § 795.110(b)(4)

⁴ § 795.110(b)(5)



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The third factor, the degree of permanence of the relationship, is a problem and cannot be practically applied to the real estate sector, because the final rule favors “non-exclusivity” in working relationships as a determinant of independent work. However, in the real estate industry real estate salespersons must be affiliated with one brokerage at a time generally to ensure that real estate transactions are done properly and for general consumer protection. The other factors that weigh in favor of a worker being an independent contractor as outlined in the rule should also be reconsidered. NAR requests further clarification and guidance on this factor of what constitutes a high degree of permanence within the real estate sector for real estate brokers and agents.

The fourth factor, the nature and degree of control also presents a challenge when applied to the real estate industry because many state real estate commissions require broker supervision of real estate salespeople. In many jurisdictions, brokers are responsible for providing guidance, support, and supervision to real estate salespeople. While brokers supervise real estate agents, they do not control the way agents complete their work or the timing of when agents complete their work. Agents retain autonomy and independence in their work. Agents set their own schedules, choose their workloads, and conduct transactions at their own pace with moderate supervision protocols imposed on their brokers. The supervision that brokers generally must provide includes details such as the allocation of earned fees, management of incurred business expenses, and details on licensure requirements. Supervisory controls necessary to ensure statutory compliance are different from control that would define an employment relationship where any employee produces work in a manner controlled by the employer. Additional agency guidance is needed on this factor to distinguish legacy independent contractors from other types of workers.

The fifth factor, the extent to which the work performed is an integral part of the employer’s business, is also a conflicting factor when applied to the real estate sector because real estate is regulated primarily at the state level for real estate brokers and salespeople. Many states have structured requirements for how real estate agents and brokers must conduct business to actively practice within a given jurisdiction. Real estate licensees demonstrate initiative, managerial expertise, business acumen, and customer service skills to be successful and close a real estate transaction which is integral to the function of the industry. The success of real estate licensees depends on their individual judgment, foresight, and work ethic within the industry with the supervision of the broker as required by state law.

There are significant state laws in place that follow the Internal Revenue Code and codify real estate professionals' status as independent contractors even for labor purposes. In states where industry specific laws are in place that offer clarity on work arrangements, those state laws should be given deference. For example, in California, the state legislature enacted laws exempting occupations, including for real estate licensees, recognizing the unworkable nature of certain labor tests and the importance of maintaining choice in the independent contractor classification.⁵

NAR again recognizes the significance and importance of protecting all workers; but believes the Department should provide additional clarification and guidance on this rule. Real estate professionals like other small business owners desire clear, concise, and predictable rules that will allow them to run their businesses efficiently and effectively, and in compliance with all laws. Market instability and uncertainty is not helpful for any worker, industry or employer, and can be extremely harmful to small businesses who are already working to ensure compliance. For this reason and the aforementioned reasons, NAR is requesting a delay in the effective date of the final rule beyond March 11, 2024.

Thank you for considering NAR's recommendations and requests to provide greater predictability, clarity, and certainty as it relates to classifying workers' status under the FLSA. NAR welcomes the opportunity to meet with the Department to discuss this rule and its impact, and to work collaboratively as a thought partner in advancing worker classification issues. If you have any questions, please contact me, or Nia Duggins, Sr. Policy Representative at 202-383-1085 or nduggins@nar.realtor.

Sincerely,



Kevin Sears

2024 President, National Association of REALTORS®