NAR Issue Summaries

Business / Worker Classification (independent contractor v. employee)

NAR Committee:

Business Issues Policy Committee

What is the fundamental issue?

The longstanding business arrangement for real estate brokerages includes real estate agents classified as independent contractors rather than employees. While real estate agents have been specifically considered independent contractors for federal taxation purposes since 1984, there have been occasional challenges to that classification in state courts for purposes other than federal taxation, such as overtime pay and other benefits.

As a result, calls for federal action to address employer abuses of the independent contractor classification have been ongoing for many years. The U.S. Department of Labor (DOL) had proposed and reproposed changes to the Fair Labor Standards Act (FLSA), the federal law governing minimum wage and overtime requirements, considering ways to reclassify more workers as "employees" rather than "independent contractors" to address these concerns.

On January 10, 2024, the DOL issued its final rule regarding how workers should be classified under the Fair Labor Standards Act (FLSA). The final rule became effective on March 11, 2024. To date, regulatory actions have not directly impacted the Internal Revenue Code (IRC) statutory protection for qualified real estate professionals as independent contractors (26 U.S.C. §3508), but DOL's focus on these issues is adding confusion and uncertainty for the industry and could have the effect of misclassifying workers.

I am a real estate professional. What does this mean for my business?

Losing the independent contractor status for real estate agents would dramatically change the structure of the industry. With the continued focus at the federal and state levels on reclassifying workers as employees, it is important to ensure compliance with laws and regulations governing business models to avoid legal challenges. NAR has developed several resources including a Window to the Law video and guidance document for understanding independent contractor status best practices.

NAR Policy:

NAR strongly supports the continued right of brokers to choose whether to classify agents as employees or independent contractors. NAR supports actions at the state level to strengthen the rights of brokers to make these determinations and will resist efforts at the federal level to weaken those rights.

Opposition Arguments:

Those calling for a crackdown on improper worker classification believe that many employers classify

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workers as independent contractors simply to avoid existing requirements of state and federal labor law,*i.e.*overtime pay, employer Social Security contributions, workers compensation requirements, health insurance employer mandate, etc.

Legislative/Regulatory Status/Outlook

In recent years, Congressional committees with jurisdiction over workplace issues have been reviewing the use of independent contractors in the "gig" economy business model. NAR continues to track and participate in any discussions that have the potential to impact the independent contractor model used by real estate brokerages.

Federal legislation supported by NAR has been introduced that would mirror IRC section 3508 into the FLSA to provide additional certainty for real estate professionals' classification as independent contractors. (H.R. 5419, the "Direct Seller and Real Estate Harmonization Act.") Aligning the FLSA with the IRC would ensure professionals in the real estate industry can continue to operate their businesses and support economic growth with legal certainty.

New state legislation and new federal rules expanding the definition of employee continue to threaten a worker's ability to be classified as an independent contractor. On January 10, 2024, the U.S. Department of Labor issued its final rule regarding how workers should be classified under the FLSA, and it may result in misclassification issues. This final rule is effective March 10, 2024. NAR provided a comment and signed a joint comment letter with the Direct Sellers Association expressing concerns regarding the Employee or Independent Contractor Classification Under the Fair Labor Standards Act new rule, and how it may impact real estate professionals. The final rule rescinds the 2021 independent contractor rule and applies a multi-factor economic reality test for determining whether workers should be classified as independent contractors or employees. Learn more.

NAR requested that the Department of Labor delay implementation of the rule until the Department issues additional guidance. NAR also requested industry specific guidance that considers the Internal Revenue Code (IRC) carve out for real estate agents, and that recognizes state laws governing how real estate professionals should be classified.

Outside of the federal realm, there has been an increase in court cases brought at the state level, notably in California and Massachusetts, contesting the independent contractor status of real estate professionals. Visit www.nar.realtor/independent-contractor-status for complete information on pending litigation and the legal status of independent contractor designation.

In a recent state court case, Kennedy v. Weichert, the New Jersey Supreme Court held that agreements classifying real estate professionals as independent contractors is the dispositive factor of a salesperson's classification status under New Jersey's Brokers Act. This case was a major win for real estate professionals and independent contractors within the industry.

NAR will continue to monitor federal and state action on these issues.

Current Legislation/Regulation (bill number or regulation)

Business / Worker Classification (independent contractor v. employee)

H.R. 5419, the "Direct Seller and Real Estate Harmonization Act.

Employee or Independent Contractor Classification Under the Fair Labor Standards Act Rule

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