



# INDEPENDENT CONTRACTOR STATUS

FOR REAL ESTATE SALESPERSONS

**A new U.S. Department of Labor regulation modifies how the agency will analyze whether workers are classified as employees or independent contractors under the Fair Labor Standards Act. The agency now primarily considers six factors when evaluating worker classification, with no one factor being dispositive. Each of the factors identified here are designed to reduce the risk of misclassification for brokerages and salespersons in independent contractor relationships.**

## SALESPERSON'S OPPORTUNITY FOR PROFIT OR LOSS DEPENDING ON MANAGERIAL SKILL

- » A majority of a real estate salesperson's compensation should come from commissions, not salary.
- » Brokerages should exercise as little control as possible over which homes an individual real estate salesperson is allowed to sell, and avoid limiting where and how a realtor sells
- » Real estate salespersons should make independent investments in developing their own business, including investing in advertising/marketing, rather than relying primarily on the brokerage to do so.
- » Real estate salespersons should be free to work as many or as few hours as they want, on whatever days they want, and to hire employees and make other investments in its business without first seeking approval from the brokerage.

## DEGREE OF PERMANENCE OF THE WORK RELATIONSHIP

- » Brokerages should enter into written independent contractor agreements with real estate salespersons, which should be for limited duration (even if later extended) and not have automatic-renewal clauses.
- » To the extent permissible, brokerages should reduce or limit non-competition and exclusivity agreements that real estate salespersons must sign.



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## INVESTMENTS BY THE SALESPERSON AND THE BROKERAGE/EMPLOYER

- » Real estate salespersons, not their brokerages, should have responsibility for advertising and marketing their services, staging, and photographing homes.
- » Real estate salespersons should be responsible for their own business expenses, such as those associated with vehicles, computers, cell phones, and real estate licenses, as well as their legal and professional expenses, office expenses, and travel expenses.
- » Brokerages should be mindful that when brokerages provide “office space, paperwork, including contracts, procedures, training, and use of its platform and confidential information to generate leads,” courts have found this is indicative of an employer-employee relationship.

## NATURE AND DEGREE OF CONTROL THE BROKERAGE/EMPLOYER HAS OVER THE SALESPERSON

- » Brokerages should allow salespersons to set their own work schedule.
- » Brokerages should not limit or choose which homes a real estate salesperson can sell or the salesperson’s clients.
- » Brokerages should exercise minimal control over real estate salespersons beyond what is necessary to comply with existing law.

## EXTENT TO WHICH THE WORK PERFORMED BY THE SALESPERSON IS INTEGRAL TO THE BUSINESS

- » Brokerages should ensure that they do not have salespersons that are classified as employees and others classified as independent contractors.



## SKILL AND INITIATIVE OF THE SALESPERSON

- » Real estate salespersons should work independently to promote and market their skills rather than relying solely on brokerages to develop business.
- » Real estate salespersons should avoid requiring lengthy training to real estate salespersons unless required by law.