

Are Your Agents Independent Contractors?



**A Real Estate
Broker's Risk
Reduction
Guide to
Independent
Contractor
Status**

Daytona Beach Area Association of REALTORS

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Executive Summary

If you're a real estate broker, this is an issue you can ill afford to ignore.

So far, three court cases in the United States are underway challenging the status of real estate salespeople as independent contractors.

What? We all **know** they are independent contractors, right? One case in Massachusetts¹ and two in California are challenging that axiom. And although Florida law defines the real estate sales associate as an independent contractor, there is still a big caveat.²



This guide was developed to help educate brokers about the issue, and inform them of the steps they can take today to protect themselves within the provisions of state and federal law, and the IRS. This guide includes a number of resources for brokers from the National Association of REALTORS® as well as Florida REALTORS®.

Nothing in this guide is to be construed as legal advice—if you have any questions about this subject, please consult with your legal counsel.

¹ *Monell v. Boston Pads, LLC*, No. 11-3756 (Mass. Super. Ct. July 15, 2013).

² See page 7 for information specific to Florida law.

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Independent Contractor Status

Frequently Asked Questions

1. What is the difference between an independent contractor and an employee?

Employers have a significant degree of control over their employees, and are able to direct when, how, and where employees accomplish their tasks and responsibilities. Employers also often provide the necessary “tools of the trade” to their employees. In contrast, an independent contractor generally can determine when, how and where to perform their work, and is responsible for any necessary tools or equipment necessary to provide the services.

For legal purposes, the key distinction between an employee and an independent contractor is often determined by the amount of control a business exerts over the worker. The more control a business exerts over the worker, the greater the likelihood the worker will be deemed an employee.

2. Are brokers required to classify their salespeople as independent contractors?

No. Brokers can classify their real estate salespeople as either employees or as independent contractors.

3. What laws and regulations apply to a brokerage’s classification of its salespeople?

Worker classification laws at the federal and state levels as well as state real estate license laws will apply to a brokerage’s classification of its salespeople. At the federal level, the Internal Revenue Service has carved out a special statutory non-employee status for real estate professionals, qualifying them as independent contractors when all of the following requirements are met:

- The individual must be a licensed real estate professional;
- Substantially all of their payments must be directly related to sales or other output, rather than the number of hours worked; and
- Their services must be performed under a written contract providing that they will not be treated as employees for federal tax purposes.

State statutes for worker classification and real estate licenses vary in regards to determining proper classification of real estate licensees. Some states explicitly recognize real estate licensees as independent contractors when certain conditions are met, and other states are silent as to real estate licensees so the courts must apply the applicable test for determining proper classification. This is why it is vital for real estate professionals to know the laws that pertain to worker classification in their states.

4. Is an independent contractor written agreement sufficient to classify workers as independent contractors?

Having an independent contractor agreement is a very important element of establishing an independent contractor relationship with a real estate salesperson, but the existence of an agreement is not enough to avoid misclassification. Courts and regulatory agencies will look to the reality of the relationship, how the parties interacted, and how much control a broker exerts over the real estate

salesperson in order to determine the true nature of the relationship between the parties.

5. What types of activities should brokers avoid in order to properly classify salespeople as independent contractors?

Under many state, and federal, laws, making certain acts “mandatory” may be considered an indication of employer-like control over the worker. One of the hallmarks of an independent contractor relationship is that the independent contractor has the ability to direct and control where, when and how they perform their work.

In order to establish an independent contractor relationship, the following is a list of the types of activities that should be avoided:

- Requiring the worker perform the services during set work hours.
- Requiring the worker perform the services at a specific location.
- Making attendance at staff meetings mandatory.
- Providing training to the worker.
- Supplying tools and materials to the worker.

6. Since worker classification is often dependent on the level of control an employer exerts over a worker, does this mean that brokers should not supervise their independent contractor salespeople?

No. In fact, according to real estate licensing laws brokers must maintain a certain amount of supervision over their salespeople. Brokers must therefore make sure that they are balancing their state real estate license laws’ supervision requirements with the applicable requirements in state and federal worker classification laws.

7. Do federal income taxes have to be withheld from a real estate professional’s earnings?

No, if the independent contractor meets the three elements of the IRS’s carve out. The IRS recognizes the unique nature of the real estate industry and created a statutory non-employee status for real estate professionals, provided three elements are met: 1) the individual is a licensed real estate professional; 2) substantially all of their payments be directly related to sales or other output, rather than number of hours worked; and 3) their services are performed under a written contract providing that they will not be treated as employees for federal tax purposes. If these three elements are met, no federal income taxes need to be withheld from the real estate professional's earnings.

8. Does qualifying as a statutory independent contractor under IRS rules also mean that state income taxes do not have to be withheld from a real estate professional's earnings?

No, qualifying as a statutory independent contractor under IRS rules applies only to federal income taxes. The question of whether state income taxes must be withheld from a real estate professional's earnings is a question of state law. Brokers should check the applicable state law where they operate.

9. Can a broker provide its independent contractors with benefits such as health insurance and 401K participation?

The provision of employee-type benefits, such as health insurance, vacation pay and 401k participation, can be factors pointing to an employer-employee relationship, rather than that of an independent contractor. The provision of these types of benefits may compromise the argument that the relationship with the worker is that of an independent contractor.

10. What happens if a broker misclassifies an employee as an independent contractor?

Improper classification of workers can cause businesses a number of tax and other legal problems. At the federal level, the IRS may levy unpaid payroll taxes against a business it believes is misclassifying its workers, as well as interest and other penalties. In addition, the United States Department of Labor, the National Labor Relations Board, and the Equal Employment Opportunity Agency have an interest in a business's classification of its workers, and may pursue penalties and legal action against businesses believed to be engaging in worker misclassification.

At the state level, businesses may face fines and penalties for violations of state workers' compensation laws, tax laws, and state unemployment compensation laws. Improper classification can also expose businesses to private causes of action and costly litigation.

Florida Law

Two chapters of the Florida statutes directly address this issue, and both of these citations favor the argument that real estate licensees are independent contractors in Florida. But there is a caveat.

First citation

Title XXXI
LABOR

Chapter 440
WORKERS' COMPENSATION

440.02 Definitions.

(d) "Employee" does not include: . . .

2. A real estate licensee, if that person agrees, in writing, to perform for remuneration solely by way of commission.

Second Citation

Title XXXII
REGULATION OF PROFESSIONS AND OCCUPATIONS

Chapter 475
REAL ESTATE BROKERS, SALES ASSOCIATES, SCHOOLS, AND APPRAISERS

475.01 Definitions.—

(2) The terms "employ," "employment," "employer," and "employee," when used in this chapter and in rules adopted pursuant thereto to describe the relationship between a broker and a sales associate, include an independent contractor relationship when such relationship is intended by and established between a broker and a sales associate. The existence of such relationship shall not relieve either the broker or the sales associate of her or his duties, obligations, or responsibilities under this chapter.

Caveat

Clearly, the intention here is to define real estate licensees as independent contractors, but the key phrases in these citations are ***"in writing"*** and ***"when such relationship is intended and established between a broker and a sales associate."***

So a broker who has not established an independent contractor relation, in writing, may still be at risk. And such oversight may have unintended consequences.

Ten Ways to Successfully Manage Your Independent Contractor Relationships

May 29, 2014

The relationship between brokers and real estate salespeople is unique. This fact has been widely codified in applicable federal and state laws, including many state unemployment insurance and worker's compensation statutes. Under federal law, the Internal Revenue Code specifically carves out real estate salespeople from the definition of employee, provided the IRS' three-factor test is met. Brokers should be aware that compliance with the IRS three-factor test does not necessarily exempt real estate salespeople from a state's definition of employee. Approaches to this issue vary greatly by state, and emerging case law is continuing to shape the liabilities brokers may face when classifying their sales agents. In states where a specific test for properly classifying real estate salespeople as independent contractors has been adopted in a particular statute, brokers should ensure compliance with the applicable test. If no specific test has been adopted, brokers should at a minimum keep in mind the ten tips outlined below.

Ten Tips for Managing Independent Contractor Relationships with Your Sales Agents

- 1) Have written independent contractor agreements with your real estate salespeople.
- 2) Don't ever refer to real estate salespeople as employees of the broker in any broker written materials or otherwise.
- 3) Avoid paying for any job-related training or continuing education.
- 4) Pay your real estate salespeople on a commission-only basis; avoid paying them at regular fixed intervals.
- 5) Don't require your real estate salespeople to report to the broker's office on certain days or at certain times in order to perform general office administrative duties, such as answering phones.
- 6) Allow your real estate salespeople to work where, when and how they deem best.
- 7) Maintain control of broker-employed administrative support. Avoid allowing your real estate salespeople to exercise any authority over the hiring, firing or supervising of such staff.
- 8) Make attendance at monthly staff or training meetings voluntary.
- 9) Allow real estate salespeople to choose and purchase equipment, as necessary, to perform their jobs, such as computers or iPads.
- 10) Issue your real estate salespeople 1099s, rather than W-2s. Do not withhold any federal or state income taxes (including estimated taxes), social security, Medicare or any other applicable federal or state taxes.

Additional Resources

A number of resources on this topic are available on www.REALTOR.org's Independent Contractor resources page: <http://www.realtor.org/topics/independent-contractor>. These resources include:

- “Ten Ways to Successfully Manage Your Independent Contractor Relationships”
- Legal Affairs video on recent worker classification litigation
- Chart detailing various state labor laws approach to classifying real estate professionals
- Coming soon—Sample independent contractor agreement

Outside resources include:

- The IRS website's guide to worker classification
- U.S. Department of Labor–Wage and Hour Division guidance on worker classification
- US Small Business Administration resources: <http://www.sba.gov/content/self-employed-independent-contractors>.
- United States Department of Labor initiative: <http://www.dol.gov/whd/workers/misclassification/>

NAR Videos Related to the Independent Contractor Status Issue

The screenshot shows the NAR website interface. At the top left is the NAR logo with the text 'NATIONAL ASSOCIATION of REALTORS®'. To the right are navigation links: 'Topics | Programs | Directories | Apps | Videos | Store'. Below this is a secondary navigation bar with categories: 'News, Blogs & Videos', 'Research & Statistics', 'Member Benefits', 'Education', 'Events', 'Political Advocacy', 'Law, Ethics & Policy', 'Business Specialties', and 'About NAR'. The main content area is titled 'VIDEOS' and features a video player. The video title is 'Window to the Law: Worker Classification for Real Estate Professionals'. The video thumbnail shows two women sitting at a table in front of a large window with a city view. A play button is centered over the video. On the left side of the video player, there are tags: 'Related', 'INDEPENDENT CONTRACTOR', and 'LAW AND POLICY'. Social media sharing icons are visible in the top right corner of the video player area.

<http://www.realtor.org/videos/window-to-the-law-worker-classification-for-real-estate-professionals>

NAR Videos Related to the Independent Contractor Status Issue

The screenshot shows the top navigation bar of the National Association of Realtors (NAR) website. The logo on the left reads "NATIONAL ASSOCIATION of REALTORS® REALTOR". The navigation menu includes: Topics | Programs | Directories | Apps | Videos | Store; Pay Dues; AE | NRDS; News, Blogs & Videos; Research & Statistics; Member Benefits; Education; Events; Political Advocacy; Law, Ethics & Policy; Business Specialties; and About NAR. Social media icons for Facebook, Twitter, LinkedIn, YouTube, and Email are visible. The main content area features a "VIDEOS" section with the title "Challenges to Salesperson's Independent Contractor Status". A video player is embedded, showing a man and a woman in an office setting. The video title is "Lawsuits Challenge Independent Contractor Status".

<http://www.realtor.org/videos/challenges-to-independent-contractor-status>

Independent Contractor Agreement between Broker and Associate



("Broker")
is licensed as a real estate broker in the State of Florida and performs acts designated within Chapter 475, Florida Statutes, enjoys goodwill and a reputation for dealing with the public, and maintains an office for the purpose of serving the public as a real estate broker.

("Associate")
is licensed as a sales associate (license number SL _____) broker associate (license number BK/BL _____) in the State of Florida and is properly qualified to deal with the public as such.

Effective _____ ("effective date"), Broker and Associate agree to associate pursuant to the following terms and conditions.

1. **Employment Status:** Broker retains Associate as an independent contractor to assist Broker in the performance of real estate-related activities. With respect to the clients and customers for whom service is performed within the scope of this Agreement, Associate will be construed to be an agent of Broker; otherwise, Associate will not be deemed a servant, employee, joint venturer, or partner of Broker for any purpose. Associate will not be treated as an employee for federal tax purposes with respect to the services performed for Broker under this Agreement. Associate is responsible for paying her/his own estimated income tax payments, self-employment taxes, occupational taxes, and other taxes, if any, to the appropriate governmental entities. Broker will not withhold any taxes from compensation due to Associate, nor will Broker provide worker's compensation insurance for Associate.
2. **Associate Responsibilities:** Associate will use her/his best efforts to procure real estate-related business for Broker and will conduct her/his business in a reputable manner and in conformance with all laws, rules, regulations, and codes of ethics that are binding upon or applicable to real estate licensees, and with Broker's office policy manual, if any.
 - (a) **Compliance:** Associate recognizes and acknowledges the obligation to keep abreast of all legal and other issues that affect the real estate industry as they may change from time to time. Associate will not commit any act that violates Florida real estate license law.
 - (1) **Fair Housing:** Broker and Broker's company support and practice Fair Housing principles. Associate has been advised that failure to comply with Fair Housing principles will result in appropriate disciplinary action and possible termination of this Agreement. Associate warrants and represents that it is Associate's intent to attend Fair Housing instructional programs, keep current on developments in Fair Housing as it affects real estate marketing and sales, and comply with the Fair Housing laws and regulations. Associate understands this acknowledgment, warranty, and representation and agrees to it voluntarily.
 - (2) **Office Policy Manual:** Broker maintains does not maintain an office policy manual. Associate has received a copy and agrees to comply with the manual and such modifications, addenda, and changes as may be incorporated therein from time to time.
 - (b) **License Renewal; Continuing Education; Dues:** Associate will be responsible for timely renewing Associate's real estate license and for completing all legally required continuing education in a timely manner and maintaining the records that evidence such completion as required by the Florida Real Estate Commission. Associate will be responsible for paying all license fees, membership dues, and fines.
 - (c) **Broker Supervision:** Associate will be deemed to be working under Broker's supervision only to the extent required by Chapter 475, Florida Statutes. Associate will perform all activities, including those activities Broker requires Associate to perform, independently without Broker's supervision or control.
 - (d) **Broker Property:** Associate acknowledges that all pending sales and listings taken during the term of this Agreement are Broker's property. All programs, forms, data, keys, manuals, signs, and other paraphernalia relative to the business of Broker are Broker's property, as are all documents and other items pertaining to transactions.
 - (e) **Property of Others:** In accordance with Florida law, Associate will deliver to Broker, by the end of the next business day following receipt, any funds or other items that a consumer has entrusted to Associate in connection with a real estate transaction.
 - (f) **Responsibility:** Broker will not be liable to Associate for any expenses incurred by Associate nor for any of Associate's acts. Associate will have no authority to bind Broker by any promise or representation, oral or otherwise, unless specifically authorized in writing in a particular transaction. Suits, whether for fees or otherwise, against clients, customers, and others in the real estate business will be maintained only in Broker's name. Associate is responsible for providing all tools necessary to perform the duties outlined. Associate will also be

Broker (_____) and Associate (_____) acknowledge receipt of a copy of this page, which is Page 1 of 3.

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responsible for providing Associate's own automobile and is responsible for transportation expenses, including insurance in the minimum coverage amount of \$ _____ for personal injury protection liability and insurance in the minimum coverage amount of \$ _____ for bodily injury liability and insurance in the minimum coverage amount of \$ _____ for property damage liability and other expenses incidental to performing Associate's duties without receiving any reimbursement from Broker. Broker will be named as an additional insured in all such policies.

- (g) **Indemnification:** Associate will indemnify and hold Broker, its officers, directors, and employees harmless from all claims, demands, suits, costs, and expenses, including reasonable attorneys' fees at all levels, of whatever nature and description to the extent based on Associate's representations, acts, omissions, negligence, willful misconduct, or violation of laws, rules, regulations, codes of ethics, this Agreement, or office policy manual.

3. Broker Responsibilities:

- (a) **Access to Listings:** Broker will provide Associate with access to all current listings of Broker and listings made available to Broker through offers of cooperation, except those listings that Broker, in her/his/its discretion places exclusively in the possession of another associate.
- (b) **Access to Facilities:** Associate may use Broker's then existing office facilities for the performance of Associate's duties as described above.
- (c) **Compensation:** Broker will negotiate all terms and conditions of fees charged clients, including but not limited to the amount and payment date. Broker will compensate Associate in proportion to Associate's output with regard to real estate-related activities and not to hours worked by Associate. Such compensation will be solely through commissions as described below or in Broker's office policy manual, if any. In the event of conflict between Broker's office policy manual and this Agreement, the terms of the office policy manual will prevail. Broker may deduct from Associate's compensation any amounts due from Associate to Broker.
- (1) **Amount; Payment:** When Associate performs any brokerage service for Broker and Broker earns and collects a fee for such service, Broker will pay Associate within _____ days after the funds are collected and have cleared:
- _____ % of the fee as commission for _____
- _____ % of the fee as commission for _____
- _____ % of the fee as commission for _____
- (2) **Dividing Compensation with Other Licensees:** If two or more associates participate in rendering a brokerage service to the public, or claim to have done so, Broker will determine, in Broker's sole and absolute discretion, the amount of the fee due Associate.
- (3) **Incentives:** If a seller or listing office offers a premium, bonus, or other incentive, if such premium, incentive, or bonus is in the form of money, then

If such incentive is other than money (i.e., a cruise, trip, or other matter having economic value but not delivered in money), then such premium, bonus, or incentive will go to Broker Associate. If a nonmonetary incentive goes to Associate, Broker will report the fair market value of the incentive as income to Associate, as Broker must collect and deliver the incentive to Associate to preserve the respective legal positions of the parties.

- (4) **Benefits:** Associate will be provided no minimum salary, vacation pay, sick leave, or any other fringe benefit.
- (5) **Collection of Fees:** Broker will not be required to prosecute or sue any party in order to collect any fee for services performed by Associate. However, if Broker incurs attorney's fees and costs in the collection of or attempt to collect a fee, such amounts will be deducted from Associate's commission in the same proportion as provided for herein in the division of the fee.
- (6) **Compensation after Termination of Agreement:** After termination of this Agreement, Broker will pay Associate any amount earned before termination less amounts owed to Broker and amounts Broker must pay another licensee to complete pending transactions for which Associate was responsible before termination.

- 4. Errors and Omissions Insurance:** Broker maintains Errors and Omissions insurance which coverage includes Associate. Associate will pay a portion of Errors and Omissions coverage as follows:

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**Instant
forms**

5. **Term; Termination:** This Agreement will be in effect for _____ year(s) from the effective date. Either party may terminate this Agreement by _____ days' advance written notice to the other party. Broker may terminate this Agreement without notice for wrongful conduct by Associate. Failure by either party to maintain active licensure status pursuant to Chapter 475, Florida Statutes, will be deemed automatic termination. Associate will not, after termination of this Agreement, use to her/his own advantage, or to the advantage of any other person or entity, any information gained from the business of the Broker relating to property for sale, lease, or rental, or Broker's customers or clients. Upon termination of this Agreement, Associate will return all Broker's property to Broker with no copies made or retained by Associate.
6. **Confidentiality:** Associate acknowledges that Broker may disclose confidential information to Associate during the course of this Agreement. Any such information that is or should be reasonably understood to be confidential or proprietary to Broker, including mailing lists, customer and client lists, sales, costs, unpublished financial information, product and business plans, projections, marketing data, computer data, computer programs and supporting documentation, and Broker's office policy manual, if any, are considered confidential property of Broker. Associate will take reasonable steps and use due care during the term of this Agreement and after its termination to prevent the duplication or disclosure of confidential information, other than by or to Broker's employees or agents who must have access to the information to perform their duties for Broker.
7. **Dispute Resolution:** This Agreement will be construed under Florida law. All disputes between Associate and another associate in Broker's firm will be resolved by Broker. All disputes between Broker and Associate will be mediated under the rules of the American Arbitration Association or other mediator agreed upon by the parties. The parties will equally divide the mediation fee, if any. In any litigation between Broker and Associate, the prevailing party will be entitled to recover reasonable attorneys' fees and costs at all levels, unless the following box is checked: Arbitration: Any dispute not resolved by mediation will be settled by neutral binding arbitration in accordance with the rules of the American Arbitration Association or other arbitrator agreed upon by the parties. Each party to any arbitration or litigation (including appeals and interpleaders) will pay its own fees, costs, and expenses, including attorneys' fees at all levels, and will equally split the arbitrators' fees and administrative fees of arbitration.
8. **Additional Terms:**

 Brokerage Name

 Broker

 Date

 Associate

 Date

 Print name

 Print name

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